PRAXIS AND PLURALISM: COUNTERING BIAS IN THE CONSTITUTIONAL CONCEPT OF RELIGION

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ABSTRACT

Questions surrounding the meaning of religion in the First Amendment largely have been neglected in recent years. However, courts continue to operate under implicit assumptions about what constitutes an exercise of religion that is worthy of constitutional protection. Against the backdrop of the intensifying discord between religious freedom and civil rights in the courts throughout the last decade, this Note undertakes a reexamination of the dominant constitutional concept of religion. This Note demonstrates that, while flexible, the constitutional concept of religion advanced by judges and scholars remains plagued by biases that have the potential to adversely impact religious American Jews. This Note proposes that, in order to counter these biases, judges must reject an emerging doctrine in First Amendment caselaw and expand a popular framework used to determine the meaning of religion in the First Amendment.

INTRODUCTION

On June 15, 2020, Justice Neil Gorsuch surprised pundits[1] by siding with the Supreme Court's liberal wing in *Bostock v. Clayton County*.[2] An appointee of Republican President Donald Trump and the successor of the late Justice Antonin Scalia,[3] Justice Gorsuch authored the Court's majority opinion, which held that firing an employee merely on the basis of sexual orientation or gender identity violates Title VII of the Civil Rights Act of 1964.[4] While perhaps

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1. *See* Robert Barnes, *Neil Gorsuch? The Surprise Behind the Supreme Court's Surprising LGBTQ Decision*, WASH. POST, (June 16, 2020), https://www.washingtonpost.com/politics/courts_law/neil-gorsuch-gay-transgender-rights-supreme-court/2020/06/16/112f903c-afe3-11ea-8f56-63f38c990077_story.html.

2. *See* 140 S. Ct. 1731 (2020).

3. *See Neil Gorsuch*, OYEZ, https://www.oyez.org/justices/neil_gorsuch (last visited July 14, 2020).

4. *See Bostock*, 140 S. Ct. at 1737.

shocking to some, Justice Gorsuch's opinion was concise and the holding therein relatively narrow; in the final paragraphs of the majority opinion, Justice Gorsuch noted that he is "deeply concerned with preserving the promise of the free exercise of religion enshrined in our Constitution" and suggested that, when defending themselves against claims of discrimination on the basis of sexual orientation or gender identity, "other employers in other cases may raise free exercise arguments that merit careful consideration."[5] Indeed, just over two years before the Court handed down its decision *Bostock*, Justice Gorsuch himself adopted such free exercise arguments in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission* to conclude that a particular application of a state law prohibiting discrimination on the basis of sexual orientation was unconstitutional.[6] Thus, while Justice Gorsuch's textualist approach in *Bostock* may have yielded an expansive interpretation of a single clause in a single federal civil rights law,[7] it hardly insulated federal and state civil rights laws from attacks that employ arguments about religious freedom. On the contrary, Justice Gorsuch's opinion anticipated conflict between religious freedom and civil rights in the courts.

Clashes between religious freedom and civil rights in the courts hardly are a new phenomenon. In addition to *Masterpiece Cakeshop*, which involved a religious baker who refused to prepare a wedding cake for a same-sex couple,[8] numerous other cases from throughout the past decade have highlighted the existence of an ongoing conflict between religious freedom and civil rights in the courts. *Elane Photography, LLC v. Willock*, for example, involved a religious photographer who refused to provide services to a same-sex couple at their commitment ceremony,[9] while *Miller v. Davis* concerned a religious clerk who refused to issue marriage certificates to same-sex couples.[10] Nor have the repeated clashes between religious freedom and civil rights in the courts concerned only LGBTQ issues; in *Burwell v. Hobby Lobby Stores, Inc.*, the Court was confronted with a corporation whose religious owners refused to provide employees with legally mandated health insurance coverage for certain contraception[11] and, in the recent case of *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, the Court adjudicated changes to this legal mandate for health insurance coverage designed to accommodate employers' religious convictions.[12]

