A Loss for Words: "Religion" in the First Amendment

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ARTICLES

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Only something which has no history can be defined.
—Friedrich Nietzsche

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INTRODUCTION

The Religion Clauses of the First Amendment became effective over 200 years ago, but the Supreme Court has yet to provide an authoritative

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Before asking how religion should be defined, one should of course first ask if religion can be defined. Nonetheless, scholars typically fail to seriously consider from the outset whether religion is definable. They simply assume that it is and immediately address the question of how it should be defined. Then, each eventually arrives at an answer in the form of a glittering definition that purportedly captures the essence of religion. For those who doubt that religion has an essence and is definable, taking any of these definitions seriously is difficult, if not impossible. What would better satisfy such skeptics is a method of determining what constitutes religion, not a definition thereof.

Part I of this Article addresses the threshold question of why scrutinizing and deciphering the term “religion” in the First Amendment is important today. Part II examines the attempts of the Supreme Court and scholars to define religion, explicitly or implicitly, in accordance with its supposed essence. Relying in large part on the writings of Friedrich Nietzsche and Ludwig Wittgenstein, Part III explains why abstract concepts such as religion lack an essence and defy definition. Part IV explores and critiques a possible solution to this problem of undefinability: the so-called “analogical approach,” which seeks to provide a method of determining whether a particular belief system or way of life constitutes a religion. Finally, Part V offers suggestions for refining the analogical approach to remedy some of its shortcomings.

I. WHY BOTHER?

A critic of this endeavor might argue that the meaning of “religion” is intuitively obvious and requires no exposition. Religion, the argument goes, has manifested itself in various forms since at least the beginning of written history and orients the thinking of every competent adult alive today in some way. The need to determine what constitutes “religion” in the First Amendment is thus no greater than the need to determine what constitutes the sky. We simply know religion when we see it.

Without a doubt, this argument is correct in its underlying assumption that most people would agree that Judaism, Christianity, Islam, Buddhism, and the like each constitute a religion. But the previous centuries have witnessed an explosion of new forms of religion, belief systems, and ways of life that test the boundaries of this concept. Reasonable minds may disagree over how to classify many of these new forms.

Consider Scientology, for example. Professors deChant and Jorgensen contend that Scientology “exhibits almost all of the ordinary

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features of the major world religions.” These features, they have said, include: (1) “a sacred, supernatural myth of the origins and nature of humanity”; (2) a comprehensive account of the human condition; (3) a prophet-like figure, L. Ron Hubbard; (4) writings that form sacred scriptures and define religious doctrines; (5) religious practices and rituals; (6) moral principles and ethical standards for guiding conduct; (7) an ordained clergy and community of believers; and (8) involvement in “social betterment programs in service to the larger, secular society.” Thus, deChant and Jorgensen concluded that Scientology is clearly a religion.

On the other hand, some courts in the United States and Europe have disagreed. In Missouri, for instance, the state tax commission ruled that the Missouri Church of Scientology is not a religion, but rather “an applied philosophy [with] a certain religious connotation.” The Missouri Supreme Court later affirmed the ruling. In a similar vein, the Federal Labor Court in Germany concluded that Scientology is ultimately “a commercial enterprise.” The Charity Commission in England also reached this conclusion; as a result, it rejected the Church of Scientology’s application to register as a charity. Here, taking sides in this debate over the nature of Scientology is not the point. Rather, the point is that this debate among reasonable minds illustrates that the concept of religion is, upon close scrutiny, far from straightforward.

A perhaps more perplexing example is so-called “Christian atheism” or “Godless Christianity.” Those who are typically credited with laying its intellectual foundation include Richard Braithwaite, R.M. Hare, and Paul Van Buren. Despite rejecting the empirical propositions of Christianity, including its conception of God, they considered themselves Christians.

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3. Id.
5. Id.
9. Id.
Moreover, Van Buren practiced as an ordained Episcopalian priest, and Hare attended an Anglican church and participated in its rituals. Braithwaite summarized their general position; according to him, a Christian is one who lives in accordance with Christian morality and associates her intention with the thinking of Christian stories, though she need not believe that these stories correspond to empirical fact.

One could argue that belief in God is a necessary and sufficient condition for being a Christian. This argument is certainly reasonable, but not airtight. For example, though atheistic, Buddhism is universally seen as a religion. Why, one might ask, should we automatically conclude that an atheist who adheres to traditional Buddhist practices and morality is religious, whereas an atheist who adheres to traditional Christian practices and morality is not? Conceivably, an atheistic Christian of this sort might be more religious than a Christian who believes in God yet behaves immorally and never attends church or engages in rituals. Again, taking sides here is not the point, nor is venturing into the realm of theology necessary at this juncture. The point is simply that reasonable minds may disagree over how to classify idiosyncratic belief systems and ways of life. Christian atheism is one of the numerous examples of how the concept of religion, like other concepts, is encircled by an area of vagueness and uncertainty.

By all accounts, there are no signs of slowing in the trend of emerging forms of belief systems and ways of life that straddle the divide between religion and nonreligion. If Harold Bloom—the great literary critic and scholar of religion—is correct in arguing that one of the driving forces in American culture is Emersonianism, then the continuance of this trend is certain. Ralph Waldo Emerson encouraged each generation to create a belief system and way of life disconnected from the past and thus totally unique. In his famous words:

Our age is retrospective. It builds the sepulchres of the fathers. It writes biographies, histories, and criticism. The foregoing generations beheld God and nature face to face; we, through their eyes. Why should not we also enjoy an original relation to the universe? Why should not we have a poetry and philosophy of insight and not of tradition, and a religion by revelation to us, and

11. God and the Ethics of Belief: New Essays in Philosophy of Religion 210 (Andrew Dole & Andrew Chignell eds., 2005) [hereinafter God and the Ethics of Belief] (noting, for example, that “Hare used to say the Apostles’ Creed every Sunday in church a little ahead of the rest of the congregation”).
not the history of theirs? Embosomed for a season in nature, whose floods of life stream around and through us, and invite us, by the powers they supply, to action proportioned to nature, why should we grope among the dry bones of the past, or put the living generation into masquerade out of its faded wardrobe? The sun shines to-day also. There is more wool and flax in the fields. There are new lands, new men, new thoughts. Let us demand our own works and laws and worship.  

The accuracy of Bloom’s assessment of the presence of Emersonianism in American culture is open for debate. In fact, Bloom repeatedly read Emerson’s writings for decades. After absorbing the perspective of another person in this way, one tends to view the world in the colors of that perspective. Assuming, though, that Bloom’s assessment is accurate, then new and unique belief systems and ways of life that are neither clearly religious nor clearly nonreligious (like Emersonianism itself) are inevitable. As such forms continue to surface, the need to know how to accurately determine what constitutes “religion” in the First Amendment will become increasingly pressing.

As Eduardo Peñalver, now a Professor at Cornell Law School, rightly argued in a student note he published in the Yale Law Journal, the meaning of religion is not a hollow, academic concern. Rather, “benefits under the Free Exercise Clause and . . . burdens under the Establishment Clause”


16. See Robert Moynihan, Interview: Harold Bloom, DIACRITICS, Fall 1983, at 57, 66 (where Bloom states that he “began to read Emerson intensely in 1963 or 1964 . . .”).

17. Quoting George E. Woodberry, Sydney Ahlstrom maintains that Emerson “was . . . ‘exclusively a man of religion’ whose every thought [was] corollary to his religious premises.” SYDNEY E. AHLSTROM, THEOLOGY IN AMERICA: THE MAJOR PROTESTANT VOICES FROM PURITANISM TO NEO-ORTHODOXY 293 (2003). On the other hand, after Emerson delivered his famous Divinity School Address at Harvard, conservative Bostonians labeled him an atheist. See Robert E. Burkholder, Emerson, Kneeland, and the Divinity School Address, in 58 AM. LITERATURE 1, 10 (1986). Some modern commentators view Emerson in a similar light. Harold Fromm, for instance, argued that Emerson “gave up on historical Christianity,” and when he did, [H]e knowingly ceased to be a Christian. He had left his church, spoken of Jesus as a human role model, and used biblical history and Christian dogmas simply as figures of speech, supportive exempla in his powerful rhetoric against the dead incarnations of past spirit. If being regarded as a believer required literal belief in scripture, then, in fundamentalist layman’s parlance, Emerson was indeed becoming the atheist that some of his detractors claimed. Or as Nietzsche, his devoted-but darker and more pessimistic-disciple, was famously to put it, “God is dead.”

Harold Fromm, Overcoming the Oversoul: Emerson’s Evolutionary Existentialism, 57 HUDSON REV. 71, 81 (Spring, 2004).

hinge on whether an individual or group is deemed religious or nonreligious. Accordingly, adopting a method of determining what constitutes religion that is fair and true to reality—and thus reflective of the diversity of contemporary religious belief and practice—is called for. Ideally, such a method would limit judicial arbitrariness and bias and help ensure just treatment of the present and future belief systems and ways of life that are difficult to classify. No less important, the method would also help ensure just treatment of the members of minority religions who lack access to the political process, as they are often surrounded by controversy and vulnerable to majoritarian and judicial prejudice.

At this point in the discussion, a critic might feel the need to interject. Specifically, she might make the argument that, although important, this discussion about the meaning of the term “religion” in the First Amendment is ultimately pointless. After all, in Employment Division v. Smith, the Supreme Court overturned decades of precedent establishing that a person is exempt under the Free Exercise Clause from any law that substantially burdens her religious liberty, unless a compelling state interest justifies denying the exemption. In effect, the Court practically erased the Free Exercise Clause from the Constitution. Consequently, very few cases will ever emerge requiring the Court to distinguish religion from nonreligion because such cases typically arise in the free exercise context. The need to determine what constitutes “religion” is therefore so minor as to merit disregard.

In addressing this argument, there are good reasons to think that Smith will not endure for terribly long. Significantly, only five Justices comprised the majority. This suggests that a Court with a different make-up could decide a similar case differently in the future. The fact that Smith is open to criticism that many find persuasive renders this possibility more likely. Indeed, Smith generated a deeply negative response from commentators, states, and Congress, thereby casting its legitimacy into serious doubt.

Notably, Professor Kent Greenawalt of Columbia Law School, a prolific writer in the area of constitutional law and jurisprudence, protested

19. Id.
20. See deChant & Jorgensen, supra note 2; see also Peñalver, supra note 18, at 793 n.16 (discussing the failure of the political system and judiciary to protect religious minorities).
24. Smith, 494 U.S. at 873 (stating that the majority included Justices Scalia, Rehnquist, White, Stevens, and Kennedy).
that “the Supreme Court has nearly written the Free Exercise Clause out of the Constitution.”

Samuel Rabinove, the former long-time legal director of the American Jewish Committee, exhibited a similar reaction; he claimed that Smith “virtually eviscerate[d] the free exercise of religion.”

The Los Angeles Times condemned the Court for “pure legal adventurism” and characterized Smith as “a sweeping repudiation of nearly a century of humane and enlightened legal precedent.”

A plethora of other commentators expressed this same, critical tone. What is more, certain states devised their own unique solutions to the problem created by Smith. For instance, a few state supreme courts (including Washington, Minnesota, and Wisconsin) interpreted their respective constitutions as requiring greater free exercise protection than the U.S. Constitution.

Perhaps most striking was Congress’s response. After the Court decided Smith, many prominent religious and civil liberty groups intensely lobbied legislators on Capitol Hill to undo the resultant change in free exercise law.

Congress answered almost unanimously with the Religious Freedom Restoration Act of 1993 (“RFRA”). Without doubt, RFRA was an attempt to overturn Smith and reestablish former free exercise precedent, requiring exemptions from laws that substantially burden religious liberty when no compelling state interest exists.

Eventually, though, in City of Boerne v. Flores, the Court struck down RFRA as applied to state and local governments on the grounds that Congress lacked authority to supersede its constitutional interpretation in Smith.

In short, as the response from commentators, states, and Congress illustrates, Smith is a house built upon sand. We want to think that the walls of the Court can silence only so many appeals to enlightened principles, such as freedom of conscience and religious expression, before these principles seep through the walls and onto the pages of the Court’s
opinions. If Smith is revisited and addressed differently, as is quite possible, then the overall number of free exercise claims will undoubtedly increase. The number of such claims could reach unexpected heights, given the continuous burgeoning of new forms of religion, belief systems, and ways of life that lie in the concept of religion’s area of uncertainty. Should this scenario unfold, the already pressing need to determine what constitutes “religion” in the First Amendment would become momentous. Waiting until Smith is overruled to refine a method designed to make this determination would likely leave the judiciary unprepared to handle the consequent influx of free exercise claims.

Even now, however, with Smith as established law, at least three factors indicate that the need to determine what constitutes “religion” in the First Amendment is still great. First, Smith allows for free exercise challenges to laws that “target” a religion for the disadvantaged.34 Although targeting is rare, it can still happen, and the Court needs to know what constitutes “religion” to handle such cases.

