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The Concept of Religion

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Note

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I. INTRODUCTION: WHY A CONSTITUTIONAL DEFINITION OF RELIGION IS DESIRABLE

The First Amendment guarantees that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."[1] The great majority of modern judicial decisions interpreting the Religion Clauses have focused on determining what constitutes a "law respecting the establishment" or what is involved in "prohibiting the free exercise."[2] Far less frequently, however, have the courts expressly considered the meaning of the concept that stands at the very heart of the Religion Clauses: religion. At first glance, such an endeavor may seem to be altogether unnecessary. Religion is a commonly used and widely understood term in our everyday language, not some obscure term of art in need of technical definition. Indeed, when the Supreme Court discusses "religion," most of the time it uses the word unreflectively, as if it were completely self-defining.[3]

This laissez-faire approach assumes that religion should be used for constitutional purposes in the same way that it is used in everyday language

1. U.S. CONST. amend. I.

2. *See, e.g.*, Lee v. Weisman, 505 U.S. 577 (1992) (holding that a rabbi's prayer at a public high school graduation ceremony constituted an establishment of religion); Employment Div. v. Smith, 494 U.S. 872 (1990) (holding that Oregon's dismissal of two Native Americans for their religious use of peyote did not violate the employees' free exercise rights); Edwards v. Aguillard, 482 U.S. 578 (1987) (holding that a Louisiana law requiring public schools to teach creation science whenever evolution was taught was an unconstitutional establishment of religion); Wallace v. Jaffree, 472 U.S. 38 (1985) (holding that a daily period of silence in Alabama public schools amounted to an establishment of religion); Wisconsin v. Yoder, 406 U.S. 205 (1972) (holding that mandatory high school attendance laws violated the free exercise rights of Amish parents).

3. *See, e.g.*, *Yoder*, 406 U.S. at 215 (limiting the exemption of children from mandatory school attendance laws to religious groups without supplying a definition of religion to help separate such groups from secular ones).

and, further, that its meaning and application are readily apparent.[4] Many words used in the Constitution, however, are assigned completely different meanings for purposes of constitutional adjudication from those they possess in everyday language. "Speech" is one obvious example. Constitutional protection of "speech" under the First Amendment goes far beyond what we normally mean when we use the word,[5] covering such diverse forms of expression as burning the American flag,[6] wearing a black armband,[7] and picketing with a sign.[8] On the other hand, many words (for example, "majority"[9]) possess the same meaning in constitutional jurisprudence that they have in everyday language. To argue, then, that no definition of religion is necessary is to say that "religion" is more like "majority" than it is like "speech." Such a position, however, requires justification. In other words, even to deny the need for a definition of religion for the purposes of constitutional adjudication is to propose a definition of sorts (that is, "the everyday, clear meaning of the term"), one that must be defended.[10] In a sense, then, the discussion of a constitutional definition is unavoidable.

Moreover, the definition of religion for First Amendment purposes is not merely an academic exercise on which nothing really turns. In *Malnak v. Yogi*,[11] for example, a federal court's decision to classify the Science of Creative Intelligence-Transcendental Meditation (SCI-TM) as a religion meant that it could no longer be taught as an elective in public schools. In *Africa v. Pennsylvania*,[12] the Third Circuit's decision *not* to recognize MOVE as a religion resulted in its refusal to grant Frank Africa free exercise protection for his requested diet of raw foods while in prison. In these and other cases, one sees most clearly what is potentially at stake in defining "religion" for the First Amendment.[13]

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4. The Framers probably shared these assumptions. *See* ARLIN M. ADAMS & CHARLES J. EMMERICH, A NATION DEDICATED TO RELIGIOUS LIBERTY 90 (1990). As a judge on the Third Circuit, Adams wrote two highly influential opinions on the issue of defining religion. *See* Africa v. Pennsylvania, 662 F.2d 1025 (3d Cir. 1981); Malnak v. Yogi, 592 F.2d 197, 200-15 (3d Cir. 1979) (Adams, J., concurring).

5. *See generally* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 12-1 to -39 (2d ed. 1988) (describing Supreme Court jurisprudence on "speech").

6. *See* Texas v. Johnson, 491 U.S. 397, 406 (1989).

7. *See* Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503, 505 (1969).

8. *See* Police Dep't v. Mosley, 408 U.S. 92, 95 (1972).

9. *E.g.*, U.S. CONST. art. II, § 1, cl. 3.

10. Some commentators have taken the view, for example, that "religion" in the First Amendment is more like "speech," arguing that "religion" should be construed much more broadly for constitutional purposes than it would be in ordinary language. *See, e.g.*, Note, *Towards a Constitutional Definition of Religion*, 91 HARV. L. REV. 1056, 1056 (1978) (advocating the inclusion of whatever constitutes a person's "ultimate concern" within "religion" for First Amendment purposes).

11. 592 F.2d 197 (3d Cir. 1979) (per curiam).

12. 662 F.2d 1025 (3d Cir. 1981).

13. The definition of religion in the First Amendment has, at least in part, played a role in many other cases. *See, e.g.*, United States v. Seeger, 380 U.S. 163, 166 (1965) (holding that a man's opposition to war based upon his "belief in and devotion to goodness and virtue for their own sakes" is "religious"), *discussed infra* notes 38-51 and accompanying text; United States v. Meyers, 95 F.3d 1475 (10th Cir. 1996) (holding that the Church of Marijuana is not a religion), *discussed infra* note 78; Alvarado v. City of San

Because the classification of a group or individual as religious or nonreligious is directly related both to the provision of benefits under the Free Exercise Clause[14] and to the imposition of burdens under the Establishment Clause,[15] fundamental notions of fairness require that courts be prevented from making arbitrary or inequitable classifications. The danger of bias in Religion Clause jurisprudence is a very real one. Given the fact that, as Frederick Gedicks points out, "[n]o Jewish, Muslim, or Native American plaintiff has ever prevailed on a free exercise claim before the Supreme Court,"[16] there is reason to be concerned that bias might operate in judicial

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Jose, 94 F.3d 1223 (9th Cir. 1996) (holding that commissioning a statue of Quetzalcoatl, an ancient Aztec god, is not a religious act for Establishment Clause purposes); Peloza v. Capistrano Unified Sch. Dist., Nos. 92-55228 & 92-55644, 1994 WL 382635 (9th Cir. July 25, 1994) (holding that "evolutionism" is not a religion); Johnson v. Pennsylvania Bureau of Corrections, 661 F. Supp. 425 (W.D. Pa. 1987) (holding that the "Spiritual Order of Universal Beings," a group founded by the plaintiff, is not a religion).

14. *See, e.g.*, Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993) (holding that a law against killing animals, which was passed in order to prevent the exercise of the Santeria religion, was a violation of the group's First Amendment rights).

15. *See, e.g.*, *Malnak*, 592 F.2d at 200 (per curiam).

16. FREDERICK MARK GEDICKS, THE RHETORIC OF CHURCH AND STATE 116 (1995). Although plaintiffs from minority religious groups have won free exercise claims in lower courts, such victories are relatively rare. A computer search reaffirmed Gedicks's assertion. Search of WESTLAW, Allfeds Database (May 26, 1997) (terms and connectors search for cases containing "free exercise"). Over the past two years, I could find only one case in which a non-Christian plaintiff prevailed on a free exercise claim in the lower federal courts. *See* Cheema v. Thompson, 67 F.3d 883 (9th Cir. 1995) (upholding a free exercise claim by Sikh students seeking accommodation of their possession of ceremonial daggers on school property, despite a generally applicable no weapons policy). The same search, however, yielded a variety of cases in which the free exercise claims of non-Christians were denied, *see, e.g.*, May v. Baldwin, 109 F.3d 557 (9th Cir.) (rejecting a free exercise claim by a Rastafarian inmate who did not want to unbraid his dreadlocks), *cert. denied*, 66 U.S.L.W. 3282 (1997); Brock v. Carroll, 107 F.3d 241 (4th Cir. 1997) (rejecting a free exercise claim by a prisoner deprived of his "prayer pipe"); Fawaad v. Jones, 81 F.3d 1084 (11th Cir.) (rejecting a free exercise claim by a Muslim prisoner who was forced to use his given name in addition to the Muslim name he had chosen upon conversion to that faith), *cert. denied*, 66 U.S.L.W. 3282 (1997); Hamilton v. Schriro, 74 F.3d 1545 (8th Cir.) (rejecting a free exercise claim by a Native-American prisoner seeking access to a sweat lodge and permission to grow long hair), *cert. denied*, 117 S. Ct. 193 (1996); Hicks v. Garner, 69 F.3d 22 (5th Cir. 1995) (rejecting a free exercise claim by a Rastafarian seeking to grow long hair), and a number of cases in which the free exercise claims of Christian plaintiffs were upheld, *see, e.g.*, Mockaitis v. Harcleroad, 104 F.3d 1522 (9th Cir. 1997) (upholding a free exercise claim by a Catholic priest and bishop concerning a prosecutor's secret taping of a confession by a suspect to a Catholic priest); Tucker v. California Dep't of Educ., 97 F.3d 1204 (9th Cir. 1996) (holding that a rule barring employees from posting religious messages at a Christian plaintiff's workplace violated his free exercise rights); Sasnett v. Sullivan, 91 F.3d 1018 (7th Cir. 1996) (holding that the refusal of prisons to make exceptions to a no jewelry policy to accommodate prisoners seeking to wear crucifixes violated the prisoners' free exercise rights), *vacated on other grounds*, 117 S. Ct. 2502 (1997).

I am not making a strong statistical claim here, but merely suggesting the possibility of judicial bias against non-Christian plaintiffs. In a country in which most people consider themselves to be Christian, it might be argued that the majority of free exercise claims would be made by Christians and that therefore it is not surprising to find a numerical disparity between free exercise victories by Christians and non-Christians. On the other hand, it might be the case that, in a country where most people are Christian, the laws are written in such a way that they do not interfere with the free exercise of the majority religion. If this is the case, we would expect more free exercise claims to be made by non-Christians and hence a statistical disparity in favor of non-Christian plaintiffs. There is no a priori way to determine which possibility actually obtains. Clearly, further empirical research (more rigorous than my simple WESTLAW search) needs to be done on this issue.

efforts to define religion.[17] One way to restrain potentially arbitrary decisionmaking is to reduce the scope for judicial discretion regarding the constitutional meaning of religion.

Scholars have suggested a wide variety of definitions for "religion" in the First Amendment. A 1978 note in the *Harvard Law Review* advocated a functional approach to the definition of religion that would treat "religion" like "speech" and protect a very broad range of belief systems—whatever constitutes a person's "ultimate concern."[18] The note's proposal has been persuasively criticized by Jesse Choper, however.[19] Several scholars, rejecting a broad definition like that endorsed by the Harvard note, have proposed content-based definitions; that is, they have attempted to find some essence within all religious belief systems according to which such systems can be distinguished from nonreligious belief systems. Choper, for example, has proposed a definition based upon the presence of a belief in "extra-temporal consequences" to human action.[20] Andrew Austin has proposed a definition based upon the presence of "faith."[21] George Freeman, however, has presented a devastating critique of efforts to elaborate content-based definitions of religion.[22] Along with Kent Greenawalt,[23] Freeman has proposed an analogical approach to determining what constitutes a religion; that is, a *methodology* for deciding if a belief system is or is not a religion, rather than a *definition* in the dictionary sense.[24]

In this Note, I advocate construing "religion" under the First Amendment in its evolving, everyday sense. In so doing, I seek to build upon the work of Freeman and Greenawalt by developing in more detail their analogical methodology for determining whether or not a specific belief system is a religion. In Part II, I survey the present judicial disagreement regarding the best way to define religion. In Part III, I explore three preliminary issues: I begin by arguing that "religion" in the First Amendment should be read

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17. *Cf.* ADAMS & EMMERICH, *supra* note 4, at 92 (admitting that the definition of religion presents real dangers of western bias).