In light of the ongoing conflict between religious freedom and civil rights in the courts, scholars have expressed worry about the future orientation of the

5. *Id.* at 1754.
6. *See* 138 S. Ct. 1719, 1734 (2018) (Gorsuch, J., concurring).
7. *See Bostock*, 140 S. Ct. at 1738–41.
8. *See Masterpiece Cakeshop*, 138 S. Ct. at 1723.
9. *See* 309 P.3d 53 (N.M. 2013).
10. *See* 123 F. Supp. 3d 924 (E.D. Ky. 2015).
11. *See* 573 U.S. 682 (2014).
12. *See* 140 S. Ct. 2367 (2020).

Court with respect to questions at the intersection of equality and religious liberty.[13] Although the Court proclaimed just over thirty years ago that "the right of free exercise does not relieve an individual of the obligation to comply with a '. . . neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes),'"[14] decisions such as *Masterpiece Cakeshop* raise the possibility that enforcement of even neutral and generally applicable civil rights laws may be deemed hostile towards religion (and thus violative of the First Amendment).[15] Thus, as the "neutral" and "generally applicable" laws litigated in the courts become less about substance use[16] and more about contentious civil rights issues, the Court may find ways to provide constitutional protection to those who attack civil rights laws by employing arguments about freedom of religion. The prospect of such developments in First Amendment caselaw raises the important, yet often overlooked, question—what constitutes an exercise of religion?

Questions surrounding the meaning of religion in the First Amendment, which commanded much scholarly attention throughout the 1980s and 1990s,[17] largely have been neglected in recent years. However, even without explicitly addressing these questions, courts have continued to operate under implicit assumptions about what constitutes an exercise of religion that is worthy of constitutional protection.[18] And at least some scholars have proposed revisiting the meaning of religion in the First Amendment in order to resolve,[19] or to predict the course of,[20] the ongoing conflict between religion and civil rights in the courts. In light of the repeated clashes between religious freedom and civil rights in the courts, the time is ripe for a long overdue reexamination of the dominant constitutional concept of religion.

This Note highlights serious shortcomings in the dominant constitutional concept of religion. Specifically, this Note demonstrates that the dominant constitutional concept of religion is plagued by biases that have the potential to adversely impact religious American Jews. Part I summarizes Supreme Court and circuit court decisions about the meaning of religion in the First Amendment, as well as scholarship from recent decades that has advanced a flexible constitutional concept of religion to help judges avoid bias. Part II shows how the meaning of religion in the First Amendment is becoming increasingly relevant, how the constitutional concept of religion advanced by

13. *See, e.g.*, Brendan Beery, *Prophylactic Free Exercise: The First Amendment and Religion in a Post-Kennedy World*, 82 ALB. L. REV. 121 (2018).

14. Emp't. Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 879 (1990) (quoting United States v. Lee, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring)).

15. *See* Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719, 1729–31 (2018).

16. *Smith*, 494 U.S. at 872.

17. *See infra* I.B.

18. *See infra* II.B.2.

19. *See infra* II.A.

20. *See* Beery, *supra* note 13.

judges and scholars depicts Judaism in Christian terms, and how the current meaning of religion in the First Amendment may cause religious American Jews to receive fewer protections under the Constitution.

As a solution to the problem that it identifies, this Note argues both for the rejection of an emerging doctrine in First Amendment caselaw and for the expansion of a popular framework used to determine the meaning of religion in the First Amendment. Part III contends that judges must disavow the hybrid-rights approach to religious freedom adopted by the majority of circuit courts, as well as develop the conceptual framework for religion proposed by Eduardo Peñalver.