Second, Smith does not affect the free exercise rights of a rather broad class of potential claimants. After the Court struck down RFRA in City of Boerne v. Flores, Congress once again responded—this time with the Religious Land Use and Institutionalized Persons Act (“RLUIPA”).35 Through RLUIPA, Congress restored pre-Smith free exercise rights in two contexts: land-use planning and persons in institutions (such as prisons, mental hospitals, and nursing homes).36 Thus, in these contexts, a person is exempt from a law that substantially burdens her religious liberty unless a compelling state interest justifies denying the exemption. This pre-Smith standard applies to a sufficiently broad class of potential claimants so as to justify prompt efforts to refine and adopt a method of distinguishing religion from nonreligion. Indeed, courts tend to struggle with the task of making this distinction in the context of institutionalized persons. Prisons are often a wellspring of free exercise claims involving beliefs and practices that are difficult to classify.37

36. Id. at 2000cc–1(a).
Third, the holding in *Smith* only limits the scope of the Free Exercise Clause and does not implicate the Establishment Clause. The manner in which some judges construe the term “religion” in establishment clause cases could produce negative societal consequences. One way to avoid these consequences is to oblige the judiciary to apply a method of accurately determining what constitutes “religion.” The behavior of the District Court for the Southern District of Alabama under Judge William Brevard Hand illustrates the danger in imposing no such obligations.

In 1983, the district court wrongly held that it lacked authority to prohibit a school board from allowing regular prayer services in public schools, prayer services designed primarily for Christians. On remand, Chief Justice Hand, a Christian, realigned the parties and concluded that secularism meets the criteria for his definition of religion. Then, he ruled that the use of history, economics, social studies, and science textbooks in public schools promotes secularism and violates Alabama’s Establishment Clause, so the use of such textbooks was therefore prohibited. This ruling was reversed and remanded as well. Nonetheless, as this incident shows, granting some judges the freedom to create and apply a definition of religion based squarely on their own biased perspectives presents a real threat.

In sum, cases will arise often enough under the “targeting” exception, RLUIPA, and the Establishment Clause to justify the endeavor to accurately determine what constitutes “religion” in the First Amendment. Given the shaky ground upon which *Smith* is founded, this endeavor makes all the more sense. The day may indeed come when the meaning of the Free Exercise Clause is fully restored and the Court no longer grovels before the throne of power at the expense of individual liberty. In light of this, prudence requires a prompt attempt to perfect a method of

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41. *Id.* at 988.

distinguishing religion from nonreligion. The very concept of religion is rapidly changing under the waves of modern events. New belief systems and ways of life continue to emerge that test the boundaries of this concept. If Smith is overruled, the number and complexity of the resultant free exercise claims could prove staggering. The judiciary should better prepare itself to face these possibilities and realities.

II. ATTEMPTS TO DEFINE RELIGION, OR THE SEARCH FOR AN “ESSENCE”

The history of attempts to define religion is one of shortcomings. Like the dagger that hovered before Macbeth’s eyes, the essence of religion is a creation of the mind that disappears when grasped at. Various judges and legal scholars sought to break this spell—to put this supposed “essence” into immortal words—only to form additional links in the chain of shortcomings. But their efforts were not in vein. By coming up short, their efforts serve the important function of further justifying abandonment of the search for a definition of religion in favor of a method of analysis.

A. The Court’s Attempts

The Supreme Court experienced first-hand the folly of assuming that religion has an essence and of attempting to craft a definition based on this assumption. In 1890, the Court suggested that monotheism—the belief in one Supreme Being—is at the heart of religion: “The term ‘religion’ has reference to one’s views of his relations to his Creator, and to the obligations they impose of reverence for his being and character, and of obedience to his will.” Approximately forty years later, Chief Justice Hughes expressly articulated the Court’s underlying assumption: “The essence of religion is belief in a relation to God.” By assuming that monotheism is the essence of religion and by attempting to craft a definition based on this assumption, the Court put itself in an embarrassing position. Specifically, the Court excluded the world’s nontheistic and polytheistic religions—which today are shared by over one billion people—from the term “religion” in the First Amendment.

In reaction to this revealing underinclusiveness, the Court abandoned its search for an essence and issued a series of decisions allowing just about anything under the sun to qualify as a religion, even openly nonreligious belief systems. In Torcaso v. Watkins, for example, the Court rejected its previous equation of religion with monotheism as a violation of the

43. See William Shakespeare, The Tragedy of Macbeth act 2, sc. 1.
Establishment Clause. At the same time, it declared that “Secular Humanism” is a religion without adequately explaining why. Although certain forms of secular humanism border on the religious, the prominent forms affirm neither God nor a transcendent reality. George Freeman, for example, argued that a belief system that does not affirm God or a transcendent reality lacks any traditional religious significance. Despite vastly expanding the scope of the term “religion” in the First Amendment to include seemingly patent nonreligious belief systems, the Court did not actually define the term.

In United States v. Seeger and Welsh v. United States, the Court addressed the meaning of “religion” in the context of section 6(j) of the Universal Military Training and Service Act. In the Torcaso-like spirit of overinclusiveness, the Court broadened the scope of this term to include deeply held moral and ethical beliefs rooted in history or sociology, so long as they “function” as a religion in the claimant’s life. These cases concerned a statutory definition of religion, not a constitutional one. Nonetheless, the conceptual difficulties are largely the same, and some judges and scholars have predicted that the Court will eventually define the term “religion” in the First Amendment just as broadly. These predictions have not come to pass, but if they do, the definition of religion will be so broad that it will mean practically nothing.

Since Seeger and Welsh, the Court has remained remarkably silent about the meaning of “religion” in the First Amendment, except for occasional dicta. Most notably, in Wisconsin v. Yoder, the Court refused to extend the holdings in Seeger and Welsh to cases involving the Religion Clauses. The Court flatly declared that “to have the protection of the Religion Clauses, the claims must be rooted in religious belief,” as opposed to claims rooted in history or sociology, for example. Again, however, the Court in Yoder did not define “religion” in the First Amendment, and to this day no such definition exists.

In sum, from 1890 until today, the pendulum of what “religion” in the First Amendment means has swung from embarrassingly parochial underinclusiveness to a seemingly all-welcoming overinclusiveness. Yoder narrowed the term’s scope somewhat, excluding openly nonreligious

47. 367 U.S. 488, 495 (1967).
48. Id. at 495 n.11.
49. 2 MORAL EDUCATION: A HANDBOOK 398–99 (F. Clark Power et al. eds., 2008).
53. Id. at 341.
54. Freeman, supra note 50, at 1526 n.45.
56. Id. at 215–16 (emphasis added).
beliefs, but the judiciary still remains empty-handed. The inability to grasp and define the essence of religion explains both this wild disparity over the previous century and why the Court has nothing to really show for its efforts. It may also explain why the Court has apparently abandoned the task of defining religion.

B. Scholarly Attempts

In the words of the anthropologist Alexander Goldenweiser:

Few problems have occupied the minds of thinking men so persistently and intensely as the problem of the origin and nature of religion. The psychologist vies with the sociologist and anthropologist, the philosopher with the philologist and theologian, in their attempts to enhance our comprehension of that peculiar phenomenon, which in its distribution is at least coextensive with man, and possesses, as an emotional value, but few rivals in the entire gamut of psychic experiences.57

Given the centrality of the question of religion, particularly its “essence,” the Court’s empty-handedness has understandably inspired various legal scholars to try to pinpoint and define this supposed essence. These scholars undoubtedly learned from the Court’s struggles and failures, but their attempts have ultimately been unsuccessful as well. Two well-known attempts, both in the form of student notes, illustrate the profound complications inherent in all such attempts.

A 1978 Harvard Law Review note by John Sexton, who later became the Dean at New York University School of Law, and who is now the President of New York University, drew heavily on the writings of the Protestant theologian Paul Tillich.58 According to Tillich, the concerns of each individual can be ranked, and each individual has one ultimate concern that gives meaning and orientation to her entire life.59 Whatever is her ultimate concern, Tillich claimed, is her religion.60 The Seeger Court relied upon this doctrine to justify its conclusion that seemingly nonreligious beliefs qualify as a religion if they “function” as one in the claimant’s life.61

Sexton accepted Tillich’s notion that ultimate concern is “the essence of religion.”62 Accordingly, he claimed that “religion exists when there is

59. Id. at 1067 (citing PAUL TILLICH, DYNAMICS OF FAITH 1–2 (1958)).
60. Id. (citing PAUL TILLICH, THE PROTESTANT ERA 58, 87 (1948)).
62. Note, supra note 58, at 1066–67 (quoting PAUL TILLICH, DYNAMICS OF FAITH 1–2 (1958)).
an ultimate concern,” meaning a concern that is of “unconditional, absolute, or unqualified character” to the person who harbors it. Sexton passionately argued that Tillich’s “ultimate concern” definition should determine what constitutes “religion” in the First Amendment, particularly under the Free Exercise Clause. This definition, he reasoned, best promotes “the core value underlying the free exercise clause—inviolability of conscience.”

In the spirit of promoting this core value, Sexton affirmed the broad scope of the “ultimate concern” definition and even suggested that Marxism, Nazism, and other nonreligious ideologies could qualify as a religion under it:

Even political and social beliefs may be religious. Tillich suggests: ‘If a national group makes the life and growth of the nation its ultimate concern . . . [e]verything is centered in the only god, the nation . . .’ This point has been variously made about “civil religion in America,” Communism, Marxism, Nazism, Italian Fascism, and Japanese militarism.

While Sexton’s appreciation for inviolability of conscience is admirable, one might wonder about a definition under which Marxism and Nazism could qualify as religions. As Sexton would have it, the belief system of a reincarnated Karl Marx or Adolf Hitler should qualify as a religion and thus receive free exercise protection so long as the belief system appears to constitute the claimant’s ultimate concern. Arguably, if political philosophies such as these could qualify, the term “religion” in the First Amendment would be so broad as to have little meaning and use.

Despite its apparent breadth, an “ultimate concern” definition may in fact prove in practice to be unacceptably narrow. Few individuals adhere to their beliefs with the tenacity required to qualify their core belief as an “ultimate concern.” Sexton asserted that a good measure of whether an individual’s concern is “ultimate” is whether she would “accept martyrdom in preference to transgressing its tenets.” The number of people actually willing to sacrifice their lives for a religious belief or practice is likely very small. As Arthur Schopenhauer so convincingly argued, the basic

63. Id.
64. Id. at 1075.
65. Id. at 1072. Sexton maintained that the Establishment Clause would need a narrower definition, so as to avoid “attack on all programs that further the ultimate concerns of individuals or entangle the government with such concerns.” Id. at 1084. Needless to say, those who oppose a definition of religion for First Amendment purposes find the idea of a dual definition doubly troubling.
66. Id. at 1071 (footnotes omitted).
67. Id. at 1075 n.108 (quoting United States v. Kauten, 133 F.2d 703, 708 (1943)).
character of human beings is the will to live—the will, despite all obstacles and suffering, to continue living. 68

In Sherbert v. Verner, for example, Sherbert refused to work on Saturdays for religious reasons, and a state agency denied her unemployment compensation as a result. 69 The Court held that the state agency violated Sherbert’s free exercise rights in doing so and ruled in her favor. 70 But, under the “martyrdom test,” the Court should have ruled against Sherbert unless she was willing to sacrifice her life to avoid working on Saturdays. 71 Assuming that the will to live is as powerful as Schopenhauer said, Sherbert would have chosen life over no work on Saturdays—a choice that, under Sexton’s test, would have stripped her unquestionably religious claim of free exercise protection. 72 If courts were to adopt this “martyrdom test,” many other unquestionably religious claims would likely fail to receive free exercise protection as well. Again, most people would seem unwilling candidates to endure martyrdom in defense of their religious beliefs and practices.

