FINDING RELIGION FOR THE FIRST AMENDMENT

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I. INTRODUCTION

Scholars and courts have struggled to come up with a definition of the term "religion" for the religion clauses.[1] They have done this because they believe that finding a definition will help provide a uniform test for determining whether something qualifies for protection under the Free Exercise Clause or raises concerns under the Establishment Clause.[2] In this Article, I will explain why their aspiration is misguided: providing a single definition of the term "religion" will not help us to apply the religion clauses. Scholars and courts focus primarily upon *whether* the religion clauses require a broad or a narrow definition of the term "religion," whereas I will argue the focus should be upon

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

2. *See, e.g.*, Anand Agneshwar, *Rediscovering God in the Constitution*, 67 N.Y.U. L. REV. 295, 295-97 (1992); Francis J. Beckwith, *Public Education, Religious Establishment, and the Challenge of Intelligent Design*, 17 NOTRE DAME J.L. ETHICS & PUB. POL'Y 461, 482-88 (2003); Jesse H. Choper, *Defining "Religion" in the First Amendment*, 1982 U. ILL. L. REV. 579, 579-80 (1982); James M. Donovan, *God Is as God Does: Law, Anthropology, and the Definition of "Religion"*, 6 SETON HALL CONST. L.J. 25, 25-29 (1995); Eli A. Echols, Note: *Defining Religion for Constitutional Purposes: A New Approach Based on the Writings of Emanuel Swedenborg*, 13 B.U. PUB. INT. L.J. 117, 120-23 (2003); Kent Greenawalt, *Religion as a Concept in Constitutional Law*, 72 CAL. L. REV. 753, 753-54 (1984); H. Wayne House, *A Tale of Two Kingdoms: Can There be Peaceful Coexistence of Religion with the Secular State?*, 13 BYU J. PUB. L. 203 (1999); Craig Mason, Comment, *"Secular Humanism" and the Definition of Religion: Extending a Modified "Ultimate Concern" Test to* Mozert v. Hawkins County Public Schools *and* Smith v. Board of School Commissioners, 63 WASH. L. REV. 445, 445 (1988); Eduardo Penalver, *The Concept of Religion,* 107 YALE L.J. 791, 791 (1997).

when the religion clauses require a broad definition and *when* they require a narrow definition. Finding the proper focus helps to dissolve some long-standing problems regarding the religion clauses—the so-called "tension between the clauses" and the lack of a definition of the term "religion" in religion clause jurisprudence.

As many scholars have noted, finding a single definition of the term "religion" that works in both religion clauses is extremely difficult. Some scholars claim that the framers used "religion" to refer only to theistic belief systems.[3] This definition, however, would lead to legally absurd results. For instance, Hinduism would qualify for full protection under the Free Exercise Clause while Buddhism, or at least Zen Buddhism, would receive none.[4] In addition, courts sometimes recognize the need to protect non-theistic belief systems such as "Buddhism, Taoism, Ethical Culture, [and] Secular Humanism" under the Free Exercise Clause.[5] Occasionally, courts even consider conscientious objections to war, whether based in theistic beliefs or not, to qualify as religious.[6] A legally acceptable interpretation of the Free Exercise Clause, therefore, must include non-theistic belief systems.

A more expansive definition of the term "religion," however, creates problems in interpreting the Establishment Clause. For 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.

In order to avoid this kind of result, some scholars have proposed that the term "religion" be defined differently in each clause.[7] This, however, is an attempt to reach the desired legal result by ignoring the text of the Constitution. The word "religion" only occurs once in the two clauses, which read: "Congress shall make no law respecting an establishment of religion, or

3. *See* George C. Freeman, III, *The Misguided Search for the Constitutional Definition of "Religion"*, 71 GEO. L.J. 1519, 1520 n.5 (1983) (claiming that "the Founders equated religion with theism"); Penalver, *supra* note 2, at 805 n.91; Lee J. Strang, *The Meaning of "Religion" in the First Amendment*, 40 DUQ. L. REV. 181 (2002).

4. CHARLES TALIAFERRO, CONTEMPORARY PHILOSOPHY OF RELIGION 17, 22, 279-81 (1998); WILLIAM R. LAFLEUR, BUDDHISM 97 (1988).

5. Torasco v. Watkins, 367 U.S. 488, 495 & n.11 (1961).

6. *See, e.g.,* Welsh v. United States, 398 U.S. 333, 343-44 (1970) (interpreting a federal statute that exempted religious conscientious objectors from the draft to include those with "deeply held moral, ethical, or religious beliefs" against war).

7. *See generally* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 14-6 (1978).

prohibiting the free exercise thereof."[8] Thus, it seems implausible that the definition of the term "religion" varies between the two clauses.[9]

Nonetheless, the Free Exercise Clause seems to require a more expansive definition than the Establishment Clause. Thus, providing a definition of "religion" that works in both clauses is difficult. But there is another problem: there simply is no single, correct definition of the term "religion" as it occurs in ordinary English. These problems have led some scholars to conclude that the religion clauses present a unique challenge for courts. For instance, one scholar claims that "the inability of the court to provide an adequate definition of religion in the First Amendment has given rise to a number of inconsistent and contradictory decisions."[10]

While I agree that there have been "inconsistent and contradictory decisions," I deny that their primary cause is the Court's inability to provide a definition of the term "religion." To the extent that the lack of a definition hinders consistent interpretations of the religion clauses, it creates no greater problem for those clauses than for others. As I will argue, such terms as "life," "executive," and "press" present nearly identical definitional challenges for constitutional interpretation. The lack of a precise definition of the term "religion" in the religion clauses presents no greater interpretative challenge than does the lack of precise definitions for terms in other clauses. In other words, despite the definitional challenges, there is nothing constitutionally special about the term "religion."

Yet there is something quite special about religion itself. A religion can play many roles in a person's life. A religion can be "an institution . . . an ideology or worldview . . . a set of personal loyalties . . . locus of community, akin to family ties . . . an aspect of identity," and it can provide "answers to questions of ultimate reality, and offers a connection to the transcendent."[11] These different aspects of religions are important in different legal contexts, or so I will argue. For instance, if courts exempt religious conscientious objectors from military service, they treat religion as a set of personal loyalties, an ideology, and an aspect of identity.[12] This explains why we are also tempted to exempt

8. U.S. CONST. amend. I.

9. That is, if indeed there are two clauses. Stephen Carter has argued that the better approach is to recognize only one clause. *See* Stephen L. Carter, *Reflections on the Separation of Church and State*, 44 ARIZ. L. REV. 293, 298-99 (2002). Nothing herein is inconsistent with this approach.

10. House, *supra* note 2, at 257.

11. Michael W. McConnell, *The Problem of Singling out Religion*, 50 DEPAUL L. REV. 1, 42 (2000).

12. *See* United States v. Seeger, 380 U.S. 163, 176 (1965); *Welsh*, 398 U.S. at 339-40 (1970).

atheistic conscientious objectors: their conscientious objections similarly involve a set of personal loyalties, ideologies, and aspects of identity. In contrast, if courts exempt religions from anti-discrimination laws, they treat religion as a private institution formed to exhibit and embody a worldview. The autonomy of the religion itself would be violated if, e.g., the Catholic Church were required to ordain and "hire" female priests.

