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Scott C. Idleman

Marquette University Law School, scott.idleman@marquette.edu

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THE UNDERLYING CAUSES OF DIVERGENT FIRST AMENDMENT INTERPRETATIONS

Scott C. Idleman*

There is much validity to the notion that differing worldviews and foundational premises can yield, and in recent years have yielded, highly divergent interpretations of the First Amendment's religion clauses.¹ Some may disagree with this hypothesis, of course, and perhaps such disagreement is itself the product of incongruent starting conceptions and premises. Be that as it may, it is fairly accepted among legal scholars and especially social scientists that the discernment of the principles and doctrines of law can often be difficult to separate from the identity—that is, the experiences, the ideological and religious foundations, the psychological characteristics, and the social, economic, and political profile—of the discerners.²

By comparison, it is rather debatable whether either these worldviews or interpretations can realistically be situated on a linear spectrum, with the “religionists” at one end and the “secularists” at the other.³ A better but decidedly more complex approach might be to envision them within a multi-axis framework, thereby reflecting the likelihood that there are other reasonable arrays of interpretive camps, that citizens may embrace some parts but reject other parts of these interpretive camps, and that citizens hold their views with differing levels of intensity. Even if one were able to plot out a genuine multitude of positions, however, it would still leave unanswered the question of why different judges, lawyers, academics, and the public vary so dramatically when they strive to interpret the First Amendment.

* Professor, Marquette University Law School. I would like to thank the AALS Section on Law and Religion, and Professor Mark Modak-Truran in particular, for inviting me to present this article at the January 2007 AALS conference. I would also like to thank the Marquette University Law School for providing assistance during this article's drafting. Finally, and as always, I would like to thank my wife, Elizabeth, for her enduring support.

1. U.S. CONST. amend. I (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . .”). This was arguably the central hypothesis of the panel at which this article was presented. See AALS Section on Law and Religion, Newsletter at 1-2, Dec. 2006, available at <http://www.aals.org/documents/sections/lawandreligion/LawReligionDec2006.pdf>.

2. See, e.g., Gregory C. Sisk & Michael Heise, *Judges and Ideology: Public and Academic Debates About Statistical Measures*, 99 NW. U. L. REV. 743 (2005); Gregory C. Sisk, Michael Heise & Andrew P. Morriss, *Searching for the Soul of Judicial Decisionmaking: An Empirical Study of Religious Freedom Decisions*, 65 OHIO ST. L.J. 491 (2004). This is not to say that the written law itself in conjunction with legal norms and processes do not constrain legal decision-makers, nor is it to discount exogenous influences such as interest groups. For an overview of three standard decisional models encompassing many of these factors, see Joseph D. Kearney & Thomas W. Merrill, *The Influence of Amicus Curiae Briefs on the Supreme Court*, 148 U. PA. L. REV. 743, 774-88 (2000).

3. This appears to have been a key premise associated with the panel's hypothesis referenced earlier. See AALS Section on Law and Religion, *supra* note 1, at 1.

The objective of this article is to address this question by identifying some of the major conceptual fault-lines beneath the religion clauses' doctrinal topography. In particular, it describes two subsurface variables that meaningfully influence the reading of history and historical documents, the discernment of principles, the interpretation of prior case law, and, ultimately, the formulation and application of doctrine. These variables are, first, the unconscious associative perception of religion and, second, the perceived relationship between the active presence of religion and the vitality of the social and political order. Other important variables exist, of course, and these are addressed briefly in the concluding part of the article.

I. THE ASSOCIATIVE PERCEPTION OF RELIGION

Likely central to many citizens' views of nonestablishment and religious liberty are the underlying notions or impressions that they associate, whether consciously or unconsciously, with the terms *religion* or *religious*. Specifically, what are the unfiltered or immediate thoughts, images, experiences, and emotional responses that these words, in varying contexts, evoke? The attempt to discern these underlying notions is more than simply an empirical inquiry into the many possible definitions of religion, much less a normative argument about how religion ought to be defined or conceptualized. It is also not to deny that a number of citizens, including judges and professors, consciously possess fairly systematic or sophisticated definitions of religion.

Rather, it is a general acknowledgement of two postulates: *first*, that human beings, based on a variety of personal characteristics and experiences, harbor presuppositions and prejudices which in turn inform their unconscious or instinctual conceptualization of religion, their expectation regarding the characteristics of religious citizens, and their perception of religion-related claims under the First Amendment, and *second*, that these unconscious perceptions and expectations can differ in decisive ways from the intellectualized, abstract views of religion or religious claimants that one believes—and is perhaps even convinced—that one holds.⁴

Needless to say, people can possess a variety of such disjunctions, and there is nothing especially remarkable about their existence. As one judge has recognized, "human behavior, which is profoundly affected by the decision-making process, is both an elaborate process of interpreting, choosing and rejecting possible lines of action or alternative decision-making in response to both the external stimuli being perceived, as well as an expression of pre-established inclinations and meanings within an individual."⁵

4. Cf. BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 167 (1921) ("Deep below consciousness are other forces, the likes and the dislikes, the predilections and the prejudices, the complex of instincts and emotions and habits and convictions, which make the man, whether he be litigant or judge."); JOSEPH C. HUTCHESON, JR., *THE JUDGMENT INTUITIVE* 14-34 (1938) (describing the role of intuition, or "hunches," in the judicial decision-making process).

5. Donald C. Nugent, *Judicial Bias*, 42 CLEV. ST. L. REV. 1, 10 (1994). "To simplify the complex flood of information from the world, we tend to categorize objects, people and occurrences into groups, types or categories—that is, into [what behavioral scientists refer to as] schemata—so that we can treat

When uncritically possessed by a legal decision-maker, however, these disjunctions or their constituent premises acquire an incalculable significance, for they can unknowingly affect the reading of history, the formulation of doctrine, and assessment and disposition of real-life claims. Not less important, they can also be the source of seemingly irreconcilable interpretive conflicts, such as those that currently attend the understanding of the First Amendment.⁶

A. *A Closer Examination of the Phenomenon*

To illustrate the potential disjunction between abstract conceptualization and instinctual perception, consider some of the following terms and attempt to note the very first, unfiltered associative thought that comes to mind when encountering each term:

- | | |
|--------------------------|-------------------------|
| • religious display | • religion and politics |
| • religious oppression | • religion and abortion |
| • religious conservative | • religion and science |

For the most part, there are no correct or incorrect associative reactions to these terms or phrases. One’s particular reaction, however, can speak volumes about one’s operative yet subconscious perceptions of religion and its manifestation in particular contexts.

To illustrate the actual range of meanings that these terms can have, thereby allowing one to assess one’s own interpretations, consider more closely the term *religious conservative*. A religious conservative, first of all, could describe a person who is theologically, liturgically, or dogmatically conservative within that person’s congregation or denomination. Alternatively, it could be a religious person who is socially conservative with regard to the morality of public policies or the legal permissibility of certain conduct. Or it could denote someone who is not even religious, but who has a conservative view of the role of religion in politics or public policymaking, just as a fiscal conservative has a restrictive view of governmental spending.

Moreover, one cannot tell from the words alone the particular faith or religion, if any, to which the religious conservative belongs or adheres. It could be a Roman Catholic who favors the return of the Latin Mass, or a

nonidentical stimuli as if they were equivalent.” *Id.* “Schemata guide this selective filtering of incoming information by providing a model of what to expect; they tell the brain what information to pay attention to and what information to ignore.” *Id.* at 10-11 (footnote omitted).

6. To be sure, “the task of giving meaning to the Free Exercise and Establishment Clauses of the First Amendment has been the source of some of the deepest divisions on the Court.” Kathleen A. Brady, *Fostering Harmony Among the Justices: How Contemporary Debates in Theology Can Help To Reconcile the Divisions on the Court Regarding Religious Expression by the State*, 75 NOTRE DAME L. REV. 433, 435 (1999).

fundamentalist who opposes the teaching of evolutionary theory in public schools, or an Old School Protestant who opposes same-sex marriage. It could be an adherent of Orthodox or Conservative Judaism, or a Hindu traditionalist, or a Muslim member of the British Conservative Party, or an Old Order Mennonite who abstains from using electricity in the home.

Undoubtedly, there are many more types of religious conservatives that could be identified. But an exhaustive litany is not necessary to make the point at issue, which is that what one instinctively and initially envisions when first encountering the term *religious conservative*—or any of the above terms—may shed substantial light on one's predispositions when assessing the meaning of the religion clauses, their application in any given case, and more generally, the proper role of religion in law in politics. More significant, for any given individual, is the extent to which these instinctive responses may differ dramatically from what one *consciously* professes to believe, quite sincerely, about religion, religious believers, religion in public forums, and so forth. It is significant precisely because the individual, if he remains unaware of his unconscious biases, will have no incentive to adjust his decision-making, regardless of the possible impropriety of these biases and despite the adverse consequences that they may have.⁷

One of the clearest examples of this phenomenon, outside of the religion context, is that of so-called unconscious racism or implicit bias.⁸ Consider, for example, the commercial fields of realty and mortgage lending. As a starting premise, it seems fair to assume that most real estate agents or mortgage lenders are not self-consciously racist—that is, they do not perceive themselves as such—and, in fact, that many of them genuinely agree with contemporary principles of equality. Yet, study after study has demonstrated that African-American home buyers are often dealt with by realtors and lenders differently than Caucasian home buyers.⁹ Similar allegations have been waged with regard to employment decisions,¹⁰ traffic

7. See Nugent, *supra* note 5, at 5 (“[T]hrough this blind faith in their impartiality . . . judges may gain a false sense of confidence in their decisions. They may fail to take into account the unavoidable influences we all experience as human beings and disregard the limits of human nature and the difficulty of bringing to the conscious level subjective motivations, beliefs and predilections.”); Jeffrey J. Rachlinski, *Heuristics and Biases in the Courts: Ignorance or Adaptation?*, 79 OR. L. REV. 61 (2000). For a proposal to facilitate judges’ awareness of biases, see Evan R. Seamone, *Judicial Mindfulness*, 70 U. CIN. L. REV. 1023 (2002).

8. See Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987) (explaining the phenomenon and critiquing current equal protection doctrine which looks only at text, intent, and motive). For a recent review of the social science literature, see Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CAL. L. REV. 945 (2006).

