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DOES IT MATTER WHAT RELIGION IS?

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INTRODUCTION: THE MONTY PYTHON PROBLEM

One memorable conceit of the Monty Python comedy troupe was the problematic weapon developed by the English military during World War II. The weapon was a joke so funny that upon hearing it the auditor died laughing. Unfortunately, the weapon suffered from a fatal defect: no one could learn the joke in order to deliver it without suffering the fate intended for the enemy. You can imagine how the sketch unfolds.[1] A dedicated soldier walks into a shed with sheaf of paper . . . uncontrolled laughter is heard . . . then a gasp and a crash. And so on, through many zany iterations.

On some accounts, religious liberty may be self-destructive in much the same way as the undeliverable joke. The problem goes roughly like this: in order to protect religious liberty we have to define what religion is, and once we are in the business of saying that some beliefs, commitments, and projects are entitled to special treatment as "religious" while others are not, we are creating a sphere of orthodoxy of exactly the sort that any plausible understanding of religious liberty should deplore.

In earlier work, we have illustrated this problem with the story of the two Ms. Campbells who live across the street from each other in a

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We benefitted from reading an early draft of Andrew Koppelman's paper, *The Troublesome Roots of Religious Neutrality*, 84 NOTRE DAME L. REV. 865 (2009). We are grateful to him for sharing the paper and to Kent Greenawalt for the comments that he provided on an earlier draft of this paper at the time of the panel.

1 The skit can be viewed at YouTube.com, Monty Python: World's Funniest Joke, http://www.youtube.com/watch?v=LhmnOpoGAPw (last visited Nov. 18, 2008).

suburban community.[2] Both want to run soup kitchens for the poor, and both suffer from a zoning regulation prohibiting that activity.[3] One Ms. Campbell understands the teaching of her faith to demand good works of this sort, and believes herself to be under personal command from her god to run her soup kitchen.[4] The other Ms. Campbell, if asked, would say that religion has nothing to do with her enterprise; she cannot stand the suffering of innocent persons, and takes widespread, poverty-driven hunger to be something that any responsible person would seek to ameliorate.[5] Giving the first Ms. Campbell a privilege to disregard the ordinance on the grounds that she is religiously motivated, while denying that privilege to the second Ms. Campbell, seems patently unjust. Indeed, it seems to be an affront to religious liberty itself. Hence the possibility that religious liberty will of necessity come unstrung in the same paradoxical way as the Monty Python joke weapon.

Can religious liberty be spared this fate of self-destruction? To put the question more narrowly, can an attractive regime of religious liberty be built which does not insist on decisions about whether one or another of our Ms. Campbells is appropriately religious to be its beneficiary? If not, then the Constitution's commitment to religious freedom would require the government to choose among controversial conceptions of religion for the very purpose of identifying which beliefs enjoyed constitutional protection. It would matter very much, in other words, that courts be able to say exactly what religion is.

We have no doubt that it does matter, for many purposes and in many ways, what religion is. It matters, for example, that there is a domain of human activity and experience which we call religion, that we are broadly capable of distinguishing that domain from other realms of activity and experience, and that we can call out the cultural and personal characteristics that are common to much activity and experience that we recognize as religious. The distinction between religion and nonreligion is a significant ethical guidepost in many people's lives. Sociological studies of civil society almost certainly need to take account of religion and its impact. And it is hard to imagine how historical, philosophical, or legal conversations about religious freedom could proceed without a common, general under-

2 *See* CHRISTOPHER L. EISGRUBER & LAWRENCE G. SAGER, RELIGIOUS FREEDOM AND THE CONSTITUTION 11–13, 54–55 (2007).

3 *Id.* at 11.

4 *Id.*

5 *Id.*

standing of what religion is and what role it has played and continues to play in a given time and place.

But for these purposes—however profound and important they may be—close and controversial definitions of what counts as religion at the margins are not likely to be crucial. More importantly, it does not follow from these familiar contexts in which we find ourselves distinguishing religion from other activities that a robust and attractive regime of religious liberty has to make close and controversial judgments that qualify some activities as religious and disqualify others. It does not follow—to take our ruling example—that American judges have to decide whether the second Ms. Campbell is religiously motivated or not. Indeed, we will argue that *that* question is entirely irrelevant to the administration of a well-formed regime of religious liberty. More generally, we will argue that just where competing theories about the definition of religion become controversial and interesting, they also become irrelevant to constitutional law. Insofar as definitions of religion are needed at all, conventional, common sense definitions will suffice.

Our starting point for these reflections is the judiciary's hands-off approach to questions of religious doctrine, which was the focus of the American Association of Law Schools' Law and Religion section panel in January, 2008. Long-standing Supreme Court precedent declares that courts ought neither to resolve "controversies over religious doctrine and practice" nor decide the "interpretation of particular church doctrines and the importance of those doctrines to the religion."[6] The idea that courts should keep their hands off questions of religious doctrine rarely excites much controversy among lawyers or constitutional scholars. And why should it? The entire project of disestablishment might, after all, be characterized as a kind of hands-off approach to religious doctrine.

Some commentators, however, think that while the hands-off approach may be well motivated, it simply is not possible for courts to stay above the fray of conflicting religious understandings. Their doubts divide into two categories. One category pertains directly to the hands-off approach. This category consists of mild, pragmatic concerns focused on a discrete line of cases involving contracts, bequests, or other private law instruments that refer to religion. For example, Kent Greenawalt has discussed cases in which a church has accepted a

6 Presbyterian Church v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church, 393 U.S. 440, 449, 450 (1969); *see also* Kent Greenawalt, *Hands Off! Civil Court Involvement in Conflicts over Religious Property*, 98 COLUM. L. REV. 1843 (1998) (exploring courts' limitations in resolving conflicts over religious property).

gift subject to restrictions that refer to some aspect of religious doctrine.[7] If a dispute later arises about whether the church has honored the restriction, a court may have to address some questions of religious doctrine; if it declines to do so, it will effectively limit the freedom of donors to make, and churches to accept, legally binding restrictions on gifts.

We will comment briefly on this first category of concerns. But, interesting as these questions may be, they fine-tune rather than threaten to upend the enterprise of securing religious liberty. Our focus will be on the second category of concerns, which, by our lights, is very threatening indeed. This category consists of arguments suggesting that any viable theory of religious freedom must endorse one or another controversial definition of religion.[8] The idea is, roughly speaking, that religious freedom is about protecting religion, and that courts will not be able to recognize the activity that they are trying to protect if they cannot define it precisely. How, for example, can you know whether the second Ms. Campbell is protected by the Religion Clauses of the Constitution[9] without knowing whether her commitment to alleviate the suffering of the hungry poor qualifies as religious?[10]

This argument can then lead in either of two directions. It can give in to the complaint that there is an embarrassing hole in the center of the Court's religious liberty jurisprudence, and that contro-

7 *See* Greenawalt, *supra* note 6, at 1890–94 (illustrating the problems in deciphering intent to donate an inter vivos gift to a religious institution that fundamentally changed its character after the donation).