Because different aspects of religions are relevant in different legal contexts, what qualifies for protection under the Free Exercise Clause or raises concerns under the Establishment Clause depends upon the legal context. In other words, even if there were a uniquely correct definition of the term "religion" as it occurs in ordinary English, it should not fix the definition in the religion clauses because what qualifies as a religion should differ across differing legal contexts. Thus, not only should we not expect a single definition of "religion" but, for legal purposes, we also should not desire one.

In fact, as I will argue, providing a single definition for the religion clauses would create more problems than it would solve. This is not to suggest that two definitions, one for each clause, would resolve the problems. The single occurrence of the term "religion" in the religion clauses makes such an interpretation implausible. More importantly, however, a single definition for each clause still ignores the relationship between the legal context and what qualifies as a religion in that context. Properly understanding this relationship has at least two benefits: (1) we will cease the futile search for a single definition of the term "religion" for the religion clauses; and (2) we will obtain a greater understanding of what is required to reduce whatever tension exists between the two clauses. Perhaps more importantly, however, we will be in a better position to diagnose the "inconsistent and contradictory decisions."

My argument will advance in three stages. First, I will outline the different approaches scholars and courts have used to provide a definition of the term "religion" in the religion clauses and then expose the problems with each approach. Second, I will show that even if we could produce an acceptable, single definition of the term "religion," it would not help us interpret and apply the religion clauses because what qualifies as religion differs across differing legal contexts. Third, I will illustrate how recognizing the contextual nature of what qualifies as a religion places us in a better position to diagnose and reduce whatever tension exists between the clauses. In the end, the interpretation of the religion clauses that emerges from this recognition is that the religion clauses are best understood as extensions of other clauses—Free

Speech, Equal Protection, etc.—into the religious context.[13]

II. THE FUTILE SEARCH FOR A SINGLE DEFINITION OF THE TERM "RELIGION"

Before examining different proposed definitions of the term "religion," we must first become clear about what it is that we want from an adequate definition for the religion clauses. The motivation of those attempting to provide a definition of "religion" is to help courts avoid "inconsistent and contradictory decisions."[14] To do so, a definition must satisfy at least two minimal criteria. First, it must assist courts in deciding difficult cases. Otherwise, it cannot help to eliminate the problems supposedly created by lack of an adequate definition. Second, a definition cannot produce clearly counterintuitive legal results: it must be neither too broad nor too narrow. Some deviation from our basic intuitions about what the religion clauses protect or forbid is tolerable (and perhaps expected), but *gross* deviations are a sign that the definition simply trades inconsistency for counterintuitive results.

In general, there are three approaches used by scholars and courts to provide a definition of the term "religion" in the religion clauses. First, some scholars provide definitions by trying to discern how the framers used the term "religion." I will call this the "originalist approach." Second, some scholars attempt to identify something unique to religions and appeal to that unique trait to define "religion." I will call this the "uniqueness approach." Third, some scholars, and many courts, identify religions by asking whether something is sufficiently similar to things that are widely accepted as clear examples of religions. I will call this the "analogical approach."[15]

A. The Originalist Approach

Originalists look to how the framers used the language in the Constitution as a method of discerning its meaning. Specifically, they look to how the framers used the term "religion" in order to identify its meaning in the religion clauses. There seems to be general agreement about what the framers meant when they used

13. This is not to say, however, that the religion clauses are superfluous. *But see*, Mark Tushnet, *The Redundant Free Exercise Clause?*, 33 LOY. U. CHI. L.J. 71 (2001) (arguing that any protection afforded to religious expression under the Free Exercise Clause already is afforded under the Free Speech Clause).

14. House, *supra* note 2, at 257; Donovan, *supra* note 2, at 25-26; Christine L. Niles, *Epistemological Nonsense? The Secular/Religious Distinction*, 17 NOTRE DAME J.L. ETHICS & PUB. POL'Y 561 (2003).

15. The futility of some of these approaches may seem obvious. I discuss them because, as noted throughout, scholars and courts continue to employ them.

the term "religion" in the First Amendment.[16] As George Freeman argues, the framers referred to a Creator, Deity, or Maker whenever they used the term "religion." [17] From this, Freeman concludes that the framers "equated religion with theism."[18] Many scholars are persuaded that for an originalist, theism is "a constitutionally necessary ingredient to qualify a belief system as religion."[19]

If this originalist definition is correct, then it is unacceptably narrow and thereby fails to satisfy the second criterion of adequacy for a definition. For instance, Zen Buddhism and Taoism would not be religions under such a definition.[20] When we insert the definition into the religion clauses, the results are legally unacceptable. For example, the Free Exercise Clause would not protect Zen Buddhism and Taoism; nor would the Establishment Clause prohibit governments from requiring citizens to practice them.[21] Even if a purely theistic definition may have been legally adequate in 1791, it is no longer legally adequate. Consequently, this definition fails to satisfy the second criterion of adequacy for a definition.[22]

B. The Uniqueness Approach

The apparent failure of originalism drives many scholars to define the term "religion" by attempting to identify traits that all religions share and that only religions possess. If such traits exist, then perhaps they can be used to define the term "religion" for the

16. Malnak v. Yogi, 592 F.2d 197, 201 (3d Cir. 1979) (Adams, J., concurring); Freeman, *supra* note 3 at 1520-23; Penalver, *supra* note 2, at 804 n.91; Strang, *supra* note 3, at 181-83.

17. Freeman, *supra* note 3, at 1520-23.

18. *Id.* at 1520.

19. Donovan, *supra* note 2, at 36.

20. LAFLEUR, *supra* note 4, at 96; TALIAFERRO, *supra* note 4, at 279-81.

21. Even if there are other constitutional reasons why government could not require such conduct, it nonetheless would be legally absurd if violation of the Establishment Clause were not among them.

22. It is worth noting that originalism is not necessarily committed to the theistic definition traditionally attributed to it. The recent shift in focus for many originalists from the intent of the framers to the original understanding of the constitutional text makes the fact that the framers only had theistic religions in mind less than decisive when interpreting the scope of the religion clauses. *See* Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 LOY. L. REV. 611, 611 (1999); Ronald Dworkin, *The Arduous Virtue of Fidelity: Originalism, Scalia, Tribe, and Nerve*, 65 FORDHAM L. REV. 1249, 1256 (1997); Michael W. McConnell, *The Importance of Humility in Judicial Review: A Comment on Ronald Dworkin's 'Moral Reading' of the Constitution*, 65 FORDHAM L. REV. 1269, 1269 (1997); Michael S. Moore, *Justifying the Natural Law Theory of Constitutional Interpretation*, 69 FORDHAM L. REV. 2087, 2093 (2001); ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 37-41 (1997). Nothing in this Article is inconsistent with the alternative interpretations available to such an approach.

religion clauses. We can divide attempts to identify something unique to religion by the type of unique trait sought: (1) a unique set of concepts that compose the content of the term "religion"; (2) a unique kind of input that produces religious beliefs; and (3) a unique kind of output that religious beliefs produce. I will call these three different methods the "content-based method," the "epistemological method," and the "functional method," respectively.

1. The Content-Based Method

Those employing the content-based method attempt to specify the simple concepts that compose the complex content of the word "religion." This is a familiar way in which we try to define terms. For instance, we define the term "bachelor" by decomposing it into the simple concepts that compose its content, namely "male," "unmarried," and "adult." With the simple concepts identified, we can determine which things are bachelors; in this case, the unmarried male adults. If we identify the simple concepts that compose the content of the term "religion," then we similarly may be able to determine which things are religions.