In short, if ever adopted, the “ultimate concern” definition of religion would probably oscillate between producing overinclusive and underinclusive outcomes, depending on how judges interpret it. As Sexton admitted, this definition can incorporate seemingly obvious nonreligious belief systems, such as Marxism and Nazism. 73 At the same time, his “martyrdom test” could narrow the “ultimate concern” definition so drastically that “only a few could expect to enjoy its protection.” 74 A definition that would produce these outcomes has a weak claim of representing “the essence of religion.” 75

The “ultimate concern” definition exemplifies the difficulties in identifying a single feature as constituting the essence of religion. Analysis of the “functional definition” proposed in a Cornell Law Review note by Ben Clements illustrates that even a definition based on a set of features (and thus apparently more specific and representative) also cannot constitute the essence of religion and is doomed to fail. 76

Clements argued that religion should be defined as “a comprehensive belief system that addresses the fundamental questions of human existence, such as the meaning of life and death, man’s role in the universe, and the

70. Id. at 406.
71. Freeman, supra note 50, at 1539.
72. Id.
73. Note, supra note 58, at 1071.
74. Freeman, supra note 50, at 1541.
nature of good and evil, and that gives rise to duties of conscience.”\textsuperscript{76} This
definition, he argued, focuses not on “the specific practices or beliefs of
traditional religions,” but rather on the \textit{function} of religion in people’s
lives, as do the definitions of Sexton and the Court in \textit{Seeger} and \textit{Welsh}.\textsuperscript{77}
As such, he believed that this functional definition honors the principles
underlying the Religion Clauses (especially the Free Exercise Clause),
principles such as the inviolability of conscience, inclusivity under the law,
and affirmation of difference.\textsuperscript{78} A narrower definition, he argued, such as
one based on the specific beliefs and practices of the world’s major
religions, would exclude new or idiosyncratic religions and thus fail to
honor these principles, thereby detaching itself from the Constitution.\textsuperscript{79}

While appropriately aligned with relevant constitutional principles,
Clements’s functional definition suffers from a high degree of
overinclusiveness. Like the ultimate concern standard, it flings the door of
religion open to ideologies such as Marxism and Nazism. Clements failed
to recognize just how broad his functional definition is. He argued that it
would \textit{not} incorporate “political philosophies” because “it is not clear that
they address fundamental questions.”\textsuperscript{80} However, the history of political
philosophy suggests quite the contrary. Marxism and Nazism very much
address “fundamental questions,” the first major prong of Clements’s
definition. Likewise, Marxism and Nazism satisfy the second major prong
of Clements’s definition: establishing “duties of conscience.”

Marxism seems to posit a conception of good and evil. For Marx, evil
is “the restriction of man to something below his full humanity.”\textsuperscript{81} This
condition, he argued, is most pronounced in capitalist societies, where most
human beings are mere cogs in a machine, dominated and exploited by the
power elite.\textsuperscript{82} On the other hand, Marx believed that “[t]he realization of
[a] thing’s essence—its nature, what it inherently is—is the thing’s
good.”\textsuperscript{83} For example, according to Marx, “moral good” is the realization
of the essence of freedom, which entails the abolition of the conditions that
force human beings to something below their humanity.\textsuperscript{84} Freedom, in
other words, entails the negation of the oppressive and exploitative
conditions that render capitalist societies possible, and the negation of these
conditions is a prerequisite to the realization of “moral good.”

\begin{itemize}
\item \textsuperscript{76} \textit{Id.} at 553.
\item \textsuperscript{77} \textit{Id.} at 551.
\item \textsuperscript{78} \textit{See id.} at 551–52.
\item \textsuperscript{79} \textit{See id.}
\item \textsuperscript{80} \textit{Id.} at 554–55.
\item \textsuperscript{81} Philip Rieff, \textit{The Feeling Intellect: Selected Writings} 87 (Jonathan B. Imber
\item \textsuperscript{82} Karl Marx \& Friedrich Engels, \textit{The Communist Manifesto} 70 (Joseph Katz
\item \textsuperscript{83} Philip J. Kain, \textit{Marx and Ethics} 21 (1988).
\item \textsuperscript{84} \textit{Id.}
\end{itemize}
Furthermore, as George Novack noted, Marx squarely addressed the following fundamental questions: “Is life worth living? And if so, how should the inevitable approach and advent of death be met?”

Marx’s reply to these questions, Novack pointed out, is that “life is the supreme value for humankind,” not life as it is in capitalist societies, “but life as liberated humanity will make and remake it.” Although Marx embraced the idea of material determinism, he believed that to “make and remake life,” human beings must nonetheless act to liberate themselves. To achieve liberation, he maintained, human beings must first abolish private property, the foundation of the capitalist system. In the Marxist worldview, one could certainly characterize the goal of abolishing private property as a duty of conscience. Moreover, one could characterize “man’s role in the universe” in a twofold manner: first, to decrease “the power of one person over another” by creating an egalitarian, communist state; and second, to “increase[e] humanity’s power over nature.”

Conversely, a dedicated Nazi may believe that man’s role in the universe is to elevate the “Aryan race” and may see “the meaning of life in the person of Adolf Hitler.” In the words of Hitler himself, whoever lacks faith in him commits “a sin against the meaning of life as a whole.” Further, a dedicated Nazi’s view of good and evil is not difficult to discern. Hitler believed that the Jews were “the source of all modern evil” and viewed their extermination as part of “God’s plan.” In addition, Hitler and other Nazis believed that individuals who belonged to the “Aryan race” were under a duty to sacrifice themselves for the sake of the whole—for the sake of carrying out “God’s plan.” Hitler told Germans that they were nothing and that their nation (i.e., the whole) was everything.

In sum, political ideologies that few people would regard as religions could qualify as such under Clements’s functional definition. As argued above, Marxism and Nazism seem as though they could qualify as religions because they each offer a comprehensive belief system that “addresses the fundamental questions of human existence” and “gives rise to duties of

85. George Novack, Marxist Writings on History & Philosophy 185 (2002).
86. Id.
88. Marx & Engels, supra note 82, at 67.
89. Novack, supra note 85.
94. Id.
conscience.”\textsuperscript{95} Clements’s functional definition is thus overbroad and unsatisfactory, as Sexton’s can be. Of course, the critic could once again interject here. She could argue that the definitions of religion that Sexton and Clements proposed are not as sophisticated as others, and that undermining these definitions by no way entails that all definitions of religion are flawed. The next section anticipates and addresses this argument.

As a preliminary response, any definition of religion that attempts to capture the essence of religion— including Sexton’s single-factor definition and Clements’s multi-factor one—is doomed to fail and will unravel when critiqued. It will either exclude some belief systems that are clearly religious, incorporate some belief systems that are clearly nonreligious, or perhaps both. And what definition of religion does not at least implicitly attempt to represent its essence? All those who attempt to define religion grasp at this illusory essence and walk away with little to nothing in hand. Their shortcomings flow from the fact that they fail to recognize that religion lacks an essence and therefore cannot be defined.

\textbf{III. THE UNDEFINABILITY OF “RELIGION”}

One will find no shortage of judges and scholars who argue that religion lacks an essence and that any definition of religion is thus destined to prove inadequate. According to Justice Murphy of the High Court of Australia, “There is no single acceptable criterion, no essence of religion.”\textsuperscript{96} In a similar vein, United States Federal District Judge Hansen stated that “a succinct and comprehensive definition . . . would appear to be a judicial impossibility.”\textsuperscript{97} William James, in \textit{The Varieties of Religious Experience}, bluntly asserted that “it would be foolish to set up an abstract definition of religion’s essence, and then proceed to defend that definition from all comers.”\textsuperscript{98}

Perhaps nobody, however, has demonstrated more convincingly than Friedrich Nietzsche and Ludwig Wittgenstein that abstract concepts such as religion lack an essence and defy definition. Nietzsche’s analysis of the concept of punishment and Wittgenstein’s analysis of the concept of games are of particular relevance here. Although neither analysis focuses on the definability of religion, both shed light on why the search for an essence of religion is misguided and why any definition stemming from this search is

\begin{itemize}
\item \textsuperscript{95} Clements, supra note 75, at 553.
\item \textsuperscript{96} Kent Greenawalt, \textit{Religion as a Concept in Constitutional Law}, 72 CALIF. L. REV. 753, 775 n.86 (1984) (quoting \textit{Church of the New Faith v Comm’r of Payroll Tax} (1983) 154 CLR 120, 150 (Austl)).
\item \textsuperscript{98} William James, \textit{Circumscription of the Topic}, in \textit{THEORIES OF RELIGION: A READER} 64 (Seth Kunin & Jonathan Miles-Watson eds., 2006).
\end{itemize}
doomed from the start. While Nietzsche’s insights are illuminating, only Wittgenstein offered a real solution to this problem of undefinability.99

In his book, *On the Genealogy of Morality*, Nietzsche took aim at certain moral genealogists who confuse the purpose of punishment with its origin.100 According to Nietzsche, they commit the same error: they specify a purpose of punishment—for example, revenge or deterrence—and then argue that punishment originated for this purpose.101 To combat such thinking, Nietzsche dissected the concept of punishment in hopes of showing that it is too elaborate and elusive to be so confidently understood.102 Nietzsche’s analysis is applicable to every abstract concept with an established history, including that of religion.

Nietzsche began by looking at the concept of punishment in the abstract and isolating its prominent elements—namely, its form and purpose.103 These elements, he argued, together give the concept of punishment its meaning.104 Nietzsche observed that “[t]he form is fluid,” and history verifies this point.105 The number of ways in which the form of punishment has manifested itself is seemingly infinite.106 Human beings have always used their imaginations to create new ways of punishing and inflicting pain upon each other and will undoubtedly continue doing so in the future, prolonging the cycle of barbarism that spans history and hinders a truly enlightened existence.

Nietzsche asserted that the purpose of punishment is even more fluid than its form.107 Looking at history, Nietzsche identified—in his own unique, frenetic manner—some of the more prominent ways in which the purpose of punishment has manifested itself: “as a means . . . of preventing further harm”; “as payment of a debt to the creditor in any form (even one of emotional compensation)”; “as a means of isolating a disturbance of balance, to prevent further spread of the disturbance”; “as a means of inspiring the fear of those who determine and execute punishment”; as a sort of counter-balance to the privileges which the criminal had enjoyed . . .”; “as a rooting-out of degenerate elements” in society; “as a festival, in the form of violating and mocking [a conquered] enemy”; “as an aide memoir, either for the person suffering the punishment—so called ‘reform,’ or for those who see it carried out”; “as payment of a fee

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99. See Freeman, *supra* note 50, at 1549–59 (applying a Wittgensteinian analysis to the concept of religion in the First Amendment).


101. *Id.*

102. *Id. at* 57–58.

103. *Id. at* 54–55.

104. *Id.*

105. *Id. at* 55.

106. *Id. at* 57–58.

107. *Id. at* 56–57.
stipulated by the power which protects the wrongdoer from excesses of revenge”; “as a compromise with the natural state of revenge”; “as a declaration of war . . . against an enemy of peace, law, order, authority, who is fought as dangerous to the life of the community, in breach of the ‘contract’ on which the community is founded.”

In short, the purpose of punishment, like its form, is fluid and ever-changing, never fixed and unified. Since form and purpose give rise to meaning, the meaning of the concept of punishment is fluid too. As Nietzsche attempted to show, this concept has undergone, and is still undergoing, a continuous process of interpretation and re-interpretation, re-invention and transformation. Accordingly, language cannot completely capture its meaning, given the lack of a stable core or essence to capture.

The same is true of many enduring, abstract concepts. The form and purpose of a concept of this sort may become manifest in a certain way at one point in time, and in quite another way at another point. As time goes on, the ways in which a concept’s form and purpose become manifest overlap, combine, conceal, and negate each other. Trying to attain some single meaning or essence from this unending, tumultuous process is impossible. It is like trying to capture the essence of a river in a glass jar.

Turning to the concept of religion, one can begin to appreciate how elaborate and elusive this concept is by examining its prominent elements: its form and purpose. These elements are, like those corresponding to the concept of punishment, fluid and ever-changing. A name signifies each distinct way in which the form of religion manifests itself. Some of the most well-known names are, of course, Judaism, Islam, Christianity, Buddhism, Hinduism, and Confucianism, but these are only a few. The best estimates reveal that roughly 4,200 forms of religion exist today. This is not even including the religions of the Persians, Greeks, Egyptians, Mayans, Druids, Aztecs, Vikings, and of other peoples lost to history. Without doubt, the precise number of ways in which the form of religion has manifested itself is not entirely known and is perhaps unknowable, yet the number will keep increasing. Needless to say, religion’s form is unquestionably fluid.

Religion’s purpose is perhaps even more fluid, and people have varied wildly in characterizing it. Some people claim that religion’s purpose is to answer fundamental “why” questions. Others claim it is to foster togetherness in groups. Sigmund Freud famously argued that religion exists to generate illusions that fulfill the “strongest and most urgent wishes

108. Id. at 57–58.
109. Id. at 57.
110. Id.
112. Freeman, supra note 50.
of mankind.” Gordon Alport, a “psychologist of religion,” maintained that “intrinsically religious” people use religion for nonmaterial purposes, such as praying “in order to commune with God and understand his truth,” whereas “extrinsically religious” people use religion for external or material purposes, such as attending church “to gain respectability” or praying for “purely financial benefits.”

According to Karl Marx and Friedrich Engels, religion’s raison d’être is to help people cope with and respond to the intolerable conditions that capitalist societies generate. Max Horkheimer, a post-Marxist Holocaust survivor, claimed that religion, by holding up the ideal of perfect justice, serves the purpose of ameliorating “[d]issatisfaction with earthly destiny” and of providing an impetus toward that ideal. Martin Luther King, Jr. argued that religion’s purpose is to “produce living witnesses and testimonies to the power of God in human experience.” On a more skeptical note, Michael Shermer, the founder of Skeptic magazine, wrote that the purpose of religion is to provide “a foundation for social order and moral edification.”