8 For a sampling of recent additions to the vast literature making this argument, see, for example, Barbra Bennett, *Twentieth Century Approaches to Defining Religion: Clifford Geertz and the First Amendment*, 7 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 93, 131 (2007) (describing courts' struggle to find criteria on which to base a definition of religion); L. Scott Smith, *Constitutional Meanings of 'Religion' Past and Present: Explorations in Definition and Theory*, 14 TEMP. POL. & CIV. RTS. L. REV. 89, 135–37 (2004) (arguing that a single definition of religion does not meet the needs of a pluralistic society such as the United States); Jeffrey Omar Usman, *Defining Religion: The Struggle to Define Religion Under the First Amendment and the Contributions and Insights of Other Disciplines of Study Including Theology, Psychology, Sociology, the Arts, and Anthropology*, 83 N.D. L. REV. 123, 188–93 (2007) (exploring the diversity in other disciplines' definitions of religion and their applicability to a legal definition); Jeffrey L. Oldham, Note, *Constitutional "Religion": A Survey of First Amendment Definitions of Religion*, 6 TEX. F. ON C.L. & C.R. 117, 167–71 (2001) (arguing for a narrow faith-based definition of religion which would include a belief in a supernatural element related to explanations of good and evil).

9 U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . .").

10 *See* EISGRUBER & SAGER, *supra* note 2, at 54–55.

versial as any such effort will be, it behooves the Court to decide what counts as "religion" within the meaning of the Constitution's Religion Clauses. Or this argument can cut deeper still, and lead to the conclusion that religious liberty is indeed self-defeating in the same way as the Monty Python killer joke: you cannot protect religion without knowing what it is, but once you say what religion is, you have undone religious liberty.[11]

In our view, the idea that you must be able to define religion in order to defend religious liberty rests on a mistaken understanding of religious freedom, and more narrowly, of the normative thrust of the Religion Clauses of the Constitution. We have argued elsewhere that their purpose is not to protect religion per se, but to protect Americans from a certain kind of governmental malfeasance that proceeds against the backdrop of a religious and religiously diverse society.[12] In a religiously diverse society, government can find itself captive of a perspective that encourages it—out of hostility, indifference, or misunderstanding—to take action that unjustly prefers or disfavors some persons, viewpoints, identities, or practices. What is critical from the vantage of religious freedom is not that religion or religiosity be the victim of this injustice, but rather that it is the cultural and political ramifications of religious diversity and governmental capture that give rise to the injustice.[13] This may at first blush seem like a technical refinement, but, as we will show in the pages that follow, it makes theoretical debates about the meaning of "religion" irrelevant to the interpretation of the Religion Clauses of the Constitution.

If a municipal zoning ordinance, for example, permitted one of our two Ms. Campbells to run her soup kitchen, and prohibited the other from doing so, on the basis of the difference between the belief structures that moved each of them, that ordinance would be a deep affront to religious liberty. And that would be so *whichever* Ms. Campbell was favored, and whether or not we were inclined to think of the second Ms. Campbell as religiously motivated.

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11 Two important exemplars of this critique are STEVEN D. SMITH, FOREORDAINED FAILURE 45–61 (1995) and Stanley Fish, *Mission Impossible: Settling the Just Bounds Between Church and State*, 97 COLUM. L. REV. 2255, 2264–65 (1997). Smith and Fish claim that theories of religious freedom inevitably suffer from contradiction; hence the quest for such a theory is a "foreordained failure" or an "impossible mission." *See* SMITH, *supra*, at 99–117; Fish, *supra*, at 2324–32. For our responses to these arguments, see Christopher L. Eisgruber & Lawrence G. Sager, *Unthinking Religious Freedom*, 74 TEX. L. REV. 577, 590–614 (1996) (book review) and Christopher L. Eisgruber, Book Review, 16 J.L. & RELIGION 259 (2001).

12 *See* EISGRUBER & SAGER, *supra* note 2, at 51–73.

13 *See id.* at 89.

We will elaborate this crucial point in the concluding sections of this essay. But before we do that, we will attend more closely to the hands-off doctrine itself. We will begin by considering the core values of religious freedom that the doctrine reflects, and we will then look at the largely successful efforts of the courts to implement the hands-off approach in free exercise and other cases.

I. THE INEVITABILITY OF THE HANDS-OFF APPROACH

The Supreme Court has consistently taken the position that American courts have no business adjudicating disputes about the content of religious doctrine.[14] This principle has generated very little controversy amongst either the Justices or academic commentators, and it is easy to see why. The hands-off approach to religious doctrine, as Kent Greenawalt has called it,[15] connects directly to the basic idea of disestablishment. By its very definition, disestablishment requires the government to abstain from promulgating official versions of religious doctrine.[16] If courts were to resolve controversies about religious doctrine, they would be doing exactly what disestablishment proscribes—identifying one or another version of religious truth as the government's preferred or official view.

Indeed, the hands-off doctrine follows rather quickly from a robust commitment to justice in a religiously plural society, whether or not supplemented by an express disestablishment norm like the one in the United States Constitution.[17] If government were to endorse some interpretations of religious doctrine at the expense of others, it would thereby favor some religious persons, sects, and groups over others. For this reason, a constitutional regime that respects religious diversity will inevitably generate some disestablishmentarian principles even if its constitution has no disestablishment clause. The Canadian Constitution is a good example. It contains no analogue to the First Amendment's Establishment Clause. The Canadian Supreme Court has nevertheless interpreted its constitution to

14 *See, e.g.*, Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696, 724–25 (1976) (holding that civil courts have no authority to review church judgments about religious doctrine).

15 *See* Greenawalt, *supra* note 6.

16 For a broad review of the disestablishment principle, see Steven D. Smith, *Separation and the "Secular": Reconstructing the Disestablishment Decision*, 67 TEX. L. REV. 955 (1989).

17 *See* Christopher L. Eisgruber & Mariah Zeisberg, *Religious Freedom in Canada and the United States*, 4 INT'L J. CONST. L. 244, 262–67 (2006) (describing the Supreme Court of Canada's adoption of a disestablishment norm).

prohibit the government from adopting policies that support or endorse particular religious positions.[18]

In the United States, religious freedom scholars who disagree vigorously about many other questions—such as whether the government may display religious symbols, or whether tax dollars may ever flow to churches—nevertheless agree that the government has no business picking and choosing among religious doctrines. For example, although *Engel v. Vitale*,[19] in which the Supreme Court prohibited the government from sponsoring an official prayer, remains controversial among the general public, it enjoys widespread (if not universal) support from leading law professors who study religious liberty.[20] That is so even though these professors represent a broad spectrum of religious and political views. Despite their differences, American commentators upon religious freedom tend to be sensitive to the basic fact of religious diversity in the United States and sympathetic to the position of religious minorities. America's religious heterogeneity means that any religious group will be a minority in parts of the country. If the government were writing prayers for schoolchildren, each group could expect to be unhappy with the prayers in some districts.

II. The Phenomenological Approach to Identifying Belief

Must there be exceptions to the hands-off doctrine? That is to say, can courts give full effect to the Constitution's Religion Clauses without resolving issues about religious doctrine? Or will respect for religious freedom itself sometimes require them to wade into such controversies, however much they might prefer to avoid them? Suppose, for example, that a plaintiff comes to court and complains that the government is burdening the exercise of her religion. The government defends by arguing, among other things, that its regulation imposes no burden on the plaintiff's religion. To adjudicate this dispute, does not the court need to decide whether a burden exists—and to do that, won't the court have to decide what the plaintiff's religion does and does not require?

Yes—but the court can and should treat the question as involving a phenomenological claim about what the claimant in fact believes, not a theological claim about how best to interpret religious doctrine.

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18 *See id.*

19 370 U.S. 421, 435–37 (1962).

20 This consensus also embraces many national religious organizations. *See, e.g.*, Kathleen A. Brady, *The Push to Private Religious Expression: Are We Missing Something?*, 70 Fordham L. Rev. 1147, 1153–55 (2002) (describing a "new consensus" among scholars and jurists).

