

**RELIGIOUS RIGHTS AND THE DEFINITIONAL PROBLEM:**

*WHAT SOCIOLOGICAL APPROACHES CAN AND CANNOT ACCOMPLISH FOR FIRST AMENDMENT JURISPRUDENCE*

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*“The word ‘religion’ is not defined in the Constitution. We must go elsewhere, therefore, to ascertain its meaning....”*

- Chief Justice Waite in *Reynolds v. United States* (1878)

## **The Definitional Problem<sup>1</sup>**

Without elaboration, the First Amendment commands: “Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof...”<sup>2</sup> Despite the lack of a textual definition, use of the term “religion” requires that it have meaning. In order to apply the First Amendment’s religion clauses to a case or controversy, the Supreme Court must determine that the case involves *religion* (Barron and Dienes 2004, 513; Berg 2004, 287; Sullivan 2005, 29).<sup>3</sup> Described this way, the import of defining religion is manifest: the Constitution protects religion only so far as the term applies.

The Constitution’s silence thus requires judges to supply an understanding of what religion is. Judges attribute meaning to the term “religion” when they decide that it is relevant to a legal problem. Much like determining what qualifies as “obscene” in free speech cases, “the question... involves not really an issue of fact but a question of constitutional *judgment* of the most sensitive and delicate kind.” (*Roth v. United States*, 1957, 497-98).<sup>4</sup>

These judgments have proved difficult for justices on the Supreme Court. The term “religion” carries significant potential for ambiguity and invites justices into thorny questions of theology, philosophy, sociology, and psychology, among others. These difficulties are compounded by the exclusivity of any definitional line-drawing: conceptual boundaries threaten to exclude something that should be included. Such exclusion poses potential tensions

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<sup>1</sup> Portions of this essay are adapted from Jesse Covington, 2007. *Taken on Faith: The Concept of Religion in First Amendment Jurisprudence*, PhD dissertation, University of Notre Dame.

<sup>2</sup> The term “religion” appears only once more in the Constitution—in Article VI’s prohibition of religious tests for public office.

<sup>3</sup> “A precondition for invoking the Free Exercise Clause depends on showing that it is a religion or religious belief that is burdened” (Barron and Dienes 2004, 513). Writes Berg: “The [definitional] question arises under both Religion Clauses. What sort of activity by an individual or group is the exercise of ‘religion’ and therefore protected by the Free Exercise Clause? Correspondingly, what sorts of ideas or practices are ‘religion’ such that the government cannot make a law respecting their establishment?” Likewise, “all religion cases in the United States require a finding that the activity in question qualifies as ‘religion’” (Sullivan 2005, 29).

<sup>4</sup> Justice Harlan concurring in result and dissenting in part.

with the Establishment Clause (see Choper 1982, 579-80).<sup>5</sup> Combined with the lack of constitutional guidelines, these and other challenges have complicated judges' efforts to protect religious liberty. After more than 130 years of First Amendment jurisprudence, the constitutional meaning of religion remains far from clear or settled. Writes Conkle: "...the Supreme Court has never adopted a constitutional definition [of religion] as such..." (2003, 60). Nevertheless, functional definitions remain inescapable: the Court must ascertain that a case involves "religion" in order to invoke the First Amendment's religion clauses.

### **Existing Treatment of the Definitional Issue**

Many general discussions of the constitutional definition of religion give substantial attention to the famous draft exemption cases *Seeger v. United States* (1965) and *Welsh v. United States* (1970), where religion is construed in terms of psychological ultimacy.<sup>6</sup> While both cases openly explore definitional issues, their role in relevant literature is anomalous given that neither *Seeger* nor *Welsh* directly address a *constitutional* question—indeed both are focused on statutory questions. Moreover, the Supreme Court has not applied to constitutional jurisprudence the highly individualistic account of religion it deemed appropriate to the draft exemption situations in *Seeger* and *Welsh*. Thus, to the extent that these cases are emphasized in the relevant literature, they shed insufficient light on the Court's constitutional decision making.

Despite this somewhat misguided emphasis on the draft exemption cases, the literature on the constitutional meaning of religion can provide helpful guidance for how to proceed. Indeed, four articles enjoy widespread recognition as essential works in the field.<sup>7</sup> These include Jesse Choper's "Defining 'Religion' in the First Amendment" (1982); George Freeman's "The Misguided Search for the Constitutional Definition of Religion" (1983); Kent Greenawalt's

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<sup>5</sup> Writes Choper: "...the very idea of a legal definition of religion may be viewed as an 'establishment' of religion in violation of the first amendment" (1982, 580).

<sup>6</sup> See, for example, Booher 2004, Choper 1982, Feofanov 1995, Sexton 1978, and Greenawalt, 1984, among others.

<sup>7</sup> These four articles are cited ubiquitously. For a sense of the field's agreement about these articles' status, the following should suffice: Daniel Conkle cites these four articles as "a sampling of the academic literature," (2003, 66-7). Kathleen Sullivan and Gerald Gunther note these four articles alone as "commentary on the definition of religion" (2003, 502). John Garvey and Frederick Schauer's *Reader* includes significant selections from Sexton and Greenawalt in its discussion of "what is religion". Adams and Emmerich recommend "particular" note be taken of Choper, Greenawalt, and Freeman's pieces (1990, 157n).

“Religion as a Concept in Constitutional Law” (1984); and John Sexton’s (unsigned) “Note, Toward a Constitutional Definition of Religion” in the *Harvard Law Review* (1978).<sup>8</sup> While broadly normative in their arguments for particular approaches to religion, these four articles reveal three distinct frameworks for thinking about religion: religion can be conceived of in theological, sociological, and psychological terms.

Corresponding to what might be termed a *theological* understanding of religion, Choper argues that religion is best defined in terms of its *content* rather than its function.<sup>9</sup> He argues for identifying religion on the basis of doctrinal affirmations involving “extratemporal consequences” (1982). Choper maintains that the specific beliefs of a system of thought render it religious or non-religious, depending on the content of those beliefs. Defining religion according to its content usually involves some sort of truth claim about reality. For Choper, religion must involve concern for a human’s “immortal soul” (1982, 598).<sup>10</sup> What I refer to as the ‘theological’ approach attempts to account for the Court’s efforts to define religion in terms of such substantive truth claims.

In contrast, Sexton argues for the benefits of a phenomenological or experiential understanding of religion for free exercise cases. Sexton seeks to define religion *apart* from any content, exploring how human psychology might provide a definition that averts disagreements on substantive truth claims. “Phenomenology analyzes the strictly religious act and experience and tries to distill from them an understanding of the basic human religious impulse itself” (1066*n*). “[C]onsequently, every person has a religion” (1067). That religion, maintains Sexton, is whatever is “ultimate” in the life of the individual. Thus Sexton defines religion as whatever holds a functionally ultimate role in an individual’s life.<sup>11</sup> What I call the “psychological” or individualist model includes and broadens Sexton’s view, encompassing approaches to religion grounded in a functional account of individual priority or experience.

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<sup>8</sup> While this is listed in the *Harvard Law Review* as an unsigned note, Sexton—currently President of New York University—claims this note as one of his articles. See: <http://its.law.nyu.edu/facultyprofiles/profile.cfm?section=pubs&personID=20281> (link valid as of 7/31/12).

<sup>9</sup> I use the term “theological” quite broadly, denoting more than just the study of the knowledge of God but the range of doctrinal commitments related to this study.

<sup>10</sup> Choper also discusses the potential merits of defining religion according to its engagement with “transcendent reality.” He writes: “These beliefs are concerned with aspects of reality that are not observable in ordinary experience, but which are assumed to exist at another level.” (602).

<sup>11</sup> In this, Sexton follows theologian Paul Tillich, who is cited by the Court in *United States v. Seeger* (1965).

Greenawalt and Freeman propose what have been termed “analogical” approaches religion—largely corresponding to what I will call a *sociological* understanding of religion. Greenawalt suggests that courts should “identify instances to which the concept [of religion] indisputably applies, and to ask in more doubtful instances how close the analogy is between these and the indisputable instances” (1984, 763). Likewise, Freeman suggests comparing ambiguous cases to paradigmatic examples of religion (1983). The analogical approach shows itself to be socially contingent in multiple ways.<sup>12</sup> “Exactly how to draw the line between religious and secular ideas will depend considerably on... a particular society and historical era” (Greenawalt 1984, 793). What is here termed the “sociological” approach encompasses such analogical methods’ appeals to society—both those made directly (obvious cases) and indirectly (comparing “doubtful instances”).<sup>13</sup> Moreover, this inquiry’s sociological approach considers the *subject* of society’s judgments: religion as the *beliefs and behaviors of a recognizable group*.

Despite a good deal of definition-oriented scholarship,<sup>14</sup> “[t]he definition of religion for legal purposes in this country remains... profoundly unsettled” (Sullivan, 2005, 29-30).<sup>15</sup> This essay describes and analyzes the Supreme Court’s use of *sociological* conceptions of religion in its First Amendment jurisprudence. In contrast to much of the existing literature on the subject—which is largely prescriptive—I will focus here on description and analysis. This essay seeks to more fully understand—in all its complexity—how the Court has used sociological understandings of religion and what the strengths and weaknesses of this approach may be.<sup>16</sup>

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<sup>12</sup> Writes Greenawalt: “After all, the term [religion] derives from natural language and refers to a deep and important social phenomenon. ...An approach should tie the constitutional concept of religion to concepts in more general use” (757).

<sup>13</sup> Significantly, the first of these—direct appeals to society’s judgment—is not central to these accounts. Indeed, as Peñalver (1997) notes, what one accepts as an obvious case plays a critical role on how one assesses cases by comparison.

<sup>14</sup> Literature on this topic abounds. (For example, in addition to those works already noted see Booher 2004, Choper 1982, Collier 1982, Feofanov 1995, French 1999, Howitz 1997, Ingber 1989, Peñalver 1997, L. Smith 2004).

<sup>15</sup> Sullivan also writes: “...What may be surprising to some is that the more general question—how religion ought to be understood for purposes of U.S. laws concerning religion (and there are many)—also seems new to these courts. There is no accepted legal way of talking in the United States about the vast array of religious beliefs and practices that are represented. There is no accepted legal way of navigating the definitional ground....” (2005, 100)

<sup>16</sup> The implications of this analysis are not ignored, but are reserved for the study’s conclusion.

## Overview

This essay assumes the above threefold model for classifying different accounts of religion according to their points of reference—theological, individualist, and sociological—and focuses on the last of these.<sup>17</sup> Each encompasses the parallel *type* of approach proposed in existing scholarship as described above, but broadens it and treats it more categorically. This essay focuses on the sociological approach in particular—identifying religion with reference to several related aspects of social reality.<sup>18</sup> Such efforts often account for religion as itself a communal enterprise, focusing on the importance of group beliefs, practices, and characteristics in considering religion. They also frequently appeal to society at large in order to determine which groups should be understood as ‘religious,’ or what characteristics serve to distinguish a group as ‘religious’ or non-religious. These two dimensions (religion as a group behavior and societal judgments about such groups) are closely related, since the judgments of society tend to involve groups sizeable enough to merit societal notice.<sup>19</sup> While sharing the individualist model’s skittishness about substantive content, the sociological approach is perhaps less aptly characterized as truly “functional,” since the judgments of society often entail substantive conceptions of what religion *is*.<sup>20</sup>

Broadly conceived, I argue that the Court has often identified what is “religious” according to the beliefs and especially the practices of recognized religious groups. This thesis has two prongs, corresponding to the two major sections below. One focuses on the religious *group* in question; the other focuses on society’s judgment about what is or is not religious.