Using the content-based method, Anand Agneshwar defines religion as "a system of beliefs, based on supernatural assumptions, that posits the existence of apparent evil, suffering, or ignorance in the world and announces a means of salvation or redemption from those conditions."[23] For Agneshwar, there must be supernatural content, among other things, for any purported religion to satisfy his definition.

Agneshwar's definition fails, however, because not all religions employ the supernatural. For example, pantheists, some Unitarians, and Taoists do not.[24] Yet they all should qualify for protection under the Free Exercise Clause and raise concerns under the Establishment Clause. If a set of concepts does not apply to some religions, then that set cannot comprise the simple concepts out of which the content of the term "religion" is composed. Because some religions fail to employ the supernatural, Agneshwar's definition fails.

Ludwig Wittgenstein's often-cited discussion of the term "game" illustrates the general problem with the content-based method.[25] Wittgenstein points out that there is no single way to decompose the content of the term "game" into simple constituents. Hockey, backgammon, throwing a ball against a wall, and solitaire are all games. But what do they have in

23. Agneshwar, *supra* note 2, at 296.

24. MICHAEL PETERSON ET AL., REASON AND RELIGIOUS BELIEF 4 (1991).

25. LUDWIG WITTTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS ¶66 (G.E.M. trans., 3d ed. 1958).

common? There is no set of simple concepts that applies to all games, such as "board-games, card-games, ball-games, Olympic-games," etc.[26] Because the things that qualify as games are so diverse, there simply is no single decomposition of the term "game" into simple constituents.

The same is true for the term "religion." Zen Buddhists do not believe in a Deity, some early religions lack awe and reverence, and Mormons do not believe in the transcendent.[27] Also, while something as broad as a concern for ultimate reality may capture all religions, it also likely captures much of mainstream science and philosophy. Any set of simple concepts that applies to some religions will fail to apply to all religions or will apply to non-religions. Thus, the content-based method fails to satisfy the second criterion of adequacy for a definition because ultimately it produces definitions that are too narrow, too broad, or both.[28]

2. The Epistemological Method

Those employing the epistemological method attempt to identify unique inputs for religious beliefs. According to the epistemological method, religious beliefs are arrived at in a unique way. If we can identify a distinctive epistemology of religious beliefs, then perhaps we can use it to define the term "religion" for the religion clauses.

Craig Mason uses the epistemological method to identify religions as belief systems involving ultimate concerns where "ultimate" means something like "all values and 'knowledge' which cannot be proven true, or even tested, by empirical evidence [but rather] rest upon some type of non-rational 'faith.'"[29] Robert Audi relies upon an epistemological distinction to argue that religious arguments should not shape public policy.[30] Audi distinguishes religious arguments by claiming that they do not provide

26. *Id.*

27. TALIAFERRO, *supra* note 4, at 22-23.

28. The following definition provided by Emanuel Swedenborg incurs similar problems: Religion is a life system that "recognizes what is divine; . . . includes rules governing behavior, traceable to what is divine, that do not contradict the 'golden rule;' and . . . calls on its participants to conform to the rules of the divine." Echols, *supra* note 2, at 121. It is unclear why a religion could not reject the divine or the "golden rule" and yet remain a religion. Perhaps recognizing this, Echols later states that "a life system's rules proceed from the divine in some way that is analogous to those of the major religions," which seems closer to the analogical approach. *Id.* at 133-34. Because the analogical approach also fails, *see infra* Part II.C., it does not matter which approach Echols would choose.

29. Mason, *supra* note 2, at 456.

30. Robert Audi, *The Place of Religious Argument in a Free and Democratic Society*, 30 SAN DIEGO L. REV. 677, 678 (1993).

motivation for a "rational and informed person."[31] Audi then uses this epistemological distinction to conclude that we must "separate religion from law and public policy."[32]

Such epistemological distinctions are widely accepted. For instance, agnostics think that belief in a Deity is epistemologically different from ordinary beliefs. Atheists also think that there is something epistemologically unique (and suspect) about belief in a Deity. Most theists accept that belief in a Deity is epistemologically unique as well. Wittgenstein is credited with pointing out that if you tell me that God is in the next room, and I look in the room and report that God is not there, I have not *disproved* your claim, but rather have shown that I do not *understand* your claim.

Even if this is the case, however, there is still a problem with defining the term "religion" using an epistemological distinction. Different religions have different conceptions of what justifies their beliefs. For instance, what, if anything, justifies the beliefs of Buddhists differs from what, if anything, justifies the beliefs of Calvinists.[33] No single epistemological category captures all types of religious beliefs. Some religions do not incorporate a Deity and, more to the point, some religions do not advocate accepting their doctrines on faith.[34] Thus, even if one can distinguish some religious beliefs epistemologically, one cannot similarly distinguish all religious beliefs because religious beliefs are too diverse in their epistemology.

Even if we ignore some of the diversity of religious beliefs and consider only belief in a Deity, the epistemological method still fails. The theological and philosophical questions that one must answer to establish that belief in a Deity has a distinctive epistemology are too contentious for this method to produce an adequate definition. In other words, the question of whether belief in a Deity has a distinctive epistemology is at least as disputed as the original question of which belief systems are the referents of the term "religion."[35]

31. *Id.* at 690.

32. *Id.* at 691.

33. TALIAFERRO, *supra* note 4, at 279-81. *See also* PETERSON ET AL., *supra* note 24, at 33.

34. TALIAFERRO, *supra* note 4, at 279-81.

35. For instance, while an agnostic does not know that a Deity exists, she need not take a stand upon whether others know that a Deity exists or whether others know that a Deity exists in the same way as she knows that things exist generally. In other words, while an agnostic lacks evidence of a Deity's existence, she need not take a stand upon what *kind* of evidence she lacks. Also, some theists, e.g., pantheists, think that we learn about a Deity the same way that we learn about tables, namely by empirical evidence. *See* Penalver, *supra* note 2, at 818-21. Perhaps this only reveals that people mean different things when they use the term "Deity," but if so, the prospects of

For some atheists, the fact that some religious beliefs require faith is not enough to make them epistemologically distinctive. For instance, some atheist philosophers think that all beliefs are justified (and perhaps true) only relative to a perspective.[36] For these philosophers, all beliefs—even scientific ones—ultimately stem from an unsupportable assumption. Unlike some theists who elevate religious beliefs to the epistemological status of scientific beliefs, these philosophers demote scientific beliefs to the epistemological status of unsupportable religious beliefs.

But even if we reject these philosophers' radical theses regarding scientific beliefs, it is more difficult to reject a similar claim regarding moral beliefs. In other words, even if scientific beliefs are not ultimately based upon an unsupportable assumption, it seems that non-religious moral beliefs are. As Larry Alexander points out, neither moral beliefs nor religious beliefs are empirically grounded in the same way as scientific beliefs.[37] While Alexander's claim is not universally accepted, many philosophers believe that what provides us reason to accept moral beliefs, e.g., moral sentiments, is not itself capable of further support.[38] If these philosophers are correct, then even if we can distinguish scientific beliefs from religious beliefs epistemologically, we cannot similarly distinguish moral beliefs and religious beliefs.

