Know It When They See It: American Courts Defining Religion

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The outset of our quest to find a definition of "American" religion should rightly begin with the courts. The First Amendment famously reads that Congress shall "make no law respecting an establishment of religion, or prohibiting the free exercise thereof," and, in the system of checks and balances set up by the founding document of the American nation, the Supreme Court is the final arbiter of how that language is to be interpreted and enforced. In the adversarial justice system of that country, parties who have had their rights infringed can press a claim to the courts and must abide by their decision as to whether their rights were in fact infringed upon. Through laws passed by Congress, whether or not an organization is "religious" or not affects legal purposes such as tax breaks, land grants, direct federal aid, and a plethora of other benefits. The courts ultimately have the authority, when called upon by citizens with standing in a complaint, to determine whether or not that particular group of citizens should be considered in their actions to be representative of a religion under the law, as opposed to some other kind of organization.

Of course, the struggle to define religion in the legal sense is burdened by the definitional problem of religion in general. It is difficult to conceive of a definition of religion that can avoid essentializing a broad and complex category of phenomena, and, by some opinions, even the attempt to define religion would violate the First Amendment protections of religious liberty. In this train of thought, if the court were to define religions, then they would be dictating what a religion must or must not be in order to be considered "real," which would automatically violate the establishment clause.[1] Additionally, some scholars have long argued that there simply is no such

1. Jeffrey Omar Usman, "Defining Religion: The Struggle to Define Religion under the First Amendment and the Contributions and Insights of Other Disciplines of Study Including Theology, Psychology, Sociology, the Arts, and Anthropology," *North Dakota Law Review* 83, no. 1 (2007): 147.

Arc—The Journal of the Faculty of Religious Studies, McGill University
Volume 41 (2013): 1–26

thing as "religion" in the first place, such that systems of belief or behavior could be easily categorized into them. Religion may be a "second order" category, an arbitrary abstraction that we have found to be a useful schema to organize certain human expressions into, but it is one without reality. Assessing the "definitional problem" faced by the category of religion is outside the scope of this paper; there have been a great number of volumes written about the subject. However, we must acknowledge at the outset it could reasonably be argued that the task of finding a definition is already a fool's errand for the Court.

But as a practical matter, it seems inevitable that as long as we collectively agree on the political ideal that religious freedom deserves special protections, then the court must seek at least some rudimentary definition of religion. The court's ultimate purpose is to protect the rights of citizens against infringement and, in the American adversarial system of justice, to decide between two competing claims. As long as citizens disagree on what is and is not religious, these disagreements will potentially rise to such a level that no other option remains but to seek redress in the justice system. To put these kinds of cases in a sort of untouchable limbo and deny hearing them would open the door to great injustice.

The scope of the current article will primarily address and focus on issues of the First Amendment and its constitutional protections. The Internal Revenue Service's definitions for non-profit/religious status are of interest and will serve a comparative purpose later in this paper; many corporate rights belonging to churches and denominations as corporate bodies *per se* avoid religious definition or disagreement entirely, focusing on civil statues and regulations to adjudicate disputes. However interesting the strange and often twisted maze American jurisprudence finds itself in when it comes to the matter of how to handle church bodies, these circumstances do not provide a great deal of illumination as to what religion *is* in the eyes of the court. The question of ruling on religious meaning or expression is, as we will see later, a difficult problem that the courts seem to work hard to avoid, and it is in the First Amendment that they often are forced to address the issue head on. Therefore, while I may choose selected other cases from time to time in order to better illustrate a contrast in approach or a theoretical difficulty, I will primarily deal with Supreme Court and other First Amendment cases.

For a surprisingly long period of time, the courts were able to remain silent on the meaning of the First Amendment clauses relating to religion, for the simple fact that the text of the Amendment itself reads, "*Congress* shall make. . ." The protections provided by the constitution did not extend down to the state level, one amongst many reasons that government-established churches lingered so long in many of the original states. Instead, constitutional protections were only applicable in federally held and controlled territories. Accordingly, the clauses promising freedom of religious expression were not truly tested until the members of the early Church of Jesus Christ of Latter-day Saints, colloquially known as Mormons, were pushed by social pressures and persecutions into the western territories.

The earliest legal challenge that required the Supreme Court to speak directly to the nature of religion was in the late 1800s in the case *Davis v Beason*,[2] which, like many early cases on religious freedom in America, dealt with the Church of Jesus Christ of Latter-day Saints. The appellant, Samuel Davis, was charged with "conspiracy to pervert and obstruct" the administration of an Ohio County when he attempted to register to vote. At the time, electors were required to swear an oath that they were not members of any group that supported the practices of bigamy, polygamy, plural, or celestial marriage. Discovered to be a member of the Mormon Church, Mr. Davis was charged and found guilty. He filed a claim that his imprisonment was motivated "by virtue of his conviction" and thus illegal, as the oath he swore and the laws against polygamy violated his right to freely practice his religion and constituted a violation of the First Amendment's establishment clause.

The Supreme Court found against Mr. Davis and arrived at such a decision that had wide implications for religious liberty. In the decision, the Justices argued that marriage was not only a sacred institution but also a civil one, which forms a foundation for any society, and that, accordingly, society has the right to regulate it with laws, so that bigamy and polygamy were crimes according to the current law. The Justices felt it clear that it should not seriously be contended that the whole punitive power of the justice system should bend in order for any religion to seriously teach and encourage activity that is criminal. For the purposes of our current exercise, the most salient point is that the court established: "The term 'religion' has

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2. Davis V Beason, 133 U.S. 333 (1890).

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." They further contended that the First Amendment was intended to allow everyone to entertain such notions respecting his relations to his Maker as their conscience lead them to believe in, but was never intended to protect against legislation against acts that would damage the "peace, good order, and morals of society." The Court judged that to call the encouragement of crimes which "shock the moral judgment of the community" a tenet of religion offends common sense.