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<sup>17</sup> As part of a larger project, these are developed at more length elsewhere.

<sup>18</sup> It is worth noting that this narrow focus precludes examining the Court’s use of theological or psychological approaches to religion.

<sup>19</sup> Indeed, it is hard for the religion of one individual to gain wide recognition.

<sup>20</sup> By way of contrast, “theological” approaches define religion by making substantive claims about metaphysical truths, usually related to God in some way. For example, a theological understanding might assert that God exists and that “religion” entails human relations with that God. Alternatively, a more philosophical construct might claim that natural law provides definite parameters for what may rightly be characterized as “religion.” In short, the theological method locates religion in some account of what is *true* in terms of ultimate meaning.

Likewise, “psychological” or individualist approaches emphasize the solitary adherent as the locus of belief: the individual is the arbiter of conscience, the sole maker of religious choices, and the only authority regarding his or her religion. One important version of this sort of approach identifies religion according to an idea’s relative import to the believer, rather than by the content of that belief. In short, this method seeks to define religion solely with reference to the individual. It avoids placing government in a position to contradict a believer about his or her religion.

When it has used these methods of conceptualizing religion, the Court has been able to lend meaning to the term “religion” without providing its own definition. In so doing, it has in some ways sidestepped the definitional question while still applying meaningful parameters for what qualifies as “religion” under the First Amendment. My analysis suggests that the primary virtue of a sociological conception of religion is its ability to support substantive protections for First Amendment rights. It does this in ways that the individualist/psychological approach cannot, but with fewer Establishment Clause problems than the theological approach. Moreover, sociological understandings of religion tend to reinforce democratic norms, reflecting informal majoritarian consensus about what should qualify as “religion” and what should not. However, I suggest that this is also a weakness of sociological approaches, as the tendency to accept democratic judgments can result in a failure to provide meaningful rights-protections—particularly to individuals, religious minorities, and less formally organized religious groups. Moreover, it is not altogether clear that problems associated with theological definitions are fully avoided, since societal views of what religion is may entail theological content.

Against this backdrop, we now turn to the substance of describing and analyzing the Supreme Court’s sociological accounts of religion.

### **The Behaviors and Beliefs of Known Groups**

#### *The Free Exercise Clause*

Defining religion presents a real problem for free exercise cases. On the one hand, if the text of the First Amendment requires that religiously motivated behaviors receive special protection, then there must be some way of determining just what merits such consideration and what does not. In other words, to the extent that the First Amendment requires special treatment for religion, the import of the definitional question is significantly increased. On the other hand, any definition of religion threatens to exclude something that should be included, running afoul of the Establishment Clause.

During the mid-Twentieth Century, the Supreme Court extended strong protections to religiously motivated behavior—most prominently through the exemption doctrine. During this time, its efforts to delineate who qualified for these protections focused on the doctrines and

practices of known religious groups, often supported by evidence from experts specializing in understanding those groups. These ‘group behavior’ accounts of religion served to establish the *bona fides* of the claimant, clearly setting their desired behavior apart from ordinary desires and classifying it as actually religious. Moreover, the shared doctrines and actions of the religious group helped to establish what was ‘central’ to that religion—a key point in assessing how substantial of a burden was incurred by the law or policy in question.

A number of well-known cases demonstrate these points. In neither *Sherbert v. Verner* (1963) nor in *Wisconsin v. Yoder* (1972—two paradigmatic religious exemption cases—does the Court define religion. Nevertheless, in both cases, the majority decisions apply a free exercise doctrine that requires differentiating religion from non-religion. Under the exemption doctrine, which lasted nearly thirty years following *Sherbert*, the Supreme Court held that laws that place a substantial burden on an individual’s religious exercise—even indirectly—do not merit the same presumption of constitutionality as other laws. Indeed, only a “compelling” interest can justify such incursions. In both cases, the Court relied on information about the social groups in question in order to establish the religious nature of the claims at issue.

The facts of *Sherbert* involve South Carolina denying the appellant unemployment benefits because she refused to accept available work—in South Carolina’s judgment, without cause for this refusal. She stated that her religious beliefs as a Seventh-Day Adventist compelled her to refrain from working on Saturday, but the State did not treat her religious scruples as “cause.”<sup>21</sup> In his majority opinion Justice Brennan assumes that religious reasons can and constitutionally *should* be differentiated from non-religious ones. The uniqueness of religion is quite clear as Brennan contrasts religion with other “personal reasons” that would *not* qualify as cause to refuse employment.<sup>22</sup> Brennan assumes an intimate connection between faith and conduct, and he objects to South Carolina forcing Sherbert “to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand”

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<sup>21</sup> Having lost her job due to a scheduling change requiring Saturday work, Sherbert failed to find another job.

<sup>22</sup> Brennan: “It is true that unavailability for work for some personal reasons not having to do with matters of conscience or religion has been held to be a basis of disqualification for benefits. ...[But w]here the consequence of disqualification so directly affects First Amendment rights, surely we should not conclude that every ‘personal reason’ is a basis for disqualification” (401*n*).



(404).

Significantly, Brennan proves wary of basing the Court's assessments of religiosity on individual assertions alone. Speaking to South Carolina's fear of "fraudulent claims by unscrupulous claimants feigning religious objections," Brennan leaves open the possibility that religious sincerity can be questioned (407).<sup>23</sup> However, he uses the tangible aspects of Sherbert's participation in a religious group to establish the good faith religiosity of her claims.<sup>24</sup> Significantly for present purposes, a footnote in the majority opinion recounts the duration of Sherbert's membership in her church (two years prior to her work schedule change) and its well-known doctrines regarding Saturday labor. From this evidence Brennan concludes: "No question has been raised in this case concerning the sincerity of appellant's religious beliefs. Nor is there any doubt that the prohibition against Saturday labor is a basic tenet of the Seventh-day Adventist creed..." (399*n*). The fact that Seventh-Day Adventists are commonly recognized as a religious group and that their doctrines are well-known allows Brennan to describe Saturday rest as a "basic tenet" of their faith. Sherbert's membership in the Adventist religion helps to establish the good faith of both her religiosity and the religious import of her claim regarding Saturday rest.

*Wisconsin v. Yoder* addresses whether or not Wisconsin's compulsory high school education law can apply to Old-Order Amish families who object to it for religious reasons. After determining that the law does indeed "gravely endanger if not destroy the free exercise of respondents' religious beliefs" (219), the Court finds no adequate reason for Wisconsin to enforce it against the Amish. Here, the fact that the Amish represent a discrete, identifiable group with a long history proves central to establishing their religiosity. In his majority opinion, Chief Justice Burger mentions that this group is centuries *old* no less than six times in his

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<sup>23</sup> "Even if consideration of such evidence is not foreclosed by the prohibition against judicial inquiry into the truth or falsity of religious beliefs, *United States v. Ballard*, 322 U.S. 78 - a question as to which we intimate no view since it is not before us - it is highly doubtful whether such evidence would be sufficient to warrant a substantial infringement of religious liberties. For even if the possibility of spurious claims did threaten to dilute the fund and disrupt the scheduling of work, it would plainly be incumbent upon the appellees to demonstrate that no alternative forms of regulation would combat such abuses without infringing First Amendment rights." (407)

<sup>24</sup> Writes Choper: "[T]he Court's opinion seems to underline that Sherbert's position was based on a clearly recognizable, fairly conventional religious precept." (590)

opinion.<sup>25</sup> This legacy provides evidence of their doctrines and practices: “As a result of their common heritage, Old Order Amish communities today are characterized by a fundamental belief that salvation requires life in a church community separate and apart from the world and worldly influence. This concept of life aloof from the world and its values is central to their faith” (210). Burger emphasizes the common nature of the respondent’s beliefs and practices: they are held “in accordance with the tenets of Old Order Amish communities generally” (209). The group status of the Amish is also central to substantiating Burger’s affirmation that religion includes corporate *conduct*.<sup>26</sup> The shared history, doctrines, and practices of the Amish facilitate Burger’s inquiry and support his conclusions regarding what is “central” to their faith.

In *Yoder*, the Court confirms its sociological approach through appeals to academic experts in sociology, anthropology, and education.<sup>27</sup> Bolstered by their corroborating evidence, Burger asserts that the Yoders’ claims do not reflect arbitrary whims, but rather central tenets of the Amish religion. The shared history of the Amish people proves critical for the Court: “It cannot be overemphasized that we are not dealing with a way of life and mode of education by a group claiming to have recently discovered some ‘progressive’ or more enlightened process for rearing children for modern life” (235). In contrast:

...[with] a history of three centuries as an identifiable religious sect and a long history as a successful and self-sufficient segment of American society, the Amish in this case have convincingly demonstrated the sincerity of their religious beliefs, the interrelationship of belief with their mode of life, the vital role

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<sup>25</sup> For example, “The record shows that the respondents’ religious beliefs and attitude toward life, family, and home have remained constant - perhaps some would say static - in a period of unparalleled progress in human knowledge generally and great changes in education. The respondents freely concede, and indeed assert as an article of faith, that their religious beliefs and what we would today call ‘life style’ have not altered in fundamentals for centuries.” (216-17).

<sup>26</sup> Indeed, *Yoder* makes this claim perhaps more strongly than in any previous case (see Hamilton 1993). In his initial description of the Amish, Burger notes: “Broadly speaking, the Old Order Amish religion pervades and determines the entire mode of life of its adherents. Their conduct is regulated in great detail by the *Ordnung*, or rules, of the church community” (210). Moreover, “the Old Order Amish religion pervades and determines virtually their entire way of life, regulating it with the detail of the Talmudic diet through the strictly enforced rules of the church community” (217). Burger leaves no doubt that Amish faith and practice are inseparable. When dealing with this group, “belief and action cannot be neatly confined in logic-tight compartments” (220).

<sup>27</sup> The Court primarily relies on the trial testimony and written works of two experts on the Amish—John Hostetler, Professor of Anthropology and Sociology at Temple University, and Gertrude Huntington, Professor of Anthropology at the University of Michigan—to substantiate its claims. Burger also cites education specialist Donald A. Erickson of the University of Chicago, whose written work addresses the Amish and education.

that belief and daily conduct play in the continued survival of Old Order Amish communities and their religious organization (235).<sup>28</sup>

Throughout its *Yoder* decision, the Court relies on descriptions of the Amish people as a group to affirm their religiosity.

In subsequent cases, the Court became more reticent to assess which doctrines and practices are most central to a religious group. Nevertheless, membership in a clearly recognized group remained central to establishing an adherent's good faith religious motivation. In *Thomas v. Review Board of the Indiana Employment Security Division, et al.* (1981), the Court requires that unemployment benefits be granted to a Jehovah's Witness who quit his job after being transferred to a weapons manufacturing unit of his company. However, Thomas' objection to manufacturing combat materials did not reflect a formal tenet of the Jehovah's Witnesses as a religious group. Instead, the objection stemmed from Thomas' own interpretation of his faith's requirements. Here, the nature of 'religion' presents a key problem. In his majority opinion, Chief Justice Burger acknowledges that "The determination of what is a 'religious' belief or practice is more often than not a difficult and delicate task" (714). Indeed, the Court retreats here from questions of 'centrality,' recognizing that such inquiries draw courts into thorny theological issues that may be inappropriate for judicial inquiry.<sup>29</sup> Religious motivation, rather than centrality to a religious group, becomes the key issue: "The narrow function of a reviewing court in this context is to determine whether there was an appropriate finding that petitioner terminated his work because of an *honest conviction* that such work was forbidden by his religion" (716, emphasis added). Citing *Sherbert* and *Yoder*, Burger opines: "Only beliefs rooted in religion are protected by the Free Exercise Clause, which, by its terms,

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<sup>28</sup> It is not insignificant that the values of hard work and self-sufficiency comport well with American civic values more broadly.