18. Note, *supra* note 10, at 1056.

19. *See* Jesse H. Choper, *Defining "Religion" in the First Amendment*, 1982 U. ILL. L. REV. 579, 593-97.

20. *See id.* at 597-604. This definition fails, however, because belief in extra-temporal consequences to human action (that is, reward or punishment) is not a necessary feature of belief systems that almost all would concede to be religious. Ancient Judaism, for example, professed no such belief. *See* Wayne T. Pitard, *Afterlife and Immortality*, *in* THE OXFORD COMPANION TO THE BIBLE 15, 15-16 (Bruce M. Metzger & Michael D. Coogan eds., 1993).

21. *See* Andrew W. Austin, *Faith and the Constitutional Definition of Religion*, 22 CUMB. L. REV. 1, 33-43 (1991-1992). As Austin himself notes, however, faith by itself is not sufficient for something to be called a religion. *See id.* at 40-43. Austin therefore adds the requirement of faith in a "greater power than man." *Id.* at 42. This addition makes Austin's definition unworkably vague and seems to convert it into a theistic definition (at the expense of nontheistic religions).

22. *See* George C. Freeman, III, *The Misguided Search for the Constitutional Definition of "Religion,"* 71 GEO. L.J. 1519, 1534-48 (1983).

23. *See* Kent Greenawalt, *Religion as a Concept in Constitutional Law*, 72 CAL. L. REV. 753 (1984).

24. *See* Freeman, *supra* note 22, at 1553; Greenawalt, *supra* note 23, at 762, 767-78.

narrowly to refer only to religion and not to some broader concept like conscience; I then reject the possibility of a dictionary-style definition (that is, one that simply lists the "essences" of religion); and finally, I highlight the problem of western bias in the definition of religion. From this exploration I develop three criteria that any sound constitutional definition should satisfy. In Part IV, I draw upon the work of Freeman and Greenawalt to argue that the best way to determine whether or not a belief system is a religion is through a process of analogy, based upon Ludwig Wittgenstein's philosophy of language. I therefore propose a methodology for conducting this analogical process that takes into account the evolutionary nature of language and (in an effort to improve upon the proposals of Greenawalt and Freeman) tries to minimize the scope for judicial bias. Although I do not believe that my proposed methodology is a perfect solution, I think it represents a significant improvement over present definitions.

II. THE LACK OF CONSENSUS IN THE COURTS

A. *The Supreme Court*

Although the Supreme Court has been reluctant to elaborate an authoritative definition of religion, it has addressed the issue in a number of cases stretching back into the nineteenth century.[25] The first of these cases was *Davis v. Beason*,[26] an 1890 decision upholding an Idaho law that required electors to swear an oath that they were not polygamists. Davis, a Mormon, was convicted of falsely swearing to the oath. As part of a challenge to his conviction, he argued that the law represented an establishment of religion insofar as it prevented Mormons from acting as electors in the Idaho territory. In the course of his opinion for the court rejecting Davis's claim, Justice Field defined religion theistically.

Defending the required oath, Justice Field outlined his understanding of religion: "The term 'religion' has reference to one's views of his relations to his Creator, and to the obligations they impose of reverence for his being and character, and of obedience to his will."[27] In addition to the presence of a "Creator," Field also required a certain conformity between the teachings of the group in question and the prevailing morality of "all civilized and Christian countries."[28] Indeed, at least part of the reason Field rejected Davis's

25. The Supreme Court and appellate court cases discussed in this part are widely regarded by commentators as representing the most significant judicial discussions on the topic of the definition of religion. *See, e.g.*, Choper, *supra* note 19, at 587-91 (summarizing the Supreme Court jurisprudence on the issue of defining religion).

26. 133 U.S. 333 (1890).

27. *Id.* at 342.

28. *Id.* at 341.

establishment claim was that he thought polygamy too outrageous a practice to be "a tenet of religion."[29]

Adherence to this narrow definition was facilitated by the relative religious homogeneity of the United States before the twentieth century.[30] Indeed, the connection between the religious demography of the United States (at least as perceived by the Court) and the narrow conception of religion was made explicit in *United States v. Macintosh*,[31] a case that reaffirmed the theistic definition. "We are a Christian people," the Court wrote, "according to one another the equal right of religious freedom, and acknowledging with reverence the duty of obedience to the will of God."[32]

Over the course of the twentieth century, largely as a result of immigration, the United States experienced an explosion both in the population of non-Christians and in the number of different religious sects operating within the country.[33] The resulting increase in religious diversity put pressure on the Court's narrow, theistic definition of religion and on the related understanding of the United States as a Christian country.[34] The *Davis* definition was not expressly repudiated, however, until 1961 in *Torcaso v. Watkins*.[35] In *Torcaso*, the Court struck down a provision of the Maryland constitution requiring officeholders to declare their belief in God. The Court reasoned that such a provision favored one category of religions (theistic) over another (nontheistic) in violation of the Establishment Clause.[36] For the first time, the Court admitted the existence of nontheistic religions and extended First Amendment protection to them. In a famous footnote, Justice Black observed that "[a]mong religions in this country which do not teach what

29. *Id.* at 341-42 ("To call their advocacy [of polygamy] a tenet of religion is to offend the common sense of all mankind.")

30. Although by the late 19th century the United States contained a diversity of sects, almost all religious people were Christians and therefore unlikely to object to a definition of religion that excluded nontheistic religions. *See* J. GORDON MELTON, *The Development of American Religion: An Interpretive View*, *in* ENCYCLOPEDIA OF AMERICAN RELIGIONS 1, 14-15 (5th ed. 1996).

31. 283 U.S. 605 (1931).

32. *Id.* at 625 (citing Holy Trinity Church v. United States, 143 U.S. 457, 470-71 (1892)). The theistic definition from *Davis* is quoted directly in a dissent by Justice Hughes, *see id.* at 634 (Hughes, J., dissenting), but the majority clearly applied the same theistic definition.

33. *See* WINTHROP S. HUDSON, RELIGION IN AMERICA 244-46 (4th ed. 1987). The religious homogeneity of the United States prior to the 20th century should not be exaggerated, however, because some variation did exist. *See id.* at 179-87. Prior to the immigration of large numbers of Asians in the late 19th century and the annexation of Hawaii in 1898, however, very few nontheists practiced their religions in the United States. *See id.* at 3-4, 108, 244 (describing religious pluralism in the United States before the beginning of the 20th century as pluralism within a Christian consensus); Melton, *supra* note 30, at 14-15 (describing the changing religious demography of the United States during the 20th century). There was little pressure on a theistic definition of religion. The number of religious bodies in the United States has exploded over the course of this century. *See* MELTON, *supra* note 30, at 15; J. GORDON MELTON, *Selections from the Introduction to the First Edition*, *in* ENCYCLOPEDIA OF AMERICAN RELIGIONS, *supra* note 30, at xvii, xvii.

34. *See* TRIBE, *supra* note 5, § 14-6.

35. 367 U.S. 488 (1961).

36. *See id.* at 489-90, 495.

would generally be considered belief in the existence of God are Buddhism, Taoism, Ethical Culture, Secular Humanism and others."[37]

Following just a few years later, *United States v. Seeger*[38] confirmed the broader conception of religion endorsed by Justice Black in *Torcaso*. The case concerned Section 6(j) of the Universal Military Training and Service Act,[39] which exempted from combatant training and service all those who, "by reason of religious training and belief, are conscientiously opposed to participation in war in any form."[40] The statute defined "religious training and belief" as "an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but [not including] essentially political, sociological, or philosophical views, or a merely personal moral code."[41]

Seeger had been convicted for refusing induction during the Vietnam War.[42] His opposition to war was based on his "'belief in and devotion to goodness and virtue for their own sakes, and a religious faith in a purely ethical creed.'"[43] Claiming that its understanding of "religion" was shared by modern theologians like Paul Tillich, the Court held 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" is religious.[44] What the Court meant by "parallel" is not entirely clear, but it seems to have had in mind the strength with which an individual is committed to her belief system.[45]

Although *Seeger* was technically a statutory case, the Court appears to have understood its broad definition of religion as having constitutional significance. Immediately after presenting the "parallel position" test, for

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37. *Id.* at 495 n.11. The breadth of Black's notion of religion is often overstated. "Ethical Culture" and "Secular Humanism" were not references to broad social movements, but to specific organizations, as is made clear by the two cases cited by Black in support of their inclusion. *See id.* (citing Washington Ethical Soc'y v. District of Columbia, 249 F.2d 127 (1957); Fellowship of Humanity v. County of Alameda, 315 P.2d 394 (Cal. Dist. Ct. App. 1957)).

38. 380 U.S. 163 (1965).

39. Pub. L. No. 80-759, § 6(j), 62 Stat. 612, 613 (1948) (codified at 50 U.S.C. app. § 456(j) (1958))

40. *Id.*

41. *Id.*

42. To some extent, the historical context may be relevant here. Perhaps in part because of the escalating war in Vietnam, the Supreme Court shied away from the option of holding the statute unconstitutional (and thus leaving inductees without the possibility of conscientious objection), and instead sought to broaden the meaning of "religion" within the statute itself. *Cf.* Robert L. Rabin, *When Is a Religious Belief Religious:* United States v. Seeger *and the Scope of Free Exercise*, 51 CORNELL L.Q. 231, 238-39 (1966) (speculating about the Court's reluctance to leave people without the means of claiming conscientious objector status). That this concern is not the entire story, however, is indicated by the fidelity of the *Seeger* definition to the Court's broad language in *Torcaso* in 1961.

43. *Seeger*, 380 U.S. at 166 (quoting Seeger's letter to the draft board).

44. *Id.* at 176; *see also id.* at 180 (citing 2 PAUL TILLICH, SYSTEMATIC THEOLOGY 12 (1957))

45. Evidence for this view can be found in the Court's statement that, in interpreting "Supreme Being" as used in the statute, it was faced with a choice of interpreting the term to require belief in the "orthodox God" or in a "broader concept of a power or being, or a faith, 'to which all else is subordinate.'" *Id.* at 174 (quoting WEBSTER'S NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 2105 (2d ed. 1943))

example, the Court explained that its construction "avoids imputing to Congress an intent to classify different religious beliefs, exempting some and excluding others."[46] Such an intent would have violated the Establishment Clause, as the Court had clearly stated in *Torcaso*.[47] Further, in his concurring opinion, Justice Douglas argued that the broad reading of the statute was required to avoid holding it unconstitutional.[48]

In adopting this definition of religion, the Court made clear that it was not extending the protection of the First Amendment beyond the bounds of what it considered to be religion in the colloquial sense.[49] But the Court's parallel position test bears little resemblance to what most people would consider to be religion.[50] Almost anything can occupy a place in a person's life parallel to the place of God in the life of the traditional theistic believer. Utility, for example, holds a position in the lives of many utilitarians (and some economists) parallel to that of God in the lives of traditional theists (that is, as an absolute good toward which all human action should be directed). Few people, however, have advocated treating utilitarianism as a religion. The parallel position test, then, is more appropriate as a definition of conscience than of religion.[51] Despite this apparent overbreadth, the Court substantially reaffirmed (or even expanded) the *Seeger* definition in *Welsh v. United States*.[52]

Perhaps realizing the problematic implications of its broad language, the Court appears to have shifted back toward a narrower conception of religion in *Wisconsin v. Yoder*.[53] The *Yoder* Court made a strong distinction between "secular considerations,"[54] which were not considered valid bases for challenging state regulation under the First Amendment, and "claims . . . rooted in religious belief,"[55] which were. The Court demonstrated the

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46. *Id.* at 176.