The Supreme Court did exactly that to uphold the free exercise claims of Eddie Thomas[21] and George Frazee[22] during the 1980s. Eddie Thomas was a Jehovah's Witness who, with the help of a fellow church member, took a job in a factory that made weapons.[23] He was originally employed, along with his friend, in the plant's foundry, but, when the foundry closed, he and his friend were reassigned to make tank turrets.[24] His friend accepted the assignment and believed it to be consistent with his faith. Thomas did not.[25] He maintained that his religion permitted him to work in the foundry, where he was involved in producing material used to make weapons, but it prohibited him from working more directly on the fabrication of weapons.[26] He quit his job and sought unemployment benefits. The State of Indiana refused to provide them, concluding that Thomas had declined available work without good cause.[27] Thomas claimed that Indiana had unconstitutionally burdened his free exercise rights by refusing to recognize his religious reasons as "good cause" for declining work; Indiana responded by claiming that Jehovah's Witnesses were not in fact barred by their faith from assisting in the manufacture of tank turrets.[28]

Indiana's rationale invited the Supreme Court to resolve a doctrinal controversy: did the religious doctrines of Jehovah's Witnesses really prohibit Thomas from working on tank turrets? One can understand Indiana's skepticism about Thomas' claims. After all, Thomas himself had been willing to work in the munitions factory so long as his contributions to the weapons projects were indirect.[29] Moreover, his friend and fellow believer apparently had no problem accepting the new assignment.

The Supreme Court, however, wisely abstained from passing judgment on Thomas' beliefs. The only relevant question, said the Court, was whether Thomas sincerely believed that his faith barred him from working on the turrets.[30] "The determination of what is a religious belief or practice . . . . is not to turn upon a judicial perception of the particular belief or practice in question; religious beliefs need not be

21 Thomas v. Review Bd., 450 U.S. 707 (1981).
22 Frazee v. Ill. Dep't of Employment Sec., 489 U.S. 829 (1989).
23 *Thomas*, 450 U.S. at 710.
24 *Id.*
25 *Id.*
26 *Id.* at 710–11.
27 *Id.* at 710–13.
28 *Id.* at 710–12.
29 *Id.* at 711.
30 *Id.* at 714.

acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection," said the Court.[31] It added,

> [I]t 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.
>
> 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.[32]

Eight years later, George Frazee arrived at the Court with a similar claim.[33] Like Thomas, Frazee had quit his job because of a religious belief. Frazee's employer had required him to work on Sundays, and Frazee said that his faith obliged him to treat Sunday as a day of rest.[34] The Illinois unemployment benefits commission was not persuaded: it pointed out that Frazee claimed to be a Christian, but not to be a member of any organized Christian sect.[35] As Illinois correctly noted, many Christians were willing to work on Sundays.[36]

The Supreme Court sided with Frazee. "[M]embership in an organized religious denomination" might make it easier for courts to determine whether a claimant held a particular belief, but such membership was not a prerequisite to a successful free exercise claim.[37] The relevant question was whether Frazee's religious belief was sincerely held, not whether it was well justified or shared with anyone else.[38]

The Supreme Court held, in effect, that Thomas and Frazee were the ultimate authorities on—sovereign over—their own religious beliefs. The Court thus sidestepped the resolution of a question of religious doctrine in favor of a factual question of individual phenomenology: the critical issue was the nature and internal force of what Thomas or Frazee believed, not whether their beliefs were justifiable inferences from, or interpretations of, whatever sources they recognized as sacred.[39]

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31 *Id.* (footnote and internal quotation marks omitted).

32 *Id.* at 716.

33 Frazee v. Ill. Dep't of Employment Sec., 489 U.S. 829 (1989).

34 *Id.* at 830.

35 *Id.* at 831.

36 *Id.* at 835.

37 *Id.* at 834.

38 *Id.*

39 *Id.*; Thomas v. Review Bd., 450 U.S. 707, 714 (1981).

Courts are thus able to identify and respond to religious belief while absolving themselves of any judgments about religious doctrine.[40] But Kent Greenawalt has suggested that considerations of religious freedom might themselves give courts a reason to go further, and in so doing to modify or soften the contours of the hands-off doctrine.[41] Greenawalt draws our attention to cases in which a religious organization splits, so that two or more factions make competing claims for church property. In some of these cases, Greenawalt maintains, courts may limit religious freedom if they inflexibly refuse to choose among contending interpretations of religious doctrine.[42]

For example, suppose that a testator gives money to an Orthodox Jewish congregation established, by the terms of its charter, for "the worship of God according to the Orthodox Polish Jewish Ritual."[43] In Poland, and at the congregation when the bequest is made, men and women were segregated during services. Some years later, the leaders of the congregation ask it to vote on whether to allow mixed-sex seating. The motion carries, but a minority secedes on the ground that this decision is inconsistent with "Orthodox Polish Jewish Ritual." The two sides get into a legal dispute about the bequest. Who wins? And would the result be different if the bequest, like the charter, explicitly referred to "Orthodox Polish Jewish Ritual"?[44]

In such cases, courts face a choice between deferring to the apparent leadership of the preexisting congregation (though in some cases even the identity of the leadership may be contested)[45] or determining what counts as an "Orthodox Polish Jewish Ritual." Greenawalt contends that neither option is fully satisfactory.[46] A blunt rule requiring complete deference to organizational leadership may produce outcomes quite inconsistent with the intentions of a particular

40 One of the few critics of the Court's approach is Samuel J. Levine. *See, e.g.*, Samuel J. Levine, *Rethinking the Court's Hands-Off Approach to Questions of Religious Practice and Belief*, 25 FORDHAM URB. L.J. 85, 85–87 (1997). Levine suggests that by extending equal constitutional protection to idiosyncratic beliefs, the Court may have made it less attractive for judges to protect conventionally recognized beliefs. *Id.* at 87.

41 Greenawalt, *supra* note 6, at 1865 (summarizing relevant constitutional and judicial values and arguing that "[a]ccomplishing some as fully as possible means sacrificing others").

42 *See id.* at 1906.

43 Katz v. Singerman, 127 So. 2d 515, 518 (La. 1961). Greenawalt's discussion of this case appears in Greenawalt, *supra* note 6, at 1890–92.

44 *See* Greenawalt, *supra* note 6, at 1890–94.

45 *See, e.g.*, Presbyterian Church v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church, 393 U.S. 440, 441–43 (1969).

46 *See* Greenawalt, *supra* note 6, at 1890–94.

donor; conversely, a judicial inquiry into the meaning of terms such as "Orthodox Polish Jewish Ritual" may involve courts in controversies they are ill-situated to resolve (and, for that reason, may produce results equally inconsistent with the donors' intentions).[47]

Should these cases disrupt our commitment to the hands-off doctrine? We can gain some insight into the problem by setting our "Orthodox Polish Jewish Ritual" case against the more general and more common (albeit quite difficult) run of cases about incompletely specified contracts, such as the famous case about the sale of "Rose 2d of Aberlone."[48] Rose was a cow offered for purchase; the buyer and seller both believed she was infertile, but she turned out to be pregnant (and hence much more valuable than they knew).[49]

In such a case, courts can respond in one of two broad ways. A court could adopt what we can call a *policy-based* response to the incomplete contract before it; policy-based in the sense that no effort will be made to discover or construct the will of the parties with regard to the unexpressed terms of the contract. Policy-based approaches to incomplete contracts involve default rules that do not depend upon any judgment particularized to the parties at hand or contract at hand. In a jurisdiction where transactions about cattle are common, for example, a default rule could be "in any contract for the sale of a cow, a failure to specify the fertility of the cow will be interpreted by the court as reflecting the understanding of the parties to the contract that the cow in question is fertile." Or the reverse rule might be adopted. We are out of our depth here. But the point is that in any of the possible policy-based approaches: (1) sophisticated parties can anticipate the consequence of incompleteness in their contract; and (2) courts are not called upon to use their judgment to fill in the terms of the contract in the name of the parties before it or otherwise.