<sup>29</sup> Burger states that the Indiana Court erred in emphasizing that other Jehovah's Witnesses do not share Thomas' conscientious scruples. He writes: "the guarantee of free exercise is not limited to beliefs which are shared by all of the members of a religious sect" (715-6). He continues: "Particularly in this sensitive area, it is not within the judicial function and judicial competence to inquire whether the petitioner or his fellow worker more correctly perceived the commands of their common faith. Courts are not arbiters of scriptural interpretation" (716). Burger's reference to "fellow worker" refers to an aspect of the factual record: "[Thomas] said that when he realized that his work on the tank turret line involved producing weapons for war, he consulted another Blaw-Knox employee - a friend and fellow Jehovah's Witness. The friend advised him that working on weapons parts at Blaw-Knox was not 'unscriptural.'" (711)

gives special protection to the exercise of religion” (713).<sup>30</sup>

In this case, Thomas’ membership in the Jehovah’s Witnesses serves to establish Thomas’ honest religious conviction that requires the heightened scrutiny of the compelling state interest test. While explicitly deferring to the Review Board’s finding of good faith religiosity,<sup>31</sup> Burger goes further in his opinion—citing Thomas’ active participation in a known religious group to support his religiosity. Burger notes relevant aspects of this: “On his [job] application form, he [Thomas] listed his membership in the Jehovah’s Witnesses, and noted that his hobbies were Bible study and Bible reading” (710). Likewise, the record shows that Thomas consulted a fellow believer regarding the religious implications of work on war-related materials (711). Thus Thomas’ participation with the Jehovah’s Witnesses allows Burger to refer to the “common faith” of this religion’s adherents, reinforcing Thomas’ claim to being religious.<sup>32</sup> In one sense, this is consistent with the Court’s approach in *Sherbert* and *Yoder*: participation in a known religious group establishes good faith religious motive. However, in allowing the individual claimant authority to interpret what his faith requires—even when that departs from the official doctrinal positions of his religious group—the *Thomas* decision marks a significant change from *Sherbert* and *Yoder*. Here the Court refuses to examine a religious group’s tenets in order to distinguish truly religious claims from ordinary personal preferences, setting aside a prior tool for delineating what should receive the protections of the First Amendment.

While the compelling interest standard predicated its heightened scrutiny on a finding of religiosity (and often depended on evidence of this from group religions), the majority in *Employment Division v. Smith* (1990) applies a non-discrimination standard, making the religious motivation behind conduct a much less important question. Given this, in *Smith* it is

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<sup>30</sup> Despite the special status accorded to religion in *Thomas*, its protection is not absolute. The majority shares the perspective evident in previous cases that restrictions on religiously motivated conduct require special justification. Chief Justice Burger quotes *Yoder*: “only those interests of the highest order . . . can overbalance legitimate claims to the free exercise of religion” (718). The Court finds that this high bar has not been met in *Thomas*, rendering Indiana’s denial of unemployment benefits an unconstitutional infringement on Thomas’ free exercise rights.

<sup>31</sup> “The Review Board adopted that finding, and the finding is not challenged in this Court” (714).

<sup>32</sup> As noted above: “Particularly in this sensitive area, it is not within the judicial function and judicial competence to inquire whether the petitioner or his fellow worker more correctly perceived the commands of their common faith. Courts are not arbiters of scriptural interpretation” (716).

primarily in the additional opinions that a sociological approach to religion serves to identify religion. Concurring in the Court’s judgment, Justice O’Connor is significantly more sociological than the majority opinion. While O’Connor decries relying on any practice’s “centrality” to a particular religion, she nevertheless emphasizes the role of peyote in the Native American Church.<sup>33</sup> Citing a range of authorities on the subject, O’Connor maintains that “Peyote is a sacrament of the Native American Church and is regarded as vital to respondents’ ability to practice their religion” (903).<sup>34</sup> The group character of the religion is central to this contention. In contrast to Scalia’s more individualistic treatment of religious motivation in the majority opinion, Justice O’Connor quotes the Oregon Supreme Court that: “the Native American Church is a recognized religion” (904). She recognizes that peyote use is *central* to this recognized religious group—it constitutes “the ritual embodying their religious beliefs” (904). Given the import of this specific practice to the group practices of a known religious group, O’Connor can distinguish religious peyote use as distinguishable and thus protectable.

Blackmun’s *Smith* dissent follows suit, using social observations to identify both the religiosity and import of peyote use in the Native American Church.<sup>35</sup> Blackmun asserts that “The Native American Church’s internal restrictions on, and supervision of, its members’ use of

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<sup>33</sup> Drawing a minute distinction, O’Connor writes: “This does not mean, of course, that courts may not make factual findings as to whether a claimant holds a sincerely held religious belief that conflicts with, and thus is burdened by, the challenged law. The distinction between questions of centrality and questions of sincerity and burden is admittedly fine, but it is one that is an established part of our free exercise doctrine, see *Ballard*, 322 U.S., at 85 - 88, and one that courts are capable of making” (907). Scalia criticizes O’Connor for first stating that centrality should be beyond the ken of Courts, yet proceeding to establish the role of peyote in the Native American Church. (887*n*).

<sup>34</sup> “See O. Stewart, *Peyote Religion: A History* 327-336 (1987) (describing modern status of peyotism); E. Anderson, *Peyote: The Divine Cactus* 41-65 (1980) (describing peyote ceremonies); *Teachings from the American Earth: Indian Religion and Philosophy* 96-104 (D. Tedlock & B. Tedlock eds. 1975) (same); see also *People v. Woody*, 61 Cal. 2d 716, 721-722, 394 P.2d 813, 817-818 (1964)” (903-4).

<sup>35</sup> As evidence, Blackmun cites DEA findings and numerous sources that describe known characteristics of this religious community. “The Administrator [of the Drug Enforcement Administration (DEA)] finds that . . . the Native American Church’s use of peyote is isolated to specific ceremonial occasions,” and so “an accommodation can be made for a religious organization which uses peyote in circumscribed ceremonies” (quoting DEA Final Order); *id.*, at 7, 878 F.2d, at 1464 (“[F]or members of the Native American Church, use of peyote outside the ritual is sacrilegious”); *Woody*, 61 Cal. 2d, at 721, 394 P.2d, at 817 (“[T]o use peyote for nonreligious purposes is sacrilegious”); R. Julien, *A Primer of Drug Action* 148 (3d ed. 1981) (“[P]eyote is seldom abused by members of the Native American [494 U.S. 872, 914] Church”); Slotkin, *The Peyote Way*, in *Teachings from the American Earth* 96, 104 (D. Tedlock & B. Tedlock eds. 1975) (“[T]he Native American Church . . . refuses to permit the presence of curiosity seekers at its rites, and vigorously opposes the sale or use of Peyote for non-sacramental purposes”); Bergman, *Navajo Peyote Use: Its Apparent Safety*, 128 *Am. J. Psychiatry* 695 (1971) (Bergman).” (913-4).

peyote substantially obviate the State's health and safety concerns" (913). "Respondents believe, and their sincerity has never been at issue, that the peyote plant embodies their deity, and eating it is an act of worship and communion. Without peyote, they could not enact the essential ritual of their religion" (919).<sup>36</sup> To establish this centrality, Blackmun again relies on evidence drawn from the shared group characteristics of the Native American Church, reinforced by a variety of authorities.<sup>37</sup>

Even after *Smith* completes the Court's 'turn' away from the exemption doctrine, the beliefs and practices of religious groups remain relevant to subsequent jurisprudence. Following *Smith's* assertion that the First Amendment protects religious groups against religious *discrimination* (although not against substantial burdens incidentally incurred by otherwise neutral and generally applied laws) the Court must still determine that something "religious" is the target of a suspect law or practice. At issue in *Church of the Lukumi Babalu Aye v. City of Hialeah* (1993), a Santeria church began pursuing plans to build a church building and related structures in the town of Hialeah, Florida. In response, the town passed four ordinances regulating the killing of animals within the town limits. These laws effectively prevented animal sacrifice—a regular practice of the Santeria believers. In overturning the ordinances (in a manner consistent with the *Smith* ruling), Justice Kennedy writes for the majority that the laws discriminated against Santeria practices by singling them out for disfavored treatment because of their religious motivation. Thus, the ordinances are neither neutral nor generally applicable

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<sup>36</sup> This assertion lends credence to Scalia's critique of Blackmun's opinion—namely, that Blackmun engages in assessing the centrality of peyote use to the Native American Church (888).

<sup>37</sup> (See 919-20). He cites the *amicus curiae* brief of the Association on American Indian Affairs and two books describing American Indian peyote use. While quoting from the brief, he cites the books without quotation. (From the AAIA brief Blackmun quotes: "To the members, peyote is consecrated with powers to heal body, mind and spirit. It is a teacher; it teaches the way to spiritual life through living in harmony and balance with the forces of the Creation. The rituals are an integral part of the life process. They embody a form of worship in which the sacrament Peyote is the means for communicating with the Great Spirit.") The first book, entitled *Peyote Religion*, is authored by Omer C. Stewart, an established scholar in the Anthropology Department at the University of Colorado. The second, however, is a murder-mystery novel by author and journalist Tony Hillerman entitled *People of Darkness*. Blackmun's reference to the AAIA brief suggests allowing groups to themselves define what is "central" to their religion, while the Stewart book invokes something of a more objective approach to observable sociological phenomena in assessing a law's impact on religion. Blackmun's use of the Hillerman novel is less easy to classify. Finally, Blackmun points out the findings of the Federal American Indian Religious Freedom Act that some "substances... 'are necessary to the cultural integrity of the tribe, and, therefore, religious survival'" (921). All four citations implicitly rely on the group character of the Native American Church and its known practices involving peyote to put the drug's religious significance beyond question.

because they effectively restrict religious activity alone.<sup>38</sup> This determination requires a showing that what the law singles out is *religious*. Kennedy's opinion does not disappoint.

To demonstrate Santeria's religious character, Kennedy relies on sociological evidence in several respects. He uses the group character of *Santeria* to shore up its status as "religious" and to identify its key features. He first describes the Santeria faith, citing a number of authorities to substantiate his depiction.<sup>39</sup> Two of Kennedy's sources offer a more academic perspective on Santeria.<sup>40</sup> In contrast, the other two books that Kennedy cites are both by Migene Gonzalez Wippler—presenting more of an insider's perspective on the specific practices of Santeria.<sup>41</sup> In short, Kennedy's initial depiction of Santeria relies on a breadth of source material and emphasizes its known history, tenets and practices as a recognized religious group. He concludes: "Given the historical association between animal sacrifice and religious worship, ...petitioners' assertion that animal sacrifice is an integral part of their religion 'cannot be deemed bizarre or incredible'" (531). Despite the significant changes to free exercise doctrine, the *Lukumi* decision continues to apply a sociological approach to religion. Kennedy suggests that conduct may receive protection from discriminatory treatment if that conduct uniquely corresponds with the tenets or practices of a religious group with which the individual identifies.

The future of free-exercise jurisprudence remains unclear in the post-*Smith* era. As *Lukumi* demonstrates, *Smith's* non-discrimination standard fails to avert the definitional problem: courts must still determine what qualifies for protection. *Locke v. Davey* (2004)

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<sup>38</sup> Moreover, he maintains that the laws are both overinclusive and underinclusive in various respects, thus failing to meet the "narrowly tailored" criterion of strict scrutiny.