47. *See* Torcaso v. Watkins, 367 U.S. 488, 493 (1961).

48. *See Seeger*, 380 U.S. at 188 (Douglas, J., concurring). This constitutional reading of the *Seeger* holding has been endorsed by several lower courts and most scholars. *See, e.g.*, Malnak v. Yogi, 592 F.2d 197, 204-05 (3d Cir. 1979) (per curiam); Choper, *supra* note 19, at 588; Donald A. Giannella, *Religious Liberty, Nonestablishment, and Doctrinal Development: Part I. The Religious Liberty Guarantee*, 80 HARV. L. REV. 1381, 1425 (1967); Rabin, *supra* note 42, at 238.

49. *See Seeger*, 380 U.S. at 180 ("[W]e believe this construction embraces the ever-broadening understanding of the modern religious community.").

50. *See* Austin, *supra* note 21, at 15. *But see* A. Stephen Boyan, Jr., *Defining Religion in Operational and Institutional Terms*, 116 U. PA. L. REV. 479, 497 (1968) (praising the *Seeger* definition as a step in the right direction).

51. I understand conscience to be a broader concept than religion, as it encompasses both religiously and nonreligiously motivated beliefs. *See infra* Section III.A (discussing the reasons for rejecting a broad understanding of "religion" in the First Amendment).

52. 398 U.S. 333, 341 (1970) (including within the "parallel position" definition someone who crossed the word "religion" off of his application for conscientious objector status and who described his beliefs as based upon his readings in "history and sociology").

53. 406 U.S. 205 (1972). For discussions of the apparent narrowing of the Court's definition in *Yoder*, see Austin, *supra* note 21, at 17; and Choper, *supra* note 19, at 585.

54. *Yoder*, 406 U.S. at 216.

55. *Id.* at 215.

narrowing of its understanding of "religion" through its choice of an example of "secular" motivation: Thoreau's rejection of the social values of his time and his subsequent isolation at Walden Pond.[56] Thoreau's beliefs, however, would almost certainly have passed as religion under the "parallel position" definition from *Seeger* and *Welsh*.[57]

Subsequent Supreme Court decisions have not dealt directly with the issue of defining religion.[58] The current Supreme Court jurisprudence on the definition of religion is therefore in a state of some uncertainty. Before *Yoder*, the jurisprudence was characterized by a steady broadening of the Court's understanding of religion, but *Yoder*'s apparent reversal of this trend makes it difficult to predict how the Court will treat definitional questions in the future.

B. *The Courts of Appeals*

Where the Supreme Court has been hesitant to tread in recent years, lower courts have proved themselves more willing to experiment. Several federal judges have formulated definitions of religion for use in First Amendment cases. The most influential of these definitions is the three-part inquiry proposed by Judge Adams of the Third Circuit.

The Adams "test" was first formulated in a concurring opinion in *Malnak v. Yogi*.[59] The plaintiffs in *Malnak* were seeking an injunction against the teaching of a course entitled Science of Creative Intelligence-Transcendental Meditation (SCI-TM) in New Jersey public high schools. The course was offered as an elective at five schools during the 1975-1976 academic year.[60] The textbook used in the course was developed by Maharishi Mahesh Yogi, the founder of SCI-TM. Each member of the class was given his own mantra to be chanted during meditation. In order to receive the mantra, however, the student had to attend a *puja* (held off school grounds on Sundays), at which offerings were made to *Guru Dev*.[61]

In a per curiam decision, the Third Circuit held that SCI-TM was a religion.[62] In his concurring opinion, Judge Adams drew on the "parallel position" test in *Seeger* to construct a "definition by analogy":[63] "The modern

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56. *See id.* at 216. Thoreau's motivation, the Court said, "was philosophical and personal rather than religious." *Id.*

57. Thoreau's beliefs were far more religiously based than, for example, those of the defendant in *Welsh*. *Compare Welsh*, 398 U.S. at 340-41 (describing Welsh's beliefs), *with* Freeman, *supra* note 22, at 1559-60 (describing the religious roots of much of Thoreau's belief system).

58. *See, e.g.*, Thomas v. Review Bd. of the Ind. Indep. Employment Sec. Div., 450 U.S. 707, 714-16 (1981) (expressing hesitancy about the enterprise of determining the religious nature of beliefs, but stating that certain beliefs could be too bizarre to qualify as "religious").

59. 592 F.2d 197, 207-10 (3d Cir. 1979) (Adams, J., concurring).

60. *See id.* at 197-98 (per curiam).

61. *Puja* is Hindi for "homage, reverence, worship." R.C. TIWARI ET AL., HINDI-ENGLISH ENGLISH-HINDI DICTIONARY 146 (1993). *Guru Dev* is translated, literally, as "teacher-god." *Id.* at 56, 113.

62. *See Malnak*, 592 F.2d at 199 (per curiam).

63. *Id.* at 207 (Adams, J., concurring).

approach thus looks to the familiar religions as models in order to ascertain, by comparison, whether the new set of ideas or beliefs is confronting the same concerns, or serving the same purposes, as unquestioned and accepted 'religions.'"[64] Adams produced three "indicia" to help determine when a "set of ideas" is sufficiently analogous to "accepted" religions:[65] first, the nature of the ideas in question (religions generally deal with "ultimate" questions);[66] second, the comprehensiveness of the set of ideas;[67] and third, the "formal, external or surface signs that may be analogized to accepted religions."[68] Judge Adams did not present the indicia as "essential" features of religion but rather as "objective" guides to help systematize the judge's decisionmaking.[69]

In *Africa v. Pennsylvania*,[70] Judge Adams was able to apply his *Malnak* test in a majority opinion. Frank Africa, a prisoner who claimed to be a "Naturalist Minister" for the MOVE organization, sought an injunction requiring the state prison authority to provide him with a diet of raw fruit and vegetables. Africa claimed that the principles of his religion, MOVE, required the raw food diet. He described MOVE as a "revolutionary" organization, "absolutely opposed to all that is wrong."[71] MOVE lacked a governing body and engaged in no "ceremonies" or "rituals";[72] instead, MOVE members considered every act of life to be vested with religious meaning and significance. The raw food diet requested by Africa was mandated by MOVE's commitment to all that is natural and untainted: "'Water is *raw*, which makes it *pure*, which means it is *innocent*, *trustworthy*, and *safe*, which is the same as *God*.'"[73]

Applying the *Malnak* definition by analogy, Judge Adams went through each of the three criteria and held that MOVE was not a religion. MOVE, he decided, was an organization more interested in reforming society than in the "spiritual or other-worldly."[74] Further, and perhaps for Adams most importantly, MOVE was altogether lacking in the "structural characteristics" typical of religions,[75] such as formal services, ceremonies, clergy, hierarchical organization, efforts at propagation, and holidays.[76] Instead of a religion,

64. *Id.* at 207.
65. *Id.* at 207-08.
66. *Id.* at 208.
67. *See id.* at 209.
68. *Id.* at 210.
69. *Id.*
70. 662 F.2d 1025 (3d Cir. 1981).
71. *Id.* at 1026 (quoting Africa).
72. *Id.* at 1027.
73. *Id.* (quoting Africa).
74. *Id.* at 1034. The suggestion that religions must be concerned primarily with the "spiritual" or "other-worldly," and not with reforming society, assumes a strong distinction between the public, secular sphere and the private, devotional sphere that is characteristic of western, particularly Protestant, faiths.
75. *Id.* at 1035 (citing *Malnak*, 592 F.2d at 209 (Adams, J., concurring)).
76. *See id.* The same bias that Judge Adams exhibited in focusing on MOVE's apparent lack of concern with the "spiritual" or "other-worldly" can also be seen in this list of structural features typical of religions. It is clear that his baseline of comparison was a Christian church community.

Adams held, MOVE would be better described as "philosophical naturalism."[77]

Other courts have followed Judge Adams's methodological framework, albeit with slight variation.[78] A somewhat different definition of religion, however, was proposed by Judge Cardamone of the Second Circuit in *United States v. Moon*.[79] In that case, the court was faced with a constitutional challenge to Reverend Moon's conviction for filing false tax returns. As part of his rejection of Moon's appeal, Judge Cardamone considered the issue of the definition of religion. He suggested the adoption of the definition proposed by William James in *The Varieties of Religious Experience*:[80] "'the feelings, acts, and experiences of individual men in their solitude, so far as they apprehend themselves to stand in relation to whatever they may consider the divine.'"[81]

In sum, the state of the search for a constitutional definition of religion in the courts could be charitably described as unsettled. The Supreme Court has clearly abandoned its nineteenth-century theistic definition of religion. Although it has moved in the direction of a broader understanding, it has yet to provide an authoritative replacement. Meanwhile, the lower courts have proved more willing to set out definitions in detail, but they have been unable to agree among themselves as to a single meaning of the term.[82]

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77. *Id.* at 1035. Judge Adams limited his holding to MOVE as presented in the evidence before him. Perhaps as a result of his own uncertainty regarding the correct classification of the organization, he left open the possibility that a more thorough presentation of evidence could make a difference as to the result of his analysis in the future. *See id.* at 1036 n.22.

78. *See, e.g.*, United States v. Meyers, 95 F.3d 1475 (10th Cir. 1996). In *Meyers*, the Tenth Circuit adopted a definition of religion following the same comparative approach as Adams in *Malnak* and *Africa*, but using a larger number of indicia. The court provided five indicia: ultimate ideas, metaphysical beliefs, moral or ethical system, comprehensiveness of beliefs, and accoutrements of religion (which in turn included 10 sub-indicia). *See id.* at 1483-84. The case involved a defendant who tried to avoid conviction for drug violations by arguing that he was the "founder and Reverend of the Church of Marijuana" and that it was "his sincere belief that his religion commands him to use, possess, grow and distribute marijuana for the good of mankind and the planet earth." *Id.* at 1479. The court only considered the definition of religion with regard to the Religious Freedom Restoration Act (RFRA), Pub. L. No. 103-141, 107 Stat. 1488 (1993) (codified as amended at 42 U.S.C. §§ 2000bb-1 to -4 (1994)), but the close connection between RFRA and prior Religion Clause jurisprudence would seem to imply that a definition of religion for the purposes of RFRA adjudication would be relevant to the question of a constitutional definition. In any event, the Supreme Court has since held the RFRA unconstitutional. *See* City of Boerne v. Flores, 117 S. Ct. 2157 (1997).

79. 718 F.2d 1210 (2d Cir. 1983).

80. WILLIAM JAMES, VARIETIES OF RELIGIOUS EXPERIENCE (Harvard Univ. Press 1985) (1910).

81. *Moon*, 718 F.2d at 1227 (quoting JAMES, *supra* note 80, at 31). Interestingly, James referred to his own proposed definition as "arbitrary" and limited its application to the purpose of the lectures from which the definition was drawn. JAMES, *supra* note 80, at 32, 34.