First, this decision establishes a fairly straightforward definition of religion. A religion, according to *Davis v. Beason*, is a set of references to how one views a Creator God and what obligations one feels that relationship compels one to feel in obedience. This is obviously a *very* Judeo-Christian understanding of religion, which, at least in the plain language, requires an idea of a definite and creative deity that possesses a will which humanity must follow—an active, monotheistic deity. The language also seems to implicitly argue that, in order to be counted as a religion, the tenets must conform, at least to some degree, with the moral judgment of the community at large, and that these tenets cannot actively encourage crime or "shocking" moral behaviour. Second, the decision established a "neck up" definition of religion by which one can *believe* whatever one wants but must *behave* in accordance with well-established laws, or at the least, in a manner that is conducive to safety and public order.

This creates the first cracks in the court's legal treatment of religion at the same time that it introduces a definitive definition. By separating belief and action, a strong argument could be made that the separation of belief and action actually protected not merely Judeo-Christian religion, but in particular Western Protestantism, under which religion is a relational and private matter rather than a lived and ritual communal obligation. A theme begins to emerge that we will see time and again throughout American legal history: Religious practitioners can be burdened, often quite substantially, when their religious faith requires concrete action and ritual. In the early case of *Reynolds v United States* just a year before,[3] the Court positively held that religious belief could not be a protection against indictment. Specific actions could be prosecuted regardless of whether they constituted a clear

3. Reynolds V United States, 98 U.S. 145 (1879).

and specifically religious obligation, if they went against the common law of the land or were seen as destructive to the fabric of society. The problem becoming, as any first-year student of political science could describe, what is seen as "destructive to the fabric of society" is quite often fluid over time, if not a downright prejudicial expression of the tyranny of a majority. After all, at some points in American history, the ideas of educating African-Americans or allowing Catholics to hold public office were seen in the popular imagination as "destructive to the fabric of society." While *Beason* provides an explicit definition of religion, for further reference, it also holds the door open for judges to exercise fairly unlimited discretion as to which religious *actions* must be regulated "for the good of society." The state, in this case, subordinates religion to the common good in a move not unlike Mill's utilitarianism.

This all fits in general with American jurisprudence during the early years of the country's history. Only eighty years earlier than the Davis case, a court in New York convicted a man of blasphemy, stating that Christianity has "always" been understood as the basis for sound civil government and that irreverence to Christianity could not be protected by constitutional guarantees.[4] In one form or another, this judicial definition of religion as referencing only belief systems that related man to an omnipotent Creator continued throughout much of America's early history. The early history of the Free Exercise clause established precedents that laws may be passed limiting religious expression when such expression is somehow harmful to persons or the structure of society itself, as the courts determined polygamy to be. In the case of a vested interest in seeing to the safety and security of the public, the right of free religious expression could be overruled. As an example, early American court decisions disqualified those without belief in God or ultimate punishment as legal witnesses in direct discrimination against the irreligious, and "even a father may be deprived of the guardianship of his child if he professes a belief in a sect adjudged to be obnoxious to society."[5]

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4. People V Ruggles, 133 8 Johns. R. 290 N.Y. 333 (1811).

5. Abraham Burstein, *Religion, Cults, and the Law* (New York: Oceana Publications, 1980), 9.

Movement Towards a More Functional Definition

This legal situation continued well into the mid-twentieth century, when a series of court cases that mostly revolved around conscientious objection first began to open the door for an interpretation of religion that focuses on the way beliefs might function in the life of an individual. In 1943, in *United States v Kauten,*[6] the defendant attempted to conscientiously object to the draft and be classified as exempt from military duty, but the local draft board and appeal board concluded that his objection to war was not based upon any religious training because the defendant had self-reported that he was atheist or agnostic. Moreover, conscientious objector status was granted only for those who were morally opposed to *all* wars; opposing only specific wars would not qualify. Mr. Kauten was ordered to report for duty and then arrested when he failed to appear.

The Second Court of Appeals ruled in favour of the draft board and upheld the conviction on technical grounds; it was ruled that Mr. Kauten did in fact have a legal obligation to appear and report for military duty and that what he properly should have done was to apply for a writ of habeas corpus and procure judicial review of his classification. His rights, the court insisted, were not actually infringed upon in any practical sense until he was actually subjected to military service against his will. The situation prior to actually reporting for duty was an administrative inconvenience at best, and during basic training he would have had ample time to apply for judicial review.

Of much more interest for our purposes is the last part of the rendered decision in which Second Circuit Court Judge Augustus Hand somewhat amusingly observes that it is unnecessary for the court to attempt a definition of religion since the case was resolved on grounds of administrative due process, and then promptly sets about vaguely defining religion anyway:

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6. United States V Kauten, 133 F. 2d 703 (1943).

> Religious belief arises from a sense of the inadequacy of reason as a means of relating the individual to his fellow-men [*sic*] and to his universe—a sense common to men in the most primitive and in the most highly civilized societies. . . . There is a distinction between a course of reasoning resulting in a conviction that a particular war is inexpedient or disastrous and a conscientious objection to participation in any war under any circumstances. The latter, and not the former, may be the basis of exemption under the Act. The former is usually a political objection, while the latter, we think, may justly be regarded as a response of the individual to an inward mentor, call it conscience or God, that is for many persons at the present time the equivalent of what has always been thought a religious impulse.