<sup>39</sup> He draws on two encyclopedias of religion, two books focused on Santeria, and the findings of the District Court that originally heard the case. 13 *Encyclopedia of Religion* (M. Eliade ed. 1987); 1 *Encyclopedia of the American Religious Experience* (C. Lippy & P. Williams eds. 1988); M. Gonzalez-Wippler, *The Santeria Experience* (1982); M. Gonzalez-Wippler, *Santeria: The Religion* 3-4 (1989); and 723 F.Supp. 1467 (SD Fla. 1989). Furthermore, Kennedy sees the number of adherents as significant: "The District Court estimated that there are at least 50,000 practitioners in South Florida today" (525). Kennedy highlights that past persecution of this group groups' history of persecution and subsequent secrecy.

<sup>40</sup> for example, *The Encyclopedia of Religion* was edited by University of Chicago historian of religion Mircea Eliade.

<sup>41</sup> Information on Gonzalez Wippler is relatively scarce. Book-related biographies refer to her as a "witch" (Publisher's weekly editorial review of *Book of Shadows* on Amazon.com [retrieved 1-20-2007]; a "devout Catholic" Amazon.com's editorial review of *Return of Angels* on Amazon.com [retrieved 1-20-2007]); an "anthropologist and leading authority on Santeria" (Library Journal's editorial review of *Santeria: The Religion: Faith, Rites, Magic* on Amazon.com [retrieved 1-20-2007]).

uniquely illuminates the difficulty by interacting with both religion clauses. *Locke* addresses a Washington State college scholarship program preventing otherwise eligible recipients from using the money to fund a degree in devotional theology.<sup>42</sup> Joshua Locke—an otherwise qualified applicant who wished to pursue a degree in pastoral ministries—challenged the law, arguing that Washington’s exclusion violated both the establishment and free exercise clauses of the Constitution by singling out religion for disfavored treatment. The Ninth Circuit Court of Appeals agreed. Chief Justice Rehnquist authored the Supreme Court’s opinion reversing the Ninth Circuit’s judgment.<sup>43</sup>

Significantly, the *Locke* decision supports the claim that *some* conduct—such as taking a course in devotional theology or pursuing a religious vocation—is inherently religious. As such, it is different from other conduct and may be so treated under law. Washington may single out conduct motivated by faith (pursuing a devotional theology degree) for different treatment (non-receipt of funds) under the State Constitution’s non-establishment provisions. However, whether or not a degree program is best described as one of “devotional theology” is assessed by religionists themselves (religious colleges and their attendees) rather than by the state.<sup>44</sup> Moreover, the ruling suggests that religion may be treated as more distinctive under the Establishment Clause than under the Free Exercise Clause. The Court avoids further engagement in definitional questions by granting states some legislative discretion. The Establishment Clause permits states to distinguish religion from non-religion when distributing benefits and the Free Exercise Clause does not require otherwise.

Nevertheless, the Court clearly permits religious classifications for free exercise reasons in *Cutter v. Wilkinson* (2005)—another case standing at the crossroads between the religion clauses. Consolidating several related cases,<sup>45</sup> *Cutter* addresses the contention from prisoners

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<sup>42</sup> This rule reflects the Washington State Constitution, which reads: “No public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or the support of any religious establishment” (Article I, §11).

<sup>43</sup> Rehnquist is joined by Justices Stevens, O’Connor, Kennedy, Souter, Ginsburg, and Breyer.

<sup>44</sup> The Washington statute assigns determinations to colleges rather than individuals. This allows institutions with formalized mission statements to assess which programs have devotional content and which do not; state agents do not have to do this. The *Locke* Court concedes that Washington *may* single out religion for special treatment (non-receipt of benefits), but is not obligated to do so.

<sup>45</sup> While *Cutter*—like *Boerne*—is not explicitly a free exercise case, it merits our consideration for its direct engagement with Free Exercise Clause doctrine. Indeed, *Cutter* was originally filed as a First Amendment challenge,



belonging to “Satanist, Wicca, and Asatru religions, and the Church of Jesus Christ Christian” that their Ohio prison failed to abide by RLUIPA guidelines, impermissibly burdening their religious practices (712). In response, the prison officials contested RLUIPA as an unconstitutional endorsement of religion over non-religion in violation of the Establishment Clause. In its decision, the Supreme Court unanimously decided in favor of the prisoners, upholding RLUIPA as a constitutional accommodation of religion.

In her majority opinion, Justice Ginsburg does not specify (nor does RLUIPA) how “religion” should be identified, though this is critical to the law’s protections.<sup>46</sup> Beyond the assertions of individual inmates, the record suggests that identifiable religious groups may provide an important guide: “Ohio already facilitates religious services for mainstream faiths. The State provides chaplains, allows inmates to possess religious items, and permits assembly for worship” (721*n*). The Court affirms prison officials’ role in examining the sincerity of religious beliefs under RLUIPA: “prison officials may appropriately question whether a prisoner’s religiosity, asserted as the basis for a requested accommodation, is authentic” (725*n*). Consistent with *Smith*, Ginsburg notes that government officials cannot scrutinize either truth claims or questions of centrality,<sup>47</sup> but does not specify what criteria may be applied to permissible assessments of good faith. RLUIPA states that “religious exercise” is “any exercise of religion, whether or not compelled by, or central to, a system of religious belief” [§2000cc-5(7)(A)]. While depending in this case on claims from those adhering to organized religions groups, the it is not clear that this approach is binding. Indeed, methods for distinguishing religion from other motivations are left profoundly ambiguous.

More recently, in *Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission* (2012), the Supreme Court relies heavily on the group doctrines and practices of the Lutheran Church-Missouri Synod. In Chief Justice John Robert’s

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but was amended to include the RLUIPA after its enactment. Moreover, this case meets the selection criteria for this study. However, it is worth noting that one of the texts established as part of the selection criteria includes *Cutter* as an Establishment Clause case. There is some ambiguity as to which clause is most central to the case, but because of its orientation toward unimpeded religious exercise and its jurisprudential relationship to *Smith*, *Boerne*, and *Locke*, it appears here as a free exercise case.

<sup>46</sup> Section “g” of RLUIPA states: “This chapter shall be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this chapter and the Constitution.”

<sup>47</sup> Ginsburg cites both *Gillette v. United States* (1971) and *United States v. Seeger* (1965) with approbation in this respect.

unanimous majority opinion, the Court affirms that the First Amendment includes a ministerial exemption from federal antidiscrimination laws. To enjoy this exemption, the employee in question must be a “minister” according to the rites of the religious group in question. Thus, in order to grant the exemption (barring the EEOC case from proceeding) the Court must make substantial inquiry into the beliefs and practices of the group in question.

The *Hosanna-Tabor* decision does not fail to make just this sort of inquiry. While declining to define what is and is not a religious ‘minister’ for future cases,<sup>48</sup> Roberts’ opinion dwells on the specific practices of the denomination in question:

The Synod classifies teachers into two categories: “called” and “lay.” ... “Called” teachers are regarded as having been called to their vocation by God through a congregation. To be eligible to receive a call from a congregation, a teacher must satisfy certain academic requirements. One way of doing so is by completing a “colloquy” program at a Lutheran college or university. The program requires candidates to take eight courses of theological study, obtain the endorsement of their local Synod district, and pass an oral examination by a faculty committee. A teacher who meets these requirements maybe called by a congregation. Once called, a teacher receives the formal title “Minister of Religion, Commissioned.” ... After Perich completed her colloquy later that school year, Hosanna-Tabor asked her to become a called teacher. Perich accepted thecall and received a “diploma of vocation” designating her a commissioned minister. (1-2)

The means by which the Lutheran Church-Missouri Synod recognizes a ministerial vocation are sufficient for the Court to agree that Perich was a minister. Thus the ministerial exception required by the First Amendment protects the church from a discrimination suit that would otherwise proceed if Perich were not a minister. Here, the doctrines and practices of the religious group are central to establishing the religiosity that provides constitutional protection in this case.

In sum, membership in a religious group with recognizable beliefs and practices has frequently served to identify religion. A primary virtue of this approach has been its help in

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<sup>48</sup> “We are reluctant... to adopt a rigid formula for deciding when an employee qualifies as a minister. It is enough for us to conclude, in this our first case involving the ministerial exception, that the exception covers Perich, given all the circumstances of her employment.” (15-16)

differentiating religion from non-religion, thus identifying what merits the protections of the Free Exercise Clause and what may not. This group-oriented approach has aided the Court in two tasks: consistently in assessing religious motivation, and at times in determining the centrality of a practice to a particular religion.<sup>49</sup> Using this approach, the Court has been able to grant substantive protections to religious exercise—most prominently through the exemption doctrine, but also in a more limited fashion under *Smith*'s non-discrimination test. It has clearly served to help identify religion without resorting to substantive definitions that often depend on theological premises.

However, two liabilities of this approach warrant brief note. First, a group-based approach risks assuming that religions are intrinsically group-oriented, leaving individual beliefs and practices more vulnerable to state interference. Second, minority religions whose practices are less well known may receive fewer protections. Nevertheless, this aspect of the sociological approach has been instrumental to the Court's most significant protections for religious practices. We now turn to the use of group religious tenets and conduct in delineating 'religion' in Establishment Clause cases.

### *The Establishment Clause*

The meaning of "religion" poses another set of difficulties under the Establishment clause. In such cases, the Court must assess whether or not the state action in question establishes something that can be identified as *religion*. Since the conduct in question may originate from a variety of motives, the particular dynamics of individual situations and the groups involved becomes central to determining religiosity. Notably, the Supreme Court has often used a group-oriented sociological understanding of religion to identify problematically religious activities. In other words, it has looked to groups' beliefs and conduct to determine what is religious such that the state *cannot* support it. This is most apparent in the Court's application of the "pervasively sectarian" standard when declining to fund groups that might otherwise qualify for support. Nevertheless, a similar approach appears in other cases as well. We turn now to examining these cases.

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<sup>49</sup> It is by no means clear that these two are fully separable. Indeed, a practice that is demonstrably central to a particular religious group may be more easily inferred to be religiously motivated.

The foundational Establishment Clause case of *Everson v. Board of Education* (1947) does not dwell on the question of what characterizes “religion” in the sense that government must not establish it. Nevertheless, in permitting government funding to support students’ transportation to religious schools, Justice Black’s famous interpretation of the Establishment Clause clearly assumes that religion is a corporate activity. It describes what is prohibited in terms of “church,” “institutions,” “attendance” and “religious organizations or groups.”<sup>50</sup> Without excluding the more individual aspects of religion, the Court clearly has group behaviors in view. Moreover, Justice Jackson’s *dissent* makes the group aspect of religion highly relevant insofar as he explores Catholic canon law regarding religious education. (22-23) Indeed, Jackson draws attention to Catholic schools’ communal role in forming young people—suggesting that whereas Catholics *indoctrinate*, public schools prepare children to individually *choose* their religion.<sup>51</sup> (23-4) Thus while recognizing a particular group dynamic within Roman Catholicism, Jackson implicitly critiques its non-voluntarist function.

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<sup>50</sup> “The ‘establishment of religion’ clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever from they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect ‘a wall of separation between Church and State.’ *Reynolds v. United States*, supra, 98 U.S. at page 164.” (15-16)

<sup>51</sup> “It is no exaggeration to say that the whole historic conflict in temporal policy between the Catholic Church and non-Catholics comes to a focus in their respective school policies. The Roman Catholic Church, counseled by experience in many ages and many lands and with all sorts and conditions of men, takes what, from the viewpoint of its own progress and the success of its mission, is a wise estimate of the importance of education to religion. It does not leave the individual to pick up religion by chance. It relies on early and indelible indoctrination in the faith and order of the Church by the word and example of persons consecrated to the task.