9. See Kerwin K. Charles & Erik Hurst, *The Transition to Home Ownership and the Black-White Wealth Gap*, 84 REV. ECON. & STATISTICS 281 (2002) (noting this phenomenon, although also attributing white-black mortgage-related differences to other major factors); A. Mechele Dickerson, *Caught in the Trap: Pricing Racial Housing Preferences*, 103 MICH. L. REV. 1273, 1281 (2005) (book review); Myron Orfield, *Land Use and Housing Policies to Reduce Concentrated Poverty and Racial Discrimination*, 33 FORDHAM URB. L.J. 877, 880 (2006).

10. See, e.g., Melissa Hart, *Subjective Decisionmaking and Unconscious Decisionmaking*, 56 ALA. L. REV. 741 (2005) (favoring unconscious discrimination claims under Title VII).

and pedestrian stops (often called “racial profiling”),¹¹ numerous aspects of the criminal justice system,¹² and even retail automobile sales.¹³

Nor does one always need a formal study to observe the manifestation of latent or unconscious racism. The 2006 incident involving comedian Michael Richards—who by all accounts was not previously considered a racist and did not view himself as such, and yet spewed racial epithets with the ease of a seasoned Klansman—demonstrates the potency of underlying beliefs and premises.¹⁴ Even after the incident, Richards insisted “I’m not a racist. That’s what’s so insane about this.”¹⁵

Of course, the breadth and imprecision of the terms *religion* and *religious* may not be the only linguistic reason that different listeners experience different associative thoughts. Some of the variation may reflect the flexible interpretability of the *other* word in each pairing, such as display, oppression, conservative, and so forth. This can only be a partial explanation, however, for one could readily devise pairings using these latter words, such as storefront display or fiscal conservative, that would likely generate similar or comparable images among most if not all listeners. If that is correct, then one could fairly surmise that these latter words are not especially ambiguous or fluid, and that the more significant perceptual factor is indeed the term *religion* or its variants.

The reality may in fact be that one cannot meaningfully perceive religion, or that which is or is not religious—and cannot therefore have a perspective on nonestablishment or free exercise—unless and until these notions are filled with and shaped by one’s own, potentially subconscious preconceptions. Illustrative of this point is the colonial Europeans’ perspective on the religious beliefs and rituals of the original inhabitants of the Americas. Generally speaking, these settlers did not recognize—and in many instances *could not* recognize—the cosmologies of the indigenous tribes as authentic religions, but instead viewed them as an assortment of paganistic, heathenish, and fundamentally misguided myths and customs. After all, the Indian belief systems lacked the “sacred texts, written histories, and church institutions” that characterized the colonizers’ own faiths.¹⁶ Given their own preconceptions about what is or is not religious,

11. See U.S. DEP’T OF JUSTICE, A RESOURCE GUIDE ON RACIAL PROFILING DATA COLLECTION SYSTEMS: PROMISING PRACTICES AND LESSONS LEARNED 5-8 (2000) (reviewing anecdotal and empirical evidence), available at <http://www.ncjrs.gov/pdffiles1/bja/184768.pdf>.

12. See Angela J. Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 *FORDHAM L. REV.* 13, 25-38 (1998) (discussing unconscious racism at the arrest and charging stages); Sheri Lynn Johnson, *Unconscious Racism and the Criminal Law*, 73 *CORNELL L. REV.* 1016 (1988) (discussing unconscious racism at the trial and sentencing stages).

13. See Ian Ayres, *Fair Driving: Gender, Race and Discrimination in Retail Car Negotiations*, 104 *HARV. L. REV.* 817 (1991). For a subsequent, more nuanced study, see Ian Ayres, *Further Evidence of Discrimination in New Car Negotiations and Estimates of Its Cause*, 94 *MICH. L. REV.* 109 (1995).

14. See *Richards Says Anger, Not Racism, Sparked Tirade*, MSNBC, Nov. 22, 2006, available at <http://www.msnbc.msn.com/id/15816126/>. Richards is best known for his role as the eccentric “Cosmo Kramer” in the television series *Seinfeld*, the show famously about nothing.

15. *Id.*

16. Irene S. Vernon, *Religious Rights*, in *ENCYCLOPEDIA OF NORTH AMERICAN INDIANS* 541, 541 (Frederick E. Hoxie ed., 1996) (“The denial of Indian religious liberty arose from the clash of European

in other words, most of these settlers could not even contemplate the possibility that Indian spirituality was a religion, much less one that should be treated respectfully or equally under the law.¹⁷

There is little reason to think, moreover, that these types of preconceptions, for better or worse, would not likewise continue to influence a contemporary decision-maker's treatment and final disposition of religion-related claims.¹⁸ (Is it just a coincidence that Justice Hugo Black, who in his younger years had some affiliation with the KKK, wrote the rather strong, elaborate, and arguably unnecessary language in *Everson v. Board of Education*¹⁹ about the categorically separationist nature of the Establishment Clause and the no-public-aid principle?²⁰) In addition to interpreting history and formulating doctrine, a variety of functions such as determining credibility, assigning culpability, and assessing the facts could all be colored by preconceptions of which a judge and jury, for example, are not even cognizant. It is true, of course, that most evidence codes include provisions

and Native American worldviews. Christian colonizers evaluated Indian religions from the perspective of their own particular faiths. They searched for sacred texts, written histories, and church institutions in Indian societies, and were appalled when tribal religions did not display these characteristics.”).

17. See Maureen E. Smith, *Crippling the Spirit, Wounding the Soul: Native American Spiritual and Religious Suppression*, in *AMERICAN INDIAN THOUGHT: PHILOSOPHICAL ESSAYS* 116, 118 (Anne Waters ed., 2004) (“Coming out of the context of the Middle Ages, with the Crusades and the Inquisition, Europeans had very strict ideas about appropriate religious behavior— notions of how to worship and how to live. These beliefs colored their view of Native religion, leaving them virtually incapable of viewing the Natives’ actions as spiritual.”).

18. With regard to American Indian religious freedom claims, in particular, see Allison M. Dusias, *Ghost Dance and Holy Ghost: The Echoes of Nineteenth-Century Christianization Policy in Twentieth-Century Native American Free Exercise Cases*, 49 *STAN. L. REV.* 773, 805-19 (1997) (discussing various definitional and conceptual problems); John Rhodes, *An American Tradition: The Religious Persecution of Native Americans*, 52 *MONT. L. REV.* 13, 16-17 (1991) (contending that “courts do not understand the nature of Indian religious beliefs because most judges are confined intellectually by Judeo-Christian notions of what constitutes a religion”; that “[t]his bias is reflected in the judicially constructed legal doctrines for determining the constitutional validity of religious claims”; and that, “because these doctrines are framed in Western concepts of religiosity, they are prejudicial to the non-Western religions of Native Americans”); *id.* at 35 (“The continuing inability of our society to comprehend and appreciate the religions of Native Americans is reflected in first amendment case law, both in the results of the cases, which frequently deny Indian religious rights, and in the flavor of the opinions, which rarely transcend Judeo-Christian [sic] notions of religion to grasp the spirituality of American Indian religions.”); Bryan J. Rose, Comment, *A Judicial Dilemma: Indian Religion, Indian Land, and the Religion Clauses*, 7 *VA. J. SOC. POL’Y & L.* 103 (1999) (discussing the problems created by applying Supreme Court jurisprudence to Indian religion cases).

19. 330 U.S. 1 (1947) (upholding public busing of both public and parochial school students). *Everson* was a 5-4 decision with a judgment that Justice Black’s own rhetoric seemed to foreclose. In fact, “Black reportedly told friends that he made the approval of the aid ‘as tight’ as possible to render it a ‘pyrrhic victory’ for aid proponents.” Thomas C. Berg, *Anti-Catholicism and Modern Church-State Relations*, 33 *LOY. U. CHI. L.J.* 121, 127 (2001) (quoting ROGER K. NEWMAN, *HUGO BLACK: A BIOGRAPHY* 363-64 (1994)).

20. See Berg, *supra* note 19, at 126-29; Ira C. Lupu & Robert W. Tuttle, *Federalism and Faith*, 56 *EMORY L.J.* 18, 41 (2006) (noting the view, held by some, “that *Everson* is at least in part a product of widely shared (both within and without the Supreme Court) anti-Catholic sentiment”). To be sure, “Hugo Black Jr.’s memoirs state . . . that the one sentiment [his father] did share with the Ku Klux Klan . . . was a distrust of the Catholic Church.” Berg, *supra* note 19, at 128 (citing HUGO BLACK, JR., *MY FATHER: A REMEMBRANCE* 104 (1975); John T. McGreevy, *Thinking on One’s Own: Catholicism in the American Intellectual Imagination, 1928-1960*, *J. AM. HIST.*, June 1997, at 124).

modeled after Rule 610 of the *Federal Rules of Evidence*²¹ that prohibit consideration of a witness's or party's religious beliefs.²² But, again, these rules can likely have an impact only on the conscious, surficial decision-making of the judge and juror, leaving much of the significant unconscious elements in place.

B. The Supreme Court and the Definition of Religion

One possible means of ameliorating the effects of these elements is for the Supreme Court to issue a meaningful constitutional definition of religion, at least to the extent that such a definition would override or at least circumscribe conflicting judicial preconceptions. Notably, however, *religion* appears to be one of the few key terms, if not the only key term, of the First Amendment that the contemporary Supreme Court has not authoritatively and comprehensively defined.²³ The most that the Court has said, in relatively dated cases of unknown precedential authority, is that religion involves a person's relationship to God²⁴ or "the affirmative pursuit of one's convictions about the ultimate mystery of the universe and man's relation to it."²⁵ Conversely, the Court has explained that the religion does

21. FED. R. EVID. 610 ("Evidence of the beliefs or opinions of a witness on matters of religion is not admissible for the purpose of showing that by reason of their nature the witness' credibility is impaired or enhanced."). For a comprehensive examination of Rule 610, see Michael Ariens, *Evidence of Religion and the Religion of Evidence*, 40 BUFF. L. REV. 65, 77-86 (1992).