Or, in an incomplete contract case like Rose of Aberlone's, a court could adopt an *intention-based* approach. In form, an intention-based approach is likely to ask this question: what would the buyer and seller have done if, contrary to fact, they had anticipated and provided for the contingency that Rose was fertile? Of course, counterfactual questions of this sort are notoriously hard to answer. Whether it admits what it is doing or not, a court is likely to find itself answering a different question, a question that is immediately adja-

47 *Id.* at 1905 ("[B]ecause of various competing values, no resolution of the role of civil courts is fully satisfactory. Perhaps the most fundamental dilemma is that courts cannot both avoid resolving religious questions *and* give effect to all the expectations of those deeply involved in religious organizations.")

48 Sherwood v. Walker, 33 N.W. 919, 920 (Mich. 1887).

49 *Id.*

cent to this difficult counterfactual one, namely: what *should* the buyer and seller have done if . . . ? Answering that question may very well be the best available way of answering the counterfactual question; and on some accounts of courts and contracts, this might in fact be the better question for the court to seek to answer.

There is an ongoing debate about whether courts should be intention-based or policy-based in the face of incomplete contracts, and what more precise form their intention-based or policy-based role should take.[50] The perceived stakes include predictability, overall efficiency, and fairness between contracting parties. But there are important limits on what plausible arguments can be made on behalf of either approach. No one could plausibly argue, for example, that a contracting party in a jurisdiction that followed a strong policy-based approach to incomplete contracts was being denied his or her day in court or due process when a court in that jurisdiction refused to launch a particularized, counterfactual inquiry in service of reshaping the contract. After all, parties in such jurisdictions have the option of specifying the outcomes of future contingencies, including a mistaken judgment of bovine fecundity. Similarly, no one could plausibly argue that some deep form of injustice was at risk when a court in an intention-based jurisdiction undertook to supply an incomplete contract with terms reasonably attributable to the parties' inchoate intentions, or alternatively, terms that were simply reasonable.

With this in mind, let us return to our "Orthodox Polish Jewish Ritual" testamentary donor.[51] His case is very much like Rose of Aberlone's, in that it is the absence of any contractual provision dealing with schism within the beneficiary congregation that causes problems.[52] And as in the Rose of Aberlone case, a court confronting the problem of the donor could pursue an intention-based or a policy-based approach. Here, the policy-based approach is likely to entail some form of judicial support for existing church authority and existing distributions of property rights, on the grounds that this status quo-favoring position makes it possible to avoid judgments of relig-

50 For default rule theories, see Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87 (1989) and Charles J. Goetz & Robert E. Scott, *The Limits of Expanded Choice: An Analysis of the Interactions Between Express and Implied Contract Terms*, 73 CAL. L. REV. 261 (1985).

51 *See supra* notes 43–49 and accompanying text.

52 Contract law typically distinguishes between mistakes about present facts (such as whether Rose was fertile at the time she was sold) and the failure to anticipate future events that arguably frustrate completion of the contract (such as occurred when the Jewish congregation fractured). *See supra* note 43 and accompanying text. For our purposes, at least, this distinction is immaterial.

ious substance. This, of course, is entirely consistent with the hands-off approach and the values upon which it rests.

The more interesting issue is whether a court in the case of the "Orthodox Polish Jewish Ritual" donor could or should adopt an intention-based approach. The intention-based approach would encourage the court to inquire as to what the donor would have done if, contrary to fact, he had provided for the possibility that the congregation would fracture over a controversial change to its rituals.

Now it is just at this point that things get rather messy. We have seen that in the free exercise context, courts avoid taking positions about religious doctrine by particularizing their inquiry to the phenomenology of the individual free exercise claimant.[53] Can they do that here? There is, of course, no fact of the matter behind the counterfactual inquiry as to what the "Orthodox Polish Jewish Ritual" testator would have done if he had thought to provide for the possibility that the congregation that he wished to benefit might abolish its practice of segregated worship. All that is available is a conjecture.

In a few situations, this conjecture might have some meaningful psychological (as opposed to theological) content. For example, if there is convincing evidence that the testator had regarded the segregation of men and women in Orthodox Polish Jewish worship as enormously important, and was attracted to the congregation in question precisely because it maintained that segregation, these facts would offer a judge or jury reason for thinking that if the testator had thought to draft a provision regarding mixed-sex seating, the provision would have been to the disadvantage of the renegade congregation.

Were a court to adopt the intention-based approach under these circumstances, and build a term into the testator's will that favored the minority, gender-segregated-worship-supporting portion of the congregation, the exercise of state authority implicated by the court's action would have important elements in common with the phenomenological approach in free exercise cases. Here, as in the free exercise cases, the court would be determining and acting on the sovereign judgment of an individual, not passing judgment in any way on a controversial matter of religious doctrine or practice. But most cases will be far less clear, and the absence of clarity will invite the judiciary to cross the line into the domain of deciding questions of religious substance.

Suppose, for example, that the evidence is that the testator loved his congregation because it was traditional and committed to old val-

53 *See supra* notes 21–39 and accompanying text.

ues and old ways. Or suppose that the testator came from generations of Orthodox Polish Jewish Ritual faithful, who loved and supported the deep values of their faith for decades upon decades of temptation to choose other, more modern, variations on the Jewish faith. These may seem like modest variations on the more specific evidence of his commitment to gender worship segregation, but note what sort of inquiry might now be demanded. Suppose that the progressive members of the congregation insist that, properly understood, their willingness to abolish gender-segregated worship better connects with the old values and old traditions of their faith. The court would then have to ask troubling questions, such as, "What are the deep values of the Orthodox Polish Jewish Ritual, and are they advanced or retarded by insisting on the maintenance of gender segregation?" Even these modest inquiries verge on asking what a good congregant of the Orthodox Polish Jewish Ritual variety should want for his congregation, and so put judges in the constitutionally disturbing position of taking sides in a religious conflict.

To be sure, the court could conduct its inquiries at a sort of arm's length. In other words, it could ask not about what beliefs are best, but rather which ones appear to be best from the vantage of a stipulated set of prior assumptions, commitments, and/or values. So a judge could sensibly say to herself, in effect, "Personally, I recoil at the thought of gender-segregated worship, and nothing that I believe or value would support this wretched practice, but I think that that is precisely what someone steeped in the traditions of the 'Orthodox Polish Jewish Ritual' would have wanted for his congregation." But if, at the end of the day, this is tantamount to saying, what someone steeped in the traditions of the Orthodox Polish Jewish Ritual *should* have wanted, then the state has put itself in the business of choosing sides in the domain of a contested orthodoxy.

The Anglican Church, for example, is on the brink of a worldwide schism, and local manifestations of the deep division within the church have begun to serve up church-property disputes.[54] In a sense, a court which put the hands-off doctrine aside and purported to resolve such a dispute on grounds of which of the contending factions represented the church's deepest beliefs, commitments, and/or values could be doing so at arm's length; this would be a claim about the history and theology of a particular sectarian tradition, not a claim

54 *See, e.g.*, *In re* Multi-Circuit Episcopal Church Prop. Lit., CL 2007-0248724 (Va. Cir. Ct. June 27, 2008), *available at* http://www.thediocese.net/News_services/Property/5_questions.pdf (deciding five questions about controlling case law regarding church property).

about religious truth. But it is hard to imagine a more vivid instance of the state taking sides in a theological dispute to the detriment of religious liberty in a pluralist society.