Our public school, if not a product of Protestantism, at least is more consistent with it than with the Catholic culture and scheme of values. It is a relatively recent development, dating from about 1840. It is organized on the premise that secular education can be isolated from all religious teaching, so that the school can inculcate all needed temporal knowledge and also maintain a strict and lofty neutrality as to religion. The assumption is that, after the individual has been instructed in worldly wisdom, he will be better fitted to choose his religion. Whether such a disjunction is possible, and, if possible, whether it is wise, are questions I need not try to answer.

I should be surprised if any Catholic would deny that the parochial school is a vital, if not the most vital, part of the Roman Catholic Church. If put to the choice, that venerable institution, I should expect, would forego its whole service for mature persons before it would give up education of the young, and it would be a wise choice. Its growth and cohesion, discipline and loyalty, spring from its schools. Catholic education is the rock on which the whole structure rests, and to render tax aid to its Church school is indistinguishable to me from rendering the same aid to the Church itself.” (23-24)

More prominently, the entire thread of cases appealing to the dangers of “pervasively sectarian” groups demonstrates the Court’s use of religious groups as a means of identifying that which government cannot support. Evidence of this approach appears in Justice Frankfurter’s concurring opinion in *McCollum v. Board of Education* (1948)—a case rejecting the constitutionality of inviting religious teachers to offer elective classes in public schools. While acknowledging that “Traditionally, organized education in the Western world was Church education” (213),<sup>52</sup> Frankfurter proceeds to trace America’s progressive departure from providing any state support to schools teaching “sectarian doctrine” (215). Citing President Grant’s exhortation to provide public education “unmixed with sectarian, pagan, or atheistical dogmas” (218), Frankfurter contrast groups who wish to practice deeply religious education with the sort of religiously neutral public education that can contribute to national unity (216, 231). Significantly, however, the neutrality that Frankfurter has in mind is more of a generalized Protestant consensus, raising questions of identity and group definition (225).<sup>53</sup> In contrast, the program at issue in this case has the “candid purpose... [of] sectarian teaching” (226) and entails invidious results: “As a result, the public school system of Champaign actively furthers inculcation in the religious tenets of some faiths, and in the process sharpens the consciousness of religious differences at least among some of the children committed to its care[,] ...precisely the consequences against which the Constitution was directed...” (228). In this view, religions with sectarian tendencies cannot receive government support and may even work against American democracy.

This perspective becomes increasingly apparent in the majority opinions in *Lemon v. Kurtzman* (1971) and *Tilton v. Richardson* (1971). In *Lemon*, the Court strikes down several supplementary funding programs funneling public monies to private religious schools. Chief Justice Burger’s majority opinion relies heavily on a group-oriented sociological approach that emphasizes the religious character of the education taking place. He observes that the schools are in close physical proximity to their affiliated churches, are staffed by nuns, and make use of

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<sup>52</sup> He continues: “It could hardly be otherwise when the education of children was primarily study of the Word and the ways of God. Even in the Protestant countries, where there was a less close identification of Church and State, the basis of education was largely the Bible, and its chief purpose inculcation of piety. To the extent that the State intervened, it used its authority to further aims of the Church.” (213)

<sup>53</sup> These questions are treated at greater length later in the paper.

religious symbols. (615-16) Moreover, “Religious authority necessarily pervades the school system” (617)<sup>54</sup> “In short, parochial schools involve substantial religious activity and purpose” (619) Thus embedded, “We simply recognize that a dedicated religious person, teaching in a school affiliated with his or her faith and operated to inculcate its tenets, will inevitably experience great difficulty in remaining religiously neutral.” (618) While acknowledging that religion is about faith, morals and doctrine, Burger emphasizes that these are uniquely embedded in the institutions of religious groups. Burger contrasts state neutrality with parochial schools’ ideological character, repeatedly using the term “ideology” in an implicitly negative sense (616ff). On this telling, unsupportable religious groups can be identified by shared institutions and practices—especially by the pervasiveness of religion within those institutions.

While *Tilton* upholds the practice in question (public funding supporting facilities for private religious colleges), it follows a similar path as *Lemon* in its account of what “religion” means in this context. Specifically, the Court finds that the schools were *not* problematically sectarian. “The institutions presented evidence that there had been no religious services or worship in the federally financed facilities, that there are no religious symbols or plaques in or on them, and that they had been used solely for nonreligious purposes” (680) Moreover, “There is no evidence that religion seeps into the use of any of these facilities. ...[T]he schools were characterized by an atmosphere of academic freedom rather than religious indoctrination” (681). In short, the practices of the institution render the fact situation such that “appellants themselves do not contend that these four institutions are ‘sectarian.’” (685) Since religion does not present a central feature of the colleges’ function, this exempts them from the charge of sectarianism, helping the state aid maintain its non-“ideological” character (687).

*Meek v. Pittinger* (1975) and *Aguilar v. Felton* (1985) reflect the height of the ‘pervasively sectarian’ doctrine and thus rely on evidence of group behavior in order to identify what is “religion” in the sense excluded from governmental aid by the Establishment Clause.

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<sup>54</sup> “The teacher is employed by a religious organization, subject to the direction and discipline of religious authorities, and works in a system dedicated to rearing children in a particular faith. These controls are not lessened by the fact that most of the lay teachers are of the Catholic faith.” (618)

Striking down auxiliary aid services to non-public religious schools (except for textbooks), *Meek* follows in the trajectory of *Lemon* and *Tilton*. In his majority opinion, Justice Stewart identifies what is prohibited according to the “pervasively sectarian” and ‘ideological’ character of the religiously-affiliated schools in question. Indeed, the *Meek* decision helps to illustrate how the second prong of the *Lemon* Test relies on a corporate conception of religion. The highly sectarian nature of the schools in question gives *any* aid the “primary effect” of advancing religion: “...the direct loan of instructional material and equipment has the unconstitutional primary effect of advancing religion because of the predominantly religious character of the schools benefiting from the Act.” (363)

All of this begs the question: Just what does “pervasively sectarian” mean to the Court? In these cases it appears to denote a group with such a holistic approach to their religion that all of their beliefs and activities are interrelated into an integral whole, such that “...it would simply ignore reality to attempt to separate secular educational functions from the predominantly religious role performed by many... church-related... schools...” (*Meek*, 335). Citing *Hunt v. McNair*, Stewart describes a deeply religious school as “an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission” (336). The schools at issue in *Meek* are of just this sort: “...the teaching process is, to a large extent, devoted to the inculcation of religious values and belief.” (366) The problem is not clearly one of *proportion* (i.e., the quantity of religious instruction relative to secular education), but of robust *integration*: “[T]he secular education those schools provide goes hand in hand with the religious mission that is the only reason for the schools' existence. Within the institution, the two are inextricably intertwined” (366). The Court’s concern here is with “inculcation” (369, 371). In such a context, Stewart insists that “...the danger that religious doctrine will become intertwined with secular instruction persists.” (370)

*Aguilar v. Felton* (1985) follows a similar course, using the corporate practices of the religious school to identify its religious nature. “With respect to the religious atmosphere of these schools, the Court of Appeals concluded that ‘the picture that emerges is of a system in which religious considerations play a key role in the selection of students and teachers, and which has as its substantial purpose the inculcation of religious values.’” (405) Again, integral

religiosity is the problem and can be identified by the schools' institutional affiliation:

...many of the schools here receive funds and report back to their affiliated church, require attendance at church religious exercises, begin the schoolday or class period with prayer, and grant preference in admission to members of the sponsoring denominations. ...In addition, the Catholic schools at issue here, which constitute the vast majority of the aided schools, are under the general supervision and control of the local parish. (412)

As a result, Justice Brennan's majority opinion concludes that "the aid is provided in a pervasively sectarian environment." (412)

The Court eventually distances itself from the "pervasively sectarian" approach, particularly as it shifts away from the Lemon standard to increasingly embrace a more formal (rather than substantive) approach to "neutrality." In *Wallace v. Jaffree* (1985) the Court notes the how the old standard tended to favor religion over non-religion.<sup>55</sup> Shortly thereafter the Court's opinion in *Lamb's Chapel v. Center Moriches Union Free School District* (1993) and the plurality's opinion in *Mitchell v. Helms* (2000) suggest that the "pervasively sectarian" standard will not remain primary. In *Lamb's Chapel*, the *per curiam* opinion implicitly criticizes the school district's apparent application of the 'pervasively sectarian' standard.<sup>56</sup> Now, however, the Court treats this as impermissible viewpoint discrimination against religion.<sup>57</sup> Here the Court no longer defines "neutrality" according to a supposed 'generic' alternative to pervasive sectarianism, but according to nonpreferential treatment between religious and non-religious groups alike.

Justice Thomas' plurality opinion in *Mitchell v. Helms* (2000) makes this more explicit. He writes: "...there was a period when this factor mattered, particularly if the pervasively sectarian

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<sup>55</sup> "At one time it was thought that this right merely proscribed the preference of one Christian sect over another, but would not require equal respect for the conscience of the infidel, the atheist, or the adherent of a non-Christian faith such as Islam or Judaism. But when the underlying principle has been examined in the crucible of litigation, the Court has unambiguously concluded that the individual freedom of conscience protected by the First Amendment embraces the right to select any religious faith or none at all. (52-53)

<sup>56</sup> "The District also submits that it justifiably denied use of its property to a 'radical' church for the purpose of proselytizing, since to do so would lead to threats of public unrest and even violence." (395)

<sup>57</sup> "That all religions and all uses for religious purposes are treated alike under Rule 7, however, does not answer the critical question whether it discriminates on the basis of viewpoint to permit school property to be used for the presentation of all views about family issues and child rearing except those dealing with the subject matter from a religious standpoint." (393)



school was a primary or secondary school. ...But that period is one that the Court should regret, and it is thankfully long past.” (826) Instead, he indicates, “Neutrality” should trump the “pervasively sectarian” rule because doing so will prevent government from scrutinizing the beliefs and practices of religious groups.<sup>58</sup> This standard, Thomas suggests, involved government too much in religion and effectively punished those who believe most deeply. “...[I]t is most bizarre that the Court would, as the dissent seemingly does, reserve special hostility for those who take their religion seriously, who think that their religion should affect the whole of their lives, or who make the mistake of being effective in transmitting their views to children” (827-8). This shift toward formal neutrality—embraced in *Zelman v. Simmons-Harris* (2001)—decreases the extent to which “religion” warrants distinctive treatment, thus concomitantly decreasing the need to use sociology to identify it.

#### *Expert Testimony on the Sociology of Religion*

Significantly, focusing on the behaviors and beliefs of religious groups does not resolve the question of how “religion” is defined. Instead, it focuses on group activities that are recognized as “religious” and focuses on these to determine religiosity. On what is such recognition based? Although many free exercise cases appeal to known experts on particular religious groups (as noted above in several cases), this proves somewhat less common in Establishment Clause cases.