This demonstration could continue indefinitely. The point is not to suggest that any particular perspective on the purpose of religion is correct, or that none is correct. The point, rather, is merely to show that the purpose of religion, like its form, is unfixed, manifold, and ever-changing. The meaning of religion is thus also fluid. Consequently, a definition of “religion”—one that succinctly captures all of the present and previous phenomena to which this concept refers—is and will always remain impossible. No core meaning or essence exists to etch into eternal words, only a sea of phenomena, some more prevalent than others at any given time. What Nietzsche said of punishment is true of religion as well: “this concept . . . is absolutely undefinable.”

Although Nietzsche made a compelling argument that certain concepts lack an essence and cannot be defined, Wittgenstein has perhaps been more influential than anyone else in demonstrating why any attempt to find the essence of such a concept is fruitless. To show why this search is misguided, Wittgenstein analyzed the concept of games, namely, “board-

120. NIETZSCHE, supra note 100, at 57.
121. Freeman, supra note 50, at 1549. I fully agree with Freeman on this point.
games, card-games, ball-games, Olympic games, and so on.” He famously claimed that no single feature is common to all of them; in other words, the concept of games lacks an essence.

One cannot, for example, say that fun or amusement is a necessary and sufficient feature of all games. Just think of games involving gambling, which a person may play out of a sense of financial depression while not experiencing any “fun,” or games that injured professionals play only for the money. Nor can one say that all games entail competition between players, given that Solitaire and other card games call for a single player only. Likewise, winning and losing is not a universal feature, for a child throwing a ball against a wall can neither win nor lose. In addition, neither skill nor luck is a common feature of all games. Ring-Around-the-Rosie demands no real skill, nor does it involve significant luck.

Wittgenstein wrote that if one continues to examine the totality of games closely and long enough, one “will not see something that is common to all . . . .” That is, one will not see an essence, but rather “similarities, relationships, and a whole series of them at that.” Accordingly, any definition of games based on a single, necessary feature will fail to incorporate some activities that are clearly games. Moreover, simply adding more such features to a definition will prove fruitless. Because no common feature is present in each game, it follows that every necessary feature excludes one or more games. As such, a definition based on any number of necessary features will be underinclusive to some extent and thus cannot constitute the essence of this concept.

Unlike Nietzsche, Wittgenstein offered a solution to the problem of undefinability that plagues abstract concepts in general. As stated above, Wittgenstein said that when looking at the totality of games, one will only see “similarities” and “relationships,” as opposed to an essence. His expression for these similarities is “family resemblances,” for the various “resemblances between members of a family . . . overlap and criss-cross in the same way.” According to Wittgenstein, whether a particular activity is a game depends, not upon some definition, but upon the extent to which the activity resembles standard, well-known games.

By applying Wittgenstein’s analysis to the concept of religion, one can see that no single feature is common to all religions, and an essence is thus lacking. A belief in a “Supreme Being” is certainly not a necessary feature,
contrary to what the Supreme Court appeared to assume for many years. Some religions, such as Buddhism, deny the existence of gods, whereas others deny their relevance. Nor is belief in an afterlife a common feature of all religions; not every religion assumes or teaches that an afterlife exists, as Deism illustrates.

One may think that universal moral codes are present in all religions, but in certain societies, morality lies within the province of “philosophers rather than priests” or “the academy rather than the temple.” For example, though widely regarded as religions, the Greco-Oriental mystery cults offer their adherents no ethical principles for guidance. What, though, of a belief in a transcendent reality or a distinction between the natural and the supernatural? Intuitively, this appears to underlie all religions. However, Greek religions viewed their gods as part of the natural order. Baruch Spinoza, the great philosopher, likewise did not distinguish between worldly and transcendent reality in this sense. For Spinoza, God is Nature (broadly speaking), not just a being that transcends it, and miracles, if rare occurrences in the natural world, are certainly not supernatural. Further, one would be mistaken to assume that participation in a social organization, sacred texts, worship, prayer, or rituals are common to all religions. As Freeman pointed out, “[a] mystic might avoid affiliation with any religious organization; a primitive religion might sustain itself without any literature; and a Buddhist might not worship, pray, . . . or practice any rituals.”

Like demonstrating that religion lacks a single, stable purpose, demonstrating that no single feature is common to all religions can continue indefinitely. Regardless of how intensely one searches, one will fail to discover any feature that is necessary for something to qualify as a religion. An essence, in other words, is nowhere to be found. Thus, any definition of religion that is based on a necessary feature (what definition is not?) will prove underinclusive. Likewise, no definition based on any number of such features can incorporate every religion and thus constitute the essence of this concept. Given this problem of undefinability, resorting to Wittgenstein’s solution seems prudent. According to his solution, in determining whether a particular belief system is a religion, one should not rely upon any definition. Instead, one should compare the belief system in

129. WORLD RELIGIONS: A GUIDE TO THE ESSENTIALS 1 (Thomas A. Robinson & Hillary Rodrigues eds., 2006).
130. Id.
131. Id.
132. Note, supra note 58, at 1073.
133. Freeman, supra note 50, at 1554.
134. FREDERICK COPLERSTON, 4 A HISTORY OF PHILOSOPHY 245 (1994).
135. Freeman, supra note 50, at 1554.
question to examples of “what is indisputably religion,” and see if the two systems share enough similarities to belong in the same family.  

IV. THE ANALOGICAL APPROACH AND ITS FLAWS

The so-called “analogical approach to the concept of religion” is consistent with Wittgenstein’s idea of family resemblances, and its advocates deny that religion has an essence and can be defined accordingly. In the words of Freeman (one of the most convincing advocates of this approach): “There simply is no essence of religion, no single characteristic or set of characteristics that all religions have in common that make[] them religions.” Indeed, what is apparent upon examining different religions is not an essence, but a set of “family resemblances” or “a complicated network of similarities overlapping and criss-crossing.” Advocates of the analogical approach focus on these family resemblances in an attempt to determine whether or not a particular belief system or way of life is a religion.

Although advocates of the analogical approach disagree over various details, they agree that this approach entails certain general steps. The first, and by no means simple, step is to construct a paradigm that represents “what is indisputably religion.” In attempting to do this, one should examine numerous and sharply different religious beliefs, practices, and organizations throughout the world. Upon examining these phenomena, one might ascertain what appear to be various common features, such as: a central concern with God or gods, the sacredness of nature, or a transcendent reality; rituals and ceremonies; and some prophet-like or divinized figure(s). By selecting a set of such features that are sufficiently representative and inclusive of the world’s religions, one can construct a paradigm of what most people would consider indisputably religion.

The next step involves comparing this paradigm to the prominent features of the disputed instance, that is, the particular belief system or way of life at issue. If the similarities between them are sufficiently great, then the disputed instance qualifies as a religion. Conversely, it fails to qualify if the similarities are too few. The lack of any one feature, such as belief in God or a moral code, does not automatically banish the disputed instance from the family of religion because no one feature is necessary. Likewise, no particular subset of features is necessary, although various

136. Greenawalt, supra note 96, at 762.
137. Freeman, supra note 50, at 1548.
139. Freeman, supra note 50; see also Greenawalt, supra note 96, at 767.
140. See Freeman, supra note 50, at 1553–54.
141. See, e.g., Greenawalt, supra note 96, at 768 (stating that “[a] final decision to consider something religious depends on how closely the combination of characteristics resembles those of the paradigm . . .”).
142. See Freeman, supra note 50, at 1556.
subsets will prove sufficient. Rather, what ultimately matters is the degree of the similarity between the paradigm and the disputed instance.\footnote{143}{See id. at 1553–56.}

Generally speaking, one could say that the analogical approach is a method of determining whether a belief system or way of life constitutes a religion by comparing it to a paradigm of religion. Articulated this way, the analogical approach admittedly comes across as rather commonsensical and perhaps even obvious. Like many other things, however, the details are quite complex and unresolved. Before scrutinizing these details, it is helpful to provide a brief overview of the approach’s origin and early application in the courts.

Judge Arlin Adams of the Third Circuit was the first judge to articulate an analogical approach to the concept of religion.\footnote{144}{Greenawalt, supra note 96, at 774.} In *Malnak v. Yogi*, the Third Circuit addressed the question of whether an optional course taught in the New Jersey schools, entitled “Creative Intelligence—Transcendental Meditation,” constituted a religion and thus violated the Establishment Clause.\footnote{145}{592 F.2d 197, 197–98 (3d Cir. 1979).} The Third Circuit ruled that it did, pointing out that the course entailed the performance of rituals, chants, and offerings to a deity.\footnote{146}{Id. at 198.} Judge Adams, though, felt constrained to take an extra step and wrote a concurring opinion exploring the problem of determining what constitutes “religion” for First-Amendment purposes.\footnote{147}{Id. at 200 (Adams, J., concurring).}

Judge Adams argued that a line of Supreme Court cases implicitly approved a modern or “new definition” of religion, best understood as a “definition by analogy.”\footnote{148}{Freeman, supra note 50, at 1529–30. Using the word “definition,” however, is rather misleading, for at bottom the analogical approach is a method.} In his words, “The modern approach . . . looks to the familiar religions as models in order to ascertain, by comparison, whether the new set of ideas or beliefs is confronting the same concerns, or serving the same purposes, as unquestioned and accepted ‘religions.’”\footnote{149}{Malnak, 592 F.2d at 207.}

Looking at these “familiar” or “unquestioned and accepted religions,” Judge Adams identified the following features as most representative of them: (1) concern with “fundamental problems of human existence,” including “the meaning of life and death, man’s role in the Universe, [and] the proper moral code of right and wrong”; (2) a comprehensive world view, which addresses and provides “religious” answers to these fundamental problems; and (3) the presence of “formal, external, or surface signs” such as services, ceremonies, rituals, a clergy, and a structural organization.\footnote{150}{Id. at 207–09.}
According to Judge Adams, these features form a paradigm of religion, and whether a disputed instance qualifies as a religion under the First Amendment depends upon the degree to which it resembles this paradigm. In *Africa v. Commonwealth of Pennsylvania*, a unanimous Third Circuit panel—headed by Judge Adams—adopted and put his analogical approach to the test. This constituted the first time a federal court officially endorsed the analogical approach as a judicially appropriate solution to the problem of determining whether a disputed instance is a religion under the First Amendment.

*Africa* addressed whether a prison organization named “MOVE” qualified as a religion for free exercise purposes. MOVE’s leader, Frank Africa, viewed himself as a “Naturalist Minister” and demanded a special diet of raw food for the members of his organization. He maintained that whatever is raw is “pure, which means it is innocent, trustworthy, and safe, which is the same as God.” In determining whether MOVE was a religion and whether its members were therefore entitled to this special diet under the Free Exercise Clause, the Third Circuit measured MOVE by Judge Adams’s paradigm of religion.

The Third Circuit found that MOVE lacked many of the “formal, external, or surface signs” present in familiar religions, including special services, official customs, religious holidays, a well-defined organizational structure, and a scripture book or catechism. Moreover, although MOVE seemed to embrace a single governing idea, the Third Circuit found that this idea—one best described as a form of philosophical naturalism—shares more dissimilarities than similarities with the theological worldviews of familiar religions. Lastly, the Third Circuit found that MOVE failed to demonstrate a sufficient concern with fundamental questions, given its absence of a clear position on matters concerning “personal morality, human mortality, [and] the meaning and purpose of life.” In sum, MOVE did not resemble Judge Adams’s paradigm of religion closely enough to qualify as a religion under the First Amendment.

The analogical approach that Judge Adams articulated is imperfect: even he admitted that it “should not be thought of as a final ‘test’ for religion.” Its imperfect nature inspired Greenawalt and Freeman to each
write an article offering improvements in aspiration of developing, or making progress towards, a final test.161 Because their proposals on how to refine the analogical approach differ in significant respects, each proposal implicitly raises questions about the other and, in turn, about the soundness of the analogical approach as a whole.

This Article will now use Greenawalt’s and Freeman’s articles to examine the boundaries of the analogical approach, including an exploration of the unacceptable forms that it could potentially assume. Their articles at times contradict each other; at other times, they are internally inconsistent. By exposing these problems, this Article will hopefully lay additional groundwork for improving the analogical approach.

Careful analysis of Greenawalt’s and Freeman’s articles reveals the depth of two fundamental problems with the analogical approach. First, the approach unrealistically presupposes broad agreement on a set of paradigmatic features of religion. Although similar to some extent, the features that Greenawalt selected differ in number and substance from those that Freeman selected. It is highly likely that judges too will disagree in this area. Inconsistent results in selection of the paradigmatic features are therefore almost certainly inevitable. Taken to the extreme, such variation could mean that a religion in one jurisdiction may not qualify as a religion in another. Perhaps more significantly, granting judges complete freedom to select the paradigmatic features of religion invites bias against unconventional belief systems and ways of life that are difficult to classify.