We can now say something about the comparison between the ordinary run of incomplete contract issues, represented by Rose of Aberlone, and the special case of church property disputes, represented by the "Orthodox Polish Jewish Ritual" testator. In ordinary contracts cases, we have seen that while there is ongoing debate in legal theory circles about policy-based versus intention-based approaches to incomplete contracts, the stakes on either side are modest.[55] Contracting parties cannot insist that deep injustice is threatened when a court makes use of policy-based default rules. Neither can they claim that such an injustice follows from an intention-based approach where a court attempts counterfactual completion of the contract, even where, as is often likely to be the case, the court will be making judgments as to what the parties *should* have agreed to do as opposed to what they would have agreed to do. But church property cases are different, in that an intention-based approach by a court is likely not only to drift from the safe harbor of a counterfactual prediction that rests squarely on an individual claimant's phenomenology, but also to enter the normatively unacceptable waters of choosing sides in theological debates.

There are two possible ways we could shape doctrine in response to these observations. One would be to permit very limited and very cautious counterfactual inquiry in cases like the "Orthodox Polish Jewish Ritual" testator. Properly constrained, such an inquiry would not be a repudiation of the hands-off doctrine and the values that demand that doctrine, but rather a realization that the phenomenological approach can be extended in a limited set of church property cases. The other approach would be for courts in the name of the hands-off doctrine to refuse ever to take an intention-based approach in church property cases, given how limited appropriate cases for intention-based intervention are and how fraught such cases are with the danger of encouraging judges to step outside the boundaries of the phenomenological approach and into the realm of making official state judgments about matters of contested theology.[56]

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55 *See supra* note 50 and accompanying text.

56 Greenawalt reaches a similar conclusion. *See, e.g.*, Greenawalt, *supra* note 6, at 1892 ("Courts should not assume that a grantor intended continuation of any specific practices, unless the grant explicitly covers those practices, or the new practices, according to an overwhelmingly dominant public understanding, make the group a different kind of religious body." (footnote omitted)).

Our own instinct favors the prophylactic approach. But more important than this conclusion is the understanding that it is the hands-off approach that ultimately should govern these cases, and that the only reasonable choice is between alternatives that lie within that approach.

III. THE PROBLEM WITH FOCUSING ON RELIGION

As we noted earlier, the hands-off approach itself is widely accepted. Many scholars and judges, however, seem to believe that while courts should abstain from choosing among contested interpretations of religious doctrine, they have no choice but to choose among contested interpretations of the concept of religion. For example, in both *Thomas* and *Frazee*, the Supreme Court suggested that constitutional rights are exquisitely sensitive to the distinction between religion and nonreligion. The Court asserted that while the beliefs and practices protected by the Free Exercise Clause might be unorthodox, ill-articulated, idiosyncratic, and perhaps even contradictory, they had to be religious rather than secular.[57] "There is no doubt that '[o]nly beliefs rooted in religion are protected by the Free Exercise clause,'" declared the *Frazee* Court.[58] "Purely secular views do not suffice," it continued.[59]

The *Thomas* Court supported this categorical aside by referring to constitutional text, observing that "the Free Exercise clause, . . . by its terms, gives special protection to the exercise of religion."[60] That cannot possibly be the end of the matter. After all, the First Amendment also singles out "speech" and "press" for special protections,[61] but the Court has had no trouble generalizing those protections to encompass other forms of expression such as arm bands,[62] campaign contributions,[63] flag-burning and flag salutes,[64] none of which is literally "speech" or "press." There is, moreover, a durable and compelling

57 *See supra* notes 21–39 and accompanying text.

58 Frazee v. Ill. Dep't of Employment Sec., 489 U.S. 829, 833 (1989) (quoting Thomas v. Review Bd., 450 U.S. 707, 713 (1981) (alteration in original)).

59 *Id.* Bizarrely, the Court cited *United States v. Seeger*, 380 U.S. 163 (1965), to support this last proposition. The *Seeger* Court did indeed opine that only religious convictions were entitled to protection, but it then proceeded to protect (on statutory grounds) atheist convictions on the ground that they were functionally equivalent to religious beliefs. *Seeger*, 380 U.S. at 185–88.

60 *Thomas*, 450 U.S. at 713.

61 *See* U.S. CONST. amend. I.

62 *See* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969).

63 *See* Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377 (2000).

64 *See* Texas v. Johnson, 491 U.S. 397 (1989).

tradition in free speech cases to the effect that *compelled* speech (as in flag salutes[65] and license plate mottos[66]) is anathema to liberty. The Court has recognized, in other words, that the freedom not to speak is implicit in the freedom to speak. It is at least equally plausible that religion can be freely exercised only if one is also free to choose not to exercise it at all. Thus some thoughtful commentators maintain that, in a modern democracy, "religious freedom should *by definition* include the freedom not to believe in a religion."[67] Whether or not that is so, the *Frazee* and *Thomas* courts' preference for religious beliefs and practices cannot be defended simply by pointing to the text of the First Amendment.

That is a good thing, because the view expressed in *Frazee* and *Thomas* would require courts to distinguish beliefs that were religious from those that were not, and thus to define "religion" for purposes of constitutional interpretation. This consequence should trouble us. If, in the name of religious liberty, courts are charged with the task of distinguishing religious commitments and practices from their non-religious parallels, the deep, religious-liberty-centered values that motivate the hands-off approach to religious doctrine will be fatally compromised. In the end, religious liberty will be thoroughly undone—it will turn out to be much like Monty Python's self-defeating, lethal joke.

To see why, consider again the case of the two Ms. Campbells with which we began this Essay.[68] One Ms. Campbell understands herself to be under the command of her god to open a soup kitchen; the other Ms. Campbell attributes her passion for the same enterprise to the obligations of decency in the face of the suffering of her fellow human beings. Both seek judicial relief from the strictures of a zoning regulation that prohibits soup kitchens. Now, if the disposition of their claims depends on whether one or both of them is religiously motivated, the court will have to begin by deciding whether the beneficence of the second Ms. Campbell emanates from secular motives or religious ones. Does a supreme being have to enter the story? Is a deeply held, life-organizing set of moral beliefs a religion? Do others have to share in her commitments? And on and on.

Even the first, plainly religious Ms. Campbell may present the court with difficulties. Suppose it is clear that she is religious and that

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65 *See* W. Va. State Bd. of Ed. v. Barnette, 319 U.S. 624 (1943).

66 *See* Wooley v. Maynard, 430 U.S. 705 (1977).

67 Garry Wills, *Romney and JFK: The Difference*, N.Y. REVIEW OF BOOKS, Jan. 17, 2008, at 32, 32 (emphasis added).

68 *See supra* notes 2–5 and accompanying text.

religion requires her to care for the poor. Does it require her to operate a soup kitchen, or does she have other choices? Must the soup kitchen be in her home, or could it be elsewhere? Suppose the first Ms. Campbell admits that she could fulfill her religious obligation to care for the poor in many different ways, but she thinks that, in light of her personal resources and abilities, opening a soup kitchen at home would be the most impactful and meaningful way of doing so. Is her reason for choosing the soup kitchen over other options secular or religious? If her god has spoken to her, how detailed must the message have been?

Judicial inquiries of this kind should trouble anyone committed to religious freedom. They are in the deepest sense morally arbitrary: people with very similar commitments and projects would have different rights depending on the fine points of their religious views. They are personally intrusive: to assert their rights, people must be willing to expose their religious beliefs to extensive and detailed cross-examination in court. They are potentially coercive: if either Ms. Campbell knows that her ability to operate a soup kitchen depends on whether she is able to say the right things about her passionate commitment, then she may begin to talk and think about that commitment a bit differently.