This was a first key case that moved the concept of religion away from relating directly to a supreme being and towards a focus on how the belief in question related the individual towards the universe and his fellow humanity. The approach clearly used by the court's musings is to examine the role of beliefs in the life and mind of the believer, and it was an approach that increasingly began to appear in cases across the nation. In a case the very next year[7] involving accusations of fraud against a small group of "faith healers," the Supreme Court determined that they must look primarily to the sincerity of a person's beliefs to help decide if those beliefs constitute a religion for the purposes of constitutional protection. The court held that the judicial system has no business in deciding whether or not the religious claims of an organization are *actually* true, only whether or not the members seem to sincerely believe them to be true. Then in 1961, a case, *Torcaso v Watkins,* landed right in the middle of the "incorporation" debates of the 40s–60s, when the American legal landscape was dealing with how to apply the Fourteenth Amendment to the Bill of Rights. This case, a challenge to the Maryland state constitution disqualifying those from public office who refused to declare their belief in the existence of God, contained a footnote that most explicitly signals this shift in thinking. A justice used a footnote, described by at least one author as "dicta upon dicta,"[8] to note: "Among religions in this country which do not teach what would generally be

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7. United States V Ballard, 322 U.S. 78 (1944).

8. Ronald B. Flowers, *That Godless Court?: Supreme Court Decisions on Church-State Relationships* (Louisville, Kentucky: Westminster John Knox Press, 2005).

considered a belief in the existence of God are Buddhism, Taoism, Ethical Culture, Secular Humanism, and others.'"[9]

Now, this sort of footnote does not set legal precedent, and in fact had very little to do with the reasoning involved in arriving at the verdict. However, it has caused a great deal of contentious commentary about where the proper line should be between philosophical non-religious beliefs and religion. But avoiding that conversation entirely in this paper, the purpose in quoting it is to demonstrate that the court had slowly made a remarkable shift from a definition of religion that required belief in a traditional Judeo-Christian creator God and teachings of obedience to Divine Will. Instead, the court had broadened the definition of religion considerably.

Ultimate Concern: The Court fully adopts Paul Tillich

German-American Theologian and philosopher Paul Tillich was enormously influential in the modern understanding of religious attitudes and the essence of religious perception. In his book *Dynamics of Faith* he developed a theory of "ultimate concern" that defined faith and the essence of the religious experience itself as perception of an overwhelming reality separate from ordinary realities, a concern in the face of which it seems all other concerns must be sacrificed and subordinated. Tillich did not exclude atheists from the ranks of the faithful. Tillich's manner of defining religion in such a way did more than provide grist for philosophers and theologians to analyze in countless papers and debates, it provided what would become the legal definition of religion in America as dictated by the Supreme Court.

The Universal Military Training and Service Act governed the draft in the 1960s, and incidentally also contained the government's regulations for defining a conscientious objector who qualified for exemption on religious grounds. The text of the regulations required belief in a "Supreme Being" in order to be awarded the exemption, and the Supreme Court, in 1965, considered three consolidated cases that objected to this regulation on constitutional grounds—the relevant objection in the case was that such a regulation was alleged to discriminate between different forms of religious expression. Put simply, it was a government regulation that

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9. Torcaso V Watkins, 367 U.S. 488 (1961).

clearly privileged theistic religious impulses over non-theistic ones. None of the three defendants considered themselves atheist but all of them held that their various religious beliefs, which did not include any traditional conception of an active God, should qualify under the standard because their conscientious objections were based on beliefs in the existence of a supreme reality or universal power beyond that of man.

In their decision, rendered in *United States v Seeger*, the Supreme Court essentially adopted a Tillich definition of religious faith wholesale, in words that could nearly read like a quotation from the theologian's work. They quoted Tillich multiple times within the dicta of the decision, among other quotations meant to display the breadth and diversity of religious beliefs respected as part of American society. The court held that the term "Supreme Being" in the regulation must at the least mean the concept of a power or being or faith to which all else is subordinate or upon which all else is ultimately dependent. The court established a test for determining whether or not a belief was religious as opposed to "merely" philosophical, social, or practical in nature: The belief must be "a sincere and meaningful belief that occupied in the life of its possessor a place parallel to that filled by the God of those admittedly qualifying for the exemption."[10] Freedom of conscience, the court decided, was a principle that must show respect and even admiration for a person's innate convictions, and that such convictions, when not found in conflict with public order and safety, should be honoured as the very grounds of liberty. The right to act, or refuse to act, according to one's most deeply held beliefs, must be accorded the categorical designation of a "religion," at least for purposes of the law. And this was to occur regardless of whether these beliefs were part of an already recognized religious system.

Since 1965 this has largely been the law of the land in terms of a legal definition of religion in America, determining which beliefs are religious and which are not. It is an admittedly vague and subjective definition, but it does at least fulfill the requirements of seeming able to encompass everything that may be considered a religion without excluding anything unnecessarily or in a prejudicial way. The Supreme Court reaffirmed this definition in later decisions, in *Welsh v United States* and *Thomas v. Review Board*, while slightly narrowing and attempting to navigate the distinguishing line

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10. United States V Seeger, 380 U.S. 163 (1965).

between personal philosophical choice and truly "religious" belief. Despite this occasional narrowing or clarification, there have been no major cases to be heard before the Supreme Court that challenged the religious test set out by *Seeger* in the 60s.

Problems with the Functional Definition

The astute reader will of course already have thought of an obvious problem of this functional approach of "ultimate concern." It does have the advantage of being as inclusive as possible in respecting the great varieties of religious experience, but in some respects, its greatest strength is also a weakness, for it seems impossible to exclude almost anything from being a religious belief. As some commentators have observed, such a definition of religion as outlined in *Seeger* could potentially include practically any position imaginable. If the terms "religion" or "Supreme Being" are taken to mean whatever occupies a place in a person's life such that they order their actions based upon it and all other concerns are subordinate to it, then one can imagine that communism, capitalism, ethical utilitarianism, and even a particularly fanatical fan's love of his sports team is potentially a religion that we are obliged to constitutionally protect. Indeed, in Tillich's formulation, every single thinking person has an ultimate concern, which need not necessarily be expressed as a religious conception of deity.[11]

This is fine for the philosopher or theologian, but in the practical terms of a judicial system that must review regulations and ascertain the guilt or innocence of a party accused of harm, it seems immediately problematic. "Mere" philosophical, moral, ethical, or political affiliations and convictions are not placed under the penumbra of the Bill of Rights, but the functional definition adopted in *Seeger* provides no easy method for distinguishing between these and religion. However, drawing that distinction, however arbitrary one is aware the line placement is, is precisely the function of the court. The Supreme Court had expressed a worry about this function far earlier, in 1879, while reviewing a case connected to the practice of polygamy:

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11. Paul Tillich, *Dynamics of Faith* (New York: HarperCollins, 2011), 40–50.