22. See ALA. R. EVID. 610; ALASKA R. EVID. 610; ARIZ. R. EVID. 610; ARK. R. EVID. 610; CAL. EVID. CODE § 789; COLO. R. EVID. 610; FLA. STAT. ANN. § 90.611; HAW. R. EVID. 610; IDAHO R. EVID. 610; IND. R. EVID. 610; IOWA R. EVID. 5.610; KY. R. EVID. 610; LA. CODE EVID. art. 610; ME. R. EVID. 610; MD. R. 5-610; MASS. GEN. L. ANN. ch. 223 § 19; MICH. R. EVID. 610; MINN. R. EVID. 610; MISS. R. EVID. 610; MONT. R. EVID. 610; NEB. EVID. R. 610; N.H. R. EVID. 610; N.J. R. EVID. 610; N.M. R. EVID. 11-610; N.D. R. EVID. 610; OHIO EVID. R. 610; OKLA. STAT. ANN. tit. 12, § 2610; OR. R. EVID. 610; PA. R. EVID. 610; R.I. R. EVID. 610; S.C. R. EVID. 610; S.D. CODIFIED L. § 19-14-17; TEX. R. EVID. 610; UTAH R. EVID. 610; VT. R. EVID. 610; WASH. R. EVID. 610; W. VA. R. EVID. 610; WIS. STAT. ANN. § 906.10; WYO. R. EVID. 610. Georgia, interestingly, provides that "[r]eligious belief shall go only to the credit of a witness." GA. CODE ANN. § 24-9-3.

23. See *United States v. Meyers*, 906 F. Supp. 1494, 1500 (D. Wyo. 1995) (stating that "the Supreme Court has done little to identify positively what 'religion' is for First Amendment purposes"), *aff'd*, 95 F.3d 1475 (10th Cir. 1996), *cert. denied*, 522 U.S. 1006 (1997); L. Scott Smith, *Constitutional Meanings of 'Religion' Past and Present: Explorations in Definition and Theory*, 14 TEMP. POL. & CIV. RTS. L. REV. 89, 91 (2004) (remarking that the Court "has demonstrated an aversion to the task").

24. See *Davis v. Beason*, 133 U.S. 333, 342 (1890) ("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."), *overruled on other grounds by* *Romer v. Evans*, 517 U.S. 620, 634 (1996); *Reynolds v. United States*, 98 U.S. 145, 163-64 (1879) (similar, invoking the writings of James Madison and Thomas Jefferson). The *Davis* conception is perhaps the most elaborate, but it is doubtful that its theism-based view of religion would be deemed acceptable today. See, e.g., *Torcaso v. Watkins*, 367 U.S. 488, 495 n.11 (1961) (noting, when discussing the scope of the First Amendment, that "[a]mong religions in this country which do not teach what would generally be considered a belief in the existence of God are Buddhism, Taoism, Ethical Culture, Secular Humanism and others"). *But cf.* *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 577 (1993) (Souter, J., concurring in part and concurring in the judgment) ("The extent to which the Free Exercise Clause requires government to refrain from impeding religious exercise defines nothing less than the respective relationships in our constitutional democracy of the individual to government and to God.").

25. *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586, 593 (1940), *overruled on other grounds by* *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

not encompass “purely secular considerations” or “philosophical and personal” beliefs such as those held by Henry David Thoreau,²⁶ but this category remains elusive as well.

Even among the multitude of other Article III judges, past and present, only a modest number have ventured into this definitional abyss and yielded substantial, though not necessarily consistent, definitions.²⁷ It seems, in fact, that many lower courts, when faced with an alleged religion that is unknown or extremely unconventional, simply assume that it is a religion for purposes of the case, subsequently ruling against the claimant on some other basis.²⁸ Legal scholars, by comparison, have produced an abundance of literature on defining religion,²⁹ but of course their proposals

26. See *Wisconsin v. Yoder*, 406 U.S. 205, 216 (1972).

27. See, e.g., *Kaufman v. McCaughtry*, 419 F.3d 678, 681-82 (7th Cir. 2005) (employing, in part, an ultimate concern approach and stating that “atheism may be considered, in this specialized sense, a religion”); *United States v. Ward*, 989 F.2d 1015, 1018 (9th Cir. 1992) (relying on *Welsh* and asserting, in the free exercise context, that “religious beliefs, then, are those that stem from a person’s moral, ethical, or religious beliefs about what is right and wrong and are held with the strength of traditional religious convictions”); *Int’l Soc’y for Krishna Consciousness, Inc. v. Barber*, 650 F.2d 430, 440 (2d Cir. 1981) (employing, in part, an ultimate concern approach in the free exercise context); *Malnak v. Yogi*, 592 F.2d 197, 200-10 (3d Cir. 1979) (Adams, J., concurring in the result) (employing, in part, an ultimate concern approach in the establishment context); *Founding Church of Scientology of Wash., D.C. v. United States*, 409 F.2d 1146, 1160 (D.C. Cir. 1969) (considering criteria such as whether “[i]t is incorporated as [a religion within its jurisdiction]”; “[i]t has ministers, who are licensed as such, with legal authority to marry and to bury”; “[i]ts fundamental writings contain a general account of man and his nature comparable in scope, if not in content, to those of some recognized religions”), *cert. denied*, 396 U.S. 963 (1969); *United States v. Meyers*, 906 F. Supp. 1494, 1502-03 (D. Wyo. 1995) (holding that religion under RFRA is identical to religion under the First Amendment, and looking to whether a claimant’s beliefs address “ultimate ideas,” are “metaphysical,” prescribe norms of conduct, are comprehensive, and bear various “accoutrements” of recognized religions), *aff’d*, 95 F.3d 1475, 1482-84 (10th Cir. 1996) (adopting the district court’s analysis), *cert. denied*, 522 U.S. 1006 (1997).

28. See, e.g., *Wells v. City & County of Denver*, 257 F.3d 1132, 1152 (10th Cir. 2001) (atheism), *cert. denied*, 534 U.S. 997 (2001); *Kalka v. Hawk*, 215 F.3d 90, 98 (D.C. Cir. 2000) (humanism); *Kunselman v. W. Reserve Local Sch. Dist.*, 70 F.3d 931, 931 (6th Cir. 1995) (Satanism); *Brown v. Woodland Joint Unified Sch. Dist.*, 27 F.3d 1373, 1378 (9th Cir. 1994) (Wicca); *McCabe v. Arave*, 827 F.2d 634, 637 n.2 (9th Cir. 1987) (Church Jesus Christ Christian); *United States v. Middleton*, 690 F.2d 820, 824 (11th Cir. 1982) (Ethiopian Zion Coptic Church), *cert. denied*, 460 U.S. 1051 (1983); *Haff v. Cooke*, 923 F. Supp. 1104, 1108 (E.D. Wis. 1996) (Identity Christianity); *Faheem-El v. Lane*, No. 82 C 4404, 1984 WL 717, at *2 n.1 (N.D. Ill. June 29, 1984) (El Rukn Science Temple); see also MICHAEL WOLF ET AL., *RELIGION IN THE WORKPLACE: A COMPREHENSIVE GUIDE TO RELIGIOUS DISCRIMINATION AND ACCOMMODATION* 31 (1998) (noting in the administrative context that, “[i]n practice, when an employee attaches the appellation ‘religion’ to a set of beliefs, the courts are reluctant to dig beneath the surface”).

29. See, e.g., Andrew W. Austin, *Faith and the Constitutional Definition of Religion*, 22 CUMB. L. REV. 1 (1991); Anita Bowser, *Delimiting Religion in the Constitution: A Classification Problem*, 11 VAL. U. L. REV. 163 (1977); A. Stephen Boyan, Jr., *Defining Religion in Operational and Institutional Terms*, 116 U. PA. L. REV. 479 (1968); Jesse H. Choper, *Defining “Religion” in the First Amendment*, 1982 U. ILL. L. REV. 579; James M. Donovan, *God Is as God Does: Law, Anthropology, and the Definition of “Religion”*, 6 SETON HALL CONST. L.J. 23 (1995); Dmitry N. Feofanov, *Defining Religion: An Immodest Proposal*, 23 HOFSTRA L. REV. 309 (1994); George C. Freeman III, *The Misguided Search for the Constitutional Definition of “Religion”*, 71 GEO. L.J. 1519 (1983); Kent Greenawalt, *Religion as a Concept in Constitutional Law*, 72 CAL. L. REV. 753 (1984); Stanley Ingber, *Religion or Ideology: A Needed Clarification of the Religion Clauses*, 41 STAN. L. REV. 233 (1989); John C. Knechtle, *If We Don’t Know What It Is, How Do We Know if It’s Established?*, 41 BRANDEIS L.J. 521 (2003); Val D. Ricks, *To God God’s, to Caesar Caesar’s, and to Both the Defining of Religion*, 26 CREIGHTON L. REV. 1053 (1993); Jane M. Ritter, *The Legal Definition of Religion: From Eating Cat Food to White Supremacy*, 20 Touro L. REV.

formally carry no weight in a court of law, which may very well explain the relative volume of their work.³⁰

Needless to say, this lack of an authoritative and meaningful definition is anomalous. Most other operative terms in the First Amendment, such as establishment,³¹ free exercise,³² speech,³³ peaceable assembly,³⁴ and petition,³⁵ have been defined or delineated at least by individual Justices if not by the Court itself.³⁶ Even obscenity—the famous object of Justice Stewart's statement that "I know it when I see it"³⁷—has its own three-part definition.³⁸ But not religion. The closest that the modern Court has come

751 (2004); Smith, *supra* note 23 at 110; C. John Sommerville, *Defining Religion and the Present Supreme Court*, 6 U. FLA. J.L. & PUB. POL'Y (1994); Jeffrey L. Oldham, Note, *Constitutional "Religion": A Survey of First Amendment Definitions of Religion*, 6 TEX. FORUM ON CIV. LIB. & CIV. RTS 117 (2001); Note, *Toward a Constitutional Definition of Religion*, 91 HARV. L. REV. 1056 (1978).

30. See BETTE NOVIT EVANS, INTERPRETING THE FREE EXERCISE OF RELIGION: THE CONSTITUTION AND AMERICAN PLURALISM 48 (1997) ("Scholars may debate definitions of religions at leisure, but when judges do so, their definitions are authoritative acts of state power.").

31. See *Lee v. Weisman*, 505 U.S. 577, 587-98 (1992) (non-punitive coercion); *County of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 592-94 (1989) (endorsement); *Larson v. Valente*, 456 U.S. 228 (1982) (discrimination); *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971) (purpose, effect, and entanglement); *Everson v. Bd. of Educ.*, 330 U.S. 1, 15-16 (1947) (listing a multitude of prohibitions).