82. As with the discussion in the courts, scholarly debate over the correct definition of religion for First Amendment purposes has been inconclusive. Constraints on space prevent me from discussing in detail the various definitions that have been proposed and their many weaknesses. For a more detailed critique of the various definitions, see Freeman, *supra* note 22, at 1534-48.

III. FORMULATING A METHODOLOGY FOR DETERMINING WHAT QUALIFIES AS A "RELIGION": PRELIMINARY CONSIDERATIONS

This part explores three issues that should be addressed before elaborating my own methodology for determining what constitutes a "religion" under the First Amendment. First, before I can describe the specific form of my proposal, I must deal with the more general and logically prior question of whether "religion" in the First Amendment means the same thing as religion in the narrow, colloquial sense or whether it is a term, like "speech," whose signification for constitutional purposes is far broader than our use of it in everyday language. Second, I explore the nature of language and definitions more generally to see what lessons can be drawn for my own endeavor. Finally, I consider the problem of western bias and how it might manifest itself in a constitutional determination of religion-status. From my consideration of these three issues, I develop three criteria that I think any sound definitional methodology must satisfy.

A. *"Religion" in the First Amendment Means Religion*

Several factors seem to point toward the appropriateness of limiting the protection extended by the Religion Clauses to religion as the term is used in everyday language:[83] first, the original intent of the Framers and the text of the Constitution itself; second, the history of religiously motivated violence and the vulnerability of religious groups to marginalization and persecution; and third, the particular role religions play in the lives of their adherents. It is important to note that in discussing these factors, particularly the second and third, I am making an extremely limited claim. I do not argue that the history of religious violence and the importance of religion to adherents justify (independently of the Religion Clauses) constitutional protection of religion. Instead, I simply argue that these factors weigh in favor of interpreting the Religion Clauses restrictively, to protect a narrow understanding of religion (as opposed to a broader concept, like "conscience"). Nonreligious belief, though certainly worthy of constitutional protection, is more appropriately covered by other provisions of the Constitution.

1. *The Intent of the Framers*

In the context of many provisions of the Constitution, the views of the Framers are at least partially obscured by an incomplete record. In the case of the signification of "religion" in the First Amendment, however, compelling

83. By this I mean a relatively narrow understanding of the word, one which excludes such systems of thought as philosophy or mere ideology.

evidence points strongly in the direction of a narrow understanding of the term. In particular, the history of the drafting of the Religion Clauses sheds light on the intentions of the Framers.

When the text of the First Amendment was being considered, several drafts of the Religion Clauses were rejected before Congress settled on the final form.[84] Significantly, earlier versions of the Religion Clauses expressly included protection for "'rights of conscience.'"[85] One such version was adopted briefly by Congress but was ultimately rejected in favor of a version that explicitly protected only religion.[86] As Michael McConnell notes, this initial consideration, and ultimate rejection, of the word "conscience" can be interpreted in either of two ways. First, one could assume that the Framers decided not to include "conscience" in the final wording of the amendment because they considered it to be redundant, with the protection of religion already constituting a recognition of the general inviolability of conscience.[87] Second, one might interpret the Framers' refusal to include "conscience" in the First Amendment as reflecting a desire to limit its protection to the narrower category of religion.[88]

The latter of these two options is the more plausible and has been endorsed by several scholars.[89] Conscience, including as it does religious and nonreligious motivation, is a far broader concept than religion. If the Framers had wanted to eliminate the apparent redundancy of including both "conscience" and "religion" while maintaining the protection of both, the most appropriate way to do so would have been to eliminate the narrower word, religion.

By itself, this appeal to original intent assumes that the views of the Framers are the most relevant factor in determining the meaning of the Religion Clauses; this assumption itself, however, is controversial and in need of justification.[90] Further, an exclusive reliance on original intent would mandate the adoption of the Framers' theistic definition of religion.[91] As I

84. *See* Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1410, 1481 (1990).

85. *Id.* (quoting 1 ANNALS OF CONG. 757-59, 796 (Joseph Gales ed., 1789)).

86. *See id.*

87. *See id.* at 1495.

88. *See id.*

89. *See id.*; *see also* Freeman, *supra* note 22, at 1521-22 (arguing that the history of the congressional debates should be interpreted as endorsing an intention by the Framers to protect "freedom of conscience only in matters of religion" and not "freedom of conscience per se"); Stanley Ingber, *Religion or Ideology: A Needed Clarification of the Religion Clauses*, 41 STAN. L. REV. 233, 277-78 (1989) (endorsing the narrow interpretation of the Framers' choice to omit the word "conscience" from the First Amendment).

90. *See* Christopher L. Eisgruber & Lawrence G. Sager, *The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct*, 61 U. CHI. L. REV. 1245, 1270 (1994).

91. Madison, for example, defined religion as "the duty which we owe to our Creator and the Manner of discharging it." JAMES MADISON, *To the Honorable the General Assembly of the Commonwealth of Virginia. A Memorial and Remonstrance.*, *in* THE MIND OF THE FOUNDER: SOURCES OF THE POLITICAL THOUGHT OF JAMES MADISON 6, 7 (Marvin Meyers ed., 1981).

argue below, such a static definition of religion would be inconsistent with the evolutionary nature of language and would raise serious establishment concerns.[92] The establishment problem may be more apparent than real, however, because original intent concerning the actual *meaning* of religion is itself inherently ambiguous. The Framers probably never considered the issue of defining religion for the First Amendment at all, because they thought the everyday meaning of the term was clear. Indeed, there is no way to distinguish original intent to apply the First Amendment to religion in the everyday sense of that word (at any given point in time) from original intent to apply the First Amendment to a particular, theistic definition of religion. The two were, for the Framers, one and the same thing.[93]

2. *The History of Religious Violence and the Vulnerability of Religious Minorities*

Modern legal scholars acknowledge the existence of a long history of religiously motivated violence.[94] Moreover, some theologians have argued that religious tolerance and understanding are the only hope the world has for peace and survival.[95] Such a consistent tendency toward violent conflict has not been demonstrated in the case of nonreligious conscience.[96] Because classification as a religion for First Amendment purposes involves the imposition of establishment burdens (in addition to a grant of free exercise protections),[97] it is necessary to tailor the application of the Religion Clauses as narrowly as possible to those belief systems that truly need them.[98] Thus the history of violent religious conflict weighs in favor of a narrow reading of "religion" as meaning religion in the everyday sense.[99]

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92. *See infra* notes 129-134 and accompanying text.

93. *Cf.* ADAMS & EMMERICH, *supra* note 4, at 90 (observing that the Framers probably thought that the meaning of religion was self-evident).

94. *See, e.g.*, Eisgruber & Sager, *supra* note 90, at 1282; Douglas Laycock, *Religious Liberty as Liberty*, 7 J. CONTEMP. LEGAL ISSUES 313, 317 (1996).

95. *See, e.g.*, HANS KUNG, GLOBAL RESPONSIBILITY 75-76 (1991).

96. *See infra* note 101. I would not deny that at times persons have been ruthlessly persecuted on account of their nonreligious conscience, as in the communist red scares of the first half of the 20th century. But this phenomenon has not been nearly as pervasive as religious persecution and is adequately covered by other provisions of the Constitution.

97. *See, e.g.*, Malnak v. Yogi, 592 F.2d 197, 200 (3d Cir. 1979) (per curiam).

98. Further, both the Establishment and Free Exercise Clauses limit the freedom of the state. Thus, an overly broad definition of religion could severely hamper the ability of the state to function effectively. *See* Choper, *supra* note 19, at 592. Choper makes the plausible argument that because free exercise benefits granted to religions constitute burdens on the state, the wider the definition of religion adopted, the less robust the protections the Religion Clauses are likely to provide. *See id.* This provides another reason for tailoring the Religion Clauses narrowly to those belief systems that need protection.

99. This historical justification is itself reinforced by original intent, because the bloody history of religious conflict and intolerance in post-Reformation Europe was one of the major concerns that generated support for the Religion Clauses among rationalist humanists like Madison. *Cf.* MADISON, *supra* note 91, at 11 ("Torrents of blood have been spilt in the old world, by vain attempts of the secular arm to extinguish Religious discord . . . .").

This history of religious violence may be the result of a general refusal of religious believers to submit the tenets of their faith to the standards of rationality of those outside their religion.[100] Because each religion has its own unique doctrinal "framework" assumptions, religious disagreements are particularly unamenable to resolution through discussion. Different religions operate within distinct, albeit overlapping, conceptions of rationality (for example, with different ideas about what counts as a fair assumption or what constitutes evidence pointing toward a particular conclusion), and they have limited common vocabularies for resolving their disagreements. Thus debates between adherents of different religious systems often devolve rapidly into mutually contradictory assertions of the truth of each side's position.[101]

The sharp (and often violent) nature of religious disagreement in turn engenders a unique vulnerability of minority religious belief and practice to

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100. Norman Malcolm, drawing on Wittgenstein's concept of the "language game," has compared the discourse of an individual religion to a unique language game with its own internal logic, basic assumptions ("framework propositions"), and game-specific criteria for what counts as evidence. *See* Norman Malcolm, *The Groundlessness of Belief*, *in* REASON AND RELIGION 143 (Stuart C. Brown ed., 1977). This view of religion as somehow less than "rational" by "objective" scientific standards has been challenged by more orthodox philosophers of religion such as Colin Lyas. *See, e.g.*, Colin Lyas, *The Groundlessness of Religious Belief*, *in* REASON AND RELIGION, *supra*, at 158.

Malcolm does not seek to denigrate religious belief as somehow less than reasonable. Indeed, following Wittgenstein, he rejects any game-independent notion of reasonableness. *See* Malcolm, *supra*, at 146. Scientific belief, he argues, is no more "objectively" reasonable than religious belief, but from the perspective of one language game, behavior within another language game seems "unreasonable." *Id.* at 152. It is thus impossible for someone operating from within one language game to justify her beliefs to someone operating within another language game. *See id.* at 151-52. Nevertheless, the presence of individuals who, like Lyas, are willing to subject their "religion" to the scrutiny of scientific and philosophical standards of "reasonability" indicates the impossibility of using the rejection of some notion of public reason within religion as a necessary condition for calling something a religion. Such exceptions, however, should not prevent us from making a broad argument about the value of protecting "religion" as such based on the role of reason within religions in general.

101. *See, e.g.*, Thomas Nagel, *Moral Conflict and Political Legitimacy*, 16 PHIL. & PUB. AFF. 215, 232 (1987) (describing debates between different religious believers as normally consisting of bare assertions of each side's truth). Philosophical ethicists have argued in a similar vein about the apparent irresolvability of many moral and political judgments. *See* ALFRED JULES AYER, LANGUAGE, TRUTH AND LOGIC 21-22 (1956) (arguing that moral disagreements not based on disagreements over the "facts" of a situation are irresolvable because moral judgments are fundamentally subjective); ALASDAIR MACINTYRE, AFTER VIRTUE 6-8 (1981) (observing that modern moral and political disagreements are uniquely irresolvable through rational discussion). But unlike philosophically derived moral or political judgments, which are often experienced as dictated by the individual conscience, the religiously based belief is experienced by the believer as imposed from outside by a reality that transcends the individual. *See* Ingber, *supra* note 89, at 282. Philosophical moral objectivists also think of ethical judgments as somehow transcending the individual, *see, e.g.*, IMMANUEL KANT, FUNDAMENTAL PRINCIPLES OF THE METAPHYSICS OF MORALS (Thomas K. Abbott trans., The Bobbs-Merrill Co. 1981) (1785) (setting forth a philosophical moral system, the content of which transcends the individual moral subject), but as with other philosophical ethicists, they participate in a shared philosophical mode of discourse that provides an alternative to violent confrontation. I understand that not all philosophers agree as to what constitutes necessary and sufficient conditions for "truth," but I believe that philosophers do share a more or less common mode of discourse, or methodology, for evaluating and discussing such issues. The feeling that the religious belief is externally imposed gives religiously motivated disagreements a sharper, more violent edge than disagreements based on differences between secular ethical systems (for example, between Kantianism and utilitarianism). To the religious believer, the one who does not believe is often seen as one who refuses to acknowledge a self-evident truth. The potential for violence resulting from the irresolvability of moral and political disputes, however, is mitigated by their more transparent and self-conscious subjectivity.

marginalization.[102] Because religious beliefs and practices generally cannot be defended according to the nonbeliever's notion of rationality,[103] religious dissenters are easily brushed aside as irrational or persecuted as dangerous perversions of the natural order embraced by the majority.[104] Whether the established system of belief is Christianity or (as is arguably the situation today) a form of scientific empiricism,[105] the epistemological isolation of minority religions from other forms of rationality (and, at the same time, from majoritarian politics) renders them particularly susceptible to persecution.[106] This unique vulnerability of minority religious groups to violent persecution, as evidenced by a long history of religious violence, justifies limiting the application of "religion" in the First Amendment to religions.