> Can a man excuse his practices to the contrary because of his religious belief? The permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself. Government could exist only in name under such circumstances.[12]

The title of this paper comes from a famous Supreme Court decision involving definitions of obscenity and pornography, "I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it."[13] Religion in the current courts shares this same position of vagueness and unsatisfactory definition. This is problematic in a legal sense. One of the reasons why laws are codified to begin with is to attempt to provide neutral and standard expectations for societal and governmental regulations. It is desirable for the law to be written and judged in such a way that a reasonably intelligent person familiar with the law could read the relevant statutes and know whether or not the action that they were about to undertake was legal or not. For the most part, this is not the case if your question hinges on whether or not your actions are "religious," which is hardly a desirable state of affairs.

The *Seeger* definition of religion can also lead to decisions that seem to fly in the face of conventional wisdom, sometimes in ways that can actually be quite offensive to the people involved. A perfect example is the decision of the Seventh Circuit Court that treated atheism, within the context of the case, as religion. The court overturned a ruling that had prevented a prison inmate from starting a humanism and atheism group because the appellant's atheism was "sincerely and deeply held" and "central to his life," and thus the court decided it must be granted protections. The irony involved in the case is that although this decision provided the appellant with the result desired, it did so while directly ignoring his own insistent feelings on the matter.

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12. Reynolds V United States.
13. Jacobellis V Ohio, 378 U.S. 184 (1964).

> The problem here was that the prison officials did not treat atheism as a "religion," perhaps in keeping with Kaufman's own insistence that it is the antithesis of religion. But whether atheism is a "religion" for First Amendment purposes is a somewhat different question than whether its adherents believe in a supreme being, or attend regular devotional services, or have a sacred scripture.[14]

While I think the question of whether atheism and other stances of unbelief are "religious" or not is certainly a fascinating one worthy of discussion, for this paper's purpose it is enough to note that many atheists would themselves find such a categorization grossly offensive, if not indeed antithetical, as Mr. Kaufman felt, to everything that they believe in. And it serves as just one example of how the functional definition of religion as "ultimate concern" occasionally could lead an observer to determine behaviour is "religious" in a way that encompasses so broad a variety of activities as to be completely emptied of meaning and content.

Mr. Kaufman's case is illustrative in actual cultural and governmental practice; some argue that atheism in particular has fallen to the bottom of a nebulous legal hierarchy in a position that opens it up to persecution. There remains only one openly atheist representative in Congress, and widely cited opinion polls show that atheists are the "most mistrusted minority" in America.[15] Research cited by legal scholar Weiler-Harwell points to poll trends indicative of most Americans opening their arms to embrace, at least superficially, new religious groups as long as they eagerly pledge their allegiance to the nation, the flag, and God in a sort of "generic monotheism." The argument given is that American society cannot accept atheists because there is a ceremonial-deistic aspect to the culture at large that views irreligion as non-normative and even subversive. One illustrative example occurs in the Seventh Circuit Court of Appeals, in *Welsh v Boy Scouts of America*. This case is only twenty years old, and in it the courts explicitly questioned the litigant's patriotism because of their rejection of an oath that mentioned God. The judge implied that rejecting the Boy Scout oath was somehow also a rejection of the Declaration of Independence, on the grounds that that document also contains references to God.[16] The actual

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14. Kaufman V Mccaughtry, 419 F.3d 678 (2004).
15. Nina Weiler-Harwell, *Discrimination against Atheists: A New Legal Hierarchy among Religious Beliefs* (El Paso: LFB Scholarly Publishing, 2011).
16. Welsh V Boy Scouts of America, 993 F. 2d 1267 (1993).

decision of the court avoided the constitutional question, ruling strictly on the statute and arguing that the Boy Scouts did not qualify as a "place of public accommodation" under the legislation. The Supreme Court declined to hear the case, leaving its constitutional challenges currently unanswered. However, it illustrates here the connection in the minds of the public, and even occasionally of the judicial branch, of irreligion with lawlessness.

The example serves to highlight the difficulties and tensions involved in formulating any definition of religion at all, and the debate continues in legal journals as to precisely what methods the courts should undertake. Put simply, the *Seeger* definition seems to be one with which very few people are actually happy, but to which even fewer people seem able to offer a clearly and decisively better alternative.

The Definition Found and Examined

From this examination, by no means exhaustive, we can form a few rudimentary conclusions about the definition of a religion in the American context, at least from the point of view of the justice system and the courts. This definition began as essentially identical to the Judeo-Christian tradition, in which other religions were considered subordinate at best, primitive or mystical traditions that did not correspond in any real way to what the law considered a religion deserving of protection under the constitutional amendment. The early years of American jurisprudence carved out clear preference for the majority religious tradition, privileging the Christian paradigm as the fundamental foundation of all good government.

In the early twentieth century, the scope of religion expanded under cases that addressed issues such as freedom of speech, freedom of assembly, and conscientious objection, until a functionalist definition of religion was adopted that fully embraced Paul Tillich's language of "ultimate concern." Under this definition, a religion is a matter of whatever concerns and beliefs a person subordinates all other concerns to, an over-riding imperative that functions "parallel" to a traditional belief in an active deity. In effect, it leaves to the individual judges involved in a case the decision whether behaviours and beliefs are "religious" or "merely" philosophical/moral/ethical, acknowledging that language is inherently flawed and falls short of being able to encompass the essence of religion in an inclusive way. This

leads me to directly compare the definition to the famous court definition of obscenity, in which the courts "know it when they see it."