At the very least, these complexities reveal that epistemologically distinguishing religious beliefs depends upon resolving extremely controversial theological and epistemological questions. Thus, the epistemological distinction that scholars like Audi rely upon to conclude that we must "separate religion from law and public policy" is itself extremely contentious. Ironically, the theological and philosophical questions that must be resolved to maintain such a distinction are precisely the kind of questions that the religion clauses are designed to keep government from resolving.

What this shows is that an epistemological distinction cannot capture all religious beliefs. Religious beliefs are epistemologically too diverse. For instance, faith plays virtually no role in Zen Buddhism, but an enormous role in most Christian religions.[39]

identifying an epistemological marker for all religious beliefs are even less likely.

36. There is a vast amount of literature on this subject, but one representative is Richard Rorty, *Foucault and Epistemology*, *in* FOUCAULT: A CRITICAL READER 41, 44-45 (David Couzens Hay ed., 1986).

37. Larry Alexander, *Liberalism, Religion, and the Unity of Epistemology*, 30 SAN DIEGO L. REV. 763, 792-94 (1993).

38. *See, e.g.,* DAVID HUME, A TREATISE OF HUMAN NATURE 455-618 (L.A. Selby-Bigge ed., 1978).

39. *See* TALIAFERRO, *supra* note 4, at 279-81; PETERSON ET AL., *supra* note 24, at 33.

One cannot identify something unique to religions by discerning distinctive inputs of religious beliefs. Thus, the epistemological method fails to satisfy the second criterion of adequacy for a definition: it produces definitions that are too narrow, too broad, or simply too contentious.

3. The Functional Method

Scholars employing the functional method attempt to identify unique outputs of religious beliefs. According to the functional method, religious beliefs play a unique role in the lives of adherents. For example, James Donovan uses this method to identify religions by whether they, roughly, respond "to the existential concerns of the individual"[40] by serving "the psychological function of alleviating death anxiety."[41] Another scholar who employs this method is Keith Yandell:

> A religion proposes a *diagnosis* (an account of what it takes the basic problem facing human beings to be) and a *cure* (a way of permanently and desirably solving that problem): one basic problem shared by every human person and one fundamental solution that, however adapted to different cultures and cases, is essentially the same across the board.[42]

Those attempting to identify a unique role played by religious belief systems encounter problems similar to those that plague the content-based method. Again, Wittgenstein's discussion of the term "game" is informative. There is no *single* role that games play in our lives. Even if there were, there would be non-games that also play that role. The same is true of religions. For instance, why is alleviating death anxiety a religious role, whereas, presumably, alleviating stage fright is not? Religious beliefs can play either, or neither, role. Reading Epicurus provides a set of beliefs that alleviates death anxiety, but it is not thereby a religion. Also, identifying "one basic problem shared by every human person and one fundamental solution" is not unique to religions. Freudian psychology diagnoses a basic problem facing all humans and then proposes a cure, and yet Freudian psychology is not a religion. There is no unique role that religions, or games, play in our lives. The functional method fails to satisfy the second criterion of adequacy for a definition because the definitions it produces are either too narrow or too broad.

None of the three methods has identified a trait that all religions share and only religions possess. There is no single decomposition of the content of the term "religion" into simple

40. Donovan, *supra* note 2, at 29.

41. *Id.* at 95.

42. KEITH YANDELL, PHILOSOPHY OF RELIGION: A CONTEMPORARY INTRODUCTION 17 (1999).

constituents. It is too contentious whether (and unlikely that enough) religious beliefs are epistemologically distinctive. No distinctive role has been identified that all and only religious belief systems play. Thus, the uniqueness approach fails to provide an adequate definition of the term "religion" for the religion clauses. If we are going to define the term "religion" for the religion clauses, we need an approach that does not rely upon the existence of such unique traits.

C. The Analogical Approach

Those employing the analogical approach, perhaps recognizing the failure of the uniqueness approach, do not attempt to identify traits unique to religions. Rather, they compare a belief system with belief systems from paradigmatic traditional religions to determine whether the belief system in question has more in common with religious belief systems than with non-religious ones. For example, Eduardo Penalver identifies religions by comparing belief systems with one theistic religion, one non-theistic religion, and one pantheistic religion.[43] Similarly, George Freeman identifies something as a religion if it is more likely "to promote a paradigmatic religious belief system than it is to promote a paradigmatic irreligious belief system."[44] Also, many courts have adopted this "definition by analogy" approach.[45]

There is an initial problem that those employing the analogical approach must address: they must identify which similarities are the relevant ones for comparison. This problem, however, does not seem difficult to overcome. After all, native English speakers seem to have no trouble identifying new religions as such. For instance, native speakers have come to identify Mormonism as a religion even though Joseph Smith founded it after the term "religion" already had a meaning. They likely identified Mormonism as a religion because it resembles belief systems accepted as religions in certain ways: it has a "belief in God; a comprehensive view of the world . . . belief in some form of afterlife; communication with God . . . the use of sacred texts," etc.[46] Even though, as we have seen, none of these traits are possessed by all and only religions, they are *relevant* to identifying religions; otherwise they never would have been plausible candidates. Thus, it seems that we already make accurate assumptions about which similarities are relevant when we compare a belief system with paradigm examples of religions and non-religions.

43. Penalver, *supra* note 2, at 817.

44. Freeman, *supra* note 3, at 1563.

45. *See* Africa v. Pennsylvania, 662 F.2d 1025, 1032 & n.12 (3d Cir. 1981) (listing other courts adopting this approach).

46. Greenawalt, *supra* note 2, at 767.

Even after we determine the relevant similarities, however, the analogical approach cannot help us when the subject matter requires precision. To illustrate, consider the following example, again involving the term "game." Suppose that schoolchildren race to get their math problems done first whenever they receive an assignment. They do not agree to do this, nor do they receive an explicit reward for finishing first. Is this a game? Perhaps we would call it a game, and perhaps we would (likely unconsciously) analogize with paradigm examples of games to make our decision, just as the analogical approach suggests. Someone might even refer to it as "the schoolchildren's little game." But what follows from this?

Assume that the school would receive a $100,000 grant if the schoolchildren's attempts to finish first really constitute a game. Ordinarily it would not matter whether it really is a game. It is enough that it is not *wrong* to call it a game. But the fact that it is not *wrong* to call it a game does not entail that it is wrong *not* to call it a game. In other words, even though someone does not abuse the language by calling it a "game," someone who refuses to call it a "game" also does not abuse the language. There simply is no clear answer in such circumstances. The fact that it is not incorrect to call it "the schoolchildren's little game" decides nothing about the funding.

When we analogize with paradigm examples of games, the most we can conclude is that this is a borderline case: the schoolchildren's attempts to finish first share relevant similarities with some games, but not others. Thus, contrary to Kent Greenwalt's hope, the analogical approach itself cannot "help us resolve borderline questions and work toward clarification of the conditions required for the application of the concept."[47] When the situation requires extraordinary precision, the analogical approach provides no guidance in resolving borderline cases, even if we could identify all of the similarities relevant for comparison.