32. See *Locke v. Davey*, 540 U.S. 712, 720 (2004) (indicating that free exercise encompasses the ability engage in a "religious service or rite" without "criminal [] or civil sanctions" as well as the right of "ministers . . . to participate in the political affairs of the community"); *Hernandez v. Comm'r of Internal Revenue*, 490 U.S. 680, 699 (1989) (stating that free exercise includes "the observation of a central religious belief or practice"); *Employment Division v. Smith*, 494 U.S. 872, 877-82 (1990) (explaining that free exercise includes "the right to believe and profess whatever religious doctrine one desires," religious conduct that does not conflict with neutral laws of general applicability, and religious conduct "in conjunction with other constitutional[ly] protect[ed] [liberties], such as freedom of speech and of the press or the right of parents to direct the education of their children" (citations omitted)); *Thomas v. Review Bd. of Ind. Employment Sec. Div.*, 450 U.S. 707, 717-18 (1981) (free exercise includes the ability to engage in "conduct mandated by religious belief" or not to engage in "conduct proscribed by a religious faith" without the resulting denial of an important government benefit); *Wisconsin v. Yoder*, 406 U.S. 205, 215-19 (1972) (finding, with regard to Old Order Amish, that free exercise can encompass an entire way of life).

33. See *Spence v. State of Washington*, 418 U.S. 405, 410-11 (1974) (explaining that speech involves "[a]n intent to convey a particularized message . . . and in the surrounding circumstances the likelihood [i]s great that the message would be understood by those who view[] it").

34. See *United States v. Cruikshank*, 92 U.S. 542, 551-53 (1875).

35. See *McDonald v. Smith*, 472 U.S. 479, 486-90 (1985) (Brennan, J., concurring).

36. At least one commentator has written that the Court has also not defined the term *press*. See Troy L. Booher, *Finding Religion for the First Amendment*, 38 J. MARSHALL L. REV. 469, 483 (2004). The Court has stated, however, that "[f]reedom of the press . . . is not confined to newspapers and periodicals. It necessarily embraces pamphlets and leaflets. . . . The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion." *Branzburg v. Hayes*, 408 U.S. 665, 704 (1972) (quoting *Lovell v. City of Griffin*, 303 U.S. 444, 450 (1938)); see also *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 798-802 (1978) (Burger, C.J., concurring). With respect, this does appear to be a fairly developed definition, although *definition* itself can be a contested concept.

37. *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) (stating, in regard to the process of determining whether expression is constitutionally obscene, that "perhaps I could never succeed in intelligibly [defining the kinds of material embraced in the Court's prior descriptions of obscenity]. But I know it when I see it . . .").

38. See *Miller v. California*, 413 U.S. 15, 24 (1973) (explaining that a work can be deemed obscene if "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest; . . . [if] the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and . . . [if] the work,

to meaningfully defining religion was its conceptualization of religion under the conscientious objector exception to the Military Selective Service Act.³⁹

At that time, during the Vietnam War, the statute required that a conscientious objector's beliefs had to bear some "relation to a Supreme Being involving duties superior to those arising from any human relation."⁴⁰ In *United States v. Seeger*,⁴¹ the Court framed the inquiry as whether this exception was limited only to conventionally theistic belief systems and, if so, whether this limitation ran afoul of the First Amendment.⁴² Then, obviating the need to address the constitutional issue directly, the Court creatively read the statutory exception as including "[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."⁴³ The Court, in other words, adopted what many have described as a functional approach to identifying religious claims.⁴⁴ Yet this rendering was an act of statutory construction, not an interpretation of the religion

taken as a whole, lacks serious literary, artistic, political, or scientific value." (citations omitted) (quoting *Kois v. Wisconsin*, 408 U.S. 229, 230 (1972))).

39. Pub. L. No. 80-759, 62 Stat. 604 (June 24, 1948) (codified as amended at 50 U.S.C. app. §§ 451-471a).

40. 50 U.S.C. app. § 456(j) (1958 ed.), quoted in *United States v. Seeger*, 380 U.S. 163, 165 (1965). The statute has since been amended, see 50 U.S.C. app. § 456(j) (2000) ("Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. As used in this subsection, the term 'religious training and belief' does not include essentially political, sociological, or philosophical views, or a merely personal moral code."). There are also regulations implementing the statute, formerly at 32 C.F.R. pt. 75, but the Department of Defense recently withdrew them from publication, explaining that "[t]he document on which this part was based has been revised and is limited only to DoD personnel management matters, affects only DoD military personnel, and has no impact on the public." Conscientious Objectors, 72 Fed. Reg. 33677 (June 19, 2007).

41. 380 U.S. 163 (1965).

42. *Id.* at 165. According to the Court, "[t]he question is not . . . one between theistic and atheistic beliefs. . . . Our question . . . is the narrow one: Does the term 'Supreme Being' as used in § 6(j) mean the orthodox God or the broader concept of a power or being, or a faith, 'to which all else is subordinate or upon which all else is ultimately dependent'?" *Id.* at 173-74 (quoting WEBSTER'S SECOND NEW INTERNATIONAL DICTIONARY (1958)).

43. *Id.* at 176; see also *Welsh v. United States*, 398 U.S. 333 (1970) (plurality opinion) (elaborating on *Seeger's* approach to determining the scope of what qualifies as "religious" under the statute, as amended after *Seeger*, for the purposes of conscientious objection). Comparably broad constructions of the statute have also come from the lower federal courts, see, e.g., *United States v. Levy*, 419 F.2d 360, 365 (8th Cir. 1969); *United States v. Houghton*, 413 F.2d 736, 739-42 (9th Cir. 1969); cf. *United States v. Kauten*, 133 F.2d 703, 708 (2d Cir. 1943).

44. A "functional definition focuses on the role that the belief system plays in the life of the believer" Oldham, *supra* note 29, at 145; see also Boyan, *supra* note 29, at 485-91 (espousing a similar "operational" definition along with a more traditional definition); J. Morris Clark, *Guidelines for the Free Exercise Clause*, 83 HARV. L. REV. 327, 340-44 (1969) (assessing this approach); Note, *supra* note 29, at 1072-75 (arguing for a functional approach, but only in the free exercise context). A second definitional approach is substantive or content-based, which "attempts to classify beliefs as 'religious' depending on specific features" such as theism or a belief in extra-temporal consequences. Oldham, *supra* note 29, at 157-58; see also Clark, *supra*, at 339-40 (describing one substantive approach). Yet another approach can be labeled analogical, which "attempts to classify beliefs as religious or non-religious depending on how they compare to those systems of belief that are popularly accepted as religious from a Western perspective, such as Christianity." Oldham, *supra* note 29, at 160.

clauses, and therefore is not per se authoritative as to the latter,⁴⁵ even though constitutional considerations likely informed the Court's construction.⁴⁶

Notably, not everyone is troubled by the Court's apparent unwillingness or inability to define religion for First Amendment purposes. Some judges and scholars contend that "a succinct and comprehensive definition of [religion] would appear to be a judicial impossibility."⁴⁷ Their only disappointment, one assumes, is that courts and legal academics keep trying to formulate one. There are also judges and scholars who argue, counter intuitively perhaps, that any judicial definition of religion would itself violate the First Amendment because it necessarily would encompass some belief systems but not others.⁴⁸ In turn, those included could invoke the Free Exercise Clause while those excluded could not, thereby "resurrect[ing] the very discriminatory treatment of religion which the Constitution sought forever to forbid."⁴⁹

Assuming for the moment that these are not rationales embraced by the Supreme Court, what then might explain the avoidance of defining religion under the First Amendment? One immediate response might simply be a lack of certworthiness or opportunity. After all, the Court's own rules emphasize the need for a split between or among courts over an important federal legal issue, so much so that it will "rarely" grant review even "when the asserted error consists of . . . the misapplication of a properly stated

45. See *Kalka v. Hawk*, 215 F.3d 90, 98 (D.C. Cir. 2000) ("Whether *Seeger* meant to define 'religion' as used in the First Amendment is doubtful."); *United States v. Meyers*, 906 F. Supp. 1494, 1500 (D. Wyo. 1995) (concluding that the functional approach invoked in the Selective Service Act cases does not carry over into the constitutional realm), *aff'd*, 95 F.3d 1475 (10th Cir. 1996), *cert. denied*, 522 U.S. 1006 (1997); cf. *Wisconsin v. Yoder*, 406 U.S. 205, 248-49 (1972) (Douglas, J., dissenting) (arguing that the majority's description of what does not qualify as a religion under the First Amendment is "contrary to what [the Court] held in . . . *Seeger*" and *Welsh* under the Selective Service Act). This is not to suggest that lower courts have not, in fact, used the functional approach in free exercise cases, see *United States v. Ward*, 989 F.2d 1015, 1018 n.2 (9th Cir. 1992) (citing cases and observing that "[c]ourts regularly use the *Welsh* test to determine whether belief is 'religious' for First Amendment free exercise purposes"); *Loney v. Scurr*, 474 F. Supp. 1186, 1193 n.5 (S.D. Iowa 1979) (concluding that "*Welsh*, *Seeger* and like cases can[not] be distinguished on the ground that they involved the interpretation of a statute" (citing *Torcaso v. Watkins*, 367 U.S. 488, 495 n.11 (1961))).

46. See Jesse H. Choper, *Congressional Power To Expand Judicial Definitions of the Substantive Terms of the Civil War Amendments*, 67 MINN. L. REV. 299, 336-37 (1982).

47. *Remmers v. Brewer*, 361 F. Supp. 537, 540 (S.D. Iowa 1973), *aff'd*, 494 F.2d 1277 (8th Cir. 1974), *cert. denied*, 419 U.S. 1012 (1974); see also *Alvarado v. City of San Jose*, 94 F.3d 1223, 1227 (9th Cir. 1996) ("Attempting to define religion, in general and for the purposes of the Establishment Clause, is a notoriously difficult, if not impossible, task."); George C. Freeman III, *The Misguided Search for the Constitutional Definition of "Religion"*, 71 GEO. L.J. 1519 (1983).