For example, a judge who believes that evangelical Christianity is the only “true” religion may select relatively narrow features in constructing a paradigm, such as: (1) belief in God; (2) a distinct view of good and evil; (3) an established social structure, headed by clergy; (4) sacred texts; and (5) established rituals. Another judge with a more inclusive view might select relatively broad features, such as: (1) belief in phenomena unobservable and un-testable by science; (2) a set of moral judgments; (3) faith in providence; (4) hope that a better world exists; and (5) moments of awe and wonder over humankind and nature. In some borderline cases, these paradigms would surely produce different outcomes. The belief system and way of life of Ralph Waldo Emerson, for instance, share one or two features at most with the narrower paradigm, and all of the features with the broader paradigm.162

The second fundamental problem with the analogical approach is determining the exact point at which a disputed instance qualifies as a religion. If judges cannot agree on this matter, inconsistent results and bias

161. Coincidently, they published their articles at about the same time, but they neither planned this nor knew one another. Id. at 753 n.2.
162. See RALPH WALDO EMERSON, Self-Reliance, in ESSAYS & POEMS 257, passim (1996); see also RALPH WALDO EMERSON, An Address, in ESSAYS & POEMS 73, passim (1996).
are, again, inevitable. Not surprisingly, Greenawalt and Freeman failed to agree on where to fix this point. Both, however, offered concrete ways to address this problem, and occasionally flirted with more questionable potential solutions. Two of these more questionable proposals are worth exploring in depth because they push the boundaries of the analogical approach to the extreme. By exposing and understanding the major weaknesses of this approach, more significant improvements become possible.

One potential way of determining the point at which a disputed instance qualifies as a religion derives from a footnote in Greenawalt’s article, where he suggests that a disputed instance could qualify as a religion based merely on the number of features that it shares with the representative paradigm. In this footnote, Greenawalt at least arguably suggested that if a disputed instance “exhibit[s] six of [the] nine” features in the paradigm, it qualifies as a religion.163 Greenawalt named nine paradigmatic features earlier in his article:

1. “a belief in God”; 164
2. “a comprehensive view of the world and human purposes”; 165
3. “a belief in some form of afterlife”;
4. “communication with God through ritual acts of worship and . . . individual prayer”, 167
5. “a particular perspective on moral obligations derived from a moral code or from a conception of God’s nature”; 168
6. “practices involving repentance and forgiveness of sins”; 169
7. “religious’ feelings of awe, guilt, and adoration”, 170
8. “the use of sacred texts”; 171 and
9. “organization to facilitate the corporate aspects of religious practice and to promote and perpetuate beliefs and practices.” 172

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163. Greenawalt, supra note 96, at 768 n.58.
164. Id.
165. Id.
166. Id.
167. Id.
168. Id.
169. Id.
170. Id.
171. Id.
172. Id. at 767–68. To be perfectly clear, Greenawalt did not expressly endorse the “six of nine” test as a potential solution to the problem of determining the point at which a disputed instance qualifies as a religion. He merely discussed this proposal in a footnote and neither rejected nor criticized it. In the body of his article, Greenawalt favors an
In determining whether the "six of nine" test proves satisfactory when applied to borderline cases, the belief systems of Italian Fascism and R. M. Hare are helpful.\footnote{173} As discussed in Section I, Hare is an English philosopher and "Christian atheist" who survived World War II and then devoted much of his life attempting to understand the moral good.\footnote{174} As discussed in Section II, Sexton suggested that Italian fascism could qualify as a religion, whereas many people would presumably disagree. The insufficiency of the "six of nine" test as a solution becomes apparent when the test is applied to these two borderline cases.\footnote{175}

Hare did not believe in God.\footnote{176} Accordingly, he did not engage in ritual acts of worship and individual prayer for the purpose of "communicating with God."\footnote{177} Hare’s beliefs and way of life therefore clearly fail to satisfy three of the nine features in Greenawalt’s representative paradigm. However, his beliefs and way of life seem to satisfy five of the six remaining features.

\footnote{173}{A borderline case is one in which the disputed instance (that is, the belief system or way of life at issue) could be reasonably classified as a religion or not a religion. Otherwise stated, a borderline case is one in which the disputed instance is neither clearly a religion nor clearly something else.}

\footnote{174}{MICHAEL E. BERUMEN, DO NO EVIL: ETHICS WITH APPLICATIONS TO ECONOMIC THEORY AND BUSINESS 53 (2003).}

\footnote{175}{The primary purpose of the rest of this section is to expose major problems with the versions of the analogical approach that Greenawalt and Freeman seem to implicitly approve, using Italian fascism and Hare as a means to accomplish this end. The primary purpose is not to engage in a meticulous exposition of their respective belief systems. The conclusions that are drawn about them in the rest of this Section represent the potential conclusions of but one conceivable and reasonable judge.}

\footnote{176}{Freeman, supra note 50, at 1556.}

\footnote{177}{Id.}
First, Hare engaged in the “use of sacred texts,” particularly the Bible.178 Second, he belonged to a church, or an organization that facilitates “the corporate aspects of religious practice and . . . promote[s] and perpetuate[s] beliefs and practices.”179 Third, when he attended church, he participated in “practices involving repentance and forgiveness of sins,” such as reciting the Lord’s Prayer, which contains the passage: “forgive us our debts, as we forgive our debtors,”180 in addition to the Apostles’ Creed.181 Fourth, he embraced “a particular perspective on moral obligation derived from a moral code,” namely, Christianity’s moral code. Fifth, he viewed the world in significant part through the lens of the Bible, which of course provides “a comprehensive view of the world and human purposes.”

This leaves one remaining feature—“religious feelings of awe, guilt, and adoration”—and whether Hare’s belief system qualifies as a religion under the “six of nine” test hinges upon whether this feature is satisfied. However, whether Hare’s belief system satisfies this feature is fundamentally ambiguous. It is unclear how often feelings of the sort described must arise for this feature to be satisfied. Even more problematic, this feature begs a question that Greenawalt does not answer: What, precisely, are religious feelings? To answer this question, one must first answer the question that Greenawalt’s paradigm of religion is designed to resolve: What is religion? Hence, when the outcome of a case hinges on whether the disputed instance exhibits religious feelings, the “six of nine” test forms a tautological circle from which escape is impossible and in which no definite answer exists. Hare’s beliefs and way of life, therefore, seem to remain in that ambiguous area between religion and nonreligion under the “six of nine” test.

Before applying this test to Italian fascism, it must be noted that Italian fascism is difficult to define comprehensively and succinctly, as are other concepts. For present purposes, this Article uses the definition that is reflected in Mussolini’s notorious essay, “What is Fascism?,” the definition that is probably most representative.182 Italian fascism—as defined by Mussolini—clearly lacks three of the nine features in Greenawalt’s paradigm of religion. Nowhere in “What is Fascism?” did Mussolini convincingly espouse “a belief in some form of afterlife,” “communication with God through ritual acts of worship and individual prayer,” or “practices involving repentance and forgiveness of sins.”

Italian fascism, however, possesses most of the remaining six features. First, it affirms “a belief in God” and even views God as having played a

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178. Id.
179. Id.
180. Matthew 6:12 (King James).
181. GOD AND THE ETHICS OF BELIEF, supra note 11.
182. GIOVANNI GENTILE, ORIGINS AND DOCTRINE OF FASCISM 47 (A. James Gregor ed. & trans., 2002).
vital role in the creation and maintenance of the “Fascist State.”¹⁸³

According to Mussolini, the Fascist State is “not a given, but a creation,”
and it cannot be created “without the assistance of the Deity.”¹⁸⁴
Moreover, Mussolini believed that God approves all violence used to
maintain the laws of the Fascist State, “laws that God certainly wishes to
obtain in the world.”¹⁸⁵

Second, Italian fascism recognizes some texts as “sacred.” For
instance, Mussolini claimed that Giambattista Vico is one of the “spiritual
masters” of fascism, and lionized his Scienza Nuova.¹⁸⁶ In that work,
Mussolini particularly admired Vico’s glorification of the historical process
whereby states decay and new states, in turn, are founded in their place
through force and violence.¹⁸⁷ Similarly, Mussolini referred to Giuseppe
Mazzini as “the Prophet Mazzini” and also lionized his work, On
Nationality.¹⁸⁸ Mussolini attached particular importance to On
Nationality’s claim that “true liberty” is not found in the philosophy of
liberal individualism, which sees individuals as superior to the state.¹⁸⁹
Rather, it claimed that individuals attain “true liberty” by forming “a single
body” and creating a Fascist State to which all individuals are inferior.¹⁹⁰

Third, Italian fascism provides “a comprehensive view of the world
and human purposes.” In Mussolini’s words, Italian fascism “is before all
else a total conception of life. . . . One cannot be a Fascist in politics and
not a Fascist . . . in school, not a Fascist in one’s family, not a Fascist in
one’s workplace.”¹⁹¹ As for human purposes, Mussolini considered one
such purpose more important than all others: the expansion of the Fascist
State, both domestically and abroad.¹⁹²

Fourth, Italian fascism provides “a particular perspective on moral
obligations derived from a moral code.” Mussolini, for instance,
reinterpreted one of the fundamental moral imperatives of Christianity. He
stated, “If one loves one’s neighbor, one is counseled not to provide him
with, or facilitate his obtaining, the quiet life. Rather one should assist and
prepare him for labor, for sacrifice,” that is, sacrifice of all individual
autonomy to the Fascist State.¹⁹³ As Mussolini put it, the Fascist State

¹⁸³. Id.
¹⁸⁴. Id.
¹⁸⁵. Id. at 51.
¹⁸⁶. Id.
¹⁸⁷. Id. at 51–52.
¹⁸⁸. See id. at 57.
¹⁸⁹. Id. at 46–47.
¹⁹⁰. Id.
¹⁹¹. Id. at 57.
¹⁹². See ARISTOTLE A. KALLIS, FASCIST IDEOLOGY: TERRITORY AND EXPANSIONISM IN
¹⁹³. GENTILE, supra note 182, at 52.
commands “with orders that are not subject to discussion—and must be obeyed—throughout life, without hesitation, and without exception.”

To qualify as a religion under the “six of nine” test, Italian fascism must possess the two remaining features: “religious feelings of awe, guilt, and adoration” and “organization to facilitate the corporate aspects of religious practice and to promote and perpetuate beliefs and practices.” Whether Italian fascism possesses these features, however, cannot be determined without first determining what religious feelings and practices are—which ultimately beg the question, “What is religion?” But, using Greenawalt’s paradigm to answer this question is impossible without knowing what religious feelings and practices are. Thus, as with Hare’s beliefs, application of the “six of nine” test forms an unbreakable, tautological circle when applied to Italian fascism.

In contrast to the “six of nine” test, Freeman implied that whether a disputed instance qualifies as a religion should depend upon the weight—rather than the mere number—of the features that it shares with the paradigm of religion. According to Freeman, to understand the nature of a particular thing, including a belief system or way of life, it is necessary to first ascertain its purpose. He illustrated this point by asking his reader to consider the concept of a chair. He argued that it is impossible to understand the chair’s concept “simply by observing empirical similarities between material objects.” In his view, because many different objects have legs, a seat, or a back, the concept of a chair must be limited somehow; otherwise, it would incorporate things that are not chairs. One discovers the appropriate limitations, Freeman maintained, by ascertaining the purposes of chairs—what they are “generally used for and what activities are generally associated with their use.” Hence, under Freeman’s view, to understand the concept of a chair one must first acquire “knowledge of what purposes chairs serve.”

Applying the same reasoning to the concept of religion, Freeman insisted that, in attempting to understand this concept, one must “begin by trying to identify the purpose of religion.” This, however, is a highly questionable move, one that readily invites criticism. As a matter of logic, we cannot identify the purpose of religion without first knowing what religion is. Thus, Freeman started off by tumbling face-first into a tautological pit, much like the one into which Greenawalt falls. In addition,

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194. Id. at 54.
195. See Freeman, supra note 50, at 1552–59.
196. Id. at 1550–51.
197. Id. at 1550.
198. Id. at 1551 n.212.
199. Id. at 1550.
200. Id. at 1551.
201. Id.
202. Id. at 1553.
he erred in assuming that religion has a single purpose. As previously argued, the purpose of religion is fluid, manifold, and ever-changing.

Nonetheless, drawing on Judge Adams’s opinions, Freeman stated that the “purpose” of religion is:

[T]o provide answers, or a way of arriving at answers, to certain fundamental “Why?” questions . . . : “Why is there something rather than nothing? Why are we here? Why is there suffering and evil in the world? Why should we ever act in one way rather than another? Why is any one thing ever more valuable than any other?”

Using this supposed single “purpose” of religion as a starting point, Freeman claimed that we can now discover the central features of “most traditional Eastern and Western religions” and thereby construct a representative paradigm. These features are, he declared:

(1) A belief in a Supreme Being;
(2) A belief in a transcendent reality;
(3) A moral code;
(4) A world view that provides an account of man’s role in the universe and around which an individual organizes his life;
(5) Sacred rituals and holy days;
(6) Worship and prayer;
(7) A sacred text or scriptures;
(8) Membership in a social organization that promotes a religious belief system.