There are serious objections that can be raised against such an exclusive but subjective definition of religion in the legal system. The first and most serious is that it seems to destroy the predictive power that is fundamentally assumed to be the advantage of having a codified law in the first place. The rulings and precedent set can vary widely—this has been borne out in practice,—depending on which court and which judges may hear the case in question. Additionally, from the standpoint of either believer or unbeliever, this may result in categorizations that are not only contrary to conventional wisdom, but also directly offensive to those involved. Lastly, but certainly a matter of grave concern, is the way the law continues to focus in the functional definition on beliefs "parallel" to those of traditional belief in a deity. Atheists and other secularists argue that this continues to privilege belief systems that are recognizably deistic. It may be said, looking through the lens of this viewpoint, that in America it is culturally acceptable to believe in *any* God, just so long as one believes in *a* God.

Even though this understanding of religion in the American courts is necessarily a matter of continued debate and contention, it provides us with a solid frame from which to understand certain key questions in our search for a definition of what makes a religion "American." It seems that an answer to that question must at least partially be understood in terms of the American legal system and government, which is meant to reflect the will of the people and the general consensus of society, while at the same time providing a limiting border to the tyranny of the majority. An examination of the Supreme Court cases that have touched on defining religion, supplemented by certain appeals and circuit court decisions, shows that the definition has continued to evolve throughout the history of the country, but that the definition can be said to at least be this: To be considered a religion in America, the beliefs in question must involve a concept of the Ultimate, which is both sincerely held and the basis and source of subordinate beliefs and decisions.

Applying the Rule: The construction of religion in American law

Now that we have found a definition, it is quite another thing to apply that definition. One of the primary features of a robust legal system is the way that it remains flexible and adaptable over time. As precedent is built up in the case law, and the judges and lawyers make their arguments throughout history, laws based in statute become interpreted and re-interpreted. Features of earlier cases also become obscured or re-evaluated in the course of time, taking on new meanings in new contexts. In this, law shares a common feature with many of the world's religions. There is a constant call and refrain stretching back in time to texts and sources that are considered authoritative but flexible. Law changes and decisions are overturned, sometimes in radical ways, but ostensibly not without some justification or grounding in the tradition, which carefully trained and thoughtful experts are believed to safeguard.

In this respect, American jurisprudence's dealings with issues of religion and religious freedom are not exceptions. Earlier, we discussed the evolution of the legal definition of religion over time, and how that definition has been applied in cases with a legal component has had no less of a thorny growth process. The history of religious cases in America is filled with dead-end branches, expansions and contractions of the behaviours considered to be protected, and an often bewildering array of litmus tests designed to instruct legal professionals on what constituted "unacceptable" infringements on a religious belief. Even early on in American history, judicial discretion in religion cases often resulted in anomalies and a diversity of opinions among the different courts. Later, the Fourteenth Amendment was interpreted to extend the Bill of Rights to the states for the first time, and consequently, the number of religious cases exploded in growth. This situation, alluded to earlier, has resulted in a state of affairs that can be most frustrating to the scholar of law and religion. While the Supreme Court has not directly addressed in decades the issue of defining religious behaviour, the result is that, in the mid and late twentieth century, a maze of district court decisions were passed down, often contradictory in such a way that whether or not a behaviour was "religious" could often legally depend on which side of a dividing line between districts the jurisdiction was held.

I will now examine this morass of varying approaches. The hope remains that by selecting a variety of cases over time and examining them for key analogical similarities one may discover an unspoken blueprint for what is considered "real" religion in the American court system. Initially, one expects that these cases will primarily revolve around the First Amendment protections in question. And in fact, this would be ideal for our scholarly assessment; in American law, the Constitution is the foundational law of the land. A ruling on constitutional challenges by the Supreme Court sets the standard by which all other American courts must abide, a ruling which can only be overturned by another act of the same court. Constitutional cases thus provide solid bedrock that could definitively answer the question, at least as concerns the legal scholars, thus providing a solid framework to build the blueprint upon. It is precisely for this same reason that I have mostly, up to this point, limited myself to Supreme Court cases in seeking out an explicit legal definition of religion.

Unfortunately, when we begin to address the issue of application in that definition and attempt to predict what actual courts will decide is "protected religious behavior" versus "merely personal choice," we come to a rather surprising conclusion. Courts rarely address constitutionally conflicts centering on religion. In fact, the courts seemingly make every effort to avoid addressing whether or not a behaviour or group is "religious," and have left a legacy of legal decisions in which virtually any other possible means of deciding the case have been used. Even in cases where constitutional questions have been directly addressed, the religious aspects of the case are frequently subsumed under the umbrella of freedom of expression or the rights of free assembly, leading some authors to speculate that the precedent on religious cases in America has gradually evolved to a state in which religious freedom "is not even an independent discrete freedom"[17] but must be coupled with other constitutional protections in order to be judged.

A fine example of this is the way that judicial practice on questions of *corporate* religious liberty; i.e. the liberty of congregations and groups of believers as opposed to individuals *qua* individuals, developed under laws of corporation. Over the years, in cases such as *Watson v Jones,*[18] *Kedroff*

17. Flowers, That Godless Court?, 159.
18. Watson V Jones, 80 U.S. 679 (1872).

v Saint Nicholas Cathedral,[19] and *Jones v Wolf,*[20] the court interpreted the constitutional requirement for the government to avoid establishing a religion as requiring the courts to avoid using theological or religious principles in adjudicating property or financial disputes between feuding congregational members or sects. In essence, the courts felt the only way to avoid inappropriately establishing "official" government interpretations on the correctness of religions was to handle most legal disputes as a matter of existing corporate and property law. This is the foundational beginnings of the approach of the courts in slowly redefining freedom of religion to be coupled with, if not outright replaced by, a robust interpretation of the freedom of speech. Under circumstances where we are not laying judgment on the ontological *truth* of religious claims, the courts are left to judge the manner in which those claims are *expressed* publicly. The churches and groups involved in these cases had disputes over who owned or controlled certain church properties and which body of believers were the "true" representatives of their respective theological philosophies. Rather than brand one group "true believers" and the other group "heretics," the courts awarded or overturned rulings based on two tests. The first, acquiescence to previously established organizational bylaws or hierarchy, and the second, to rule in favour of the majority membership in the absence of such organization.