48. See, e.g., Derek Davis, *The Courts and the Constitutional Meaning of "Religion": A History and Critique*, in *THE ROLE OF GOVERNMENT IN MONITORING AND REGULATING RELIGION IN PUBLIC LIFE* 89, 91 (James E. Wood, Jr. & Derek Davis eds., 1993); Jonathan Weiss, *Privilege, Posture and Protection: "Religion" in the Law*, 73 YALE L.J. 593, 604 (1964); Sharon L. Worthing, *"Religion" and "Religious Institutions" Under the First Amendment*, 7 PEPP. L. REV. 313, 345-46 (1980); cf. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 658 (1943) (Frankfurter, J., dissenting).

49. *Barnette*, 319 U.S. at 658 (Frankfurter, J., dissenting). Regarding the general bar on interdenominational discrimination, see *Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687, 703 (1994); *Larson v. Valente*, 456 U.S. 228, 244-46 (1982); *Gillette v. United States*, 401 U.S. 437, 449 (1971); *Epperson v. Arkansas*, 393 U.S. 97, 103-04 (1968); *Everson v. Bd. of Educ. of Ewing Twp.*, 330 U.S. 1, 15 (1947).

rule of law.”⁵⁰ Is there a direct, manifestly evident split between federal circuit courts or state supreme courts? The answer, of course, is “no,” precisely because so few courts have taken up the matter and because the Supreme Court has provided so little guidance such that it is basically impossible that a lower court would decide “an important federal question in a way that conflicts with relevant decisions of th[e] [Supreme] Court.”⁵¹

Even absent a split or conflict, however, the Court may still grant review if “a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court”⁵² The focus of this last sub-rule is not on whether a current split exists, but rather on the importance of the federal question and the likelihood that it will arise again, which is an indication that a split could very well develop in the future. Under this portion of Rule 10, which is typically viewed as a sign of appellate desperation when asserted alone, the case for granting review of the First Amendment definition is the strongest. It is, without doubt, an important federal question, one that is posed, explicitly or implicitly, in *every* nonestablishment and free exercise claim. Moreover, while the likelihood of a particular marginal claimant or marginal belief system encountering the legal system might be low, the likelihood that many such claims or belief systems will collectively face the courts is a certainty, especially as pluralism continues to flourish and the inmate population (which generates many of the marginal claims) continues to grow.

Importantly, the foregoing paragraphs assume that the Court is willing, or would be willing, to undertake and fulfill the task of defining religion. But this assumption may be wrong. Perhaps, as intimated earlier, the Court is deliberately avoiding the task, in which case it is obviously important to ask why. One possibility is that the Court agrees with those commentators who think that the task is impossible. Standing alone, however, this explanation seems unlikely, for the Court has often expounded constitutional terms or concepts—such as “person,”⁵³ “cruel and unusual,”⁵⁴ and

50. SUP. CT. R. 10.

51. *Id.* 10(c).

52. *Id.*

53. See, e.g., *Plyler v. Doe*, 457 U.S. 202, 210 (1982) (includes illegal aliens); *Roe v. Wade*, 410 U.S. 113, 157-58 (1973) (does not include unborn); *Levy v. Louisiana*, 391 U.S. 68, 70 (1968) (includes illegitimate children); *South Carolina v. Katzenbach*, 383 U.S. 301, 323-24 (1966) (does not include states); Michael D. Rivard, Comment, *Toward a General Theory of Constitutional Personhood: A Theory of Constitutional Personhood for Transgenic Humanoid Species*, 39 UCLA L. REV. 1425, 1452 n.103 (1992) (compiling Supreme Court cases holding that corporations are 14th Amendment persons as to property rights).

54. See, e.g., *Gregg v. Georgia*, 428 U.S. 153, 173 (1976) (“[P]ublic perceptions of standards of decency with respect to criminal sanctions are not conclusive. A penalty also must accord with ‘the dignity of man,’ which is the ‘basic concept underlying the Eighth Amendment.’ This means, at least, that the punishment not be ‘excessive.’ When a form of punishment in the abstract . . . rather than in the particular . . . is under consideration, the inquiry into ‘excessiveness’ has two aspects. First, the punishment must not involve the unnecessary and wanton infliction of pain. Second, the punishment must not be grossly out of proportion to the severity of the crime.” (citations omitted) (quoting *Trop v. Dulles*, 356 U.S. 86, 100-01 (1958) (plurality opinion))).

religion's companion term "establishment,"⁵⁵ to name a few—that are by no means easy to define. It is, after all, the "province *and duty* of the judicial department to say what the law is."⁵⁶ Moreover, as the Court has stated, "[a]lthough a determination of what is a 'religious' belief or practice entitled to constitutional protection may present a most delicate question, the very concept of ordered liberty precludes allowing every person to make his own standards on matters of conduct in which society as a whole has important interests."⁵⁷

Another possibility is that the Court agrees with those commentators who contend that defining religion would itself violate the First Amendment. Yet this seems even more unlikely than the first rationale, for the very inclusion of the word in the text of the Constitution is a strong warrant for its interpretation, absent a clear constitutional indication to the contrary. In this respect, the Court no more contravenes the Establishment Clause by defining religion than it contravenes the separation of powers by defining the respective authority of the Congress or the President.⁵⁸ Besides, if it is constitutionally permissible for the legislative and executive branches to define religion for regulatory purposes, or for the judiciary to

55. See, e.g., *County of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 593-94 (1989) (announcing that an establishment occurs when the "government . . . convey[s] or attempt[s] to convey a message that religion or a particular religious belief is *avored or preferred*" (original quotation marks omitted)); *Tex. Monthly, Inc. v. Bullock*, 489 U.S. 1, 9 (1989) (stating that an establishment exists when the government "place[s] its . . . coercive authority . . . behind a single religious faith or behind religious belief in general, compelling nonadherents to support the practices or proselytizing of favored religious organizations"); *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971) (explaining that an establishment arises when a law lacks "a secular legislative purpose," when "its principal or primary effect" is to advance or inhibit religion, or when it "foster[s] 'an excessive government entanglement with religion'" (quoting *Walz v. Tax Comm'n*, 397 U.S. 664, 674 (1970))); *Everson v. Bd. of Educ. of Ewing Twp.*, 330 U.S. 1, 15-16 (1947) (enumerating a list of criteria for discerning an establishment).

56. *Marbury v. Madison*, 5 U.S. 137, 177 (1803) (emphasis added); see also *United States v. Dickson*, 40 U.S. 141, 162 (1841) ("[T]he judicial department has imposed upon it by the constitution, the solemn duty to interpret the laws, in the last resort; and however disagreeable that duty may be, in cases where its own judgment shall differ from that of other high functionaries, it is not at liberty to surrender, or to waive it."). True, there are other constitutional terms that the Court has avoided defining, but oftentimes these avoidances are characterized as constitutional obligations pursuant to the separation of powers or federalism. See, e.g., *Taylor v. Beckham*, 178 U.S. 548, 578 (1900) (referring to the guaranty of a "republican form of government" in article IV, section 4 of the United States Constitution, and explaining that "[i]t was long ago settled that the enforcement of this guaranty belonged to the political department").

57. *Wisconsin v. Yoder*, 406 U.S. 205, 215-16 (1972) (footnote omitted); see also *Founding Church of Scientology of Wash., D.C. v. United States*, 409 F.2d 1146, 1160 (D.C. Cir. 1969) ("Though litigation of the question whether a given group or set of beliefs is or is not religious is a delicate business, our legal system sometimes requires it . . ." (footnote omitted)); Clark, *supra* note 44, at 338 (arguing that "the difficulty of distinguishing those who are conscientious from those who are not cannot obviate the necessity of doing so, assuming . . . that fairness to the conscientious individual is a major purpose of the free exercise clause"); Dmitry N. Feofanov, *Defining Religion: An Immodest Proposal*, 34 HOFSTRA L. REV. 309, 313-16 (1994) (providing several reasons why the Court should define the term).

58. See, e.g., *United States v. Lopez*, 514 U.S. 549, 551 (1995) (holding that Congress exceeded its authority under article I section 8 clause 3 of the United States Constitution); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 588 (1952) (holding that the President exceeded his authority under article II of the United States Constitution).

interpret that term as found in statutes and regulations,⁵⁹ then surely the Court itself can define religion within the First Amendment and not thereby violate the same.⁶⁰

A third and arguably more plausible theory is that many members of the Court believe that the term *religion*, which appears only once but is an essential element of both religion clauses, should presumptively mean the same thing under each clause,⁶¹ but that this interpretation, in turn, creates a potential dilemma. On the one hand, the Court is likely concerned from a practical and normative standpoint about making sure that the Free Exercise Clause encompasses many religions and religious practices, including non-conventional or emergent ones.⁶² To be sure, the Court has admonished that “[t]he determination of what is a ‘religious’ belief or practice . . . is not to turn upon a judicial perception of the particular belief or practice in question; religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection.”⁶³ On the other hand, the Court is likely also concerned from a practical and normative standpoint that the scope of the Establishment Clause not be so broad that the operations of government become unduly hindered due to increased allegations of endorsement, material advancement, entanglement, or unequal treatment. Yet a generous definition of religion, developed under and then imported from the Free Exercise Clause, could create precisely this risk.⁶⁴ It is not, then, that the task is impossible per se.

59. See, e.g., *United States v. Seeger*, 380 U.S. 163, 185 (1965) (explaining that, pursuant to the Selective Service Act, the “task [of local draft boards and courts] is to decide whether the beliefs professed by a registrant . . . are, in his own scheme of things, religious”); *Redmond v. GAF Corp.*, 574 F.2d 897, 901 n.12 (7th Cir. 1978) (explaining that “the proper test to be applied to the determination of what is ‘religious’ under [42 U.S.C.] § 2000e(j) can be derived from [*Welsh and Seeger*], i.e., (1) is the ‘belief’ for which protection is sought ‘religious’ in person’s own scheme of things, and (2) is it ‘sincerely held’”); *Marria v. Broaddus*, No. 97 Civ. 8297 NRB, 2003 WL 21782633, at *11-12 (S.D.N.Y. July 31, 2003) (assessing whether and ultimately holding that “the Nation of Gods and Earths” is a religion within the scope of the Religious Land Use and Institutional Persons Act, 42 U.S.C. §§ 2000cc to 2000cc-5); but see *Zorach v. Clauson*, 343 U.S. 306, 319 n.4 (1952) (“[A] governmental decision as to what constitutes ‘a religion’ . . . a governmental power to hinder certain religious beliefs by denying their character as such. . . . This provides precisely the kind of censorship which we have said the Constitution forbids.”).