In a Wittgensteinian vein, Freeman rejected the notion that any one feature in this paradigm is common to all religions, meaning that religion lacks an essence. At the same time though, he implied that certain features are more “central” to, or more representative of, “traditional

203. Id.
204. Id.
205. Freeman stated in his article that he had drawn his list largely from William P. Alston. See WILLIAM P. ALSTON, THE PHILOSOPHY OF LANGUAGE 88 (1964).
206. Freeman, supra note 50.
207. Id.
208. Id.
209. Id.
210. Id.
211. Id.
212. Id.
213. Id.
214. Id.
Eastern and Western religions."215 For instance, he argued that the last four features “usually lose their religious character” in the absence of the first two, namely, (1) “a belief in a Supreme Being” and (2) “a belief in a transcendent reality.”216 Hence, Freeman viewed these first two features as more central to “traditional Eastern and Western religions,” and thus weightier than the last four features.217

Moreover, Freeman claimed that secular or nonreligious belief systems ordinarily embrace only two of the eight features in his paradigm, namely, (1) “a moral code” and (2) “a world view that provides an account of man’s role in the universe and around which an individual organizes his life.”218 He thereby implied that these two features are least central to “traditional Eastern and Western religions” and accordingly hold the least weight. If one were to assign numerical values to the features in Freeman’s paradigm of religion based on the weight that he appeared to accord them, the distribution would look something like this:

- A belief in a Supreme Being
- A belief in a transcendent reality
- Sacred rituals and holy days
- Worship and prayer
- A sacred text or scriptures
- Membership in a social organization that promotes a religious belief system
- A moral code
- A world view that provides an account of man’s role in the universe and around which an individual organizes his life219

215. See id. at 1552–55.
216. Id. at 1553.
217. Id.
218. Id. at 1554–55.
219. Concededly, Freeman does not expressly endorse this particular point system, or the use of any point system. However, his prescription to allocate varying degrees of weight to paradigmatic features of religion could easily lead to judges assigning numerical values to them based on their relative weight. This leaves the door open to arbitrariness and abuse. At the same time, however, one of the primary functions of the judiciary is to engage in weighing factors and principles. Applying various degrees of weight to the paradigmatic
According to this weight-based analogical approach, the total numerical value of the features in Freeman’s paradigm of religion is eighteen. If one assumes that a disputed instance needs at least a preponderance of these eighteen points to qualify as a religion, the disputed instance would qualify so long as the features that it shares with Freeman’s paradigm amount to at least ten points. But what is one to do if a belief system appears to total a “weak” ten points or a “strong” nine?

In this scenario, Freeman might advise to once again turn to the “purpose” of religion to resolve the matter by considering the particular answers that the disputed instance provides to the fundamental “Why?” questions.220 As previously stated, Freeman claimed that the purpose of religion is to provide answers to these questions or a way of arriving at the answers.221 According to this analysis, then, when significant uncertainty remains after totaling the points, the disputed instance will qualify as a religion if it provides more “religious” answers to the fundamental “Why?” questions.222 Conversely, if the disputed instance provides more secular or nonreligious answers, it will fail to qualify. Having pieced together the elements and implications of Freeman’s weight-based analogical approach, applying it to Hare’s beliefs and Italian fascism is now appropriate.

As previously stated, Hare attended church, or “a social organization that promotes a religious belief system” (2 points).223 While at church, he participated to at least some extent in “sacred rituals” and recognized Christian “holy days” (2 points), such as Easter and Christmas, and partook in group “worship and prayer” (2 points). He also embraced “a sacred text or scriptures,” namely, the Bible (2 points), and substantial aspects of its “moral code” (1 point). Lastly, by considering himself a Christian, Hare accepted “a world view that provides an account of man’s role in the universe and around which an individual organizes his life” (1 point). At the same time, though, he rejected the existence of both God and a

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220. Id. at 1548, 1553 (criticizing Professor Mansfield in his attempt to determine what constitutes religion because Professor Mansfield did not address the “character of the answers” to the fundamental “Why?” questions, and according to Freeman, religion’s purpose is to answer these questions or provide a way of arriving at them); id. at 1555 (arguing that considering the responses to the fundamental “Why?” questions by “the traditional secularist and the traditional believer,” and thereby considering the purpose of religion, will further illuminate the differences between the two and clarify what the term “religion” means).

221. Id.

222. See id. (implying that religious answers are those that refer “to a Supreme Being or the transcendent”).

223. See infra notes 178–181 and accompanying text.
transcendent reality as “superstition.”\textsuperscript{224} As a result of this analysis under the weight-based analogical approach, the features of Hare’s beliefs and way of life appear to amount to ten points, just enough to qualify as a religion.

Nonetheless, significant uncertainty may remain over the nature of Hare’s beliefs and way of life despite the results of this particular application of the weight-based analogical approach. One might still say that Hare was ultimately not religious because he “eliminated from Christianity what is most essential to it, namely, God,” and rejected the notion of a transcendent reality.\textsuperscript{225} Even Freeman avoided drawing a conclusion on this matter. Rather, he stated, “All that the neutral observer can reasonably say . . . is that Hare’s is a religious belief system in some important respects but not in others.”\textsuperscript{226} To rid additional uncertainty, however, Freeman’s own statements suggest that we turn to the “purpose” of religion.\textsuperscript{227} Hence, at this point in the analysis, a final determination hinges on the nature of the answers that Hare would give to the five fundamental “Why?” questions. The problem, however, is that Hare would likely give answers that are neither clearly religious nor clearly nonreligious. Indeed, he expressed a strong faith that embracing Christian morality “will make life worthwhile for him and for others,”\textsuperscript{228} while espousing “a demythologized version of Christianity . . . rooted in an empiricist view of the world.”\textsuperscript{229} As such, Hare would likely give answers that are partially rooted in empiricism and partially rooted in Christian morality; taken together, these answers would fail to rid the uncertainty over the nature of his beliefs and way of life. As this example strongly suggests, relying on the “purpose” of religion in this manner will not tip the scales one way or another when examining every borderline case, as Freeman might have hoped.

Perhaps, though, the weight-based analogical approach will fare better when applied to Italian fascism? As previously discussed, Italian fascism espouses a belief in a supreme being (4 points). It also affirms the existence of a transcendent reality (4 points). In Mussolini’s words, “[t]he Fascist State is an idea that vigorously actuates itself. It is an idea and, as such, transcends every present and defined contingent and materialistic form.”\textsuperscript{230} Thus, at this early stage of the analysis, Italian fascism has quickly accumulated eight points, and needs only two more to qualify as a religion under the weight-based analogical approach.

\begin{footnotes}
\footnote{225.} Freeman, supra note 50, at 1556.
\footnote{226.} Id. at 1557.
\footnote{227.} See supra note 219.
\footnote{228.} Freeman, supra note 50, at 1556 (citing HARE, supra note 224, at 409–10).
\footnote{229.} Nielsen, supra note 8, at 152–53.
\footnote{230.} GENTILE, supra note 182, at 72 (emphasis added).
\end{footnotes}
Again, Vico’s *Scienza Nuova* and Mazzini’s *On Nationality* are the preeminent “sacred text or scriptures” of Italian fascism (2 points). Additionally, Italian Fascism advocates a rigid moral code (1 point) and offers “a world view that provides an account of man’s role in the universe and around which an individual organizes his life” (1 point). As already stated, “man’s role” is to expand the fascist state. Mussolini left little doubt over the life-orienting nature of Italian fascism with respect to each individual: “One cannot be a Fascist in politics and not a Fascist . . . in school, not a Fascist in one’s family, not a Fascist in one’s workplace.”231 Hence, at this stage, Italian fascism now has twelve points.

Because the features of Italian fascism amount to at least twelve points under this application of the weight-based analogical approach, the outcome is not ambiguous. Italian fascism qualifies as a religion. Considering any other features is thus unnecessary. Also unnecessary is considering the “purpose” of religion, or the nature of Italian fascism’s specific answers to the five fundamental “Why?” questions. As Freeman suggested, examining these questions and the answers they evoke is helpful only when significant uncertainty remains after comparing the paradigm of religion with the disputed instance.232

Based on its outcomes with respect to Hare’s beliefs and Italian fascism, the weight-based analogical approach ultimately fails to resolve the problem of determining the point at which a disputed instance qualifies as a religion. Applied to Hare’s beliefs, this approach produces an inconclusive outcome, like the “six of nine” test. Applied to Italian fascism, it raises some serious questions: most notably, is something not inherently wrong with an approach that so swiftly concludes that Italian fascism is a religion, and that Mussolini’s beliefs are more representative of religion than Hare’s beliefs?

Needless to say, violence, authoritarianism, irrationality, and intolerance of difference do not per se distinguish religion from Italian fascism or similar ideologies. Up to the present day, history shows that religion can exhibit these features, but they are not essential, nor are they desirable. The judiciary’s power to determine the meaning of constitutional terms holds immense promise. Through this power, the judiciary can assume a minor but concrete role in distancing religion from pernicious features of this sort and urging it toward more enlightened ones. If refined a certain way, the analogical approach can function as a means of effectuating this end.

In summary, by exploiting some of the weak spots in Greenawalt’s and Freeman’s articles, this Section sought to illuminate special difficulties with the analogical approach and to expose the unsatisfactory forms it could potentially take. But these difficulties and potential forms do not

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231. *Id.* at 57.
mean that the analogical approach is incapable of refinement. To the contrary, this approach is a work in progress with much potential, and ascertaining the nature of its flaws is a critical step forward in devising meaningful and lasting improvements.

V. REFINING THE ANALOGICAL APPROACH

What are the appropriate features for a paradigm of religion? After creating this paradigm, how does one determine the point at which a disputed instance qualifies as a religion? These are the great, unresolved questions of the analogical approach. As long as they remain unresolved, the analogical approach will remain incomplete.

The features that Greenawalt and Freeman selected to form their paradigms of religion, although a solid beginning, are problematic. As discussed below, Professor Peñalver exposed some of the flaws with their features and offered insightful suggestions on how to select more appropriate ones. Even a paradigm comprised of features that accurately represent the world’s religions will not always, by itself, resolve every borderline case. When the paradigm itself fails to resolve the matter, the court should turn for guidance to certain principles underlying the Religion Clauses, and the Constitution as a whole.

Such principles—including tolerance of difference, inclusivity, equality, diversity, and freedom of conscience and expression in matters of religion—will help illuminate the most fitting answer when examining borderline cases. For example, in borderline free exercise cases, these principles suggest that the court should probably err on the side of a finding that the belief system or way of life at issue (i.e., the disputed instance) qualifies as a religion.

As argued below, an analysis of Italian fascism, or similar belief systems, need not proceed to this point. A properly constructed paradigm, carefully applied, will exclude Italian fascism and similar belief systems from the concept of religion in the First Amendment. In fact, an ideally constructed and applied paradigm would resolve the majority of borderline cases involving a determination of religion-status. Still, some cases will inevitably create a need to go beyond the paradigm by applying relevant constitutional principles to resolve the matter, and Hare’s beliefs and way of life seem to present one such case.

A. The Contributions of Professor Peñalver

It is not expected that every judge will create a paradigm of religion that is free from substantial bias and determine the point at which a disputed instance qualifies as a religion in a detached and neutral way. Perhaps more so than any other legal scholar or commentator up to this

point, Peñalver stressed the need to limit the judicial bias that frustrates the proper outcome of cases involving a constitutional determination of religion-status. In his article, *The Concept of Religion*, he noted that the Supreme Court has never granted a free exercise exemption to a Jewish, Muslim, or Native American plaintiff and that the Supreme Court has shown even less tolerance with respect to plaintiffs who embrace newer and more idiosyncratic beliefs and practices.234 One way to limit such bias is to restrain judicial discretion in each of the analogical approach’s two main stages of application.

Peñalver identified what he considered to be three of the most prevalent manifestations of judicial bias in the case law.235 If not limited, this bias is a threat to the analogical approach, both in selecting the features to form a paradigm of religion and in applying the paradigm to a disputed instance. Peñalver asserted that these three most prevalent manifestations of bias are the assumptions that: (1) an essential feature of religion is belief in God; (2) “religions must be accompanied by certain types of institutional structures,” similar to Christian churches; and (3) religions all distinguish between the natural and the supernatural.236 These features, he pointed out, are certainly common to the preeminent forms of religion in the West, but distinctly less common to those forms outside of the West.237

Needless to say, these manifestations of bias extend beyond the judiciary. For example, three of the nine features in Greenawalt’s paradigm are dependent upon the concept of God.238 Multiple features that require a belief in God will slant any paradigm in favor of monotheism, a feature more prevalent in western religions such as Christianity and Judaism. Additionally, this prejudices nontheistic and polytheistic religions, including some that are universally recognized, for example, Buddhism and Hinduism.