Strictly speaking, the judicial inquiry that we are at such pains to renounce is not inconsistent with the hands-off approach. Under the principles developed in *Thomas* and *Frazee*, when more or less recognizably religious commitments are inconsistent with state regulatory mandates, nobody has to say whether the implicated religious impulse is correct, attractive, coherent, or reasonably extrapolated from acknowledged doctrine.[69] That is the point of the phenomenological approach, which asks only what the individual in question believes, and with what degree of intensity the belief is held. But note: if courts have to sort out the rights of the two Ms. Campbells on the basis of what beliefs count as "religious," the hard questions begin after the phenomenological inquiry is over. Although courts will not have to resolve disputes about religious doctrine, they will have to decide higher order and, every bit as troubling, questions about what will count as religious at all. The state, through the articulate form of judicial judgments and opinions, will be put in the position of choosing—and so by implication favoring, and by further implication, valorizing—some values and commitments over others. The result is a

69 *See* Frazee v. Ill. Dep't of Employment Sec., 489 U.S. 829, 833 (1989); Thomas v. Review Bd., 450 U.S. 707, 713 (1981).

state-sponsored orthodoxy of precisely the sort the hands-off doctrine is meant to avoid.

For example, in the case of the first Ms. Campbell, our judge was confronted with the question of whether Ms. Campbell's reasons for operating a soup kitchen qualified as "religious" if she believed that her religion gave her multiple options about how to care for the poor. Even with the help of Ms. Campbell's personal theological bootstraps (for example "I believe that all my impulses of this sort are guided by and reflect the will of God"), the judge ultimately will have to determine the religious or nonreligious character of Ms. Campbell's beliefs on the basis of some legal criterion extrinsic to those beliefs. In so doing, the judge cannot hope to reach a conclusion that is neutral among religions: any definition of religion will be more acceptable to some religions than to others, and the judge's choice will almost certainly be influenced by familiarity with a particular religious tradition. A well-disciplined judge could make scope-of-religion judgments of this sort on nonreligious grounds; but, in the end, he or she will be in the business of fashioning a kind of orthodoxy, however generous in scope.

This unfortunate result is not merely a minor problem in an otherwise sound enterprise. If the project of religious freedom is dependent on choosing among contested conceptions of what is religious, then that project is contradictory and self-destructive at its very core. We really are in the grip of the Monty Python problem.

It bears emphasis that this problem is not merely an artifact of our particular approach to religious liberty, equal liberty, which emphasizes the equal status of believers and nonbelievers.[70] It is a problem as well under the leading competitors to equal liberty, most of which endorse some version of what Douglas Laycock and Michael McConnell have called "substantive neutrality."[71] Substantive neutrality requires that the government do its best not to influence religious choices and commitments one way or the other. Any plausible elaboration of substantive neutrality will involve a heavy dose of equality norms: insofar as the government treats some faiths better than others, it will give people an incentive to adopt those faiths. If courts are in the business of saying what counts as religious, some passionate moral commitments and projects will be treated better than others, and the resulting distinction will wreak havoc with substantive neutral-

70 EISGRUBER & SAGER, *supra* note 2, at 52–53.

71 *See* Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DEPAUL L. REV. 993, 1001–02 (1990); Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 156 n.187, 169 (1992).

ity. If either Ms. Campbell is more likely to win her case because she casts her motive for running a soup kitchen in more exquisitely religious terms, the government will have given her an incentive to do exactly that.

IV. Prohibiting Discrimination Associated with Diversity Among Traditional Forms of Religion

We believe that there is a straightforward and morally attractive understanding of the Religion Clauses that eliminates the need to privilege a particular view of religion. This understanding begins from the observation that, throughout modern history and today, religious diversity has too often been the catalyst of discrimination. Religious belief and practice are sites of human experience where insensitivity, indifference, and hostility appear with unfortunate frequency. The resulting mistreatment, in simple sketch, can occur in two ways: a vulnerable religious group may find its needs or interests neglected by a hostile (or simply indifferent) majority, or a powerful religious group may disregard the needs and interests of nonmembers. Discrimination of this sort is the greatest enemy of religious freedom, and, such discrimination is, we believe, what the Constitution's Religion Clauses aim to forbid. Thus, the Constitution's job is not to privilege or protect religion per se, but rather to protect all citizens from discrimination born of religious diversity. If religious liberty and the Religion Clauses of the Constitution are so understood, the futile and dangerous venture of defining religion at its controversial margins can be avoided altogether.

On this view of the Religion Clauses, neither of the Ms. Campbells will find her constitutional rights dependent upon whether her reasons for feeding the poor in her home are religious. If either is denied the freedom to feed the poor only because her reasons for doing so are not conventionally religious or because her reasons are in some disfavored way religious, then she is a victim of precisely the sort of discrimination that the Constitution's Religion Clauses proscribe. What matters is not the religious or nonreligious character of either Ms. Campbell's reasons for action, but rather the discriminatory, disparaging, or exclusive character of the government's reasons for action. Thus any rule or judgment that distinguished between the rights of the two Ms. Campbells on the grounds that one's motivations were suitably religious and the other's were not would almost surely be unconstitutional. For that reason, it doesn't matter whether we

think of the second Ms. Campbell as religious, and it doesn't matter which Ms. Campbell is the victim of the discriminatory treatment.[72]

This understanding of religious liberty and the Religion Clauses dissolves what would otherwise be impossible conundrums surrounding the concept of religion and the problem of orthodoxy. For example, under this approach, we need not decide whether atheism is itself a religion, or whether atheistic or agnostic convictions might ever count as religious. Consider in this regard the question of whether atheists or agnostics are constitutionally entitled to claim conscientious objector status if recognizably religious pacifists are allowed to do so. That issue arose, of course, in *United States v. Seeger*.[73] At the time, federal law authorized conscientious objector status only for those who could demonstrate themselves committed to pacifism by virtue of their "religious training and belief."[74] The statute defined "religious training and belief" to mean "'an individual's belief in a relation to a Supreme Being'"[75] but not to extend to "essentially political, sociological, or philosophical views."[76] Daniel Seeger claimed to be both a pacifist and an atheist.[77] The Supreme Court held that, under the terms of the statute, Seeger's views were religious, because

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72 Professor Greenawalt overlooks this central point when he suggests that our equality-driven view of religious liberty must eventually do something analogous to defining religion, albeit using a different vocabulary. *See* Kent Greenawalt, *Hands Off: When and About What*, 84 NOTRE DAME L. REV. 913, 917 (2009) (arguing that our position requires drawing a "line . . . cast in terms other than religion"). As the text accompanying this note makes clear, our theory does not depend in any way upon whether either Ms. Campbell's belief can be characterized in any sense as religious or quasi-religious. No lines of the sort that Professor Greenawalt has in mind need to be drawn.

Professor Greenawalt is also mistaken to suppose that we must define religion in order to apply the Establishment Clause. *Id.* at 915–16. In our view, the central Establishment Clause vice is that of governmental acts which carry a social meaning that denigrates believers outside the religious mainstream. Here too, only a conventional, commonsense understanding of religion is needed to render constitutional justice. *See infra* Part V.

Under our theory, of course, difficult cases will arise, cases in which it will be difficult to say with confidence whether the governmental action in question is inconsistent with norms of fairness among a religiously diverse people. But all theories confront hard cases. The problem with the project of defining religion for the purposes of a regime of religious liberty is not that it will encounter hard cases; the problem is that the project is incoherent and self-contradictory at its core.

73 380 U.S. 163 (1965).

74 *Id.* at 165.