This series of decisions established the precedent that has continued to this day, in which the courts avoid any judgment on religious belief at all in these cases and instead use established corporate law as a guideline. In fact, many of the religious liberty cases currently percolating their way through the courtrooms hinge directly on ideas about whether corporations can have, as corporations, a religious liberty or belief. These corporate cases are dependent on tax law or some version of not-for-profit status, neither of which typically has anything to do with a functionally religious definition or academic categorization of behaviour. The IRS, and other administrative functions in local and federal governments, are allowed to maintain their own separate criteria for determining whether a group is non-profit, and whether they are categorized as religious or not. The *Internal Revenue Manual* of the IRS has quite lengthy sections on charitable tax-exempt organizations

19. Kedroff V. Saint Nicholas Cathedral, 344 U.S. 94 (1952).
20. Jones V Wolf, 443 U.S. 595 (1979).

in general, and religious organizations specifically, in a way that relegates religion to a sub-category of charity. The Internal Revenue Service relies on the court's holdings that religious individuals and organizations are not exempt from general laws that advance a compelling public interest; however, they have provided statutory regulation exempting from taxation organizations that have the sole or primary cause of charity and public welfare. They have, then, again statutorily, defined an incorporation or organization with the primary cause of "advancing religious belief" to be a charitable contribution to public welfare.

Doubtless, some militant atheists would disagree with this generous assessment of the purpose of religion. Regardless of that fact, the IRS has both impinged upon and avoided the juridical problem of defining religion by regarding it as "merely" another type of public welfare or charity. And the law, both statutorily and in the form of case law, certainly recognizes the perversion of religious organizations for the purpose of tax evasion. The IRS manual states several times that those organizations which "are operated for private benefit" do not qualify.[21]

While the classification schemes for tax law are interesting in the ways they place emphasis on some criteria over others, they are ultimately outside the scope of this particular paper. Here, it suffices to use them as an example of an interesting workaround that allowed the government to avoid passing judgment on religion directly and, instead, simply assess traditionally easier to understand property rights.

Another long-standing tactic of the American court system, which I have already outlined, is its coupling the religious freedom at stake with another constitutionally protected behaviour, either one that is better understood or less controversial. Out of a selection of forty-two of the most oft cited and influential Freedom of Expression cases, a full fifth of them were decided on the basis of arguments or grounds that revolved around the right to freedom of assembly or the right to freedom of expression. The courts have frequently argued, most notably in a case such as *United States v Ballard*,[22] that the court cannot, and should not, involve itself in attempting to identify the sincerity of depth of religious conviction as a determining factor. The reasons for this reluctance are sound; as long as

21. IRM 4.76.6 Internal Revenue Manual.

22. United States V Ballard.

it remains impossible for us to reach into someone's head and determine their inner emotional states, we can regulate only actions, not beliefs. This was, in fact, the direct holding of *United States v Reynolds* in 1878.[23] The Court, quoting Thomas Jefferson, held that there was a distinction between religious belief and the actions that flow from it, and that the courts can rule only on actions, not opinions. But, if only actions and behaviours can be judged and regulated, we immediately run into a difficulty when discussing what scholars of religion call "lived" or "practiced" religion. It seems that a separation of belief from action that favours only the former with protections disadvantages those religions that have real, communal, and public requirements of either ritual or expression. The founders chose to distinguish freedom of speech from the practice of religion, but that seems a distinction the US legal system has been unable to adequately address.

As a way of trying to avoid privileging "neck up" religions that need little in the way of concrete actions, judgments providing protection came to rest on a foundation of sufficiently robust laws that protect freedom of expression, freedom of assembly, or some other positive freedom of civic interaction that covers the particular ritual or public expression being invoked. Particularly in the latter half of the twentieth century, with the court's interpretation that religious belief was not protection from a law of neutral and general applicability,[24] cases often come to be decided on other grounds than an actual claim to Free Exercise.

Perhaps the most common way in which the courts have proven to avoid the question entirely is the series of tests meant to determine what is and is not an "acceptable" burden on religious practice. These tests have been created, refined, and replaced over the years in a variety of court cases that spread over behaviour such as cemetery coverings, ritual animal sacrifice, and mandatory school prayers. They have been so fundamentally important to case law revolving around the First Amendment religious rights that they deserve an in-depth look at their development. One thing that all the proposed tests have in common, though, is simple: The courts take completely at face value the claims of a party that their behaviour is religiously motivated. In other words, the courts are able to avoid an attempt

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23. Reynolds V United States.

24. Employment Division, Department of Human Resources of Oregon V. Smith, 494 U.S. 872 (1990).

to apply some definition of religion, and instead take it for granted that what the case deals with is, by the mere act of claiming it is so, a religious matter. The tests then are not so much an application of the definition, but instead, side-step the question and ask, *given* that the behaviour being regulated or burdened is religious, *is* the burden or regulation being imposed of such importance that it remains permissible even if the right to religious freedom is infringed.

The proto-example of such a test occurred in the *Reynolds* case already discussed. The Court, fearing the anarchy that might result if religious believe were allowed to be positive defense for ignoring any laws a group wished, ruled that while the Court could not constitutionally legislate belief, it certainly had the authority to regulate action. The Court ruled that the outlawing of polygamy was a neutral law to safeguard the fabric of society, a law that had been part of the cultural and common law tradition of Western civilization for some time, and thus it did not fit within the constitutional argument made. The Court essentially ruled that religion was no protection against a law of general applicability. For many decades, this would remain the standard applied to cases, and though occasionally viewed as problematic for the seemingly wide-sweeping powers of infringement that it offered to the government, the bedrock principle was one that would return to dominance later in American law, and remains dominant even today.