3. *The Role of Religion in the Lives of Adherents*

The final reason for limiting Religion Clause protections to religions is the irreplaceable role religions play in the lives of their adherents. While ethical systems and ideologies can tell us *how* we should live, religions provide answers to the ultimate question of *why* we should live. While science can try to explain to us the process by which we have arrived here, religions help us

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102. *See* Eisgruber & Sager, *supra* note 90, at 1282-83.

103. *See* Nagel, *supra* note 101, at 232.

104. *See* Leo Pfeffer, *Equal Protection for Unpopular Sects*, 9 N.Y.U. REV. L. & SOC. CHANGE 9, 9-10 (1979-1980).

105. For arguments that empirically based, scientific belief systems constitute the acceptable norm for public discourse, see, for example, Nagel, *supra* note 101, at 232; and John Rawls, *The Idea of an Overlapping Consensus*, 7 OXFORD J. LEGAL STUD. 1, 8 (1987).

106. The experience of the Mormons in the 19th-century United States exemplifies this pattern. Mormons were lampooned by their critics as "'men of perverted intellect.'" KENNETH H. WINN, EXILES IN A LAND OF LIBERTY: MORMONS IN AMERICA, 1830-1846, at 72 (1989) (quoting Letter to the Editor of the OHIO STAR, *reprinted in* PAINESVILLE TELEGRAPH, May 20, 1836). As would be expected from the discussion of the nature of religious belief systems as language games, *see supra* note 100, the Mormons also accused their critics of irrationality, *see* WINN, *supra*, at 73. The Mormons were tarred and feathered, run out of town, and sometimes killed. *See id.* at 96-97, 139-42. Because of their minority status, the Mormons' appeals to majoritarian political institutions were fruitless. *See id.* at 142-47. In a statement that succinctly illustrates the inability of majoritarian political systems to protect religious minorities, the Governor of Missouri explained his decision not to protect Mormon settlers from anti-Mormon violence: "[T]he quarrel was between the Mormons and the mob," he said, explaining that the best solution was to let the two sides "fight it out." *Id.* at 139 (internal quotation marks omitted).

The treatment of adherents of the Santeria religion by some local communities provides a more recent example of the vulnerability of minority religious groups to persecution through the majoritarian political process. In Hialeah, Florida, for example, the city government sought to prevent the practice of the Santeria religion by banning the killing of animals within city limits. *See* Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 526-28 (1993). Animal sacrifice plays an integral role in Santeria rituals. *See id.* at 525. Santeria rituals have sparked resentment in other cities as well. *See, e.g.*, Marty Sabota, *North Side Residents Upset About Animal Sacrifices*, SAN ANTONIO EXPRESS-NEWS, Sept. 26, 1997, at 10D, *available in* 1997 WL 13206688. The State Department has been accused of anti-Santeria bias for its refusal to allow 31 Cuban babalawos (Santeria high priests) into the United States in August 1997 for a religious conference in San Francisco. *See* Deborah Ramirez, *U.S. Bans 31 Cubans from Religious Meeting*, FT. LAUDERDALE SUN-SENTINEL, Aug. 4, 1997, at 1A, *available in* 1997 WL 11395827.

to understand why we are here at all.[107] In other words, religions attempt to provide answers to the fundamental questions of human meaning. Indeed, anthropologist Morton Klass has argued that it is religion's meaning-giving function, among other things, that distinguishes it from other types of belief systems, and he makes this function the center of his proposed "operational" definition of religion.[108] Although modern secular culture often seeks to marginalize religious belief as "irrational,"[109] the human need for the types of explanation religions provide rises time and again to visibility. Whether it be the mass suicide of UFO "cults"[110] or private soul-searching alone at night, human beings are repeatedly faced with the realization of their deep need for religion and religious explanation.[111] The ability of religions to fulfill a deeply rooted human longing makes them particularly precious and worthy of protection. The singular importance of religions to the human condition (combined with the burdening nature of the Religion Clauses) represents another reason for reading the Religion Clauses narrowly as protecting religion rather than a broader category of beliefs like conscience.

B. *Establishment Implications*

Once one accepts the thesis that the protections of the Religion Clauses are to extend only to religions, certain establishment issues arise. Several scholars have argued that the adoption of an authoritative definition of religion creates the risk of favoring the groups that fall within the definition at the expense of those that do not, effectively establishing a certain form of religion.[112] This

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107. *See, e.g.*, HERBERT MCCABE, GOD MATTERS 2-9 (1987) (arguing that science can answer "how" questions but only religion can answer "why" questions).

108. *See* MORTON KLASS, ORDERED UNIVERSES: APPROACHES TO THE ANTHROPOLOGY OF RELIGION 38 (1995). Klass argues that religion, as a universal institution, provides answers to fundamental "why" questions. *See id.* at 56. He points out, however, that the general answers to these fundamental "why" questions are not interesting to adherents of a particular belief system, because these answers are part of the framework of the adherents' worldview, the most basic of their taken-for-granted assumptions. *See id.* Instead of answering the question "Why is there death?" the believer is interested in explaining *this* particular untimely death. *See id.* at 57. Although I agree with Klass's basic point that religions are unique in their ability to answer these "why" questions, I do not think this is adequate as a definition of religion.

109. *See* STEPHEN L. CARTER, THE CULTURE OF DISBELIEF 51-56 (1993) (criticizing a "public square" that excludes religious thinking or at least forces it to be "bracketed" or translated); GEDICKS, *supra* note 16, at 32-37 (discussing the hostility of modern, secular culture toward religious knowledge).

110. The recent mass suicide of the Heaven's Gate group became the occasion for widespread reflection in the media on the unhealthy effects of the overseculanzation of American culture. *See e.g.*, Marty Kaplan, *Maybe Reason Isn't Enough*, N.Y. TIMES, Mar. 31, 1997, at A15 (discussing the inability of secular culture to satisfy human needs for meaning).

111. *See, e.g., id.* Kaplan describes this need:

> This is the sadness at the heart of our secular lives. No one wants to live in a pointless, chaotic cosmos, but that is the one that science has given us, and that our culture has largely championed. We may yearn for the divine, but our feet are stuck in the moral relativism (or even nihilism) that such a culture breeds. The post-modern Dadaism that's hip today is the best we can do; everything's a joke. But inside it feels awful.

Id.

112. *See, e.g.*, Ingber, *supra* note 89, at 240; Val D. Ricks, *To God God's, to Caesar Caesar's, and*

fear becomes reasonable only after the option of defining religion far more broadly for constitutional purposes than for ordinary discourse has been discarded. If a proposed definition excludes groups that most people agree are religions, then it will clearly be invalid in that it establishes certain religions by offering them protection not given to others.[113] Thus any constitutional definition of religion must square with data drawn from our own intuitions about what does or does not constitute a religion according to everyday standards. To avoid running afoul of the Establishment Clause, a proposed definition must conform as closely as possible to the general conception of religion used in everyday discourse.[114]

C. *The Evolutionary Nature of Language and the Problem with a Dictionary-Style Definition of "Religion"*

Before considering my own approach to the definitional methodology, it is important to explore the nature of definitions in general with the aim of understanding how they relate to word meaning. Theorists often assume that learning the meaning of a word involves forming some abstract concept or template that allows us to classify our experiences of the world around us as either falling into or outside of this template.[115] According to this view, for example, we learn from experience that "apples" are spherical, crispy, and edible. When faced with a previously unencountered object possessing these characteristics, we compare it with our template and call it an "apple." In using the word "apple" we merely respond to the dictates of our concept. Generic words like "apple" therefore denote the category of objects (known and

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to Both the Defining of Religion, 26 CREIGHTON L. REV. 1053, 1061-64 (1993); Jonathan Weiss, *Privilege, Posture and Protection: "Religion" in the Law*, 73 YALE L.J. 593, 622 (1964); Sharon L. Worthing, *"Religion" and "Religious Institutions" Under the First Amendment*, 7 PEPP. L. REV. 313, 345 (1980).

113. *See* Austin, *supra* note 21, at 6.

114. Establishment concerns would also seem to bar the adoption of a dual definition of religion such as the one proposed by Professor Tribe in the first edition of his textbook on constitutional law. *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 14-6, at 831 (1978). Professor Tribe defined religion for establishment purposes as that which is not arguably nonreligious and for free exercise purposes as that which is arguably religious. *See id.* As Judge Adams noted in *Malnak v. Yogi*, however, such a definition creates three categories of belief systems under the Religion Clauses: first, those covered neither by the Establishment Clause nor by the Free Exercise Clause; second, those protected by the Free Exercise Clause but not subject to the Establishment Clause; and third, those protected by the Free Exercise Clause and subject to the Establishment Clause. *See* Malnak v. Yogi, 592 F.2d 197, 212 (3d Cir. 1979) (Adams, J., concurring). The second group, likely to be made up of new religious groups, would be uniquely favored in that it could (as both arguably religious and arguably nonreligious) invoke free exercise benefits without suffering the burdens associated with the Establishment Clause. *See id* at 213. Perhaps for reasons such as these, Professor Tribe has abandoned this proposal in the most recent edition of his textbook. *See* TRIBE, *supra* note 5, § 14-6, at 1186.