I. THE MEANING OF RELIGION IN THE FIRST AMENDMENT

A. The Constitutional Concept of Religion in the Courts

In both of two cases from the nineteenth century that involved the meaning of religion in the First Amendment—*Reynolds v. United States* and *Davis v. Beason*—the Supreme Court assumed a portrait of religion in which a believer in a powerful deity relates to that deity in a manner implicating ethical behavior.[21] The *Reynolds* Court adopted Thomas Jefferson's view that "religion is a matter which lies solely between man and his God" as the "authoritative declaration" on the meaning of religion in the First Amendment.[22] The *Davis* Court held that "[t]he term 'religion' has reference to one's views of his relations to his Creator, and to the obligations they impose of reverence for his being and character, and of obedience to his will."[23] Between *Reynolds* and *Davis*, the Court "seemed to settle implicitly on three criteria in the determination of religious faith," namely "(1) a belief in the existence of a deity; (2) a recognition of the cosmogenic powers of that deity . . . ; and (3) the establishment of some personal relationship between deity and believer which demanded particular forms of ethical behavior."[24]

During the twentieth century, the Court gradually abandoned previously held assumptions about the meaning of religion in the First Amendment.[25] In the 1944 decision of *United States v. Ballard*, the Court held that "the truth or verity of [one's] religious doctrines or beliefs" no longer was relevant in Religion Clauses determinations.[26] This holding was part of a broader acknowledgement that the Court was incompetent to adjudicate the content of religious belief and that the Court could only "legitimately inquire into the

21. Reynolds v. United States, 98 U.S. 145 (1879); Davis v. Beason, 133 U.S. 333 (1890).

22. *Reynolds*, 98 U.S. at 164 (internal quotations omitted).

23. *Davis*, 133 U.S. at 342.

24. James McBride, *Paul Tillich and the Supreme Court: Tillich's "Ultimate Concern" as a Standard in Judicial Interpretation*, 30 J. CHURCH & STATE 245, 250 (1988).

25. *See id.* at 251.

26. 322 U.S. 78, 86 (1944).

sincerity of the beliefs held."[27] In the 1961 decision of *Torcaso v. Watkins*, the Court further expanded its understanding of religion, recognizing "religions in this country which do not teach what would generally be considered a belief in the existence of God."[28] For the *Torcaso* Court, "theistic belief could not be considered the sine qua non of a constitutionally viable notion of legally recognizable religious faith."[29]

It was not until 1965 that the Supreme Court translated its abandonment of previously held assumptions about the meaning of religion in the First Amendment into a constitutional concept of religion. In 1965, the Supreme Court "was faced with the difficult task of translating the . . . guidelines, outlined in the *Ballard* and *Torcaso* decisions, into a[n] . . . understanding of what a 'sincere' belief in a 'Supreme Being' might mean."[30] The case was *United States v. Seeger* and, in constructing a provision of a military conscription statute that provided for religious exemptions, the Court settled on a definition of religion as any "ultimate concern" an individual might have, irrespective of whether it incorporates a deity.[31] In so defining religion, the Court in *Seeger* granted a religious exemption to a military draft objector because "the beliefs which prompted his objection occup[ied] the same place in his life as the belief in a traditional deity holds in the lives of . . . Quakers."[32] However, "[t]he *Seeger* opinion left unclear whether" a person's ultimate concern "was to be judged by intellectual or psychological criteria" (i.e., whether it was to be "determined by his cognitive beliefs or his psychological attitudes").[33] In other words, the *Seeger* Court was ambiguous about whether ultimate concern referred to the place of the belief in question within one's hierarchy of beliefs or to the affective attitude of one towards the belief in question. Nevertheless, *Seeger*'s "definition of religion was tested"—and affirmed—"five years later in *Welsh v. United States*."[34] The Court in *Welsh* adjudicated the appeal of a military draft objector who was "convicted . . . of refusing to submit to induction into the Armed Forces" by deciding to "reverse this conviction because of its fundamental inconsistency with *United States v. Seeger*."[35]

27. McBride, *supra* note 24, at 251.

28. 367 U.S. 488, 495 n.11 (1961).