In the early 1960s, the case of *Sherbert v Verner*[25] was brought before the Supreme Court involving a member of the Seventh-day Adventist church, Adell Sherbert, who was fired for refusing to work on what she believed to be the Sabbath day in accordance with her church's teaching of biblical commandments. Her claim to unemployment compensation, a category of claims providing numerous cases investigating religious questions, was denied by the state of South Carolina. The denial of her unemployment was, the plaintiff held, a substantial and significant burden on her ability to freely exercise her religion. At the time, her case was that the only option available to her in lieu of unemployment was to accept positions that required her to work on the Sabbath. The choice between financial destitution and adherence to her religious beliefs seemed to create a constitutionally unacceptable compulsion.

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25. Sherbert V Verrner, 374 U.S. 398 (1963).

The Supreme Court found in Adell's favour and created what came to be called the *Sherbert* test for determining whether or not a government infringement on Free Exercise was unacceptably substantial. Writing for the majority, Justice Brennan argued what was at the time a dramatic victory for religious freedom: ". . . we held that the imposition of such a condition upon even a gratuitous benefit inevitably deterred or discouraged the exercise of First Amendment rights . . ."[26] The text of the decision created a four point test: First, the person's claim must involve a sincere religious belief. Second, the government's action must place a substantial burden on the person's ability to act on that belief. Third, if it has placed such a burden, the government must prove that it is acting on behalf of a compelling public interest. And finally, there is no other manner of pursuing that interest possible which would be less restrictive on religion.

A related but different test was created in 1971, *Lemon v Kurtzman*,[27] when the justices faced a case involving the use of public funds to reimburse religious schools for teachers' salaries and textbooks. This case involved the other side of the religious-freedom coin, addressing charges of the government's establishing religion. In their decision, the court sided for the plaintiff, along with delivering a three-prong test for future use in determining whether or not the government's action would be deemed unconstitutional under the Establishment Clause. Failure on any one of the three prongs would render a law or policy in violation: The government's action must have a secular legislative purpose; the government's action must not have the primary effect of either advancing or inhibiting religion; and the government's action must not result in an "excessive government entanglement" with religion.

These tests, which would remain the established standard for law until late into the 1980s, share a few relevant key features. First, they partially avoid the question of religious identity *per se*. In the tests, the identity of beliefs as authentically religious is relegated to only one among many criteria for judging a legal dispute. As expected, in most cases in which the tests are applied, the question of whether something is "really" religious or not is not addressed at all, taken for granted, or of only passing interest in the decision, before deciding the case on the grounds of one of the other

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26. Sherbert V Verrner.

27. Lemon V Kurtzman, 403 U.S. 602 (1971).

criteria. Indeed, the explicit purpose of the tests is to provide guidelines not for whether something is genuinely an exercise or establishment of religious orthodoxy but instead to provide criteria meant to determine whether or not the burden or support at question in the legal case is of a permissible nature or not. They also indicate the first of what will be many attempts at limiting the subjectivity and wide-ranging power of judicial interpretation by providing guidelines that more directly guide decisions. Unfortunately, these tests provide mixed results, at best, in this effort. The phrase "excessive government entanglement" particularly proved for many years after to be a thorn in the side of legislators and judges alike.

In the landmark case *Employment Division v Smith*, these tests were, though not formally overturned, largely ignored and overruled by the Court's surprising return to what can be seen as a *Reynolds*-era criteria for determining infringement of religious freedom, which many commentators and the general public felt vastly restricted religious liberty in the context of the United States. The Court, in a majority opinion delivered by Justice Scalia, for the first time in the history of these cases, found against the believer and for the state, and also for the first time, explicitly tied protection of religious freedom to protection of other related constitutional rights. The Court found that, when a law is "a neutral law of general applicability" that does not have regulating religious behaviour as a specific and obvious goal, religious beliefs *by themselves* offer no reasonable exemption from the law. Observing that in every other case of defending against such "neutral" laws, the courts had found in favour of believers who asserted a "hybrid" right—that is to say, the Court held former plaintiffs had succeeded in successfully arguing their protection because their particular religious expressions were also protected under another generally recognized constitutional right. The Supreme Court urged the believers in this case to lobby their legislature, arguing that states did have the right to explicitly or specifically exempt religious activity from laws, but that the states could not be *required* to do so.

The public outcry against what was seen as a vast restriction on religious freedom lead to congressional efforts to rectify the situation legislatively in the passage of the *Religious Freedom Restoration Act* of 1993.[28] The Congressional act reinstated the *Sherbert* test and restored a standard of

28. Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (1993).

"strict scrutiny" that would require the government to affirmatively prove an important and compelling state interest before restricting or burdening the practice of religion. Unfortunately, the act itself failed to shed any definitional light on a legislative understanding of religion, the definitions section merely defining religion as follows: The term "religion" means the exercise of religion under the First Amendment of the Constitution. Clearly, no one had given Congress the old schoolyard advice that you should not use a word to define itself. The law was later ruled unconstitutional when applied to the states, the Court ruling that Congress had overstepped its authority in attempting to directly reverse judicial decisions, and so is applicable only at the federal level. However, it spawned a supplemental law in the *Religious Land Use and Institutionalized Persons Act*, as well as a host of copycat laws and legislative motions in other states.