Peñalver pointed out that, like Greenawalt’s, “Freeman’s depiction of the paradigm religious belief system remains somewhat biased in favor of ‘traditional’ western religions.”239 Otherwise stated, Freeman’s paradigm also suffers from the erroneous assumption that traditional western religions are inherently “more religious” than nonwestern ones. Greenawalt’s and Freeman’s shortcomings in this area inspired Peñalver to attempt to “minimize the scope for judicial bias” in applying the analogical

\[\text{234. Id. at 793 n.16.}\]
\[\text{235. Id. at 813–14.}\]
\[\text{236. Id.}\]
\[\text{237. Id. at 813.}\]
\[\text{238. Again, these God-dependent features are: (1) “a belief in God”; (2) “communication with God through ritual acts of worship . . . and individual prayer”; (3) “a particular perspective on moral obligations derived from a moral code or from a conception of God’s nature.” See Greenawalt, supra note 96, at 767.}\]
\[\text{239. Peñalver, supra note 18, at 815 n.155.}\]
approach and, with the same stroke, “improve upon the proposals of Greenawalt and Freeman.”

Peñalver proposed sound means of limiting judicial bias at each of the analogical approach’s two main stages of application. With respect to selecting the appropriate features for a paradigm of religion, he maintained that, “[a]s a general rule,” the paradigm must be comprised of at least one theistic, one nontheistic, and one pantheistic religion. Peñalver reasoned,

By considering a diverse array of particular religions, the judge is more likely to be sensitive to the deep flexibility and nuance involved in the meaning . . . of the word ‘religion,’ thus reducing the risk that she will rely on features of particular religions that she mistakenly takes to be essential to all.

With respect to determining the point at which a disputed instance qualifies as a religion, Peñalver offered three “negative guidelines” to constrain the features on which judges may focus in making this determination. The guidelines are designed “to eliminate the [three] most common and egregious western biases observed in the case law.” Under these negative guidelines, religion-status cannot be denied to any particular belief system and way of life merely because of its: (1) lack of a “concept of God (or gods)”; (2) “lack of institutional features,” such as clergy or organized worship; or (3) failure to distinguish the natural and the supernatural.

Peñalver’s proposals for reducing judicial bias in constitutional determinations of religion-status represent significant progress in the analogical approach. As he rightly stressed, a considerable problem with Greenawalt’s and Freeman’s versions of the analogical approach is “that they would do nothing to constrain the decisionmaking processes of individual judges.” The enlightened principles of freedom of conscience and expression in matters of religion, inclusivity, equality, diversity, and tolerance of difference permeate Peñalver’s efforts to eliminate judicial bias against nonwestern religions, and against less popular and more unusual belief systems and lifestyles. For this, Peñalver deserves ample commendation. At the same time, his proposals leave room for improvement. Even he acknowledged that his proposals are “not a perfect means for determining what is or is not a religious belief system.” Then again, “a perfect means” may not, and likely does not, exist.

240. Id. at 795.
241. Id. at 817.
242. Id. at 817–18.
243. Id. at 818.
244. Id.
245. Id.
246. Id. at 816.
247. Id. at 821–22.
In particular, although Peñalver demanded that judges draw upon at least one theistic, one nontheistic, and one pantheistic religion in creating a paradigm of religion, he remained silent on what the features in such a paradigm would actually be. More disappointingly, other than articulating his three negative guidelines, Peñalver also remained silent on the problem of determining the point at which a disputed instance qualifies as a religion in borderline cases. In fairness, though, attempting to determine this point is a highly complex, if not impossible, task. After hitting a wall, for instance, Greenawalt concluded that “one must simply not aspire to greater certainty than a subject yields.” Likewise, as previously mentioned, after applying his version of the analogical approach to Hare’s beliefs, Freeman essentially threw up his arms and claimed, “All the neutral observer can reasonably say . . . is that Hare’s is a religious belief system in some important respects but not in others.”

In sum, between the silence of Peñalver and the shortcomings of Greenawalt and Freeman, the two great questions of the analogical approach remain unresolved. The features that should represent the paradigm of religion and the point at which a disputed instance qualifies as a religion are still uncertain under their approaches. Although the great legal philosopher, Ronald Dworkin, was perhaps mistaken in that a right answer always exists in difficult cases, certainly there are superior means of attaining the most fitting answer in difficult cases involving a constitutional determination of religion-status than Greenawalt, Freeman and Peñalver let on.

B. Toward Further Refinements

A common inadequacy in how Greenawalt, Freeman, and Peñalver created a paradigm of religion is that they focused entirely on accurately representing what religion is. This concern must be overriding, but not exclusive. Given the divisiveness and violence (both physical and psychological) too often associated with religion, efforts to condemn and erode the worst of features are almost always appropriate. Some theologians, and not just theologians, believe that tolerance and understanding of different beliefs and lifestyles is the only hope there is for peace and survival. No effort is wasted in the attempt to create a society in which we can say of one another, no matter how different: “Develop your legitimate strangeness,” and “I want you to be.”

248. See Greenawalt, supra note 96, at 816.
249. See Freeman, supra note 50, at 1557.
250. RONALD DWORIN, TAKING RIGHTS SERIOUSLY 279 (1978).
252. RENE CHAR, PARTAGE FORMEL (1945).
in addition to seeking to accurately represent what religion is, a paradigm should also strive to represent what religion ought not to be or become. Deemphasizing the most pernicious features of religion in the representative paradigm should trump the drive for perfect exactness.

In short, a paradigm of religion should satisfy two objectives. The first and most important is to accurately represent what religion is. A sound means for pursuing this end, as Peñalver urged, is to create a paradigm that is based upon “at least one theistic religion (for example, Judaism, Christianity, or certain Hindu sects), one nontheistic religion (for example, Buddhism), and one pantheistic religion (for example, Santeria).”

To give an example, a feature that is based on all three types of religion is not “a belief in God,” as in Greenawalt’s paradigm, or “a belief in a Supreme Being,” as in Freeman’s paradigm, because these features only relate to theistic religions. Rather, a feature more inclusive of all three types of religion is: *a central concern with (1) God or gods, (2) the sacredness of nature,* or *(3) a transcendent reality.* This feature incorporates the three different types of religion that Peñalver addressed (theistic, nontheistic, and pantheistic) and is thus more representative of religions in general.

Another underinclusive feature that does not incorporate these three types of religion in Freeman’s paradigm is “a sacred text or scriptures,” similar to “the use of sacred texts,” in Greenawalt’s paradigm. Some religions—like the pantheistic Santeria and various Native American religions—pass on their teachings orally. A more representative feature is: *a body of scriptures, or similarly exalted and authoritative body of oral teachings, that orients thought and action.* By simply examining theistic, nontheistic, and pantheistic religions, one will discern features that cut across religions and, hopefully, avoid some of the problems of bias that Greenawalt and Freeman encountered. In addition to the more inclusive and representative features previously specified, other features that are clearly common to the three types of religion that Peñalver addressed include: (1) rituals and ceremonies; (2) a priesthood or hierarchical structure; (3) some prophet-like or divinized figure(s); and (4) individual or

254. Peñalver, supra note 18, at 817.
255. Greenawalt, supra note 96, at 767–68.
256. See Freeman, supra note 50.
258. Charles S. Lieberman & Eliezer Don-Yehiya, *Civil Religion in Israel: Traditional Judaism and Political Culture in the Jewish State* 3 (1983) (arguing that a transcendent reality is a central concern for many religions, including nontheistic religions such as Buddhism).
group prayer, or other efforts to communicate with God or gods, nature, or the transcendent.260

Whereas the first and overriding objective of the ideal paradigm is to accurately represent what religion is, the second objective is to distance the concept of religion from the worst of features. Endorsing a paradigm that is slightly slanted in favor of ideals such as peace and affirmation of difference—ideals present in various forms of religion—would convey a powerful and important message that religious violence and hatred is intolerable today. Moreover, such a paradigm would disfavor fascist and extremist belief systems that are cloaked in religious garb, and would tend to prevent those who embrace systems of this kind from benefiting, in any way, under the protection of the Religion Clauses. To accomplish this second objective, the paradigm should incorporate features such as: condemnation of violence in theory and practice; and commitment to charity and social betterment initiatives. These features are also common among various forms of religion. Further, the latter feature is similar to one included by Professors deChant and Jorgensen—the religion scholars discussed in Part I.261 Importantly, incorporating these features in a paradigm of religion would not substantially undermine the primary objective of accurately representing what religion is, especially if they are accorded less weight. A paradigm weighted this way, and comprised of the eight aforementioned features proposed in this section, might appear as such:

- A central concern with (1) God or gods, (2) the sacredness of nature, or (3) a transcendent reality
- A body of scriptures, or similarly exalted and authoritative body of oral teachings, that orients thought and action

260. See, e.g., WARREN MATTHEWS, WORLD RELIGIONS passim (5th ed. 2008). See also Mary Ann Clark, Santería, in 5 INTRODUCTION TO NEW AND ALTERNATIVE RELIGIONS IN AMERICA 85, 86 (Eugene V. Gallagher & W. Michael Ashcraft eds., 2006) (noting that, although Santería lacks a centralized institution with a clearly defined priesthood, adherents of Santería often form communities that resemble extended families, and a hierarchy is established through “the relative initiatory age of participants”).

261. See deChant & Jorgensen, supra note 2.
Rituals and ceremonies
- Individual or group prayer, or other efforts to communicate with God or gods, nature, or the transcendent
- A priesthood or hierarchical structure
- Some prophet-like or divinized figure(s)

Moderate weight:

Least weight:
- Condemnation of violence in theory and practice
- Commitment to charity and social betterment initiatives

To see what application of this paradigm (the “suggested paradigm”) would look like in practice, turning once again to Italian fascism and Hare’s beliefs and way of life is helpful. In regards to Italian fascism, Mussolini once confidently declared: “Fascism is a religion.” Moreover, under Sexton’s “ultimate concern” definition, one could reasonably conclude that Italian fascism is Mussolini’s ultimate concern and, therefore, indeed a religion. As the Supreme Court held, however, inquiring into the sincerity of a belief system is permissible in Religion Clauses cases. The sincerity of Mussolini’s characterization of Italian fascism as a religion is worth questioning and can be adequately evaluated through application of the suggested paradigm.

262. Although vulnerable to certain abuses, as explained in Part Four of this Article, a weighted paradigm can make a great deal of sense, depending on the details. As Freeman persuasively argued, without certain features, such as belief in God or the like, other features tend to lose their religious significance. These more “central” features should be accorded greater weight to reflect this reality. On the other hand, features that are not as prominent or valued in religions and that are also shared with nonreligious belief systems should be accorded the least weight. Admittedly, there is a point at which classifications of this sort become arbitrary and break down, but the truth remains that not all features are equal. One of the obstacles in refining the analogical approach is to discover and articulate their relative worth.


264. United States v. Seeger, 380 U.S. 163, 166 (1965) (implying that whether a claimant’s belief is “sincere and meaningful” is an appropriate consideration in determining whether the belief is religious).

265. Indeed, one could reasonably conclude that Mussolini merely used religious vocabulary as a means to advance a political agenda, and that his appeals to religious ideas and practices were ultimately insincere.
Again, Greenawalt’s paradigm contains a feature articulated as “A belief in God,” and Freeman’s paradigm contains a similar feature: “A belief in a Supreme Being.” Each feature gives the impression that any degree of belief in God or a Supreme Being suffices, no matter how de minimis the belief. As argued above, Italian fascism could qualify as a religion under Greenawalt’s and Freeman’s paradigms precisely because of the incredibly broad scope of the language of features such as this. Italian fascism clearly posits a belief in God, but the sincerity of this belief goes unquestioned under Greenawalt’s and Freeman’s paradigms.

A feature that requires a central concern with God, nature, or a transcendent reality—rather than a mere belief, no matter how de minimis—is more representative of how religions in general actually are. In most religions, God or gods, nature, or a transcendent reality is at the core, not the periphery. Nietzsche argued that, in this broken and decadent modern age, the idea of the state has become the new, great idol, usurping the place once held by God. Mussolini’s belief system is a prime example of Nietzsche’s argument. At the core of Italian fascism is not God or the equivalent of God in nonmonotheistic religions. Instead, the center of gravity in Italian fascism is the idea of the fascist state. God is dethroned and relegated to the outskirts and used as a disposable tool to achieve this idea.

Accordingly, Italian fascism does not share one of the weightiest features in the above paradigm of religion: a central concern with (1) God or gods, (2) the sacredness of nature, or (3) a transcendent reality. This conclusion is consistent with controlling precedent. In Wisconsin v. Yoder, the Supreme Court held that “to have the protection of the Religion Clauses, the claims must be rooted in religious belief.” Using this metaphor, the root of Italian fascism is a particular ideal of the state. Because the root of most religions is a central concern with God or gods, nature, or a transcendent reality, the only reasonable conclusion is that Italian fascism’s ideal state is too dissimilar in kind to qualify as religious in nature.