60. The Constitution also requires, through its Due Process Clauses, that operative legal terms “are set out in terms that the ordinary person exercising ordinary common sense can sufficiently understand and comply with, without sacrifice to the public interest.” U.S. Civil Serv. Comm’n v. Nat’l Ass’n of Letter Carriers, 413 U.S. 548, 549 (1973); see generally Joseph E. Murphy, *The Duty of the Government To Make the Law Known*, 51 *FORDHAM L. REV.* 255 (1982). Certainly it is ironic that the Court’s own interpretations might not satisfy this basic standard.

61. See, e.g., *Everson v. Bd. of Educ. of Ewing Twp.*, 330 U.S. 1, 32 (1947) (Rutledge, J., dissenting); cf. also *Malnak v. Yogi*, 592 F.2d 197, 211 (3d Cir. 1979) (Adams, J., concurring).

62. See Daniel O. Conkle, *The Path of American Religious Liberty: From the Original Theology to Formal Neutrality and an Uncertain Future*, 75 *IND. L.J.* 1, 30 (2000) (explaining that “the Court appears to agree that a definition like *Seeger’s* might be well-suited for the end of the twentieth century and that, if anything, America has outgrown even the capacious approach of *Seeger*”).

63. *Thomas v. Review Bd.*, 450 U.S. 707, 714 (1981).

64. See *Grove v. Mead Sch. Dist.* No. 354, 753 F.2d 1528, 1537 (9th Cir. 1985) (“To borrow the ultimate concern test from the free exercise context and use it with present establishment clause doctrines would be to invite attack on all programs that further the ultimate concerns of individuals or entangle the government with such concerns.”); Booher, *supra* note 36, at 470 (“A more expansive definition of the term ‘religion’ . . . creates problems in interpreting the Establishment Clause. For

Rather, there is a consensus among the Justices that the problems potentially generated by defining religion outweigh the benefits of doing so, despite the burdens that this uncertainty might impose on both governments and prospective claimants.

This dual concern about under inclusion and over inclusion is not limited to the formal interpretation of the religion clauses. An analogous concern arises for scholars when considering the acceptable role or influence of religious input in public discourse, largely apart what the First Amendment might dictate. Seeking to ensure that this discourse is rational and universally accessible, or that the political processes are not unduly divisive, a number of commentators have proposed various self-observed limitations on that input, particularly in relation to the motivations or justifications for legal or political decision-making.⁶⁵ Much turns, however, on one's definition or conceptualization of religion. After all, "the broader one's definition of religion or religious values, the greater the consequences of either allowing or disallowing [legal or political decision-makers] to invoke religious values in their decision-making."⁶⁶ Conceiving of religion narrowly, thereby keeping the consequences of these extralegal limitations more manageable, would not be consistent with the contemporary understanding of religion. Conceiving of it broadly and then applying these limitations, however, "might cause the [legal and political] process[es] either to be stripped of all meaningful moral influence or (more likely) to degenerate into a medium in which religious values are simply invoked in an ad hoc and selective manner."⁶⁷

C. Interpretive Manifestations of Differing Perceptions

Whatever the Court's reasons for not authoritatively defining religion, there is little reason to think that such a definition will soon be forthcoming. For this reason, however, it is even more critical to examine in what ways, and to what extent, various conscious and unconscious associative

example, if a deeply-held, but non-theistic, moral objection to war could qualify for protection under the Free Exercise Clause, then arguably, the moral theory that generates the objection cannot be taught in public schools without violating the Establishment Clause. Yet such a result is legally unacceptable."); Conkle, *supra* note 62, at 30 (contending that a broad conception of religion under the Free Exercise Clause could yield unmanageable effects under both clauses).

65. See, e.g., ROBERT AUDI, *RELIGIOUS COMMITMENT AND SECULAR REASON* (2000); BRUCE A. ACKERMAN, *SOCIAL JUSTICE IN THE LIBERAL STATE* 10 (1980); KENT GREENAWALT, *PRIVATE CONSCIENCES AND PUBLIC REASONS* (1995); KENT GREENAWALT, *RELIGIOUS CONVICTIONS AND POLITICAL CHOICE* (1988); William P. Marshall, *The Other Side of Religion*, 44 HASTINGS L.J. 843 (1993); John Rawls, *The Idea of Public Reason Revisited*, 64 U. CHI. L. REV. 765 (1997); Suzanna Sherry, *The Sleep of Reason*, 84 GEO. L.J. 453 (1996); see also ISAAC KRAMNICK & R. LAURENCE MOORE, *THE GODLESS CONSTITUTION: THE CASE AGAINST RELIGIOUS CORRECTNESS* (1996) (advocating such limitations, though suggesting that they have a constitutional basis).

66. Scott C. Idleman, *The Limits of Religious Values in Judicial Decisionmaking*, 81 MARQ. L. REV. 537, 539 (1998).

67. *Id.* at 540; see also Jason Carter, *Toward a Genuine Debate About Morals, Religion, Politics, and Law: Why America Needs a Christian Response to the "Christian" Right*, 41 GA. L. REV. 69, 82 (2006) (contending that "if religious arguments are to be excluded because these views are not shared by all citizens, then much else must also be excluded, making it very difficult to establish any moral or ethical model for decisionmaking").

perceptions of religion can affect the reading, doctrinal formulation, and application of the religion clauses. Indeed, given that the religion clauses are well-known for having a conflicting historical record⁶⁸ as well as multiple and imprecise standards,⁶⁹ the absence of a definition or conception of religion only magnifies the probability that these perceptions will be influential.

With regard to the discernment of relevant history and principles, first of all, it can obviously be important if the person assessing a First Amendment question predominantly has in mind, consciously or unconsciously, one type or institution of religion, or one type of religious claimant, as opposed to another. In *Everson v. Board of Education of Ewing Township*,⁷⁰ for example, would the Justices' conceptualization of the meaning of establishment—not their disposition of the case, but their very understanding of the Establishment Clause—have been different if the parochial beneficiaries of the school transportation plan were primarily Moravian or Quaker children rather than Catholic children? The Roman Catholic Church, after all, is a large, hierarchical institution that is historically inseparable from the matter of state-established religion and the resulting development of principles such as separationism.⁷¹ In turn, it is difficult not to process the constitutional question without this preexisting empirical reality somehow impacting one's conception and assessment, not just of the case at hand, but of the meaning and scope of the Establishment Clause itself.

By the same token, might the Court's intuitive understanding in *Braunfeld v. Brown*⁷² of what it means to prohibit free exercise have been different if the claimants, rather than being Orthodox Jewish retailers in a predominantly Christian community that mandated Sunday business closing, were Christians in a predominantly Jewish community that prohibited

68. See *McCreary County v. ACLU of Ky.*, 545 U.S. 844, 879 (2005) (positing, after canvassing the framers' remarks, that "[t]he fair inference is that there was no common understanding about the limits of the establishment prohibition"); *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 577 (1993) (Souter, J., concurring in part and concurring in the judgment) (recognizing that "[t]he scholarship on the original understanding of the Free Exercise Clause is . . . not uniform"); Vincent Phillip Munoz, *The Original Meaning of the Establishment Clause and the Impossibility of Its Incorporation*, 8 U. PA. J. CONST. L. 585, 585-87 (2006) (noting among Supreme Court Justices the existence of multiple, competing interpretations of original intent).

69. See Steven G. Gey, *Reconciling the Supreme Court's Four Establishment Clauses*, 8 U. PA. J. CONST. L. 725, 725 (2006) (describing the Court's jurisprudence as "both hopelessly confused and deeply contradictory"); Ira C. Lupu & Robert W. Tuttle, *The Faith-Based Initiative and the Constitution*, 55 DEPAUL L. REV. 1, 57 (2005) (noting "the many equally plastic and contradictory [Establishment Clause] standards offered by various justices, from neutrality or endorsement, to the *Lemon* measures of purposes, effects, and entanglements"); Gregory C. Sisak, *How Traditional and Minority Religions Fare in the Courts: Empirical Evidence from Religious Liberty Cases*, 76 U. COLO. L. REV. 1021, 1031 (2005) (describing the law of free exercise as "unstable over time and uncertain in application").

70. 330 U.S. 1 (1947).

71. See Berg, *supra* note 19, at 123-51. The Moravians and Quakers, of course, are also historically inseparable from the matter of state-established religion, but not on the side of establishment. See Moravian Church in North America, *Our History*, available at <http://www.moravian.org/history/>; Ontario Consultants on Religious Tolerance, *The Religious Society of Friends, Quaker History*, <http://www.religioustolerance.org/quaker1.htm>.

72. 366 U.S. 599 (1961).

retail operations on Friday evening and Saturday?⁷³ Or, would the Justices' broad conception of religious exercise in *Wisconsin v. Yoder*,⁷⁴ as encompassing not simply a particular practice but an "entire mode of life,"⁷⁵ have never materialized had the claimants—instead of being the Old Order Amish, who in the Court's admiring words "singularly parallel and reflect many of the virtues of Jefferson's ideal of the 'sturdy yeoman'"⁷⁶—been a longstanding community of the Fundamentalist Church of Jesus Christ of Latter-Day Saints that similarly refused to send its children to school beyond the eighth grade? The point, once again, is not that the cases might have come out differently, but rather that the Justices' actual comprehension of the First Amendment's meaning and scope at the outset may have been different as a result of their underlying and likely unrecognized preconceptions.

II. THE PERCEIVED RELATIONSHIP BETWEEN RELIGION AND SOCIETY

A second subsurface variable in the jurisprudence of the religion clauses is the perceived relationship between religion and society, and in particular the latter's government and laws. Specifically, does one tend to view the presence or influence of religion, or of a particular religion, as either necessary, irrelevant, or deleterious to the proper functioning and prosperity of society and politics? Alternatively stated, does one believe—intuitively, or perhaps empirically—that religion is overall a positive, neutral, or negative factor in American life?⁷⁷

A. Factors Influencing One's Perception of Religion and State

As with the perception of religion generally, one's sense of the relationship between religion and government necessarily involves both conscious and unconscious dimensions.⁷⁸ It is also the product of many phenomena.⁷⁹ Among other things, it can be shaped by one's own experiences, such as family life, schooling, the character of one's community, and

73. Regarding whether the religious affiliation of claimants affects the outcome of their claims, see Sisk, *supra* note 2, at 1037-50 (finding and assessing lower success rates for Catholic and Baptist religious liberty claimants in the federal appeals and district courts).