Standing at the crossroads between the clauses, *Torcaso v. Watkins* (1961) illustrates an appeal to experts in religious group behavior. Supporting his assertion that non-theistic groups can be religious (Buddhism, Taoism, Ethical Culture, and Secular Humanism are cited), Justice Black notes two lower court decisions, one religion scholar, two encyclopedias, and several reference texts.<sup>59</sup> His approach treats religion as a phenomenon subject to social-scientific

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<sup>58</sup> “If a program offers permissible aid to the religious (including the pervasively sectarian), the areligious, and the irreligious, it is a mystery which view of religion the government has established, and thus a mystery what the constitutional violation would be.” (827)

<sup>59</sup> *Washington Ethical Society v. District of Columbia* determined that Ethical Culture is a religion, while *Fellowship of Humanity v. County of Alameda* found that a particular organization of secular humanists qualified for tax exemption as a religious group. Black also references II Encyclopaedia of the Social Sciences 293; 4 Encyclopaedia Britannica (1957 ed.) 325-327; 21 id., at 797; Archer, *Faiths Men Live By* (2d ed. revised by Purinton), 120-138, 254-313; 1961 World Almanac 695, 712; Year Book of American Churches for 1961, at 29, 47.

study. For example, Black cites the second edition of John Clark Archer's *Faiths Men Live By*. Archer, a scholar of comparative religions at Yale University, suggests that religion may best be known by its manifestations rather than its essences: "Like a tree, religion may be known by its fruits" (1958, 15).<sup>60</sup> In Black's construction, general agreement identifies which groups and behaviors qualify as such manifestations of "religion." His use of encyclopedic and factual references reflects both general and scholarly consensus regarding which groups qualify for classification as religious, confirming that his approach is largely sociological in character.<sup>61</sup>

In *Edwards v. Aguillard* (1987) the Supreme Court struck down a Louisiana law requiring evolution to be taught in tandem with creation science, determining that creation science was inherently religious. Among other means of determining that creation science was "religion", the Court noted that relevant authorities support this conclusion: "The experts, who were relied upon by the sponsor of the bill and the legislation's other supporters, testified that creation science embodies the religious view that there is a supernatural creator of the universe." (595*n*, see also 591-592)

*Allegheny County v. Greater Pittsburgh ACLU* (1989) shows the role of experts in religious behavior in yet another Establishment Clause case. In *Allegheny County*, the Court struck down a crèche display featured alone in a courthouse and upheld the combined display of a menorah and a Christmas tree outside. The non-majority portions of Justice Blackmun's opinion cite a variety of sources to support his conclusions about Jewish and Christian religious celebrations. This heavily footnoted section repeatedly refers to the *Encyclopedia of Religion*, 1987 and a wide variety of other sources—many of them sociological or anthropological—to support his extensive description of the Jewish celebration of Chanukah (see 582-587).<sup>62</sup>

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<sup>60</sup> The context for this quote is the conclusion of Archer's discussion in the introduction of how religion should be defined. While he offers a number of possible approaches, he recognizes problems and limitations with many of these and does not proceed beyond a provisional, working definition. *Faiths Men Live By* "provides a "'contemporary' approach... abreast of economic, social, political, and religious changes" (Purinton iii, 1958). Excerpted from the Carl E. Purinton's Preface to the second edition of Archer's book. Purinton revised the book after Archer's death.

<sup>61</sup> The encyclopedias include both the more general *Encyclopaedia Britannica* and the subject-specific *Encyclopaedia of the Social Sciences*. Indicative of general agreement about what groups are "religious," Black cites the *1961 World Almanac* and the *Year Book of American Churches for 1961*.

<sup>62</sup> Among the authorities that Blackmun cites are: R. Myers, *Celebrations: The Complete Book of American Holidays* 15, 17 (1972); J. Barnett, *The American Christmas, a Study in National Culture* 23 (1954); A. Bloch, *The Biblical and Historical Background of the Jewish Holy Days* 49-78 (1978); A. Bloch, *The Biblical and Historical Background of*

Similarly, in *BOE of Kiryas Joel Village School District v. Grumet*, the Court struck down the creation of a school district coterminous with a religiously-defined community of Satmar Hasidim Jews. Justice Souter's majority opinion is at pains to make clear that the Satmar Hasidim are a very religious group in their separation from secular society and in their practices. His descriptions rely on expert accounts of the religious behaviors of the Satmars.<sup>63</sup>

In each of the above cases, the relevant opinion uses a sociological approach to understand religious groups. In many ways, this hearkens more to the expert-dependent sociological treatments of religious groups in free exercise cases. In most Establishment Clause cases, however, no appeals are made to recognized experts. Instead, the Court relies on what it takes to be the common judgment of society. That is, it accepts what it believes is generally recognized as "religious" by the American people. This, then, presents another aspect of the court's "sociological" approach to religion: not only can religion be identified by the unique features of the groups practicing that religion, but it can be identified by the opinions of the broader society. It is to this approach that we now turn.

## **The Problem and Promise of Democracy**

### *Accepting Society's Judgment I—Free Exercise*

In many of its free exercise case decisions, the Supreme Court has applied a substantive conception of what 'religion' is, but has avoided supplying its own definition by attributing its understanding to the broader society. This has proved particularly useful as the Court has sought to avert the Establishment Clause dangers associated with defining religion. By deferring

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*Jewish Customs and Ceremonies* 267-278 (1980); *Encyclopaedia Judaica*, "Hanukkah," 1280-1288 (1972); Chill, *The Minhagim* 241-254 (1979) L. Trepp, *The Complete Book of Jewish Observance* 137-151; M. Strassfeld, *The Jewish Holidays* 161-177; J. Williams, *What Americans Believe and How they Worship* 348 (3d ed. 1969); P. Johnson, *A History of the Jews* 104 (1987); and R. Seltzer, *Jewish People, Jewish Thought: The Jewish Experience in History* 158 (1980).

<sup>63</sup> Souter writes: "The residents of Kiryas Joel are vigorously religious people who make few concessions to the modern world and go to great lengths to avoid assimilation into it. They interpret the Torah strictly; segregate the sexes outside the home; speak Yiddish as their primary language; eschew television, radio, and English-language publications; and dress in distinctive ways that include headcoverings and special garments for boys and modest dresses for girls. Children are educated in private religious schools, most boys at the United Talmudic Academy where they receive a thorough grounding in the Torah and limited exposure to secular subjects, and most girls at Bais Rochel, an affiliated school with a curriculum designed to prepare girls for their roles as wives and mothers. See generally W. Kephart & W. Zellner, *Extraordinary Groups* (4th ed. 1991); 1. Rubin, *Satmar, An Island in the City* (1972)."

definitional line-drawing to the public, conceptual boundaries are less clearly attributed to the state. Much of the time this has remained implicit in the Court's descriptions of group behaviors and beliefs, as elaborated above.<sup>64</sup> Citing the beliefs and rituals of groups commonly recognized as religious serves to establish the religious nature of the claim at issue, and at times its religious import.

In other cases, however, the Supreme Court has explicitly appealed to commonly accepted parameters for religion. For example, in *Davis v. Beeson* (1890) Justice Field argues that "Polygamy has always been odious among the northern and western nations of Europe, and, until the establishment of the Mormon Church, was almost exclusively a feature of the life of Asiatic and of African people" (164). Here, Field asserts polygamy's status in particular societies. However, he appears to take this argument a step further, suggesting that society's moral evaluation of polygamy is *correct*. He writes: "To extend exemption from punishment for such crimes would be to shock the moral judgment of the community. *To call their advocacy a tenet of religion is to offend the common sense of mankind*" (341-2, emphasis added). *Davis* suggests that society's judgment confirms that polygamy cannot be "religious." Thus, Field uses society's judgment as a proxy for a substantive truth claim about the nature of religious ethics.

#### *Expanding and Challenging Society's Judgment I—Free Exercise*

A sociological approach to religion can apply society's judgment directly by noting which groups, practices, or beliefs society already accepts as "religious," as described at length above. Alternatively it can apply society's judgments indirectly—comparing "doubtful instances" to what is unquestionably religious (Greenawalt 1984, 763; see also Freeman 1983).<sup>65</sup> In free exercise contexts the Court has frequently applied the latter method to compare a minority religion to more commonly known and accepted religions. This approach tends to normalize minority religions, affirms their religious character, and is thus used to aid in expanding the protections of the free exercise clause.

For example, Scholars often cite the 1961 case, *Torcaso v. Watkins* (1961), as inaugurating the Supreme Court's move toward a broader conception of religion (Freeman

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<sup>64</sup> Given the length at which these are discussed above, little will be added here regarding cases of this kind.

<sup>65</sup> This approach is also called an "analogical" method in relevant literature.

1983, Semonche 1995).<sup>66</sup> In *Torcaso* the Court strikes down a portion Maryland's Constitution that limited public offices to theists.<sup>67</sup> While this case straddles the two religion clauses, Justice Black concluded that "This Maryland religious test for public office unconstitutionally invades the appellant's freedom of belief and religion and therefore cannot be enforced against him." (496).<sup>68</sup> In defense of this conclusion, Black highlights a number of non-theistic faiths that are already familiar: "Among religions in this country which do not teach what would generally be considered a belief in the existence of God are Buddhism, Taoism, Ethical Culture, Secular Humanism and others" (496n).<sup>69</sup> Against this backdrop, Black states that Constitution prohibits favoring "those religions based on a belief in the existence of God as against those religions founded on different beliefs" (495). Thus, reinforced by popular recognition of non-theistic faiths, Black rhetorically expands the concept of "religion."

Likewise, despite dealing with more conventional religions in *Wisconsin v. Yoder* (1972), Chief Justice Burger draws attention to the close analogue between Amish beliefs and mainstream Christianity. He cites the Bible's injunction to "be not conformed to this world...," highlighting the fact that both religions use the Bible as a source of guiding authority. In a similar vein, Burger twice compares Amish beliefs and practices to those of Judaism. Not only is

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<sup>66</sup> *Torcaso* provides "an excellent example of how the [political] community is widened by striking down a law that seeks to limit inclusion and participation" (Semonche 1995, 339). This change proves significant. With this case the "Supreme Court dispelled whatever doubts may have existed about its willingness to conceive of religion in new, and radically different, terms" (Freeman 1983, 1525).

<sup>67</sup> Maryland's Constitution stipulating that "no religious test ought ever to be required as a qualification for any office of profit or trust in this State, *other than a declaration of belief in the existence of God...*" (489, emphasis added). The appellant, Mr. Torcaso, was denied an appointment to become a notary public because he refused to acknowledge belief in God

<sup>68</sup> *Torcaso* involves questions relevant to both the Free Exercise Clause and the Establishment Clause. Indeed, scholars do not agree on which clause controls the decision. Some maintain that *Torcaso* is an Establishment Clause case, since it can be read as turning on the Maryland Constitution favoring theistic religions over those that are non-theistic (Greenawalt 1984, 759; Ingber 1989, 257; Michaelson 1984, 362-3; Sexton 1978, 1063). It "establishes" a religion because "The power and authority of the State of Maryland thus is put on the side of one particular sort of believers" (490). Others maintain that the Free Exercise Clause is more central to the decision, largely because the Maryland Constitution discriminates against non-theistic religions and hence inhibits Mr. Torcaso's religious exercise (Choper 1995, 37; Conkle 2003, 74; Tamm 1999, 254n). Clearly *Torcaso* stands at the intersection of the two clauses and involves aspects of both. While "[m]uch of the opinion was an establishment clause sermon, ...the opinion expressly found an invasion only of Torcaso's 'freedom of belief and religion'" (Bradley 1987, 717).

<sup>69</sup> This list is frequently cited in scholarly discussions of the Supreme Court's definition of religion as evidence of its breadth. "...[T]his list of representative religious beliefs includes a variety of faiths with varying degrees of similarity to and dissimilarity from the dominant Western theistic traditions, ...provid[ing] an index to the broad range of beliefs to be afforded protection under the first amendment" (Michaelson, 324-5).