75 *Id.* (quoting the Universal Military Training and Service Act, 50 U.S.C. app. § 456(j) (1958)).

76 *Id.*

77 *Id.* at 166.

they held a place in his life "parallel to that filled by the God of those admittedly qualifying for the exemption."[78] Under the view we are proposing, the Religion Clauses protected Seeger without regard to whether his views counted as "religious." Congress treated atheistic ethical views less respectfully than others precisely because those views were not conventionally religious, and that fact is sufficient to show that Seeger was the victim of the sort of mistreatment that the Religion Clauses prohibit. The Court's remarkably strained reading of the statute in the *Seeger* case suggests that the Justices were in the grip of precisely this constitutional intuition and so struggled mightily to bring Seeger within the statute's beneficial ambit.[79]

We have, of course, been throwing around the terms "religion" and "religious" throughout the last few paragraphs, and some people may accordingly suspect that we are guilty of circular reasoning: we say that we can avoid having to define "religion," but then we help ourselves to that very term, as though it had already been defined. We do not deny, though, that in order to understand what religious freedom is, one must have some general understanding of what groups and activities in our society count as religious. What we deny is that one needs to know exactly which groups or beliefs fit that definition; it is good enough to recognize the conventional and familiar exemplars, and to know something about the general culture of religious diversity and the conflicts that culture has experienced or generated.

Prominent, conventionally recognized religions (such as the various Protestant sects, Catholicism, Judaism, and Islam) share a number of characteristics that create an environment ripe with the potential for discrimination, hostility, or mistreatment. So, for example, the doctrines of these religions often link true belief and virtue, so that nonbelievers are judged to be tainted by the very fact of their nonbelief. Conventionally recognized religions insist on public rituals (forms of prayer, ways of dress, dietary practices, and so on) that mark members publicly and may provoke puzzlement, distaste, contempt, or worse from outsiders. Membership in these religious groups has traditionally been an all-or-nothing matter (either you are in or you are out), and it is a high-stakes affair: not only worldly reputation but

78 *Id.* at 176.

79 Justice Harlan, who had joined the Court's opinion in *Seeger*, later admitted that he had done so reluctantly. He argued that *Seeger*'s ultimate conclusion was correct, but only because the congressional statute would have been unconstitutional if its protections were limited to religious beliefs. *See* Welsh v. United States, 398 U.S. 333, 344–45 (1970) (Harlan, J., concurring).

eternal salvation may be at stake.[80] When membership in a group is a matter of great import, is publicly visible, and is associated with practices that seem indispensible to members but strange or even threatening to nonmembers, the potential for conflict and discrimination is great. History provides ample evidence of this fact: the religions familiar to the Framers and to us have a long history of interfaith and interdenominational rivalry and competition.

Our point is not to criticize or condemn religion. Along with conflict has come much that is good, including, in the right circumstances, a capacity for interfaith cooperation. Our purpose is instead to note that traditional religious groups have been associated with certain kinds of mistreatment. Significantly, neither the perpetrators nor the victims of this mistreatment need themselves be members of a traditional religious group. Constitutional norms aimed at preventing such mistreatment, while inspired by the behavior and needs of traditional religious groups, must offer protection that extends beyond the boundaries of those groups and, indeed, beyond the edges of most understandings of religion. On this understanding, the Religion Clauses have as their target not religion, but rather justice in a society that both celebrates religious diversity and understands its perils.[81]

That observation saves us from the rather hopeless task of defining what counts as religion for constitutional purposes. If the point of the Constitution's Religion Clauses was to protect, promote, privilege, benefit, or demarcate religious behavior in distinction to other kinds of behavior, we could not avoid that question. It would then matter hugely whether the second Ms. Campbell's project, or Daniel Seeger's deeply held beliefs, were religious. If they qualified as religious, Campbell and Seeger would be protected; if not, they would be out of luck. Under such a view, esoteric arguments about the distinction

80 For an overview of world religions, see STEPHEN SHAROT, A COMPARATIVE SOCIOLOGY OF WORLD RELIGIONS 3–20 (2001).

81 In our earlier writing, we have characterized this injustice as government behavior that fails to fully credit or fairly treat some groups or individuals on account of the "spiritual foundations" of their interests and commitments. *See, e.g.*, EISGRUBER & SAGER, *supra* note 2, at 52 ("First, [our model] insists in the name of equality that no members of our political community ought to be devalued on account of the spiritual foundations of their important commitments and projects."). That formulation could lead readers of our work to think that we have simply substituted "spiritual foundations" for "religion," and that we seek to valorize and protect religion in this renamed guise; it could also lead readers to think that far from ducking the difficulty of defining religion, we've simply renamed our problem. But what we have meant to capture by our usage is what we say more explicitly here: we are concerned not with a constitutionally valorized activity, but with a constitutionally anticipated peril, the peril of discrimination provoked by religious diversity and its attendant culture.

between religion and nonreligion would have great constitutional significance. But that is not so if the Religion Clauses prevent the forms of mistreatment historically associated with religious conflict. Those mistreatments include injuries inflicted on the ground that the targeted activity is viewed as *not* religious, or *not* religious in the right way, by some powerful (religious) group. Or, to put the matter differently, religious liberty (unlike Monty Python's lethal joke) is not self-destructive, and we do not have to decide whether Ms. Campbell's and Daniel Seeger's reasons for action are religious in character. We do indeed have to know something about the meaning of religion, but we need recognize only the core or paradigm cases. As we said earlier, where disputes about the definition of religion become interesting, they also become irrelevant for constitutional purposes.

V. INTERPRETING THE ESTABLISHMENT CLAUSE

By interpreting the Free Exercise Clause as aimed at prohibiting a certain kind of vice historically related to religious persecution, rather than as aimed at protecting religion per se, we can minimize the need for courts to distinguish between religious and nonreligious values and practices. We can thereby avoid the need for the disturbing and self-destructive judicial inquiries that we imagined in the case of the two Ms. Campbells.

Are matters different on the Establishment Clause side? It might at first seem so. Public schools, for example, have considerably more constitutional discretion about whether to sponsor flag salutes than to sponsor prayers, and more discretion to teach philosophy than to teach theology. It might seem impossible to explain these differences without appealing to some definition of religion. We believe, though, that the Establishment Clause is in this respect no different from the Free Exercise Clause: its point is to prevent forms of discrimination and mistreatment associated with the conflict among conventionally recognized religions, and to apply the Clause we need only to recognize the features associated with those religions, not to endorse one or another controversial theory about what religion is.

The Establishment Clause targets a certain kind of government-sponsored favoritism, and the critical question in an Establishment Clause case is whether such favoritism is present. For example, it seems obvious that public schools cannot preach the virtues of atheism any more than they can preach the virtues of Christianity, and it seems equally obvious that the truth of that rule should not depend on whether we define atheism to be a religion. Conversely, schools can teach the Bible as literature and as one possible but potentially

fallible source of moral wisdom, just as they can teach Hegel (for example) in that way but cannot require students to affirm that Hegel's views are true.

We do not mean to suggest that religious practices and nonreligious practices should get treated exactly the same way under the Establishment Clause. On the contrary, as we have already noted, the government has much more discretion when teaching about political or philosophical matters than when teaching about religion. These differences, though, stem not from whatever characteristics distinguish (according to some controversial theory) religious from nonreligious activity, but rather from features of familiar religious practices that have made them sites of discrimination and conflict. For example, public prayer rituals serve as (among other things) markers of group membership that identify some persons as "insiders" and others as "outsiders." There is no equivalent practice in the study of Hegelian philosophy, nor have disputes about Hegelian philosophy been a traditional source of social divisions in the United States, which is why it makes sense for the Constitution to treat Hegel studies and Bible studies quite differently.