74. 406 U.S. 205 (1972).

75. *Id.* at 219.

76. *Id.* at 225.

77. This second variable, in comparison with the first, is often more explicit in the writings of judges and scholars, see, e.g., STEPHEN L. CARTER, *THE CULTURE OF DISBELIEF: HOW AMERICAN LAW AND POLITICS TRIVIALIZE RELIGIOUS DEVOTION* (1993); MARCI A. HAMILTON, *GOD VS. THE GAVEL: RELIGION AND THE RULE OF LAW* (2005); Berg, *supra* note 19, at 128-29 (noting various Justices' stated negative views of the Catholic Church); Marshall, *supra* note 65.

78. More than likely, this second variable is connected to the first. In fact, it is difficult to imagine that one's overall impression of religion in relation to society and politics would not color, or be colored by, the religion-related associations or impressions that one harbors.

79. See Nugent, *supra* note 5, at 8-20 (canvassing a number of factors that may one's perception or analysis of a given scenario or individual). "Some influences are internal or personal, such as the age, generation, religion, values, upbringing, temperament, and the physical condition of the judge. Others are external, such as the culture and norms of the community in which the judge lives, legal and political tensions, the megatrends produced by the information society, the extent of the judge's power, the

one's interpersonal relationships. If one's beliefs or conduct as a youth, for example, conflict with the religiously-informed ethos of one's community, thereby leading to anxiety and even confrontation, then one could certainly develop a skeptical if not unforgiving view of religion as a social presence and, in turn, a negative perception of religion in political and legal affairs. Conversely, if one as a youth witnesses or benefits from social reforms undertaken by religious institutions or congregants, then one could certainly develop a much more positive attitude towards religion in public life.

This perception can also be a product of one's own foundational belief system or worldview, whether labeled religious, spiritual, cosmological, or philosophical. If one's church teaches, for instance, that its or its members presence in the public sphere is vital or beneficial to society,⁸⁰ then one who adheres to the church's teachings is certainly more likely to view that public presence in such a light. Or, if one is sufficiently sure that one's religiously-grounded opinions on public policy matters are correct and worthy of legal or political expression, then one's participation in law and politics will probably be viewed as inherently beneficial to society. There are, of course, a variety of psychological factors that can influence the likelihood that one will actually develop such views, and certainly one's foundational beliefs may themselves be inspired by these factors. In the final analysis, however, it seems rather sensible to conclude that one's overarching worldview could affect one's perception of religion as a societal presence.

This second variable can also be shaped by one's consideration of regional, national, or international events, whether historical or contemporary in nature.⁸¹ One's analysis, for instance, of the French religious wars of the late sixteenth century, the twentieth-century conflicts in Bosnia-Herzegovina, or the ever-tumultuous geopolitics of the Middle East could, in concert with other factors, imbed in one's psyche a rather jaded view of religion as a force in social and political events. By comparison, one's examination of the justice-promoting efforts of the Reverend Martin Luther King, Jr.—or, conversely, the oppression waged by the atheist Soviet regime—could lead one fairly to conclude that religion is a necessary and positive component of a free, democratic, and egalitarian society.⁸²

judge's time constraints and access to information, and the rules regulating the manner in which judges may fulfill their judicial duties." *Id.* at 6 (footnotes omitted).

80. E.g., Congregation for the Doctrine of the Faith, *Doctrinal Note on Some Questions Regarding the Participation of Catholics in Political Life* (Nov. 24, 2002) (Roman Catholic Church); *First Presidency Urges Citizen Participation*, ENSIGN, Apr. 1988, at 77 (Mormon Church); Edward McGlynn Gaffney, Jr., *Political Divisiveness Along Religious Lines: The Entanglement of the Court in Sloppy History and Bad Public Policy*, 25 ST. LOUIS U. L.J. 205, 235-36 (1980) (noting "the deep strain within contemporary religious groups which . . . insists on active, even radical, involvement in politics").

81. Although presented as additional factors, it is doubtful that one's exposure to and interpretation of such events are not animated and affected, respectively, by the factors mentioned in the preceding paragraphs.

82. Cf. Richard H. Jones, *Concerning Secularists' Proposed Restrictions on the Role of Religion in American Politics*, 8 BYU J. PUB. L. 343, 391 n.151 (1994) (arguing that "20th Century secular (nonreligious) ideologies that have gained political control—e.g., fascism, communism, and various nationalisms—may present problems" for those who "attempt to show that nonreligious ideologies are socially more desirable, e.g., less divisive and volatile").

Current experiences, closer to home, can obviously play an important role as well, in some cases prompting a modification, conscious or not, of one's view of religion's proper role in the social order. "[I]n recent decades," as Professor Daniel Conkle points out, "the relationship between religious perspectives and political ideologies has become unusually direct and highly visible . . . increasingly plac[ing] religious conservatives on one side and religious liberals on the other."⁸³ So political and polarized had "their religious differences bec[o]me . . . that by the 1980s and 1990s it was possible to declare the existence of a 'culture war' in American society. And this culture war included explicitly political and partisan behavior by the religious combatants, with the competing sides participating more and more in electioneering, lobbying, and other forms of direct political action."⁸⁴ In addition to potentially "undermin[ing] the claim that religion warrants distinctive treatment under the Constitution,"⁸⁵ the resulting "perception that religious beliefs and political beliefs are closely related"⁸⁶ may also alter, or may already have altered, one's instinctual sense of the proper relation of religion and government.⁸⁷

Thus far, the examination of preconceptions and attitudes regarding religion and the social order has focused largely on religion. But differing underlying perspectives on the political order itself, and especially on the nature and role of government, can also have significant implications for one's conception of the First Amendment. For example, a deep-seated skepticism of majority rule, formed entirely apart from considerations of religion and state, could obviously predispose one to conceive of the religion clauses being inherently skewed against the actions of government, even before one examines the history and application of the clauses. Or, one who is partial to the political philosophy of Edmund Burke might conceive of the religion clauses in a very different manner, where issues of free exercise and establishment are necessarily to be harmonized with the stability of the state.

B. Interpretive Manifestations of Differing Perceptions

This final section will examine how one's view of religion and the political order might affect one's actual interpretation and application of the

83. Daniel O. Conkle, *The Path of American Religious Liberty: From the Original Theology to Formal Neutrality and an Uncertain Future*, 75 IND. L.J. 1, 31 (2000).

84. *Id.* (footnote omitted).

85. *Id.* at 31-32.

86. *Id.* at 31.

87. The close association of religion with political ideology may also prompt changes in how litigants frame their arguments. See Scott C. Idleman, *Religious Premises, Legislative Judgments, and the Establishment Clause*, 12 CORNELL J.L. & PUB. POL'Y 1, 8 (2002) ("Whether or not such a full-blown culture war is actually afoot, it does seem that [some] Establishment Clause challenges are, in fact, makeshift attempts to undermine certain laws not because they are religious per se, but simply because they enforce traditional morality. Religion, in other words, serves as a proxy for moral conservatism, and the Establishment Clause (like the Due Process Clause before it) becomes merely an expedient armament in the service of reform-minded efforts.").

religion clauses. In many instances, the correlations would not be surprising. If one begins with a generally positive impression of religion's role in society and politics, then one would be more likely to accept or favor the interaction of religion and government and to protect religious conduct from undue legal interference. One's doctrinal formulation, in turn, would likely provide for limited scrutiny where government unconditionally supports religion but heightened scrutiny where government hinders religion. In justifying this formulation, moreover, one would likely find appealing the potential authoritative sources—be they the words of the Framers, historians, prior courts, or academics—that expound a similar perspective. One would also tend to discount as extraneous or erroneous those sources that do not. Presumably the same will be true of one who begins with an overall negative impression.⁸⁸

Consistent with the gist of this article, Professor Kathleen Sullivan has set forth a typology of four general interpretations of the religion clauses—two for each clause—that in her view track “competing tacit accounts of the role of religious organizations in a democratic society.”⁸⁹ While these four interpretive positions are obviously archetypal and not fully representative of the ambivalence or complexity of many Justices' or citizens' overall stances, nevertheless they illustrate quite well the potential relationship between one's underlying presuppositions and one's conscious understanding of what the religion clauses actually mean. Additionally, while Professor Sullivan's focus is on religious organizations and not religion or religions per se, there is arguably sufficient proximity between these concepts that her analysis can be employed in this context.⁹⁰ Accordingly, and with these qualifications in mind, the remaining paragraphs of this section will sketch out each of these four positions.

In Sullivan's first conception, religious organizations, unlike other private associations, are “unique in their power to interpret the world and express shared understandings, and to command deep allegiance, fidelity,

88. See Douglas Laycock, *Regulatory Exemptions of Religious Behavior and the Original Understanding of the Establishment Clause*, 81 NOTRE DAME L. REV. 1793, 1793-94 (2006) (“One side cites Madison and Jefferson; the other side cites the defenders of the established church. One side cites the decision to end direct financial support of churches; the other side cites congressional chaplains and religious rhetoric by politicians and government officials. At least in political and judicial debates, neither side makes much effort to take account of the evidence offered by the other side . . .”); William Lee Miller, *The Moral Project of the American Founders*, in ARTICLES OF FAITH, ARTICLES OF PEACE: THE RELIGIOUS LIBERTY CLAUSES AND THE AMERICAN PUBLIC PHILOSOPHY 17, 34 (James Davison Hunter & Os Guinness eds., 1990) (“[L]ate twentieth-century Americans, riven with conscious and unconscious partisanship on . . . issues [about religion and the nation's founding], make tendentious interpretations of the sort . . . that run straight through the late twentieth-century debate about ‘church and state,’ which debate, in and out of the courts, and on all sides, seems to be marked by nothing whatever but advocacy, invective, and polemic. Because the founders are important symbols of national values, citizens of a later time twist them in order to align those revered figures with their own convictions.”).

89. Kathleen M. Sullivan, *The New Religion and the Constitution*, 116 HARV. L. REV. 1397, 1403 (2003) [hereinafter Sullivan, *The New Religion*].