Amish baptism comparable to the bar mitzvah of Judaism (210), but Amish integration of faith and conduct parallels Jewish kosher practices (216). These similarities to other recognized religious groups serve to confirm the religiosity of the Amish and to render their unique practices less anomalous by comparison to more familiar ones.

Justice Blackmun's dissent in *Employment Division v. Smith* (1990) follows a similar social-analogical approach. Blackmun compares the Native American Church's use of peyote and the Roman Catholic sacrament of communion: "In this respect, respondents' use of peyote seems closely analogous to the sacramental use of wine by the Roman Catholic Church. During Prohibition, the Federal Government exempted such use of wine from its general ban on possession and use of alcohol. See National Prohibition Act, Title II, 3, 41 Stat. 308" (913n).<sup>70</sup> Associating peyote use with this familiar and obviously religious practice normalizes an potentially unfamiliar religious practice and lends credence and import to the Native American's claims of religious motivation. While Blackmun's concern here is not with the definition of religion as such, he uses the sociological-analogical approach to religion to defend the legitimate religiosity of the Native American Church's claims (see Freeman 1983, and Greenawalt 1984).

One further example may serve to illustrate the point. In *Lukumi*—another case dealing with a minority religion that diverges in many ways from majority religions—Justice Kennedy emphasizes parallels between the two. Kennedy frames Santeria in very conventional terms. As Rebecca French observes: "We are told four times in the first paragraph of section I(A) not that the Santeria participants are part of a strange New Age syncretic cult but that the Santeria are Roman Catholics, use Catholic saint iconography, Catholic symbols, and attend 'the Catholic sacraments.' Their extensive animal sacrifice rituals, we are told, are actually quite normal and have 'ancient roots'" (1999, 57n). Kennedy points to the role of sacrifice in Judaism and Islam and obliquely ties sacrifice to Christianity as well.<sup>71</sup> In short, "...the Court felt compelled to

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<sup>70</sup> He continues: "However compelling the Government's then general interest in prohibiting the use of alcohol may have been, it could not plausibly have asserted an interest sufficiently compelling to outweigh Catholics' right to take communion."

<sup>71</sup> His use of the expression "Old Testament," though citing a Jewish source, is an obvious appeal to Christian denominations since the term is only used in Christian contexts. What Christians call the "Old Testament" constitutes the whole primary source of Jewish scripture, referred to as the "Tanakh."

...depict the Santeria religion, qua religion, in a favorable light” (French 1999, 57n). Appealing indirectly to society’s conceptions of familiar religion, Kennedy highlights the similarity between Santeria and mainstream religion—normalizing it and reinforcing its religious claim for protection.

### *Accepting Society’s Judgment II—Non Establishment*

Just as in free exercise contexts the Court has at times attributed to society its judgment that a practice is or is not religious, so too it has often done this in Establishment Clause cases. This can, however, take a variety of forms. At times this appears in an “us” versus “them” framework, in which the ‘impermissible religious’ correlates to the “them” and the ‘permissible, non-sectarian’ (even if somewhat religious) correlates to the “us”. On the one hand, the finding that a group is “pervasively sectarian” has often accepted society’s judgment that this is so—providing a basis for finding that a violation of the Establishment Clause has occurred. Numerous examples of such cases are documented above and do not bear further comment here. On the other hand, when the Court has permitted a particular practice to continue, it has often de-emphasized any tendency in a “sectarian” direction. That is, such decisions tend to stress that the belief or practice is generic and shared—either now or in the nation’s history. This provides the Court with a basis for finding that the practice is either non-religious in character or so broadly shared that any perceived “establishment” does not warrant any note. Examples of this approach abound.<sup>72</sup>

Justice Douglas’ famous remark in *Zorach v. Clausen* (1952) accepts a release time program on the basis of the American people’s ubiquitous theistic religiosity:

We are a religious people whose institutions presuppose a Supreme Being. ...When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs.  
(313-14)

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<sup>72</sup> It is worth acknowledging that it is difficult to parse when the Court’s treatment in such cases is more interested in whether or not something is “religious” or if it is an “establishment.” While both are frequently in view—and indeed often overlap—I am here limiting myself to focusing on the question of identifying “religion.”

Here, Douglas accepts accommodating public life to society's widespread religious belief, including the existence of a deity. While Douglas does not expressly endorse this belief, he indicates that governmental support for it is both permissible and desirable.

Chief Justice Burger follows a similar course in justifying the display of a crèche on public land in *Lynch v. Donnelley* (1984). He allows that the crèche has religious significance, but indicates that its inclusion in a display on public land may not in fact be religious. He writes: "We hold that, notwithstanding the religious significance of the crèche, the city of Pawtucket has not violated the Establishment Clause of the First Amendment." (687) His argument includes the claim that *acknowledging* religion (particularly if it has been done ubiquitously over time) may not itself be religious. "There is an unbroken history of official acknowledgment by all three branches of government of the role of religion in American life from at least 1789." (674) "One cannot look at even this brief resume without finding that our history is pervaded by expressions of religious beliefs such as are found in *Zorach*." (677) Here, the historical continuity of recognizing a widespread religion renders the display acceptable. In some sense, its prevalence (both in time and scope) functions to render it 'nonsectarian' in the Court's judgment.<sup>73</sup>

Likewise, a similar approach has been used to find a practice impermissible. In *Edwards v. Aguillard* (1987) the Court used the historical record to emphasize the religiosity of the creation science curriculum in question: "There is a historic and contemporaneous link between the teachings of certain religious denominations and the teaching of evolution." (590) Moreover, such judgment is supported with overt social-scientific methodology. That teaching creation is commonly understood to be "religious" can be substantiated by survey data:

About 75 percent of Louisiana's superintendents stated that they understood "creation science" to be a religious doctrine. ...Of this group, the largest proportion of superintendents interpreted creation science, as defined by the Act, to mean the literal interpretation of the Book of Genesis. The remaining superintendents believed that the Act required teaching the view

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<sup>73</sup> The reader may remark on the absence of the similar discussion from *Marsh v. Chambers* (1983), in which the Court upheld Nebraska's legislative prayers. While comparison is apt, I am persuaded that that discussion was less about the religiosity of the prayers than the extent to which they tended to *establish* religion.



that “the universe was made by a creator.” (596n)

While not based on the entire population’s understanding of creation science, the judgment of a relevant subset of the population determines that this is religious.

The “reasonable observer” standard associated with the “endorsement test”<sup>74</sup> takes a similar, though less formal, approach. Embraced by the Court in *Allegheny County v. Greater Pittsburgh ACLU* (1989), this method maintains that “the constitutionality of its effect must also be judged according to the standard of a ‘reasonable observer’” (620). It asks, would a reasonable observer conclude that government was endorsing religion? Here Justice Kennedy is careful to articulate why cultural background is relevant to assessing this:

Under the endorsement test, the “history and ubiquity” of a practice is relevant not because it creates an “artificial exception” from that test. On the contrary, the “history and ubiquity” of a practice is relevant because it provides part of the context in which a reasonable observer evaluates whether a challenged governmental practice conveys a message of endorsement of religion. (631)

Using this test, widespread and longstanding practices can develop cultural meaning apart from religion—even if their origins are religious. This method is clearly sociological insofar as it accepts the anticipated perspective of a ‘reasonable observer’ who is embedded within the broader society.

More recent cases have applied this method to reach divergent conclusions regarding questionable practices. For example, *McCreary County, KY v. ACLU* (2005) struck down two county courthouse displays including the 10 commandments for running afoul of the Establishment Clause. Central to Justice Souter’s argument in the majority opinion is the conclusion that reasonable observers in society would view the 10 Commandments as religious since they deal with the vertical relationship to God (861-869). For a range of contextual reasons, “The reasonable observer could only think that the Counties meant to emphasize and

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<sup>74</sup> In considering the Establishment Clause, “direct infringement is government endorsement or disapproval of religion. Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community. Disapproval sends the opposite message.” (Justice O’Connor, concurring in *Lynch v. Donnelly*, 1984, 688)

celebrate the Commandments' religious message." (869) This conclusion accepts society's judgment that relating to God is religious. Likewise in *Van Orden v. Perry* (2005), the plurality opinion highlights the history and law-oriented contexts for public displays of the 10 Commandments. While noting that these have a religious aspect, the Court notes that posting the 10 Commandments may be reasonably interpreted as acknowledging "the role the Decalogue plays in America's heritage" (689).<sup>75</sup>

In upholding challenged practices against Establishment clause challenges, the Court has frequently suggested that the practices or displays reflect American culture or history in broadly shared and permissible ways. We turn now to inversions of the approach.

#### *Expanding and Challenging Society's Judgment II—Non-Establishment*

A sociological approach to religion can also be used to challenge majoritarian consensus views and customs. Here, in cases identifying an Establishment Clause violation, the Court has highlighted religious diversity in society and the subsequent lack of consensus on religious matters. That is, when overturning a majority practice, the Court has challenged the status quo by suggesting it is less culturally widespread or generic than the majority might think, or by highlighting that near-ubiquity does not divest a practice of its religious character. Several brief examples help to illustrate the point.

In the face of "solemnization" claims that arguably religious practices should be allowed as important sources of shared cultural meaning, the Court has contended that ubiquity does not remove the religious nature of such practices. In *Engel v. Vitale* (1962) the Court struck down the public school recitation of a prayer composed by the New York State Regents. Writing for the majority, Justice Black allows that many patriotic exercises that reference God may be permitted, but maintains that prayer is a "purely religious function" (435).<sup>76</sup> As such, it must

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<sup>75</sup> "Of course, the Ten Commandments are religious--they were so viewed at their inception and so remain. The monument, therefore, has religious significance. According to Judeo-Christian belief, the Ten Commandments were given to Moses by God on Mt. Sinai. But Moses was a lawgiver as well as a religious leader. And the Ten Commandments have an undeniable historical meaning, as the foregoing examples demonstrate." (690)

<sup>76</sup> "There is of course nothing in the decision reached here that is inconsistent with the fact that school children and others are officially encouraged to express love for our country by reciting historical documents such as the Declaration of Independence which contain references to the Deity or by singing officially espoused anthems which include the composer's professions of faith in a Supreme Being, or with the fact that there are many

remain outside the state's purview in order to maintain religious tolerance. (432)

In *Abington School District v. Schempp* (1963), the Court overturned two public school religious practices—one of reading 10 verses of the Bible each day and the other reciting the Lord's Prayer. Citing census data on religious diversity, Justice Clark writes for the Court: "This freedom to worship was indispensable in a country whose people came from the four quarters of the earth and brought with them a diversity of religious opinion. Today authorities list 83 separate religious bodies, each with membership exceeding 50,000, existing among our people, as well as innumerable smaller groups." (214) Clark highlights that in the context of such religious diversity in society, that which seems to the majority to be shared and non-sectarian will not be so perceived by the many members of minority religious groups.