It requires precision for us to determine whether something satisfies the definition of the term "religion" when interpreting the religion clauses. After all, native English speakers do not seriously disagree about whether Catholicism is a religion. Rather, people disagree about whether borderline cases, e.g., Shintoism, are religions.[48] As we ordinarily use the term "religion," it is not wrong either to call Shintoism a religion or to refuse to call it a religion in certain contexts. The analogical approach does not help to determine whether borderline cases such as Shintoism *really* are religions. The analogical approach

47. *Id.* at 766.

48. DAVID S. NOSS, A HISTORY OF THE WORLD'S RELIGIONS 322 (10th ed. 1999); IAN S. MARKHAM, A WORLD RELIGIONS READER 187-215 (1996).

does not lead to counterintuitive results like the other approaches we have considered, but it also cannot help to resolve "inconsistent and contradictory decisions." The analogical approach fails to satisfy the first criterion of adequacy for a definition because it cannot assist courts in deciding hard cases.

At this point, we can conclude that the analogical approach cannot supply the requisite precision to decide borderline cases. However, we also can understand why. Where extraordinary precision is needed, the intuitions of native speakers about which things particular terms refer to (semantic intuitions) are not helpful. After all, it is differences in our semantic intuitions that make borderline cases borderline in the first place. For example, native speakers' semantic intuitions are not uniform regarding whether the term "religion" properly refers to Shintoism. This same lack of uniformity makes borderline cases difficult for courts. Our semantic intuitions cannot help to resolve difficult cases; rather, they are what make the cases difficult in the first place. Thus, a semantic theory that merely describes or explains our semantic intuitions cannot help to resolve difficult religion clause cases.[49] The confidence that courts and scholars have that the analogical approach can identify religions for interpretation of the religion clauses is simply misplaced.

None of the three approaches that we have examined provides an adequate definition of the term "religion" for the religion clauses. Thus, the Court's inability to provide a definition of the term "religion" in the First Amendment is understandable. But without such a definition, how can we avoid the "inconsistent and

49. It is worth noting that this criticism of the analogical approach does not depend upon adopting a traditional theory of meaning and reference whereby terms refer via descriptions native speakers associate with them. An alternative theory of reference, developed by Saul Kripke and Hilary Putnam, whereby terms refer not via descriptions native speakers associate with them but because of facts external to native speakers, does not change the result. *See generally* SAUL KRIPKE, NAMING AND NECESSITY (9th ed., Harvard U. Press 1996) (1972); Hilary Putnam, *The Meaning of "Meaning"*, *in* MIND, LANGUAGE, AND REALITY: PHILOSOPHICAL PAPERS 215-71 (1975). While it is plausible (but extremely controversial) that natural-kind terms such as "water" and "gold" do not refer to objects that satisfy descriptions native speakers associate with the terms—such as "wet" and "liquid" or "hard" and "yellowish"—but rather are rigid designators of facts external to native speakers—such as atomic structure—it is not at all clear how terms like "religion" similarly are rigid designators, despite the efforts of some scholars to apply this theory of reference to moral and legal terms. *See generally* NICOS STAVROPOULOS, OBJECTIVITY IN LAW (1996). Unlike with science (and as we have seen), native English speakers disagree about what "facts" are relevant to fixing the referents of the term "religion" as well as about who are the "experts" (analogous to scientists) needed to provide the authoritative opinions regarding the proper referents of the term "religion." Thus, this alternative theory of reference cannot save either the analogical approach or the uniqueness approach.

contradictory" religion clause decisions that many scholars attribute to the lack of such a definition? In other words, while I may have explained why the Court has not provided a definition of the term "religion," I also seem to have explained why religion clause jurisprudence will continue to produce "inconsistent and contradictory decisions." As I will argue next, however, the lack of a single, correct definition of the term "religion" does not doom religion clause jurisprudence.

III. THE RELIGION CLAUSES DO NOT REQUIRE A UNIQUE DEFINITION OF RELIGION

The primary cause of "inconsistent and contradictory" religion clause decisions is not the lack of a uniquely correct definition of the term "religion" as it occurs in ordinary English. If it were, then we should expect many other clauses to suffer from the same problem. For instance, the term "life" in the due process clauses is just as imprecise.[50] Deciding whether a fetus or a brain-dead patient qualifies as "living" requires one to take a stance on contentious moral questions. Definitions of the term "life" suffer from the same imprecision as definitions of the term "religion."

The same is true for the term "executive."[51] Whether a particular action taken by the EPA is executive or legislative in nature depends upon whether the action is law-making or law-enforcing. But where one draws the boundary between the two depends upon one's political theory. Therefore, definitions of the term "executive" also suffer from the same imprecision as definitions of the term "religion."

Finally, consider the term "press."[52] Does producing a web page or a community newsletter qualify as a press? The Court has refrained from defining the term "press," likely because such a definition would create more difficult cases than it would resolve. Whatever definition the Court provides, people would manipulate their activities to qualify under the definition; it seems much wiser to focus upon, e.g., content and viewpoint. It would be just as counterproductive for the Court to attempt to provide a single definition of the term "religion" as it would to provide a single definition of the term "press." The stakes for qualifying as a religion simply are too high. Not only does it seem unlikely that the Court could provide uniquely correct definitions of the terms "religion" and "press," but it also seems imprudent for them to do so.

The fact that the term "religion" has no uniquely correct definition does not create a *special* problem for the religion

50. U.S. CONST. amends. V, XIV.
51. U.S. CONST. art. II, § 1.
52. U.S. CONST. amend. I.

clauses. Thus, there is no reason to think that inconsistency in religion clause decisions is primarily due to the lack of an adequate definition of the term "religion." Yet how can courts properly apply the religion clauses without such a definition? Larry Alexander claims that because "any attempt to draw a line between secular and sectarian . . . will be impossible to defend theoretically . . . the First Amendment's religion clauses cannot be applied."[53] Although any line between secular and sectarian seems theoretically indefensible, this does not mean that the religion clauses cannot be applied. If a single definition were needed, then perhaps there could be no consistent religion clause jurisprudence. But, as I will illustrate, the religion clauses do not, and could not, require a single definition of the term "religion" in all legal contexts.

Even if our semantic intuitions would endorse a single definition of the term "religion," we should not employ such a definition for the religion clauses. A single definition will not work because what qualifies as religion for legal purposes differs across differing legal contexts. Religion plays many roles in people's lives. A religion can be "an institution . . . an ideology or worldview . . . a set of personal loyalties . . . locus of community, akin to family ties . . . an aspect of identity," and it can provide "answers to questions of ultimate reality, and offer[] a connection to the transcendent."[54] These different aspects of religion are (and should be) important in different legal contexts. As the legal context differs, what the religion clauses refer to does not remain constant. To illustrate, consider the following three examples.

First, in some legal contexts, the legally relevant aspects of religion are religion as a set of personal loyalties, an ideology, and a facet of personal identity. To illustrate, consider two cases, *United States v. Seeger*[55] and *Welsh v. United States*,[56] interpreting the Universal Military Training and Service Act, which exempted from military service anyone "who by reason of their religious training and belief [is] conscientiously opposed to participation in war in any form."[57] Congress explicitly excluded objections based upon "political, sociological, or philosophical views or a merely

53. Alexander, *supra* note 37, at 792.

54. McConnell, *supra* note 11, at 42.

55. 380 U.S. 163 (1965).

56. 398 U.S. 333 (1970).