90. For an earlier rendition of her framework, with less emphasis on religious organizations as such, see Kathleen M. Sullivan, *Justice Scalia and the Religion Clauses*, 22 U. HAW. L. REV. 449 (2000) [hereinafter Sullivan, *Justice Scalia*].

and obedience from their adherents.”⁹¹ As such, they effectively “exert a quasi-sovereign authority over their members, posing a potential rivalry with the state when religious and secular obligations conflict.”⁹² Fearful of the subordination of civil law and the ascendance of such organizations via support by public taxation, however, judges embracing this conception would tend towards “weak . . . enforcement of the Free Exercise Clause and strong . . . enforcement of the Establishment Clause.”⁹³ As Sullivan summarizes it, “[i]f religion poses the danger of quasi-sovereign competition with government, then judges enforcing the Constitution should not afford religious groups special exemptions from general laws, lest anarchy and balkanization ensue, nor should they permit public subsidies to flow to religious activities, lest resentment at subsidizing opposing faiths deepen religious lines of division.”⁹⁴

Under the second conception, “religious associations occupy an intermediate ground between individuals and government, and serve valuable social and political functions by fostering normative pluralism and epistemic diversity”⁹⁵ In order to ensure this role and to prevent “the potentially homogenizing tyranny of the state,”⁹⁶ however, “government is uniquely disabled by the Establishment Clause from speaking in a religious voice or forcing nonconforming citizens to subsidize others’ religious expression through taxation.”⁹⁷ In turn, a judicial embrace of this view of religious associations, though maintaining the first conception’s separationist reading of the Establishment Clause, would entail a more robust enforcement of the Free Exercise Clause. “[C]ourts would review strictly both government refusals to exempt religious associations from general laws that inhibit their collective expressive practices, and government inclusion of religious organizations within the scope of public subsidies and sponsorship.”⁹⁸

91. Sullivan, *The New Religion*, *supra* note 89, at 1403.

92. *Id.*; see also *United States v. Macintosh*, 283 U.S. 605, 633-34 (1931) (Hughes, C.J., dissenting) (“[I]n the forum of conscience, duty to a moral power higher than the state has always been maintained. The reservation of that supreme obligation, as a matter of principle, would unquestionably be made by many of our conscientious and law-abiding citizens. The essence of religion is belief in a relation to God involving duties superior to those arising from any human relation.”), *overruled in part* by *Girouard v. United States*, 328 U.S. 61, 69 (1946).

93. Sullivan, *The New Religion*, *supra* note 89, at 1404-05; see also STEPHEN L. CARTER, *THE DISSENT OF THE GOVERNED: A MEDITATION ON LAW, RELIGION, AND LOYALTY* 116 (1998) (noting the judicial perception that “citizens who cite religious grounds when they defy the democratically enacted laws that apply to everyone else are not simply lawbreakers, although they are obviously that too; they are, in some peculiar sense, placing their will in opposition to the General Will (as Rousseau called it) and are therefore actively working against the sovereign”).

94. Sullivan, *The New Religion*, *supra* note 89, at 1405. On the present Supreme Court, Justices Stevens and Ginsburg, in Sullivan’s view, are most closely aligned with this view. See *id.* Regarding this conception as it relates specifically to free exercise, see Scott C. Idleman, *Why the State Must Subordinate Religion*, in *LAW AND RELIGION: A CRITICAL ANTHOLOGY* 175 (Stephen M. Feldman ed., 2000).

95. Sullivan, *The New Religion*, *supra* note 89, at 1406.

96. *Id.*

97. *Id.* at 1405.

98. *Id.* at 1406. According to Sullivan, “[t]he Justice on the current Supreme Court who takes these combined positions most consistently is Justice David Souter.” *Id.*

Sullivan's third conception "sees religious associations as less like traditional voluntary associations than like ascriptive groups such as those based on race or gender. On this view, they are entitled not only to protection from unequal treatment, but also to preferential treatment in order to offset historical and structural disadvantages."⁹⁹ In particular, with "the rise of the welfare state and the secularization of the political process" and the ensuing emergence of "a wide range of public substitutes for formerly private and religious provision of education, health care, and charity . . . religious flourishing depends not only upon the autonomy of religious institutions and their negative freedom from government interference, but also upon their affirmative freedom to participate in the expanded public sphere"¹⁰⁰ For this reason, enforcement of the Free Exercise Clause would be relatively strong and enforcement of the Establishment Clause would be relatively weak.¹⁰¹ The former "protects religion when the political branches do not see fit to accommodate conflicting religious practices as a matter of grace," while the latter "permits religious associations to preserve any preferential legislative accommodations they can eke out, as well as to partake of the spoils of the modern welfare state on par with their secular substitutes."¹⁰²

Professor Sullivan's fourth and final view of religious organizations envisions them "as ordinary interest groups that may participate freely in politics but should expect no particular judicial solicitude from courts interpreting either of the Religion Clauses."¹⁰³ Religious associations possess none of the distinctive characteristics depicted in the first three models, including their "valu[e] to the political order,"¹⁰⁴ and practices that are religiously motivated cannot, in a legally satisfactory way, be separated from those that are not.¹⁰⁵ In turn, neither the Free Exercise Clause nor the Establishment Clause is strongly enforced. As described by Sullivan, "[t]his is the prevailing position on the current Supreme Court, as exemplified by [*Employment Division v.*] *Smith*¹⁰⁶ on the free exercise side and *Zelman v. Simmons-Harris*¹⁰⁷ on the establishment side," in each of which the Court "deferred to the outcome of the democratic process, whether it favored or disfavored religious associations."¹⁰⁸

99. *Id.* at 1408.

100. *Id.*

101. *See id.*

102. *Id.* at 1408-09. At the time of Professor Sullivan's article, "[t]he member of the current Court who best exemplifie[d] this approach [wa]s Justice Sandra Day O'Connor, who . . . favor[ed] strong free exercise exemptions, but who also . . . vote[d] . . . to uphold against establishment challenge voucher-based state aid to religious schools, no matter how evangelical their missions." *Id.* at 1409 (footnote omitted).

103. *Id.* at 1409.

104. *Id.*

105. *See id.* at 1409-10.

106. 494 U.S. 872 (1990).

107. 536 U.S. 639 (2002).

108. Sullivan, *The New Religion*, *supra* note 89, at 1410. In her earlier article, Professor Sullivan described Justice Scalia as "indisputably the founding father and leading exponent of the fourth position." Sullivan, *Justice Scalia*, *supra* note 90, at 449.

These four models provide a helpful means of discerning the practical effects of one's preexisting conceptions of the relationship between religion and religious institutions, on the one hand, and society, politics, and law, on the other hand. Even they do not exhaust the matter, however. As stated in the variable's formulation, one may also hold different views of religion's social and political utility depending on the particular religion that one has in mind. It has been argued, for example, that some progressive or liberal critics of conservative religious participation in politics (e.g., the so-called Religious Right) seem not to be as critical of otherwise comparable participation by religious clergy or groups that are advocating more agreeable causes, such as civil rights and anti-poverty programs.¹⁰⁹ Likewise, it has sometimes appeared as if those who seek to maintain or increase the role of religion in the public sphere, or who are critical of the church-state separationism that peaked in the 1960s and 1970s, are likely thinking of *their own* religious participation and are (or would be) less enthusiastic if another religion, one quite different from their own, were either to become more prominent in the legal and political spheres or to reap significant benefits from public funding programs.¹¹⁰

III. CONCLUSION

The First Amendment, as the Supreme Court recently remarked, "contains no textual definition of 'establishment,' and the term is certainly not self-defining."¹¹¹ For the most part, the same could also be said of the accompanying terms *religion* and *free exercise*. What this definitional or conceptual void necessarily invites, and for many decades has yielded, is the competing invocation of historical sources, principles, and precedents, and ultimately the formulation and application of divergent tests and standards.¹¹²

As this article has illustrated, what this void also invites—and, indeed, what these competing invocations to an extent represent—are differing

109. See CARTER, *supra* note 77, at 45-49, 58-65 (contrasting the generally positive treatment given to religious involvement in the civil rights or antiwar movements of the 1960s, the election of Jimmy Carter in 1976, and the antinuclear movement of the 1980s with the generally negative treatment given to religious involvement in the anti-abortion or anti-gay-rights movements of the 1980s and 1990s).

110. See, e.g., Andrea Pallios, Note, *Should We Have Faith in the Faith-Based Initiative?: A Constitutional Analysis of President Bush's Charitable Choice Plan*, 30 HAST. CONST. L.Q. 131, 146-47 (2002) (noting conservative Christian opposition to receipt of public funding by non-mainstream religions).

111. *McCreary County v. ACLU of Ky.*, 545 U.S. 844, 874-75 (2005).

112. Even the operative structure of the joint bar on establishment and free exercise prohibition—whether it should be read and conceptualized as one clause or two—is contested. The former is the conventional position, but some scholars have called that position in question. See, e.g., Stephen L. Carter, *Reflections on the Separation of Church and State*, 44 ARIZ. L. REV. 293, 311 (2002) ("Despite what courts and commentators say, the First Amendment contains only one religion clause, not two, and the text will not admit of an interpretation that tries to assign two different meanings to the word religion, which appears only once."); Mary Ann Glendon & Raul F. Yanes, *Structural Free Exercise*, 90 MICH. L. REV. 477, 478 n.8 (1991) ("treat[ing] the First Amendment as containing a single, coherent Religion Clause whose establishment and free exercise provisions are both in the service of the same fundamental value: religious freedom").

subconscious associative perceptions of religion and differing perceptions of religion's normative relationship to the social order. These, of course, are not the only underlying variables that can influence one's interpretation of the religion clauses. For example, one's intuitive perception of cultural or religious pluralism, be it empirically or normatively rooted, could also shape one's understanding of free exercise or establishment, just as it might one's understanding of concepts such as equal protection. Interestingly, the assimilation of First Amendment developments may itself bring about the conscious or unconscious modification of how one believes the religion clauses ought to be interpreted.

The extent to which one seeks to discern the effects of these variables on one's own conceptualization of the religion clauses is obviously a matter of individual choice. Some of them, as a practical matter, may be essentially imperceptible. To discern them, moreover, does not mean that one will modify their influence, even if one is aware of potentially adverse consequences that they may have. Identifying these variables is certainly a necessary first step, however, to making the interpretive conflicts of the religion clauses less perplexing and perhaps, in time, more reconcilable.