The majority in *Lee v. Weisman* (1992) notes the 'shared meaning' rationale for including prayer in a high school graduation ceremony:

The school board (and the United States, which supports it as amicus curie) argued that these short prayers and others like them at graduation exercises are of profound meaning to many students and parents throughout this country who consider that due respect and acknowledgment for divine guidance and for the deepest spiritual aspirations of our people ought to be expressed at an event as important in life as a graduation. (583-4)

Nevertheless, prayer is an "explicit religious exercise" (598) that cannot be justified under the First Amendment. Society's religious diversity renders 'shared meaning' arguments inapposite, as the meaning will not be shared by all. Dealing with this is "part of learning how to live in a pluralistic society, a society which insists upon open discourse towards the end of a tolerant citizenry." (590)

The Court follows suit in *Santa Fe Independent School District v. Doe* (2000), where it strikes down student-led invocations prior to high school football games. Again, the import of shared meaning is acknowledged, but it cannot overcome the religiosity of that meaning's source: "We recognize the important role that public worship plays in many communities, as well as the sincere desire to include public prayer as a part of various occasions so as to mark

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manifestations in our public life of belief in God. Such patriotic or ceremonial occasions bear no true resemblance to the unquestioned religious exercise that the State of New York has sponsored in this instance." (435n21)

those occasions' significance. But such religious activity in public schools, as elsewhere, must comport with the First Amendment." (307)

Significantly, these examples appear to assume that "religion" means something that can be contrasted with the lack of consensus in society more broadly. While this does not actually provide conceptual parameters for "religion," it does serve to identify what may be embraced by the state on the basis of the fact that it is not shared.

## **Conclusion**

Sociological approaches to the concept of religion seek to provide meaning to the term "religion" without putting the Court in the position of supplying this meaning itself. Instead, this method defines religion with reference to social reality. As explained above, this approach is "sociological" in two senses.

First, it treats religion as itself a social phenomenon—something in which groups of people participate together. The known group practices and beliefs of religious communities provide evidence for the Court to consider in establishing the religious nature of the conduct at issue in a given case. Indeed, in free exercise cases, evidence about a religious group can at times support not only an adherent's claims to good faith, but also support the "centrality" or import of a contested action to that particular religious group. In Establishment Clause cases, scrutiny of the group in question has at times supplied evidence of the degree of religiosity of that group, though the "pervasively sectarian" standard has fallen out of favor in the Court's contemporary construal of 'neutrality.' Throughout its First Amendment jurisprudence, the Supreme Court has used religious groups as a key point of reference for identifying religion.

Second, sociological approaches appeal to society more broadly for help in identifying what should be treated as "religious." In free exercise cases, the Court has at times applied this method directly, accepting as 'settled cases' those religious groups and practices that already enjoy widespread acceptance as "religious" and extending First Amendment protections to such groups. Likewise, it has used analogies and comparisons between minority religions and better-known religions in order to broaden the range of what is protected. Notably, all aspects of the sociological approach rely on some form of social observation: the beliefs and practices

of defined groups, societal consensus about groups, or a comparative combination of the two (how the beliefs and practices of questionable groups compare with those of groups accepted as religious). In Establishment Clause cases, appeals to society as a whole tend in the direction of identity and ubiquity: who counts as “us” and what practices are so widespread as to be considered part of the culture and thus accepted? Alternatively, the *lack* of consensus in a religiously diverse society has been used to identify religious practices which must remain outside the state’s purview.

A real benefit of these sociological approaches to religion is that they assist the Court in ascertaining when a claim is or is not dealing with religion—and thus whether or not the provisions of the First Amendment apply. If some things are religious and some are not, the evidence provided by group religious behavior (or as assessed by society’s judgment) can help confirm when the term “religion”—and thus the Constitution’s protections or prohibitions—ought to apply. Moreover, this approach avoids direct assertions of philosophical or theological truth. By relying on society’s judgment rather than on judges’ personal views, this method provides substance to the term “religion” without the Court providing that substance itself. It also supports individuals’ claims by providing means of assessing those claims beyond individual assertion.

In this sense, a sociological approach presents a democratic answer to a democratic problem: it seeks to avoid an establishmentarian tyranny of the majority by using the majority’s *standards* for what constitutes a religion in place of the majority’s religion itself. In such a scheme, even potentially unpopular minority groups (Satanists, for example) would qualify as ‘religious.’ While relatively broad, society’s standards have the potential to provide meaningful parameters to the concept of religion: some things are religious, other things are not. This distinction allows meaningful protection in free exercise contexts and meaningful prohibitions under the Establishment Clause.

However, in providing real boundaries to what qualifies as “religion,” the sociological method carries potential risks. It may import society’s theological or philosophical beliefs, crafting a jurisprudence to match. For example, sociological approaches are more conducive to corporate conceptions of religion than to more individualistic ones. Thus those that elect not to

participate in religious groups may receive fewer free exercise protections. Thus a questioned religious practice might not receive free exercise protections, or a state-led but 'generic' religious practice may be allowed to continue. Although no substantive definition of religion may be supplied by the Court—thus avoiding the problems associated with such a move—this approach carries the potential to simply obscure a more substantive (but implicit) definition, attributed to society at large or to experts who study religious groups.

Thus, while partaking of the virtues of democracy in relying in part on the judgment of the people, sociological approaches also participate in democracy's risk of majority tyranny. That is, it remains far from clear that sociological approaches effectively avoid matters of more theological and philosophical truth claims. A sociological approach can allow the religious persuasions of the majority to creep into its protective scheme. Religions similar to the majority are more protected, religions less similar receive less protection. Indeed, the Court may use sociological methods to supply a substantive definition that might prove problematic under Establishment Clause doctrine, legitimizing doing so by attributing that definition to society rather than to the Court.

Still these critiques are hardly damning. As described above, the Supreme Court has shown that it can at times protect against some of these dangers. It has effectively applied sociological approaches to challenge or expand society's judgment, drawing legitimating analogies between uncommon religions and more familiar ones and appealing to religious diversity to challenge claims of ubiquitously shared civil religion. Nevertheless is unclear how sufficient sociological approaches can be on their own.

Further research will do well to assess the implicit theological and philosophical assertions implicit in the Court's assessments of religion. Moreover, significant research remains to be done in describing and analyzing how more individualistic accounts of religion fare in the Court's jurisprudence.

## REFERENCES

- Adams, Arlin M. and Charles J. Emmerich. 1990 *A Nation Dedicated to Religious Liberty: the Constitutional Heritage of the Religion Clauses*. Philadelphia: University of Pennsylvania Press.
- Archer, John Clark. 1958. *Faiths Men Live By*. 2nd Ed. Ronald Press.
- Barron, Jerome A. and C. Thomas Berg. 2004. *First Amendment Law in a Nutshell*. 3<sup>rd</sup> Edition. St. Paul, MN: Thomson West.
- Berg, Thomas. 2004. *The State and Religion*. St. Paul, MN: Thomson West.
- Berg, Thomas C. 2003. "The Pledge of Allegiance and the Limited State." *The Texas Review of Law and Politics*.
- Blackburn, Simon. 1996. *The Oxford Dictionary of Philosophy*. Oxford, UK: Oxford University Press.
- Bradley, Gerard V. 1987. "The no Religious Test Clause and the Constitution of Religious Liberty: A Machine that has gone of Itself." *Case Western Reserve Law Review*. 37:674-747.
- Choper, Jesse H. 2000. "Symposium on Law in the Twentieth Century: A Century of Religious Freedom." *California Law Review*. 88:1709-1741.
- Choper, Jesse H. 1982. "Defining 'Religion' in the First Amendment." *University of Illinois Law Review*. 579.
- Choper, Jesse. 1995. *Securing Religious Liberty: Principles for Judicial Interpretation of the Religion Clauses*. Chicago and London: University of Chicago Press.
- Conkle, Daniel O. 2003. *Constitutional Law: The Religion Clauses*. New York, NY: Foundation Press.
- Freeman, George C. III. 1983. "The Misguided Search for the Constitutional Definition of Religion." *Georgetown Law Journal* 71:1519-1565.
- French, Rebecca R. 1999. "From Yoder to Yoda: Models of Traditional, Modern, and Postmodern Religion in U.S. Constitutional Law." *Arizona Law Review*. 41:49-92.
- Garvey & Schauer *Reader*. (add citation)
- Greenawalt, Kent. 1984. "Symposium: The Religion Clauses Article: Religion as a Concept in Constitutional Law." *California Law Review*. 72:753.

- Ingber, Stanley. 1989. "Religion or Ideology: A Needed Clarification of the Religion Clauses." *Stanford Law Review*. 41:233-333.
- Michaelson, Sherryl E. 1984. "Religion and Morality Legislation: A Reexamination of Establishment Clause Analysis." *New York University Law Review*. 59:301-409.
- Peñalver, Eduardo. 1997. "Note: The Concept of Religion." *Yale Law Journal*. 107: 791
- Santería. (2007). In *Encyclopædia Britannica*. Retrieved January 15, 2007, from Encyclopædia Britannica Online: <http://search.eb.com/eb/article-9065626>
- Semonche, John E. 1998. *Keeping the Faith: A Cultural History of the U.S. Supreme Court*. Lanham, MD: Rowman and Littlefield.
- Sexton, John. 1978. "[Unsigned] Note, Toward a Constitutional Definition of Religion." *Harvard Law Review*. 91: 1056.
- Smith, L. Scott. 2004. "Constitutional Meanings of 'Religion' Past and Present: Explorations in Definition and Theory." *Temple Political and Civil Rights Law Review*. 14:89-142.
- Sullivan, Kathleen M. and Gerald Gunther. 2003. *First Amendment Law*. 2<sup>nd</sup> Edition. New York: Foundation Press.
- Sullivan, Winnifred Fallers. 2005. *The impossibility of Religious Freedom*. Princeton and Oxford: Princeton University Press.
- Tamm, Rudra. 1999. "Religion Sans Ultimate: A Re-Examination of Church-State Law." *Journal of Church and State*. 41: 253.



## CASES

*Abington School District v. Schempp* (374 U.S. 203, 1963)  
*Aguilar v. Felton* (473 U.S. 402, 1985)  
*Allegheny County v. Greater Pittsburgh ACLU* (492 U.S. 573, 1989)  
*Board of Education of Kiryas Joel Village School District v. Grumet* (512 U.S. 687, 1994)  
*Church of the Lukumi Babalu Aye v. City of Hialeah* (508 U.S. 520, 1993)  
*Cutter v. Wilkinson* (544 U.S. 709, 2005)  
*Davis v. Beason* (133 U.S. 333, 1890)  
*Edwards v. Aguillard* (482 U.S. 578, 1987)  
*Employment Div., Oregon Dept. of Human Resources v. Smith* (494 U.S. 872, 1990)  
*Engel v. Vitale* (370 U.S. 421, 1962)  
*Everson v. Board of Education* (330 U.S. 1, 1947)  
*Fellowship of Humanity v. County of Alameda* (153 Cal. App. 2d 673, 1957)  
*Gillette v. United States* (401 U.S. 437, 1971)  
*Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC* (Docket 10-553, 2012)  
*Lemon v. Kurtzman* (403 U.S. 602, 1971)  
*Locke v. Davey* (540 U.S. 712, 2004)  
*Meek v. Pittenger* (421 U.S. 349, 1975)  
*Mitchell v. Helms* (530 U.S. 793, 2000)  
*Reynolds v. United States* (98 U.S. 145, 1878)  
*Roth v. United States* (354 U.S. 476, 1957)  
*Seeger v. United States* (380 U.S. 163, 1965)  
*Sherbert v. Verner* (374 U.S. 398, 1963)  
*Thomas v. Review Board of the Indiana Employment Security Div., et al* (450 U.S. 707, 1981)  
*Tilton v. Richardson* (403 U.S. 672, 1971)  
*Torcaso v. Watkins* (367 U.S. 488, 1961)  
*Washington Ethical Society v. District of Columbia* (249 F.2d 127, 1957)  
*Welsh v. United States* (398 U.S. 333, 1970)  
*Wisconsin v. Yoder* (406 U.S. 205, 1972)  
*Zelman v. Simmons-Harris, et al.* (536 U.S. 639, 2002)