57. *Seeger*, 380 U.S. at 164-65. Even though the Court is interpreting a statute in *Welsh* and *Seeger*, scholars and other courts generally agree that the Court's discussion is relevant to the constitutional definition of the term "religion." *See, e.g.*, *Malnak*, 592 F.2d at 204 (Adams, J., concurring) ("As a matter of logic and language, if the Court is willing to read 'religious belief' so as to comprehend beliefs based upon pantheistic and ethical views, it might be presumed to favor a similar inclusive definition of 'religion' as that term appears in the first amendment.").

personal moral code."[58] Thus, for the Court to find that Seeger and Welsh qualified for the exemption, it had to conclude that the objections of Seeger and Welsh were religious.

In *Welsh*, the Court found that for one's beliefs to qualify as religious, it is enough that the beliefs are held "with the strength of traditional religious convictions."[59] Similarly in *Seeger*, the Court proposed the following test to determine whether one qualifies for the exemption: "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."[60] Those who "admittedly qualify" do so by having a religiously informed conscience, which focuses upon religion as a set of personal loyalties, an ideology, and a facet of personal identity.

The institutional aspect of religions is not directly relevant to what qualifies as religion in this context. Recognizing this, the Court exempted Welsh and Seeger even though Seeger was likely an agnostic and Welsh's beliefs were only "religious in the ethical sense of the word," whatever that means.[61] The Court recognized that the objections of Welsh and Seeger similarly implicated a set of personal loyalties, an ideology, and a facet of personal identity. Whether or not these cases ultimately were decided correctly, we can see the fact that one's religion is organized, a locus of community, or practiced by large segments of the population is not directly relevant to whether one's objection qualifies as religious in this context.

Second, in some legal contexts, the legally relevant aspects of religion are religion as an institution exhibiting and embodying a certain worldview. To illustrate, consider a case where a government regulation threatens religious institutional autonomy, e.g., a new law applies existing anti-discrimination laws to religions such that the Catholic Church is required to ordain and "hire" female priests. What aspects of religion would be relevant when challenging such a law? If enforced, such a law would threaten the institutional integrity of certain religions. Thus, a religion must at least be organized to qualify for protection in this context. Businesses owned by Seeger and Welsh, no matter how deeply they held their views, would not be exempt from such a law on religious grounds. Even with these first two brief examples, we can see that what qualifies as religion differs in differing legal contexts.

Third, in some legal contexts, the legally relevant aspects are all of those relevant in the first two contexts. To illustrate,

58. *Seeger*, 380 U.S. at 172.
59. *Welsh*, 398 U.S. at 340.
60. *Seeger*, 380 U.S. at 176.
61. *Welsh*, 398 U.S. at 341.

consider the priest-penitent privilege. In 1843, a court held that the privilege must be recognized on grounds very similar to those relevant in the conscientious objector context: to fail to recognize the privilege would force a priest to violate either an ecclesiastical oath or a judicial oath.[62] The court reasoned that to avoid forcing a priest to choose between perjury and contempt, the law must exempt the priest from ever having to appear.[63] Religion was even described as a deeply personal "affair between God and man."[64]

Yet the court also stated that in this context it "is essential to the free exercise of a religion, that its ordinances should be administered – that its ceremonies as well as its essentials should be protected."[65] The practices of the religion as an organization, along with the expectations of its members regarding its religious practices, are important in this context. The institutional autonomy of the organization is at issue, just as it was in the context involving exemptions from anti-discrimination laws. In the priest-penitent context, all of the aspects of religion that were relevant in the first two examples are relevant. Thus, because more must be shown before an entity can qualify for protection in the priest-penitent context, fewer entities should qualify in this context than in either of the first two legal contexts.

However such cases should be decided, we can see that the same definition of the term "religion" will not work in all three legal contexts because what qualifies as religion varies as the legal context varies. As a result, even if there were a single definition of the term "religion" as it occurs in ordinary English, it would not help us interpret and apply the religion clauses. Thus, it cannot be the lack of an adequate definition of the term "religion" that explains "inconsistent and contradictory" religion clause decisions.

One may object that I have confused two crucially different things: (i) determining what qualifies as religion in any given legal context; and (ii) defining the term "religion." After all, the correct definition simply could be very broad in all contexts, and yet not all things that are religions would qualify in all legal contexts. For example, political speech does not cease to be speech just because it is not protected from government censure in certain forums. If I want to criticize the government on a public street corner, the Free Speech Clause generally prohibits government from silencing me. But if I want to criticize the government on a military base, the Free Speech Clause is less likely to prohibit the government from silencing me.[66]

62. People v. Philips, (N.Y. Ct. Gen. Sess. 1813), *reprinted in* 1 CATH. LAW. 199 (1955).
63. *Id.*
64. *Id.*
65. *Id.*
66. Brown v. Palmer, 944 F.2d 732, 739 (10th Cir. 1991).

If my speech is not protected from government censure in the second context, it is not because my criticisms cease to be speech. In both cases, my criticisms qualify as speech, yet what actually qualifies for *protection* varies as the legal context varies. Perhaps similarly there is a single definition of the term "religion," but what qualifies for protection under the Free Exercise Clause or raises concerns under the Establishment Clause is what should vary with the legal context.

This objection makes an important point that illustrates a dilemma for those who claim that an adequate definition of the term "religion" will resolve "inconsistent and contradictory decisions." Either the definition of the term "religion" must incorporate the legal context or it cannot help us to determine what qualifies as religion in the religion clauses because it is too broad. Either way, a definition of the term "religion" as it occurs in ordinary English will not help us to interpret and apply the religion clauses. Thus, it was a mistake for so many legal scholars to believe that providing a definition of the term "religion" could help resolve the "inconsistent and contradictory decisions" in the first place. The legal context matters and, as I will argue next, recognizing how it matters helps solve a certain interpretative puzzle involving the religion clauses.

IV. THE TENSION BETWEEN THE CLAUSES

Recognizing that what qualifies as religion in the religion clauses varies with the legal context sheds new light upon the so-called "tension between the clauses." To illustrate, consider the puzzle that emerges when we combine the following claims:

1. The Free Exercise Clause singles out religion for protection.
2. The Establishment Clause singles out religion as ineligible for some government benefits.
3. Because the same term "religion" is used in both the Establishment Clause and the Free Exercise Clause, what qualifies as religion is the same for both clauses.
4. Some Free Exercise contexts require a broad "conscientious objector" definition.
5. If what qualifies as religion is the same in all legal contexts, then the broad "conscientious objector" definition applies in all Free Exercise contexts.
6. If the broad "conscientious objector" definition applies in all Establishment Clause contexts, then too much government conduct will be forbidden.

Scholars have attempted to solve this puzzle in different ways. Before considering possible solutions, however, notice that denying 2 only makes matters worse. It simply is not plausible to interpret the Establishment Clause as forbidding the government

from benefiting non-religious individuals or institutions. Thus, it is not a viable solution to the puzzle to deny 2. Denying any of the others, however, are viable options.