An examination of those state-focused "copycat" laws is somewhat illuminating of legislative application of the definition of religion. The ideas behind RFRA have proven to have wide-spread appeal, and as of 2005, there were twelve different states with direct RFRA analogues passed by their legislature. It is the case that the majority of these statutes simply refer to "freedom of religion" by pointing back to an assumed definition of "the exercise of religion under the First Amendment." However, some of them carve out specific definitions of religion in the state statute itself without referencing the constitution. For ease of comparison, direct quotations from the five state bills related to the RFRA movement that do provide explicit definitions of religion are quoted together:

> Arizona: The ability to act or refusal to act in a manner substantially motivated by a religious belief, whether or not the exercise is compulsory or central to a larger system of religious belief. (A.R.S. 41-1493 [2003])
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> Florida: An act or refusal to act that is substantially motivated by a religious belief, whether or not the religious exercise is compulsory or central to a larger system of religious belief. (Fla. Stat. 761.01 [2002])
>
> Illinois: An act or refusal to act that is substantially motivated by a religious belief, whether or not the religious exercise is compulsory or central to a larger system of religious belief. (775 ILCS 35/5 [2003])
>
> New Mexico: An act or refusal to act that is substantially motivated by a religious belief. (N.M. Stat. Ann. 28-22-1 [2003])
>
> Texas: An act or refusal to act that is substantially motivated by sincere religious belief. In determining whether an act or refusal to act is substantially motivated by sincere religious belief under this chapter, it is not necessary to determine that the act or refusal to act is motivated by a central part or central requirement of the person's sincere religious belief. (Tex. Civ. Prac. & Rem. Code 110.001 [2003])

Accompanied by the fact that the other state-sponsored RFRA acts not quoted here merely refer religion to the Constitution, we have a masterful display of circular reasoning. Judicially we have examined a variety of methods: deferring the question of religion to instead use corporate law in decision, or creating a test to take "at face value" religious claims as genuine, and merely decide whether the infringement is substantial, by which the courts have been able to avoid a strict or predictable application of a definition for religion. On the legislative side of the law, we see that avoidance brought to its nadir as religion is defined as any behaviour religiously motivated. This is hardly an illuminating revelation, and it continues to leave up to the present day a situation in which the definition of what will be considered religious behaviour is given to individual judge's discretion, with an almost unprecedented degree of latitude.

Nor is this failure to apply a definition merely an abstract problem of legal philosophy or religious musing. The courts are asked to navigate the rocky terrain of avoiding establishment of "official" religious criteria yet also to protect "religion" from persecution; the inability to set firm and definite

boundaries has, past and present, contributed to a legal culture in which deciding whether or not behaviours are protected for individuals under the First Amendment is confusing and often contradictory. The courts have declared that atheism was a protected religious stance under the law,[29] but many atheists would themselves reject that label, and in at least one case, have sued to prevent the government labeling their group as religious.[30] Various Federal District Courts have ruled that the school-sponsored performance of religious music, religious dramas, religious symbols, and religious poetry was not an establishment of religion in public schools during the holidays.[31] They have ruled in Florida that graveside religious shrines were merely personal in nature due to a lack of religious authority explicitly promoting them as necessary, despite Florida's definition of religion not requiring expressions of religion to be central to a larger system of belief.[32] The Tenth Circuit Court of Appeals, in an *Affordable Health Care Act* case, has ruled the contraceptive mandate requiring employers to provide insurance that covers contraception is *not* an infringement of the religious liberty of business-owners;[33] but the Seventh Circuit Court of Appeals explicitly argued, in a nearly identical case less than one week later, that such coercion against religious beliefs is unconstitutional.[34] These cases have not yet risen to the level of the Supreme Court, but seem bound to determine whether or not government regulations of corporations can put a "substantial burden" on the religious lives of the individuals who own them. All of these are very real cases that directly impact the lives of average Americans, and all of which show the often-conflicted results that come about from lack of legal clarity.

Many countries have avoided this problem by setting up a religion—or irreligion in the case of some avowedly secular states such as France—as the national standard. Though these countries might enjoy varying levels of religious freedom, the establishment of an officially privileged state stance on religion generally tends to provide much clearer and more distinct

29. Kaufman V Mccaughtry.
30. Freedom from Religion Foundation, Inc. V. Us, (2012).
31. Florey V. Sioux Falls School Dist. 49-5, 619 F. 2d 1311 (1980).
32. Warner V. City of Boca Raton, 887 So. 2d 1023 (2004).
33. Hobby Lobby Stores, Inc. V. Sebelius, 870 F. Supp. 2d 1278 (2012).
34. Korte V. United States Department of Health and Human Services, (2012).

sets of guidelines by which judgments can be handed down. In effect, acknowledging a privileging of certain points of views, this seems very problematic to the American mind, which is often generalized as being consumed with individual liberties. However, it does at least provide a specific and definite framework from a point of straightforward honesty, a self-awareness of bias in the system that is permitted to operate within certain boundaries considered tolerable, which also vary from country to country. Alternatively, it has been suggested by Dr. Winnifred Sullivan, author of *The Impossibility of Religious Freedom*, that religious freedom as an independent right is too conceptually incoherent to stand, and that religious groups should receive no special protections above and beyond whatever a country normally gives to its citizens in terms of freedom of association and freedom of expression.[35] A view which on first glance seems quite controversial, but which the Supreme Court appears to have implicitly agreed on in the *Smith* decision, which distinctly linked freedom of religion to having been historically protected in America as a "hybrid" right.

Whatever the answer, what becomes clear, even by this all too brief survey into the way the standard legal definitions of religion have been applied in major court cases in America, the problem is a mess of conflicting opinion. One can see quite clearly the tension inherent in judicial decisions that must avoid defining something as religious in order to respect the Establishment Clause, while simultaneously embracing and protecting expressions of religion with a constitutionally mandated privilege distinct and separate from other forms of expression. At present, there seems no easy way to navigate through this maze. There have been more in-depth commentaries and studies of the conflicting opinions and twisting history of the legal religious landscape in America, and most of them share one thing in common: no one is quite satisfied with the status quo, but there seems to be few better alternatives.

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35. Winnifred F. Sullivan, The Impossibility of Religious Freedom (New Jersey: Princeton University Press, 2011), xxxvii.