We have elsewhere elaborated our view of the Establishment Clause by focusing attention on the social meaning of government sponsorship of religious rituals or symbols, and we hope that readers interested in a full-blown account of our view will consult that work.[82] Our point here does not, however, depend on the details of our Establishment Clause theory. For present purposes, we need only argue that it makes sense to view the Establishment Clause, like the Free Exercise Clause, as targeting a form of government favoritism or discrimination related to historically familiar religious practices and conflicts; that recognizing this form of government misconduct does not require us to choose among controversial theories about what counts as religion; and that while hard cases will certainly arise under this view of the Establishment Clause, those cases will not turn upon unanswerable questions about what sorts of practices and beliefs deserve to be regarded as religious. For example, when courts are called upon to decide whether public schools may offer classes in transcendental meditation,[83] the *wrong* question to ask is whether transcendental meditation is a religion (or a religious practice). The right question to ask is whether government sponsorship of classes in transcendental

82 *Id.* at 124–28.

83 *See, e.g.*, Malnak v. Yogi, 592 F.2d 197, 198, 213–14 (3d Cir. 1979) (holding that the Science of Creative Intelligence/Transcendental Meditation is a constitutionally protected religion).

meditation involves the same kind of failure of equal regard that makes it unconstitutional for the government to sponsor prayer ceremonies.[84]

VI. REVISITING THE TEXTUAL ARGUMENT

Our view of the Religion Clauses alleviates the need to define the edges of the concept of religion. It accomplishes that task by shifting the focus of constitutional analysis from the activity of religion to a form of government misconduct associated with conventional religious divisions. Some readers may fear that, by making this move, we have lost touch with the constitutional text. Are these fears well grounded?

We think not. On the contrary, we believe that our approach is handsomely consistent with the First Amendment's text. After all, the Amendment does not say that "religion shall be vigorously exercised in the United States." It says instead that "Congress shall make no law . . . prohibiting the free exercise [of religion]."[85] Under this rule, the people (all of them, not just those who are religious) are protected from certain kinds of laws that, if enacted, would place inappropriate burdens on the exercise of religion. What kinds of laws are these? Nobody thinks that the Clause prohibits government from placing any burdens on any form of religious practice. For example, the government can prohibit human sacrifice and other harmful rituals, regardless of whether individuals have genuine religious motivations for participating in them. The Free Exercise Clause instead prohibits the government only from imposing certain kinds of burdens, and any interpretation of the Clause must say which burdens these are. The interpretation we propose replies, burdens of a kind that are historically associated with religious persecution.

Likewise, the Constitution does not say that religion should exist separate from, or unaided, by the government. The Constitution does not even say that the government shall not establish any religion. Instead, it says, "Congress shall make no law respecting an establishment of religion."[86] To the extent that scholars focus at all on the word "respecting," they treat it as a kind of embarrassment for modern religious liberty jurisprudence: they suggest that it signifies ambivalence about "disestablishment" by prohibiting Congress from making

84 *Id.* at 214–15.

85 U.S. CONST. amend. I.

86 *Id.*

laws either for or against establishment.[87] Our proposed interpretation makes a virtue of the word "respecting." It suggests that the word broadens, rather than narrows, the impact of the Amendment's disestablishment norm. A government action may violate the norm against laws respecting an establishment of religion if it manifests the favoritism characteristic of establishments, even if the law is one that merely respects, rather than constitutes, an establishment of religion.

Finally, it is worth noting that our approach to the Religion Clauses has much in common with familiar features of free speech doctrine. The fact that a law targets speech or writing ("the press") is neither a necessary nor a sufficient condition for finding a violation of the First Amendment's Speech and Press Clauses. Like the Religion Clauses, those Clauses target a particular form of government misconduct, namely, censorship, especially (though not exclusively) viewpoint discrimination. That is why many people would consider laws against flag-burning as paradigmatic First Amendment violations even though they involve neither speech nor press, and why few people regard reasonable copyright regulations as First Amendment violations even though they manifestly and significantly limit what people can say and print.[88]

The purpose of these observations is not to suggest that our interpretation "wins" on textual grounds. Few if any interesting constitutional disputes can be settled on the basis of textual arguments; indeed, the most important textual feature of the Constitution is that it is open, by design rather than by accident, to principled disputes about the meaning of religious freedom and other moral ideals. Our objective is instead to undermine the common, understandable, but ultimately mistaken idea that simply because the Religion Clauses invoke the concept of religion, their scope must pivot upon the fine points of theories about how to define religion.

CONCLUDING THOUGHTS

Our goal in this Essay has been (despite its shamelessly provocative title!) a relatively modest one. We want to cast doubt on the common assumption which holds that to interpret the Constitution's

87 *See, e.g.*, Jed Rubenfeld, *Antidisestablishmentarianism: Why RFRA Really Was Unconstitutional*, 95 MICH. L. REV. 2347, 2350 (1997) (arguing that the word "respecting" signifies that Congress is prohibited from dictating to states how to legislate on religion).

88 *See* Christopher L. Eisgruber, *Censorship, Copyright, and Free Speech: Some Tentative Skepticism About the Campaign to Impose First Amendment Restrictions on Copyright Laws*, 2 J. TELECOMM. & HIGH TECH. L. 17, 22 (2003).

Religion Clauses one must define what religion is, and that it is therefore something of an embarrassment that this fundamental question has gone unanswered in American constitutional jurisprudence. We have tried here only to establish the existence of a morally attractive, textually plausible reading of the Constitution which not only does not require us to define "religion" but which treats the refusal to do so as a crucial virtue. We have not tried to justify that reading as the best interpretation of the Constitution but only to exhibit it as a possible approach. A much more extensive argument is required to defend the interpretation; we have attempted to supply that argument in our book *Religious Freedom and the Constitution.*[89]

Our approach has the significant advantage of clarifying cases, such as those of the hypothetical Ms. Campbell and the quite real Daniel Seeger, which become needlessly difficult and potentially destructive of the core of religious liberty under theories that demand a sharp distinction between the constitutional treatment of religion and nonreligion. That does not mean that no hard cases will arise at the boundary between religion and nonreligion. Our view, like the constitutional text itself, focuses on forms of misconduct and discrimination *related to historically familiar forms of religious conflict,* and so it will sometimes compel judges to ask difficult questions about whether an alleged instance of misconduct bears the right relation to the key features of religious conflict. These questions may arise, for example, when secular claimants seek to share in accommodations extended to religious believers. In our book, we devote several pages to examples of this kind.[90] The fact that these cases are genuinely hard should not disturb anyone: the point of good theories, after all, is not to eliminate hard cases, but rather to make sure we ask the right questions about them.

We will close with a final comment on the question that opened this Essay: does it matter what religion is? As we said in our introduction, yes, obviously it does, and profoundly so for many religious and nonreligious people alike. It may not matter very much, though, if at all, to constitutional jurisprudence. At times, we fear that the "yes" answer to the ethical question deters people from fully acknowledging the possibility of a "no" answer to the constitutional question. People want constitutional jurisprudence to affirm the value of their religious practices or of their conception of public life and the symbols that attach to it. But the point of the Religion Clauses is not to affirm (or deny) the value of religious practices, any more than the point of the

89 EISGRUBER & SAGER, *supra* note 2.

90 *Id.* at 112–18

Free Speech Clause is to affirm (or deny) the value of flag burning. The point of the Religion Clauses is instead to prohibit the government from showing the kinds of favoritism historically associated with religious persecution, and any doctrine that would involve courts in affirming (or denying) the value of religious practice would compromise rather than advance that purpose.