A. The Free Exercise Clause Singles out Religion for Protection

One way to solve the puzzle is to deny 1, or to deny that the Free Exercise Clause singles out religion for protection. Christopher Eisgruber and Lawrence Sager provide the best example of those scholars who deny 1. For Eisgruber and Sager, what "properly motivates constitutional solicitude for religious practices is their distinct vulnerability to discrimination, not their distinct value; and what is called for, in turn, is protection against discrimination, not privilege against legitimate governmental concerns."[67] Eisgruber and Sager replace "the paradigm of privilege with that of protection."[68] Religion is special in two ways: "religious activities are more important than matters of fashion or recreation . . . and people are especially likely to undervalue, or persecute, religious activities different from their own."[69]

From this, Eisgruber and Sager advocate a principle of Equal Regard, which "requires simply that government treat the deep, religiously inspired concerns of minority religious believers with the same regard as that enjoyed by the deep concerns of citizens generally."[70] To qualify for protection, a claimant must show

> (a) that a general law significantly interferes with some actions motivated by her deep religious commitment; and (b) that had her deep, religiously inspired concerns been treated with the same regard as that enjoyed by the fundamental concerns of citizens generally, she would have been exempted from the reach of the general law.[71]

Government can accommodate religion only if it similarly accommodates, or it similarly would accommodate, non-religion. In this way, Eisgruber and Sager deny 1, or they deny that the Free Exercise Clause singles out religion for protection.

There are at least three problems with Eisgruber and Sager's account. The first problem is obvious: the text of the First Amendment explicitly singles out religion for protection. To require that non-religion be protected along with religion simply ignores the text of the Constitution itself.

Second, as Michael McConnell points out, while it may be

67. Christopher Eisgruber & Lawrence Sager, *Meditating Institutions: Beyond the Public/Private Distinction: The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct*, 61 U. CHI. L. REV. 1245, 1248 (1994).

68. *Id.*

69. *Id.* at 1271.

70. *Id.* at 1283.

71. *Id.* at 1285.

arguable whether the religion clauses *require* religious accommodations, it is clear that the religion clauses at least *permit* religious accommodations.[72] McConnell explains that among the Framers, some "believed that religious concerns should be given constitutional protection, some thought protection for religious concerns was desirable but should be left to legislative discretion, and some opposed exemptions altogether; however, no member of the First Congress expressed the view that it is improper to extend protection to 'religious sentiments.'"[73]

Third, Eisgruber and Sager's principle of Equal Regard is incoherent. For instance, "concerns of citizens generally" is not a standard to which a court can compare the treatment of religions. "Some secular interests are strong and some are weak. Religious interests cannot be treated equally with respect to both concepts."[74] Also, often there will be no secular exemptions with which a court can compare the religious exemption. In such cases, the "inquiry may proceed on a hypothetical basis, examining close analogies to form an educated guess about how the government would respond if faced with other powerful claims for exemption."[75] It is exceedingly difficult to discern the legislative intent for enacted laws, and thus, such a hypothetical inquiry would provide little, if any, guidance. Thus, Eisgruber and Sager's account not only runs counter to the text and history of the Free Exercise Clause, but also ultimately fails to provide courts with any standard by which to apply the Free Exercise Clause.

B. Because the Same Term "Religion" Is Used in Both the Establishment Clause and the Free Exercise Clause, What Qualifies as Religion Is the Same for Both Clauses

Another way to solve the puzzle is to deny 3, or deny that the definition of the term "religion" is the same in both clauses. Laurence Tribe once proposed defining religion broadly for the Free Exercise Clause and narrowly for the Establishment Clause.[76] He recognized that denying 3 would allow an expansive definition for the Free Exercise Clause to account for new "legitimate" practices, but avoid an expansive definition for the Establishment Clause "lest all 'humane' programs of government be deemed . . . suspect."[77]

Perhaps denying 3 would be a viable option if the term "religion" appeared once in each clause, but both clauses share one word. They read: "Congress shall make no law respecting an

72. McConnell, *supra* note 11, at 14.
73. *Id.*
74. *Id.* at 35.
75. *Id.* at 36.
76. TRIBE, *supra* note 7, at 827-28.
77. *Id.*

establishment of religion, or prohibiting the free exercise thereof. . . ."[78] Thus, Tribe's reading simply ignores the text. Also, as we have seen, even a single definition for each clause fails to account for the fact that what qualifies as religion varies with the legal context. For both reasons, denying 3 is an inadequate solution to the puzzle.

C. Some Free Exercise Contexts Require a Broad "Conscientious Objector" Definition

Another way to solve the puzzle is to deny 4, or to deny that a broad definition, like the "conscientious objector" definition, is ever needed. The originalist definition that we considered in Part II.A. entails such a result.[79] Yet as previously discussed, the traditional originalist definition is too narrow to capture everything that should qualify for protection under the Free Exercise Clause.[80] A narrow definition also would create Establishment Clause problems. For example, if neither Santeriaism nor Shintoism qualifies as a religion, then the Establishment Clause would not forbid government from directly and deliberately subsidizing or

78. U.S. CONST. amend. I.

79. *See supra* Part II.A.

80. Michael McConnell has argued that the term "religion," as it was used in the religion clauses, cannot extend to matters of conscience. McConnell's evidence is that the framers "seriously considered enacting constitutional protection for 'conscience' . . . and deliberately adopted the term 'religion' instead." McConnell, *supra* note 11, at 12. This "historical fact casts doubt on the suggestion . . . that the constitutional term 'religion' should be broadly interpreted in order to encompass secular claims of conscience," and thus such a broad interpretation "would constitute an amendment, not an interpretation, of the First Amendment, and one that the Framers specifically considered, debated, and ultimately rejected." *Id.*

If the issue were whether the term "religion" extends to matters of conscience in all legal contexts, then the history and text likely would entail that "religion" cannot extend to matters of conscience. In other words, if the religion clauses required a single definition, then McConnell would be correct. However, a single definition is not helpful, let alone required. Therefore, the "conscientious objector" definition is not required in all legal contexts. Thus, evidence that the Framers rejected the term "conscience" in favor of the term "religion" does not necessarily preclude the "conscientious objector" definition in some contexts.

To see why, consider the following two scenarios where I struggle over which of two words to choose. First, I understand what both words express and decide that one captures what I want while the other does not. Second, I understand what both words express and notice that neither fully captures what I want. In the second scenario, I choose the word that *best* captures what I wish to express, not the word that *fully* captures what I wish to express. This means that by choosing one, I do not thereby intend to reject the other in all contexts. Thus, if the framers struggled over which word best identified the type of entities about which they were concerned, the framers' debate simply demonstrates that most of the time the religion clauses do not extend to mere matters of conscience.

advocating them. When we deny 4 and opt for a more narrow definition of the term "religion" in all legal contexts, we solve the puzzle, but produce unacceptable, counterintuitive legal results.

D. If the Broad "Conscientious Objector" Definition Applies in All Establishment Clause Contexts, Then Too Much Government Conduct Will Be Forbidden

Another way to solve the puzzle is to deny 6, or to deny that a broad "conscientious objector" definition would cause the Establishment Clause to forbid too much government conduct. Andrew Koppelman takes this approach. Koppelman begins with what he takes to be a constitutional axiom: government may not declare religious truth.[81] From this axiom, Koppelman infers that all laws must have a secular purpose.[82] Thus, whether government may accommodate religion depends upon whether government can do so while maintaining a secular purpose.