115. This seems to have been the approach taken by John Locke in his discussion of natural kind terms (terms that refer to natural categories, like species) and nominal essences. *See* JOHN LOCKE, AN ESSAY CONCERNING HUMAN UNDERSTANDING 260, 270 (A.D. Woozley ed., Meridian 1964) (1689). Nominal essences, Locke explained, are the summation of all the ideas essential to the "sort." *Id.* The membership of a particular in the sort is determined by its possession of the qualities that form the nominal essence of that sort. *See id.*

unknown) in our world that share in the complex of qualities that form our concept of apple. Use of language is reduced by this model to following a series of rules, and the process of definition involves a listing of the essential features of our category-concept.[116]

Such a rigid concept-based description of word meaning fails to capture the flexible and evolutionary nature of language. In his philosophy of language, Wittgenstein criticized this rigid view and developed an approach that found word meaning to consist in our way of using words.[117] At its base level, language is, for Wittgenstein, neither interpretation nor rule following, but rather custom or practice.[118] Learning a language, or merely learning the meaning of a word, involves learning how that word is used and applying it accordingly, not merely learning some abstract definitional concept.[119]

Under the rigid conceptualization of language, all that is involved in the process of defining religion is a determination of what notions are essential to our concept of religion—either on a functional or on a substantive level. When faced with new groups or individuals claiming religion status, the adherent to the rigid model believes that the groups are (in some sense) already "religions" or not, depending upon their qualities. The result of our classification is predetermined by our definition.[120]

While Wittgenstein allows that our definitions (in the sense of our customary use) are involved in the process of shaping our application of a word to new situations, he denies that the results of this process are as predetermined as the rigid model implies.[121] Our decision to apply or not to apply a word to a new situation is affected by the nature of our customary use of the word, but at the same time, our decision to apply the word in a new situation (or not to apply it) is itself part of the definitional process. For example, Judge Adams's refusal in *Africa v. Pennsylvania*[122] to classify MOVE as a religion was determined by his conception of religion, but his refusal also in part further defined religion for him. There is a dialectic between our current use of the word and our future application of that word

116. *See* John McDowell, *Wittgenstein on Following a Rule*, *in* MEANING AND REFERENCE 257, 257, 288 (A.W. Moore ed., 1993).

117. Several philosophers of language have adopted this approach to word meaning. *See, e.g.*, *id.* at 276; Gilbert Ryle, *The Theory of Meaning*, *in* THE IMPORTANCE OF LANGUAGE 147, 162 (Max Black ed., 1962).

118. *See* McDowell, *supra* note 116, at 275.

119. *See* LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS § 198, at 80 (G.E.M. Anscombe trans., MacMillan Co. 1953) ("[W]hat has the expression of a rule—say a sign-post—got to do with my actions? What sort of connexion is there here?—Well, perhaps this one. I have been trained to react to this sign in a particular way, and now I do so react to it.").

120. According to William Alston (a philosopher of language heavily influenced by Wittgenstein), however, definitions are attempts to teach the meaning (that is, use) of a word by substituting for it a word or phrase whose use we already know. *See* WILLIAM P. ALSTON, PHILOSOPHY OF LANGUAGE 22 (1964).

121. *See* WITTGENSTEIN, *supra* note 119, § 197, at 80; McDowell, *supra* note 116, at 288.

122. 662 F.2d 1025 (3d Cir. 1981). For a discussion of *Africa*, see *supra* notes 70-77 and accompanying text.

to new situations. Our current use plays some role in the process of determining whether or not to apply the word in the future circumstance, but, at the same time, the future application (or nonapplication) of the word alters the customary use of the word itself. Thus the application of a word to new circumstances has an evolutionary aspect built into it.

Wittgenstein's theory is supported by the observation that our use of language does in fact evolve unpredictably over time. The indeterminacy of this evolutionary process can be seen in the divergent evolution of word use between isolated members of the same linguistic group faced with similar environmental factors. A good example of such divergent evolution is the difference in use of the word "torch" in American and British English. At the time of the colonization of the Americas, the English application of the word referred exclusively to a particular type of light carried in the hand.[123] Since the development of electric lights, however, a divergence in meaning has occurred between British and American English. The British have extended the application of the word "torch" to electric, hand-held lights,[124] while Americans have not.[125] Although the two ways of using the word share a common genealogy—that is, although at one point they were used in the same way (i.e., had the same definition)—differing responses to the same new situation have led to a subsequent divergence in meaning.

The meaning of the word "religion," like "torch," has evolved over time and will likely continue to evolve. We can see such an evolution at work in the Court's slow broadening of the definition of religion since the nineteenth century, a phenomenon described above in Part II. In *Davis v. Beason*,[126] the Court unself-consciously defined religion as "one's views of his relations to his Creator,"[127] requiring a group to profess belief in God in order to be considered a religion. 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."[128]

This gradually expanding evolution reveals the problems with seeking a dictionary-style definition of religion. One such problem was discussed by

123. *See* 18 THE OXFORD ENGLISH DICTIONARY 264 (2d ed. 1989).

124. *See id.*

125. *See* WEBSTER'S NEW WORLD DICTIONARY OF THE AMERICAN LANGUAGE 1500 (2d College ed. 1984).

126. 133 U.S. 333 (1890); *see supra* text accompanying notes 26-29.

127. *Davis*, 133 U.S. at 342.

128. Edward Conze, a scholar of Buddhist thought quoted by Justice Douglas in *United States v. Seeger*, points out that the exact opposite could conceivably have occurred. Instead of extending our notion of religion to include nontheistic groups, we could have declined to apply the word "religion" to those groups at all. *See* United States v. Seeger, 380 U.S. 163, 191 (1965) (Douglas, J., concurring) (citing EDWARD CONZE, BUDDHISM: ITS ESSENCE AND DEVELOPMENT 38-39 (1959)). Undoubtedly, the many similarities between Christianity and nontheistic systems of thought like Buddhism made the conclusion that the concept of God was not essential to religion the more likely result.

Jonathan Weiss in his article *Privilege, Posture and Protection*,[129] where he expressed the fear that any authoritative constitutional definition of religion, no matter how descriptively accurate of currently existing religions, would effectively establish our present conception of religion at the expense of later religions that might emerge.[130] It is possible that Weiss was objecting to a situation in which the adopted definition failed to evolve along with the use of the word "religion" in everyday language. Such a situation would indeed raise establishment concerns. The adoption of such a static definition of religion could be compared to the taking of a photograph. At the time it was exposed, the photograph reflected reality quite accurately. As soon as the photograph was shot, however, reality began to diverge from the captured image, leaving the photograph as a mere relic of the past. Given the evolutionary nature of language, the definition of religion adopted for the First Amendment should have the ability to evolve along with the use of the word in everyday language.

As the example of the theistic definition of religion shows, the law reacts very slowly to developments in our everyday use of language. Although the adoption of the theistic definition of religion was somewhat understandable considering the religious composition of the United States in the nineteenth century, by the early twentieth century the presence of theistic tenets could no longer credibly be considered a requirement for a belief system to be considered a religion. Nevertheless, the theistic definition managed to survive as the official constitutional definition of religion until 1961, when the Court finally overturned it in *Torcaso v. Watkins*.[131]

The persistence of the theistic definition of religion indicates the danger involved in the Court's adopting a dictionary-style definition of religion for constitutional purposes (that is, one that elaborates a list of "essences," the presence of which constitute necessary and sufficient conditions for something to be called a religion). Because it spells out essential characteristics, a dictionary-style definition of religion runs the risk that the use of religion in everyday language will broaden in the future (as occurred between the nineteenth and twentieth centuries), leaving the courts with a definition of religion that favors certain religions over others. Thus dictionary-style constitutional definitions of religion carry within them the risk of the very divergence between the constitutional definition and future everyday definition that leads to establishment problems.[132] This establishment danger, in

129. Weiss, *supra* note 112.

130. *See id.* at 622.

131. 367 U.S. 488, 495 & n.11 (1961).

132. The opposite (though perhaps less likely) possibility, that the everyday definition of religion might become more narrow in the future, does not pose the same establishment threat. If the everyday definition of religion becomes more narrow in the future than it is today, a constitutional definition of religion that adhered to today's standards would simply protect more types of behavior than it had to. This would not create an establishment problem, however. Only a constitutional definition that is more narrow

addition to the many problems inherent in trying to decide which features of religion should be considered "essential,"[133] points toward the unworkability of a dictionary-style definition.[134]

D. *"Religion" and the Problem of Western Bias*

Another significant part of the problem in attempting to formulate a dictionary-style (that is, essence-based) definition of religion that will embrace everything we think of as religion results from a bias within the word itself.[135] The meaning of the word "religion" developed within a uniformly Christian (and, since the sixteenth century, Protestant) context. Thus it is a term that has largely been adapted to the taxonomic needs of western, Protestant society.[136] It is unsurprising, then, that the term's primary meanings historically have related to features of Christianity, especially

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than the everyday use of the word poses the risk of establishing a form of religion.

133. *See* Freeman, *supra* note 22, at 1534-48. There is little consensus as to the "essence" of religion. There is, of course, a dizzying array of definitions that have been unsuccessfully proposed in the legal literature alone over the past three decades. *See supra* notes 18-24 and accompanying text. But the confusion is not limited to the law. Anthropologists have also proved unable to agree upon a single definition that successfully distinguishes all religions from all nonreligions. *See* JACOB PANDIAN, CULTURE, RELIGION AND THE SACRED SELF 11-13 (1991) (listing and critiquing a range of definitions proposed within the anthropological literature). The most popular anthropological definition, based upon the presence of the "supernatural," has been forcefully criticized by anthropologist Morton Klass as rooted in an atheistic and scientific worldview and therefore as "too ethnocentric to be of use for cross-cultural study." KLASS, *supra* note 108, at 28.

Philosophers have likewise failed to locate any one essence or combination of essences that would allow them to formulate a persuasive definition of religion. *See, e.g.*, MICHAEL PETERSON ET AL., REASON AND RELIGIOUS BELIEF 3-6 (1991) (discussing the many definitions of religion that have been proposed by philosophers and proposing another); NINIAN SMART, THE PHILOSOPHY OF RELIGION 26 (1979) (discussing the difficulties of formulating a definition of religion). William Alston, a philosopher of language, argues that religion is an inherently vague concept, unamenable to specific definition. Given the same borderline case, he argues, "mature native speakers" will disagree as to whether something is or is not a religion. ALSTON, *supra* note 120, at 87-90.

134. In two articles that appeared almost simultaneously, George Freeman and Kent Greenawalt both argued that the search for a dictionary-style constitutional definition of religion was doomed to end in failure. *See* Freeman, *supra* note 22, at 1548; Greenawalt, *supra* note 23, at 763. What Greenawalt calls the "dictionary approach" to defining religion involves a quixotic search for an essence of religion, the presence of which would create the infallible conclusion that the entity in question is religious and the absence of which would mean that it is nonreligious. Both Greenawalt and Freeman deny that any such essence exists, arguing instead for a determination of what is or is not a religion based on the process of analogy. *See infra* notes 148-154 and accompanying text.

135. Both English and non-English speakers have argued that the language is itself imbued with Protestant notions of religion. For example, Josiah Strong, a 19th-century American proponent of "manifest destiny," claimed that the English language, saturated with Christian ideas, was the agent of Christian civilization throughout the world. *See* JOSIAH STRONG, *America the Embodiment of Christian Anglo-Saxon Civilization, in* OUR COUNTRY: ITS POSSIBLE FUTURE AND ITS PRESENT CRISES (New York, 1885), *reprinted in* CHURCH AND STATE IN AMERICAN HISTORY 136, 138 (John F. Wilson & Donald L. Drakeman eds., 1987). Similarly, Anton Walburg, a German Catholic priest in Cincinnati, argued that English was so imbedded with Protestant ideas that English-speaking Catholicism could never prosper. *See* HUDSON, *supra* note 33, at 242 (discussing Walburg's views).