To repeat, the overriding purpose of a paradigm of religion is to represent “what is indisputably religion.” The only way to accomplish

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266. Even if this is not what Greenawalt and Freeman intended, this is what their language conveys.
270. See GENTILE, supra note 182, at 52 (revealing that Italian Fascism elevates the Fascist State above everything else, as individuals are expected to obey the Fascist State throughout life, without hesitation or exception).
271. Greenawalt, supra note 96, at 762.
this objective is to examine different religions, identify common features, and incorporate those features into the paradigm. Because each feature is a summary of specific, observable phenomena in various religions, comparing the paradigm to a particular belief system or way of life does not merely entail consideration of the paradigm’s features at face value. Rather, this comparison requires consideration of the underlying phenomena signified by the language of the features. The extent to which a belief system or way of life is similar to these phenomena should determine whether it qualifies as a religion. Greenawalt and Freeman failed to adequately stress this point.

For instance, Italian fascism claims that certain texts are “sacred,” particularly Vico’s *Scienza Nuova* and Mazzini’s *On Nationality*. This adamant claim seems to be enough to satisfy the following feature in Greenwalt’s paradigm: “the use of sacred texts.” But whether these works constitute “a body of *scriptures* . . . that orients thought and action”—the second of the weightiest features in the suggested paradigm—depends on the extent to which they resemble the scriptures in other belief systems that are indisputably religions. Such scriptures include the Tanakh, Bible, Qur’an, Vedas, and Tripitaka. In comparison to such scriptures, the written works that Italian fascism deem sacred share more differences than similarities. In *Scienza Nuova*, for example, Vico primarily sought to reconstruct the history of certain ancient nations and to articulate the “main philosophical and theoretical presuppositions involved in this reconstruction.” On the other hand, *On Nationality* seems to be best characterized as a work of international political and social theory. Given this stark contrast with the scriptures in various religions, Italian fascism cannot reasonably be said to share the second of the weightiest features in the above paradigm: “a body of *scriptures* . . . that orients thought and action.”

In sum, Italian fascism does not share either of the weightiest features in the above paradigm, nor does it share those with the least weight, namely, *condemnation of violence in theory and practice* and *commitment to charity and social betterment initiatives*. Rather, Italian fascism glorifies violence, as shown through Mussolini’s belief that God approves all violence used to maintain the laws of the fascist state, “laws that God certainly wishes to obtain in the world.”

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274. *See Martin Wight, Mazzini, in Four Seminal Thinkers in International Theory: Machiavelli, Grotius, Kant, and Mazzini* 89, 91 (Gabriele Wight & Brian Porter eds., 2005).
With respect to charity, Mussolini encouraged it, but only if cameras were close by.\textsuperscript{276} This revealing fact casts suspicion over whether Italian fascism, as represented in the person of Mussolini, exhibited any commitment to charity whatsoever. Arguably, to perform a true act of charity, or any moral act, one should expect nothing in return. By performing acts of “charity” in front of cameras, Mussolini desired in return the favor of the Italian people, probably to exploit them with greater ease.\textsuperscript{277} As such, one cannot say with confidence that Italian fascism exhibited a commitment to charity.

With respect to social betterment initiatives, some of Mussolini’s social programs proved beneficial, including “slum clearance, rural modernization, and campaigns against illiteracy and malaria.”\textsuperscript{278} Nonetheless, Italian fascism failed to exhibit a commitment to social betterment initiatives. Its social ills greatly overshadowed its social benefits, thereby exposing where the true commitment lied. As one scholar put it, the legacy of Mussolini and the doctrine that he created “is one of hate, violence, disdain, and all that can go wrong with humanity.”\textsuperscript{279}

Furthermore, any “rituals and ceremonies” of Italian fascism, such as military parades or drills, are too different in kind from those associated with various religions to qualify as religious in nature. Nowhere in “What is Fascism?” did Mussolini convincingly advocate rituals and ceremonies of the sort typically thought of by most people as religious. All and all, then, Italian fascism does not share at least five of the eight features in the above paradigm. Again, the five features it does not share are: rituals and ceremonies (moderate weight); the two features with the greatest weight (a central concern with God or gods, the sacredness of nature, or a transcendent reality, and a body of scriptures, or similarly exalted and authoritative body of oral teachings); and the two features with the least weight (condemnation of violence, in theory and practice, and commitment to charity and social betterment initiatives). This is enough justification to conclude that Italian fascism fails to qualify as a religion for First Amendment purposes pursuant to the suggested paradigm and analysis.

Applying the suggested paradigm to Hare’s beliefs and way of life produces a more ambiguous outcome, as does applying other paradigms. As previously stated, Hare (1) embraced a body of scriptures that orients thought and action, (2) participated in rituals and ceremonies of the Anglican church, which of course consists of (3) a priesthood or hierarchical structure, and (4) he condemned violence in theory and

\textsuperscript{276} BRENDA HAUGEN, BENITO MUSSOLINI: FASCIST ITALIAN DICTATOR 63 (Anthony Wacholtz ed., 2007).
\textsuperscript{278} PALMIRA BRUMMETT ET AL., CIVILIZATION PAST AND PRESENT 855 (9th ed. 1999).
\textsuperscript{279} JOHN HENRY WADLEY, III, ETHICS, PRINCIPLES, AND LOGIC 92 (2009).
practice.\textsuperscript{280} His beliefs and way of life therefore seem to plainly share four of the features in the suggested paradigm.

Conversely, Hare flatly rejected God or gods, the sacredness of nature in the pantheistic sense, and a transcendent reality as “superstition.”\textsuperscript{281} Thus, his beliefs and way of life do not share one of the two weightiest features in the above paradigm. Whether they share any of the remaining three features is unclear. These remaining three features are as follows: belief in some prophet-like or divinized figure(s); individual or group prayer, or other efforts to communicate with God or gods, nature, or the transcendent; and commitment to charity and social betterment initiatives.

In regards to a belief in some prophet-like or divinized figure(s), Hare embraced and deeply valued Jesus’ moral teachings. Nonetheless, Hare did not view Jesus in the same way as more conventional Christians, namely, as the Son of God through whom God taught and instructed mankind. Hare recited prayers, such as the Apostles’ Creed, but to whom or what Hare prayed is unclear, as he did not believe in God.\textsuperscript{282} Whether Hare engaged in a sufficient degree of charity and social betterment initiatives is also unclear. Conceivably, therefore, application of the above paradigm to Hare’s beliefs and way of life could fail to produce a clear and satisfactory determination regarding religion-status.

The issue at hand is the point at which a disputed instance qualifies as a religion, and where Hare’s beliefs and way of life are located in relation to this point. But, application of the above paradigm does not, in itself, seem completely capable of resolving the issue. Remaining silent or surrendering after cursorily concluding that no right answer exists is unjustifiable. Although the idea of one right answer for every borderline case is naïve to an extent, we do not live in a vacuum. Before us is the Constitution, and behind us is a chain of events that comprise enlightened moments in the legal and political history of our society. The most appropriate answer in a borderline case is the one that best fits with this history and, most importantly, with the structure and applicable principles of the Constitution, particularly the principles underlying the Religion Clauses.

\textsuperscript{280} As stated before, after surviving World War II, Hare dedicated his life to understanding and articulating the moral good. His commitment to nonviolence is manifested, in part, through his theory of tolerance. \textit{See, e.g.,} Vladimir Seiler & Božena Seilerová, \textit{Toleration as a Value of Society and Personal Development, in Language, Values and the Slovak Nation} 65 (Tibor Pichler & Jana Gašpariková eds., 1994) (noting that Hare demonstrated commitment to, and developed an idea of, tolerance “with respect to other people’s ideas and convictions,” and considered the “values of different cultures to be of the same hierarchical status”); \textit{see also} DAVID L. KIRP ET AL., \textit{GENDER JUSTICE} 135 (1986) (stating that Hare’s concept of toleration implied “a readiness to respect other people’s ideals as if they were his own”).

\textsuperscript{281} \textit{HARE, supra} note 224.

\textsuperscript{282} \textit{See GOD AND THE ETHICS OF BELIEF, supra} note 11.
Applying this portion of the analysis to Hare’s beliefs and way of life should help bring some of this lofty language down to earth. With every borderline Religion Clauses case, the particular context determines, in part, the principles that control. Assume, then, that Hare is bringing a free exercise claim, and whether he succeeds depends entirely on how the reviewing court classifies his beliefs and way of life, as a religion or not a religion. Because Hare’s beliefs and way of life are neither clearly religious nor clearly nonreligious under the suggested paradigm, it is appropriate to first turn to principles underlying the Religion Clauses.

As Sexton emphasized, underlying the Free Exercise Clause is the principle of “inviolability of conscience,” or the idea that “belief should be free, not coerced.” This principle must therefore occupy a central place in the analysis and substantially affect the final determination as to whether Hare’s beliefs and way of life qualify as a religion. According to Sexton, inviolability of conscience is the “core of the free exercise clause” and is supported by several rationales. As the Supreme Court has recognized, freedom of conscience is a good in itself, and is considered a precondition of emotional well-being. Moreover, “such freedom, with the resulting proliferation of religions, promotes a desirable pluralism of thought contributing to the diversity of association, viewpoint, and enterprise essential to a vigorous, pluralistic society.” In a borderline free exercise case, these rationales strongly support a finding that the disputed instance is a religion. Indeed, individual freedom in matters of religious belief, emotional well-being, and a “vigorous, pluralistic society” should be protected.

Furthermore, the principle of inviolability of conscience mandates that the judiciary exercise considerable deference with respect to the content of free exercise claimants’ beliefs. Again, inquiries into the sincerity of beliefs are appropriate, not inquiries into their ultimate truth. Judicial deference as to what free exercise claimants’ consider to be true is the only way to avoid inappropriately discriminating among creeds, and

283. Note, supra note 58, at 1058.
284. Id.
285. Id.
286. Id.
287. The Founders expressed a deep concern over the threat of religious tyranny. Perhaps the surest way to prevent such tyranny is not to attack and belittle the beliefs of those who embrace the prevailing religions, à la Nietzsche and modern popular atheists like Richard Dawkins and Christopher Hitchens. Often, attacks of this nature only engender bitterness, resistance, and close-mindedness. Rather, perhaps the better way is to assume that religions are not going anywhere anytime soon, and to foster and protect religious freedom and diversity. In a society where sharply differing beliefs and practices are tolerated, valued and permitted to flourish, any one group is less likely to dominate and oppress all.
inappropriately suppressing what is inviolate under the Free Exercise Clause: freedom of conscience in matters of religion.

The rationales of, and judicial deference required by, the principle of inviolability of conscience weigh in favor of concluding that Hare’s beliefs and way of life qualify as a religion, as do other applicable principles. Through the Bill of Rights, and especially through the Thirteenth, Fifteenth, and Nineteenth Amendments, the Constitution reflects a commitment to enlightened principles such as tolerance of difference, diversity, equality, and inclusivity under the law. These principles are also manifested in many of the seminal moments of our legal and political history, such as Brown v. Board of Education, Title VII of the Civil Rights Act, the Voting Rights Act of 1965, the decriminalization of homosexuality, and the Equal Pay Act (to name merely a few). In addition, the line of major cases concerning the meaning of the term “religion” form part of this same trend towards greater tolerance and acceptance of difference. Indeed, the Supreme Court went from claiming that only monotheistic beliefs count as religious to vastly expanding what “religion” means in the First Amendment, so as to include nontraditional and less popular religions.

Concluding that Hare’s beliefs and way of life qualify as a religion under the First Amendment best agrees with applicable and noble principles of the U.S. Constitution, including those underlying the Religion Clauses. This conclusion is also consistent with an important legal and political trend in our society that ought to continue. In most (if not all) borderline free exercise cases, erring on the side of a finding of religion is the only appropriate action in a society that truly values, encourages, and respects freedom of conscience in matters of religion, and the seemingly endless diversity that such freedom necessarily generates.

CONCLUSION

Without doubt, the analogical approach will remain a work in progress, and the “final word” appears nowhere in this Article. Indeed, the meaning of the concept of religion in the First Amendment is a subject that seems to inevitably result in a loss for words. But the alternative is inferior and unacceptable. Once subjected to the scrutiny of critics, any definition of religion will prove inadequate, that is, underinclusive, overinclusive, or both. The Supreme Court abandoned its search for a definition long ago, and legal scholars should do the same. Perhaps the analogical approach will fare no better under the scrutiny of critics, but by recognizing that the concept of religion lacks an essence and cannot be defined, the analogical approach at least does justice to reality.

Only this approach can keep pace with the expanding and ever-changing nature of religion, whereas any definition of religion—as
Peñalver explained—is like a photograph.289 “As soon as [a] photograph [i]s shot . . . reality beg[ins] to diverge from the captured image, leaving the photograph as a mere relic of the past.”290 Finally, in what is perhaps its greatest advantage, the analogical approach provides judges with more flexibility to draw upon relevant principles in constitutional determinations of religion-status, while remaining true to what religion actually is, or appears to be. Because the analogical approach is the most acceptable option, serious efforts to refine it should continue.

289. Peñalver, supra note 18, at 811.
290. Id.