For Koppelman, a law has a secular purpose if it fails to show a "preference more specific than support for religion in general,"[83] where "religion in general"[84] refers "to the activity of pursuing ultimate questions about the meaning of human existence. . . ."[85] A law has a secular purpose if the social meaning of the law would be agreed upon by "nearly any member of society,"[86] which turns "on the range of meanings that natives of the culture can reasonably ascribe to the government action in question"[87] given the "context in which the law was enacted."[88]

Koppelman characterizes the problem of defining the term "religion" as one of finding the proper "level of abstraction."[89] Koppelman defines "religion" at the most general level and concludes that government "may coherently single out [religion in general] for special favor."[90] Rather than arguing that non-religion must be accommodated along with religion, Koppelman argues that religion may be singled out for accommodation, but only if religion is defined as broadly as possible. In this way, Koppelman achieves nearly the same practical results as Eisgruber and Sager while seemingly respecting 1.

Koppelman's account, however, ultimately fails. First, it is unclear how to determine when "nearly any member of society"[91]

81. Andrew Koppelman, *Secular Purpose*, 88 VA. L. REV. 87, 89 (2002).
82. *Id.*
83. *Id.* at 90.
84. *Id.* at 139.
85. *Id.* at 90.
86. *Id.* at 114.
87. *Id.* at 115.
88. *Id.* at 147.
89. *Id.* at 122.
90. *Id.* at 133.
91. *Id.* at 114.

considers a law to have a secular purpose. Koppelman explains that the requirement depends upon "the range of meanings that natives of the culture can reasonably ascribe to the government action in question"[92] given the "context in which the law was enacted."[93] But what are these? Do tax exemptions for religious organizations, recognition of the priest-penitent privilege, school vouchers, the phrase "under God" in the Pledge of Allegiance, or exemptions from anti-discrimination laws for religious organizations have the requisite social meaning?

Koppelman suggests an "authoritative way to resolve disputes about social meaning": courts should use data similar to that gathered in trademark disputes.[94] If enough people agree both that the government is "sponsoring or promoting" religion and that the sponsorship or promotion "conveys a message that the government is endorsing the particular religious view," then the government's action lacks a secular purpose.[95] The problem with this is that one's opinions about whether two advertisements are similar enough to cause confusion generally do not depend upon one's ideology, whereas one's opinions about whether a statute has a religious social meaning do. There is a bitter division over whether the phrase "under God" in the Pledge of Allegiance "conveys a message" that the government is endorsing a particular religious view."[96] How do we determine whether it does?

First, we would need to know the proper question to ask native speakers. Do we ask whether the phrase "under God" in the Pledge of Allegiance has a secular purpose, whether the Pledge of Allegiance as a whole has a secular purpose, or whether, overall, public schools have a secular purpose? Even assuming that the proper question is the first, public opinion regarding whether the phrase "under God" in the Pledge of Allegiance has a secular purpose is unlikely to be the same in, e.g., New York City and Salt Lake City. It is unlikely that there is a single social meaning that "enough" Americans ascribe to any given law concerning religion, especially contentious ones, which, after all, are those most likely to be litigated.

Perhaps more importantly, sometimes a narrower set of entities than what qualifies as religion in general requires accommodation. If the government must accommodate or protect "the activity of pursuing ultimate questions about the meaning of existence," then every philosophy department has the same status

92. *Id.* at 115.
93. *Id.* at 147.
94. Shari Seidman Diamond & Andrew Koppelman, *Measured Endorsement*, 60 MD. L. REV. 713, 736-60 (2001).
95. *Id.* at 749-50.
96. *See* Newdow v. United States Cong., 292 F.3d 597, 604, 611 (9th Cir. 2002).

as religions. Thus, for example, every private school's philosophy department must receive the same treatment as the Catholic Church. In the end, Koppelman's account fails to single out religion at all, and thereby suffers from the same defects as Eisgruber and Sager's account.

E. What Qualifies as Religion Is Not the Same in All Legal Contexts

The best solution to the puzzle is to deny 5, or to deny that what qualifies as a religion is the same across all legal contexts. All other possible solutions to the puzzle presuppose that a single definition of the term "religion" is required, or at least that a single definition for each clause is required. Yet as we have seen, what qualifies as religion varies as the legal context varies. Thus, the fact that the priest-penitent privilege context requires a narrow definition does not mean that conscientious objectors falling outside such a narrow definition do not enjoy protection in other legal contexts.

There are at least three benefits to understanding that what qualifies as religion in the religion clauses differs in differing legal contexts. First, we will cease the quest for a single definition of the term "religion" to assist courts in interpreting the religion clauses. We will come to recognize not only that there is no single definition, but also that even if there were, it would not adequately serve in all legal contexts.

Second, we will cease attempting to resolve tension between the clauses that does not exist. For example, recognizing that a narrow definition is needed in the priest-penitent context will no longer lead us to conclude that conscientious objections, similar to those made by Seeger and Welsh, should never qualify as religious, or that groups falling outside such a narrow definition never implicate the Establishment Clause. As a result, scholars should no longer attempt to solve such illusory problems. Appreciating the contextual nature of what qualifies as religion may not dissolve all tension between the two clauses, but it will keep us from developing solutions to problems generated by a false assumption—that what qualifies as religion is the same in all legal contexts.

Third, we will recognize that we can legitimately draw upon interpretations of many other clauses in the Constitution to interpret the religion clauses. For instance, where religious expression is at issue, then the natural place to find relevant parallels is the Free Speech Clause.[97] Where discrimination

97. *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819 (1995), is an example of the Court treating religious freedom of expression as a kind of expression protected under the Free Speech Clause.

against individuals based upon membership in a religion is at issue, then the natural place to find relevant parallels is the Equal Protection Clause.[98] Pointing out that religion does not always function like speech, race, or an assembly in some contexts, however, should not prevent courts from drawing analogies to these definitions in other contexts. Perhaps the religion clauses are best viewed as extensions of other clauses into the religious context.[99]

Noticing that what qualifies as religion in the religion clauses differs in differing legal contexts sheds new light upon religion clause scholarship. While we still need a way to identify religions in specific contexts, we can at least eliminate methods that are fundamentally misguided, and in turn, understand that the so-called "tension between the clauses" is a problem not worthy of the vast attention that it receives.

V. CONCLUSION

There is no single definition of the term "religion" as it occurs in ordinary English, at least not one that can help interpret and apply the religion clauses. The reason for this is simple: what qualifies as religion differs across differing legal contexts. A single definition will not work in all legal contexts, and thus, courts and scholars should stop attempting to provide a definition of the term "religion" that does.

By recognizing that what qualifies as religion varies as the legal context varies, we can see that the vast attention given to the so-called "tension between the clauses" is misplaced. Scholars should discontinue their search for ways to reduce tension that presupposes a unique definition of "religion" applies in all legal contexts. The better approach is to view the religion clauses as an extension of other clauses—Free Speech Clause, Equal Protection Clause, etc.—into the religious context. Within these contexts, the religion clauses forbid certain types of favoritism as well as certain types of discrimination and exclusion. I have not addressed the most difficult question: how do we determine when the religion clauses forbid these things? However, at least we should no longer be sidetracked by insignificant definitional problems and illusory puzzles.

98. *Employment Div. v. Smith*, 494 U.S. 872 (1990), moves the free exercise doctrine closer to the equal protection doctrine, as articulated in *Washington v. Davis*, 426 U.S. 229 (1976).

99. For a defense of this reading, see McConnell, *supra* note 11, at 18.