136. *See* Benson Saler, Religio *and the Definition of Religion*, 2 CULTURAL ANTHROPOLOGY 395, 395 (1987) (arguing that the term "religion," in its current usage, reflects primarily western, particularly Protestant, cultural traditions and experiences).

churches, worship, and the presence of a divine being.[137] Religion has, in fact, frequently been used as a synonym for Protestantism.[138]

In its current form, the word "religion" suggests a strong distinction between the domain of religion and the domain of the secular.[139] Such a distinction is fairly easily made in a society where religious bodies are marked off by strongly institutional forms. Many cultures, however, make far less of a sharp distinction between the secular and the sacred than is made within western culture.[140] Trying to fit such a culturally conditioned conceptual framework onto the wide variety of cultural forms existing around the world—and as a result of immigration, even in the United States alone—presents an enormous problem. In Sanskrit, for example, there is no word corresponding to the English word "religion."[141] Even within Christianity, the dualistic connotation of "religion" as standing in opposition to the "secular" (that is, nonreligious) is rooted in a very Protestant understanding of a world divided into Luther's "Two Kingdoms."[142] Such a division between secular and sacred, between the realm of religion and the realm of nonreligion, is not as firmly recognized within Catholic theology.[143]

Given such a western, Protestant bias within the term "religion," a bias written into the Constitution through its use of the word, it is unsurprising that nonwestern religions present the greatest difficulties for defining religion. These entities and systems of belief simply do not conform to the Christian model that lies at the heart of the historical development of the meaning of religion. Yet most people do not doubt that these nonwestern traditions are truly "religions" and ought to be covered by the First Amendment. In classifying belief systems as religions or nonreligions for constitutional purposes, then, one must be extremely careful about the danger of western bias. Although such bias is to some extent already inherent in the use of the word "religion" itself, consciousness of the danger can help to minimize its effects. This is particularly true if the three areas where bias is most likely to emerge are kept in mind: first, the assumption that belief in God is an essential

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137. *See* 13 THE OXFORD ENGLISH DICTIONARY, *supra* note 123, at 568.

138. *See id.* We can see a humorous example of such a use of the word in the statement of Parson Thwackum in Henry Fielding's *History of Tom Jones*: "When I mention religion I mean the Christian religion; and not only the Christian religion, but the Protestant religion; and not only the Protestant religion, but the Church of England." HENRY FIELDING, THE HISTORY OF TOM JONES 82 (Random House 1943) (1749), *quoted in* KLASS, *supra* note 108, at 17.

139. *See* KLASS, *supra* note 108, at 22 (describing the sacred-profane dichotomy associated with the term "religion" in European-derived societies); Saler, *supra* note 136, at 395 (discussing the common understanding of religion as a finite set of beliefs and practices).

140. *See* KLASS, *supra* note 108, at 22.

141. *See* Bimal K. Matilal, *Towards Defining Religion in the Indian Context*, *in* MEETING OF RELIGIONS 31, 37 (Thomas A. Aykara ed., 1978).

142. *See* Saler, *supra* note 136, at 395 (attributing the emergence of a discrete sphere of religion, and by extension nonreligion, to the Protestant Reformation).

143. Catholic Liberation Theology, for example, establishes transcendence of the religious-secular axis as a normative goal. *See* GUSTAVO GUTIERREZ, A THEOLOGY OF LIBERATION 43-46, 86 (Sister Caridad Inda & John Eagleson trans., Orbis Books 1988) (1971).

aspect of religion; second, the assumption that religions must be accompanied by certain types of institutional structures (resembling Christian churches); and third, a sharp distinction between the sacred and the secular (or between the natural and the supernatural).

E. *Three Criteria*

I should summarize my conclusions up to this point. For the reasons discussed in Sections III.C and III.D, as well as the reasons outlined in Freeman's article,[144] I have rejected the usefulness of a dictionary-style definition of religion. Instead, I am looking for a methodology for determining whether a belief system is (or is not) a religion that satisfies three criteria: First, it should define religion and not some broader concept, hewing as closely as possible to the use of the word "religion" in everyday language;[145] second, it should have the potential to evolve along with the colloquial standards governing the use of the word "religion";[146] and, third, it should minimize the risk of judicial, particularly pro-western, bias in the classification of belief systems by constraining the decisionmaking process.[147] A methodology that meets these three criteria would represent a significant improvement over the most popular definitions proposed to date.

IV. A PROPOSED METHODOLOGY FOR DETERMINING WHAT CONSTITUTES RELIGION: AN EVOLVING UNDERSTANDING

In an attempt to escape the cycle of proposed essence-based definitions defeated by appeals to nonconforming (often nonwestern) religions, Freeman and Greenawalt have both suggested the adoption of methodological approaches based on analogy.[148] These analogical approaches derive from Wittgenstein's discussion of "family resemblance concepts" in section 66 of *Philosophical Investigations*:[149]

> Consider for example the proceedings that we call "games". I mean board-games, card-games, ball-games, Olympic games and so on.

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144. *See* Freeman, *supra* note 22.

145. *See supra* Sections III.A-B.

146. *See supra* Section III.C.

147. *See supra* Section III.D.

148. Greenawalt's and Freeman's claims about the impossibility of dictionary-style definitions of religion are based upon the difficulty of discerning any "essence" of religion. Their arguments are particularly convincing when considered against the background of a general lack of consensus regarding the correct descriptive definition of religion in a whole range of disciplines. *See supra* notes 18-24 and accompanying text; *see also* note 133.

149. The term "family resemblance concepts" actually appears in section 67. WITTGENSTEIN, *supra* note 119, § 67, at 32; *see also* JOHN HICK, AN INTERPRETATION OF RELIGION 4 (1989) (discussing family resemblance concepts).

> 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. . . . [T]he result of this examination is: we see a complicated network of similarities overlapping and criss-crossing: sometimes overall similarities, sometimes similarities of detail.[150]

Freeman suggests that courts should operate by comparing the entity seeking religious status to a "paradigm" of religion.[151] The paradigm is itself constituted by a list of features common, but not essential, to "traditional Eastern and Western religions."[152] If the entity has more in common with the "paradigmatic" religion than it does with an admittedly nonreligious system, then it should qualify as a religion for First Amendment purposes.[153] Greenawalt's "definition by analogy" with the "indisputably religious" is almost identical to Freeman's, except that he begins with a baseline of particular religions.[154]

The insights of Greenawalt and Freeman represent a substantial step toward a sound methodology for defining religion. 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.[155] 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.[156]

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150. WITTGENSTEIN, *supra* note 119, § 66, at 31-32.

151. Freeman, *supra* note 22, at 1553. This is the way that Alston thinks we actually do go about applying the word "religion" to new cases. *See* ALSTON, *supra* note 120, at 88-89

152. Freeman, *supra* note 22, at 1553.

153. *See id.*

154. Greenawalt, *supra* note 23, at 767-78.

155. This is more true of Greenawalt than of Freeman, who does recognize that the selection of the baseline is important to the outcome. *See* Freeman, *supra* note 22, at 1562 (recognizing that Judge Adams's selection of Thoreau as the paradigm of nonreligion biased his conclusion about Frank Africa's beliefs in *Africa v. Pennsylvania*, 662 F.2d 1025 (3d Cir. 1981)). Nevertheless, Freeman's depiction of the paradigm religious belief system remains somewhat biased in favor of "traditional" western religions. Freeman provides a list of the characteristics of the "paradigm" religious belief system. *See id.* at 1553. Freeman then says that "a belief system will be more or less religious depending on how closely it resembles this paradigm." *Id.* But it is clear that more of the characteristics he lists (for example, belief in God) are present within western religions than within their nonwestern counterparts. This leads to the conclusion that nonwestern (for example, nontheistic) religious belief systems (that meet the rest of the criteria) are inherently "less religious" than western (for example, theistic) ones

156. To the extent that they do discuss the baseline for the comparative process, both Freeman and

The second problem with Freeman's and Greenawalt's definitions by analogy is that they would do nothing to constrain the decisionmaking processes of individual judges. They would leave each judge completely free to determine whether or not a belief system is a religion according to the presence or absence of any single characteristic (or combination of characteristics) the judge chooses.[157] It is not enough merely to list the characteristics commonly present in religions. For a definition by analogy to restrain judicial bias, it must provide some guidelines that actually constrain the judge's analogical reasoning. The Freeman and Greenawalt approach must therefore be modified such that it satisfies my three criteria. The "definition by analogy" can be improved by looking in more detail at the actual analogical process.

The decision of whether to extend Wittgenstein's family resemblance concepts to new situations can be broken down into two steps. First, the decisionmaker must determine her baseline for comparison. That is, she must decide which items are already included within the boundaries of the term's usage. Second, she must compare that set of items with the item in question. Such comparison will involve examining the array of similarities and differences between the item in question and the set of items already within the category.[158] Thus, there are two ways in which judges can be constrained in their evaluation of whether or not something is a religion: first, by limiting their discretion in choosing a "baseline" of comparison (that is, in determining what constitutes the existing set of religions with which the belief system in question will be compared); and, second, by prohibiting them from focusing on certain characteristics in their process of evaluation, characteristics that appear to be likely sources of western bias in the analogical process.

A. *Choosing a Baseline*

It is possible to think of the pattern of our use of the word "religion" as similar to an oddly shaped object. Under such a conception, Greenawalt's bare suggestion that judges use the indisputably religious as a baseline allows judges to focus on religions concentrated around one facet of this oddly shaped object to the exclusion of the others. Such a choice of one small segment of

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Greenawalt display some of the same biases that motivate the search for a definition of religion in the first place. *See supra* notes 18-24 and accompanying text. Greenawalt exhibits a clear western bias in his examples of "indubitably religious" organizations that may serve as baselines for comparison: Roman Catholicism, Greek Orthodoxy, Lutheranism, Methodism, and Orthodox Judaism. *See* Greenawalt, *supra* note 23, at 767. Freeman's approach, based upon characteristics drawn from a number of "Eastern and Western religions," *see* Freeman, *supra* note 22, at 1553, is an improvement over Greenawalt's, but it still favors western religions, *see supra* note 155.

157. Both Freeman and Greenawalt admit that their definitions present problems for judging borderline cases. *See* Freeman, *supra* note 22, at 1565; Greenawalt, *supra* note 23, at 816.

158. Which characteristics are relevant may vary from case to case, but clearly not all will be relevant all the time. Some may never be relevant.

the object as the baseline of comparison works to the detriment of belief systems that resemble some other "part" of the object not represented within the baseline.

Freeman's use of a paradigm abstracted from many different religions is an attempt both to simplify the object into a more manageable shape and to avoid Greenawalt's error by incorporating a more representative sample. But this process works to the benefit of items resembling the new, simplified object and to the detriment of items that resembled just one facet of the original object. Freeman, recognizing this, proposes establishing a "borderline paradigm,"[159] but this suggestion misses the point. Borderline religions can vary from the simplified paradigm case in countless different ways. Such variegation could not be captured by a single "borderline paradigm."

Wittgenstein's understanding of family resemblance requires that the concept of religion be considered in all its irregularity and complexity as the baseline for comparison. Thus the baseline judges should use in their analogical process is the existing set of religions in their diversity of belief and form. By "religions in their diversity of belief and form," I do not mean to say that judges should take into account every single religion in the world. Instead, judges should consider a broad range of different *particular religions* as the baseline for comparison with the entity in question. Clearly, that broad range must include both western and nonwestern (for example, Chinese, African, or indigenous American) faiths. As a general rule, judges should be required to compare the belief system in question with at least one theistic religion (for example, Judaism, Christianity, or certain Hindu sects), one nontheistic religion (for example, Buddhism), and one pantheistic religion (for example, Santeria).[160]

By considering a diverse array of particular religions, the judge is more likely to be sensitive to the deep flexibility and nuance involved in the meaning (that is, in our use) of the word "religion," thus reducing the risk that she will rely on features of particular religions that she mistakenly takes to be

159. Freeman, *supra* note 22, at 1565. He suggests Frank Africa's belief system as a "borderline-case paradigm." *Id.* "Under these circumstances, other borderline cases could qualify for protection only by having more in common with the religious paradigm than Africa had." *Id.*

160. Because western religion focuses so intensely on the deity, the greatest risk of judicial bias arises with respect to religions that deviate from the theistic model. Thus it is important to require judges to consider particular religions that lack the concept altogether. The requirement that the judge include nontheistic and pantheistic religions essentially stands in as a requirement that the judge consider nonwestern models of religion in making her comparison. A baseline could also be established by requiring geographical or cultural diversity in the baseline. A judge might, for example, be required to include one African, one Native-American, one Asian, and one European religion. The problem with such a geographical approach (as opposed to a conceptual approach like the one I have proposed) is that religions generally do not confine themselves within fixed boundaries. Christianity could be described as a European or Asian or African religion, depending upon one's perspective; Islam could be considered both Asian and African; and Santeria could be considered both African and American. A conceptual categorization of religion allows for a reasonably diverse baseline without the confusions that would be created by a geographical categorization.

essential to all religion.[161] Even using this new baseline, of course, the risk of judicial bias remains (for example, in the selection of the particular representative religions). The risk, however, is smaller than it would be in a system where judges had no guidelines at all.

B. *Negative Guidelines*

In addition to a new baseline for comparison, I propose the adoption of certain negative guidelines to constrain the characteristics on which judges may focus when considering whether or not to classify a belief system as a religion. These negative guidelines seek to eliminate the most common and egregious western biases observed in the case law. Although they cannot eliminate completely the potential for biases in the analogical process, negative guidelines are preferable to "essences." Mere indicia, unlike the negative guidelines, do not block the expansion of the constitutional notion of religion, and, unlike positive indicia, negative guidelines can be expressed as categorical and binding.

The negative guidelines I propose are based upon the three particular areas of western bias operating within the use of the word "religion."[162] 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.

In light of these guidelines, consider Judge Adams's decision in *Africa v. Pennsylvania*.[163] In that case, Judge Adams focused on MOVE's lack of "organizational structure" (that is, its lack of clergy, religious "services" and "official customs")[164] and on its lack of concern with "other-worldly" things.[165] Under the second and third of the proposed negative guidelines, Judge Adams would have been prevented from considering these issues; he would therefore have been forced to examine other, less culturally contingent features of MOVE's belief system. Although the inability to take these features into account might not have changed Judge Adams's ultimate decision, it likely

161. A detailed comparison of this sort would undoubtedly be a time-consuming exercise. For this reason, I agree with Judge Adams and Emmerich's suggestion that the definitional question should only be addressed when it would make a difference to the outcome of the case. *See, e.g.*, ADAMS & EMMERICH, *supra* note 4, at 91. Thus, for example, if a plaintiff would lose a free exercise claim even if his belief system were classified as a religion, then the court should avoid even addressing the definitional issue.

162. *See supra* Section III.D.

163. 662 F.2d 1025 (3d Cir. 1981). For a discussion of *Africa*, see *supra* notes 70-77 and accompanying text.

164. *Africa*, 662 F.2d at 1035-36.

165. *Id.* at 1034.

would have caused him to give greater weight to the many features of MOVE that do closely resemble other religious belief systems: for example, its concern with purity,[166] its belief that all things are sacred (as in pantheistic religions),[167] and its provision of an ultimate goal for human existence.[168]

Although the absence of the features outlined in the negative guidelines is not a valid reason for denying religious status, the presence of these features may be taken into account as reasons for deciding that a particular belief system is in fact a religion. Further, the negative guidelines do not prevent judges from looking to other common features of religious belief systems in their assessment of a particular group or individual. Indeed, there remain several particularly useful bases for comparison.[169]

The refusal to submit a belief system to scientific or philosophical standards of reason and evidence can be highly indicative that the system is a religion. Many of Frank Africa's beliefs demonstrated this characteristic: his beliefs that water and raw foods were pure like God, that everything was sacred, and that living the lifestyle mandated by MOVE would put a person "in touch with life's vibration."[170] This criterion is neither a necessary nor a sufficient condition for finding a belief system to be a religion.[171] In combination with other factors, however, it should weigh heavily in favor of granting religious status.[172]

Another example of a useful, permissible locus of comparison with paradigmatic religions is the nature of the questions answered by the belief system. Religions tend to be concerned with providing positive answers to questions regarding the meaning of human existence and the nature of that existence after death. MOVE would seem to qualify as a religion under this criterion as well. Its comprehensive categorization of the world as pure and impure helps to situate the individual within an intelligible normative universe

166. *See id.* at 1027. Africa called society "impure" and "blemished" while asserting that his raw food diet was "pure" and "innocent." *Id.*

167. *See id.* ("Africa testified that MOVE members participate in no distinct 'ceremonies' or 'rituals', instead, every act of life itself is invested with religious meaning and significance.")

168. *See id.* Africa said that by living according to the teachings of MOVE, a person is put "in touch with life's vibration," a concept resembling communion with God or Nirvana. *Id.* Judge Adams failed to compare MOVE with a particular religion from the pantheistic tradition. Instead, Adams relied on abstract definitions of pantheism provided in *The Oxford English Dictionary* and in the *Encyclopedia of Philosophy* to deny that MOVE was pantheistic. *See id.* at 1033 n.16.

169. Although no one of the following three suggested bases for comparison is essential to religion, the resemblance of the belief system in question to religious belief systems in any two of these three features would strongly indicate that a belief system was religious. The resemblance in only one or in none of the suggested criteria would suggest that the belief system was not a religion. There seems to be no way to formulate a hard and fast rule here. Much depends on such nonquantifiable factors as the degree of resemblance.

170. *Africa*, 662 F.2d at 1027.

171. *See supra* note 100.

172. This is especially true when one considers that it is the failure to subject beliefs to generally accepted criteria of reasonability that makes religious minorities especially vulnerable. *See supra* Subsection III.A.2.

and to guide his actions (much like the cosmology underlying Christian natural law reasoning).[173] Nevertheless, a comparison of the nature of the questions answered by a belief system with those answered by commonly acknowledged world religions (in combination with other features) can provide strong evidence that the belief system is a religion.

Finally, the ultimate goals pursued by adherents to the belief system in question may be compared with those pursued by members of the many world religions. Common religious goals include, but are not limited to, holiness, purity, salvation, and union with God or a transcendent reality. Once again, MOVE satisfies this criterion. Its pursuit of "purity" and union with "life's vibration" resembles the goals of other religious belief systems. Although not all religions pursue such goals (some, for example, seek merely to help their adherents achieve worldly comfort), the presence of such common religious goals, along with other features, indicates that the belief system is probably a religion.[174]

These criteria suggest that MOVE should have been categorized as a religion. The criteria can also be used in the other direction. Consider the example of Marxism. It is comprehensive in its scope, and its adherents often display a seemingly religious veneration of certain individuals from the history of Marxist thought (for example, Marx, Lenin, or Trotsky). Although the case is closer than most people would like to admit, Marxism would not qualify as a religion under my proposed methodology.

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173. *See* Richard J. Norman, *The History of Moral Philosophy*, *in* OXFORD COMPANION TO PHILOSOPHY 586, 587 (Ted Honderich ed., 1995). A MOVE supporter at Frank Africa's trial said that "the MOVE 'religion is total'; it encompasses every aspect of MOVE members' lives." *Africa*, 662 F.2d at 1028 (quoting Ramona Johnson); *see id.* at 1027 (describing Africa's beliefs about purity achieved through the MOVE lifestyle and impurity that results from failing to do so).

174. The mandated baseline of comparison and the three negative guidelines also provide the basis for systematized appellate review of a judicial determination that a belief system is or is not a religion. Application of the analogical methodology constitutes a question of law, and is therefore reviewable by higher courts de novo. *See, e.g.*, Professional Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc., 508 U.S. 49, 67 (1993) (Souter, J., concurring) ("[T]he question . . . is purely one of law, which we are obliged to consider *de novo*."); Peel v. Attorney Registration & Disciplinary Comm'n, 496 U.S. 91, 108 (1990) (describing the appropriate standard of review for questions of law as "*de novo*"). Failure to compare the belief system in question with particular religions from the three enumerated categories of religions would constitute reversible error, as would erroneous reliance on the absence of one (or a combination) of the traits outlined in the negative guidelines. An appellate court faced with such error could either apply the methodology properly or, if the facts were insufficient for correct application, remand for further factfinding and correct application of the methodology.

Further, an appellate court that disagreed with the lower court's conclusions (even if the lower court applied the test properly) should be allowed to reapply the test using the facts found by the lower court. As observed above, *see supra* Section III.B, the process of applying a word to a new situation is not completely determinate. That is to say, the decision to apply or not to apply the word "religion" to a new belief system is not completely determined by the concept itself. Hence, the issue of whether a judge is "right" or "wrong" in her application of the word is really a question of whether most people, when faced with the same set of facts, would apply the word in the same way. The best way to avoid "error" in the judicial application of "religion" to new belief systems is for as many different people as possible to consider the question independently. De novo review allows for a wider consideration of the proper classification for the belief system than would otherwise occur.

First, we should note that Marxism meets the third criterion for religion. The goal of revolution and utopian liberation of the working class plays a role within Marxism roughly analogous to eschatology within Christian and Jewish thought. But beyond this, one is hard pressed to find similarities between Marxism and any accepted religion from within the three categories. When viewed according to the remaining bases for comparison discussed above, Marxism bears little resemblance to a pantheistic religion like Santeria, to a theistic religion like Christianity, or even a nontheistic religion like Buddhism. Applying the three criteria, we observe that Marxists normally conceive of their belief system as being a scientifically valid theory of history. That is, they are willing to subject the predictions of their belief system to the rigors of the dominant standards of scientific empiricism. Thus the role of reason within Marxism is not that which we have come to expect from religious thought. Second, Marxism fails to provide positive answers to questions of ultimate meaning. Instead, it seeks to dispose of the questions in order to draw the adherent's attention towards the more important issues of class oppression and alienation. Thus, in only one of the three respects does Marxism resemble a religious belief system, and it would therefore be appropriate to classify it as nonreligious.

V. CONCLUSION: ASSESSING THE PROPOSED METHODOLOGY

Analyzed on the basis of the three criteria I set forth in Section III.E, my proposed methodology for determining whether a belief system is a religion represents a significant improvement over previously proposed methodologies. First, my proposal seeks to identify religions and not some broader category of belief systems. By mimicking the way in which we apply our existing family resemblance concepts to new situations, the proposed methodology closely adheres to our use of the term "religion" in everyday language. Second, the use of negative guidelines, as opposed to positive essences, leaves ample room for the methodology to expand in the future as our use of the word "religion" in everyday language changes. Finally, the combination of the negative guidelines and the requirement that judges consider both western and nonwestern religions from theistic, nontheistic, and pantheistic traditions considerably reduces the risk of a pro-western bias in the determination of religious status.[175]

The proposed evolving analogical methodology, along with the suggested negative guidelines, is not a perfect means for determining what is or is not a

175. I recognize that this methodology does not completely eliminate the risk of such bias. Nevertheless, it does seem to represent an improvement over an unfettered definition by analogy. Further, the risk of bias under the proposed definition is preferable to the establishment problems presented by dictionary-style definitions and to the considerable risk of bias in the current, unregulated system of adjudication on this issue.

religious belief system. Nevertheless, it appears to be a fair solution, considering the vague, indeterminate nature of the word "religion." All other proposals have either been too narrow, too broad, or too inadequate to improve on the status quo of no authoritative definition at all.