29. McBride, *supra* note 24, at 251.

30. *Id.* at 254.

31. 380 U.S. 163, 187 (1965) (quoting PAUL TILLICH, THE SHAKING OF THE FOUNDATIONS 57 (1948)).

32. *Id.*

33. Kent Greenawalt, *Religion as a Concept in Constitutional Law*, 72 CALIF. L. REV. 753, 807 (1984).

34. McBride, *supra* note 24, at 257; *see* 398 U.S. 333 (1970).

35. *Welsh*, 398 U.S. at 335.

Since 1965, circuit courts have continued to grapple with the constitutional concept of religion.[36] In its 1979 decision in *Malnak v. Yogi*, the Third Circuit Court of Appeals applied the "ultimate concern" definition of religion to conclude that a public school course on the Science of Creative Intelligence Transcendental Meditation was an unconstitutional establishment of religion.[37] In its analysis, the court gave its own interpretation of "ultimate concern" in which the phrase referred to "ideas" that "address fundamental questions."[38] Moreover, the court seemed to broaden the definition of religion beyond what was articulated in *Seeger* by offering "three useful indicia" for determining whether something counts as a religion: "[T]he nature of the ideas in question" (whether they "address fundamental questions"), whether "the element of comprehensiveness" is present, and whether there are "signs that may be analogized to accepted religions."[39] Applying its indicia to the facts before it, the court found that the Science of Creative Intelligence Transcendental Meditation "provide[d] answers to questions concerning the nature both of world and man, the underlying sustaining force of the universe, and the way to unlimited happiness," that it "include[d] a complete or absolute moral code" that was "sufficiently comprehensive," and that it was associated with "trained teachers and an organization devoted to the propagation of the faith."[40] In the decades following its *Malnak* decision, the Third Circuit Court of Appeals continued to apply its tripartite framework in cases involving the meaning of religion in the First Amendment.[41] Courts in the First, Second, and Ninth Circuits also adopted and applied the *Malnak* framework,[42] while courts in the Tenth and Eleventh Circuits cited the *Malnak* framework approvingly.[43] By the 1990s, however, scholars began to take issue, not only with the *Seeger* definition of religion—which had been an object of scrutiny since the 1980s—but also with the tripartite framework adopted and approved in the circuits.

B. The Constitutional Concept of Religion in Scholarship

In the 1980s, scholars began to take issue with the constitutional concept of religion put forward in *Seeger* and developed in the circuits. In particular, George Freeman, Kent Greenawalt, Bette Novit Evans, and James McBride

36. *See, e.g.*, Founding Church of Scientology v. United States, 409 F.2d 1146 (D.C. Cir. 1969).

37. *See* 592 F.2d 197 (3d Cir. 1979).

38. *Id.* at 208.

39. *Id.* at 207–09.

40. *Id.* at 213–14.

41. *See, e.g.*, Africa v. Pennsylvania, 662 F.2d 1025 (3d Cir. 1981).

42. *See* Van Schaick v. Church of Scientology, 535 F. Supp. 1125 (D. Mass. 1982); Altman v. Bedford Cent. Sch. Dist., 45 F. Supp. 2d 368 (S.D.N.Y. 1999); Sousa v. Wegman, No. 1:11-CV-01754, 2012 WL 3638031, at *3 (E.D. Cal. Aug. 21, 2012).

43. *See* Watts v. Fla. Int'l Univ., 495 F.3d 1289 (11th Cir. 2007) (opting not to apply *Malnak* for procedural reasons); United States v. Meyers, 906 F. Supp. 1494 (D. Wyo. 1995) (adding indicia regarding metaphysics and morality to the *Malnak* framework).

challenged the definition of religion as "ultimate concern."[44] Freeman and Novit Evans understood the "ultimate concern" inquiry as a cognitive determination regarding the function of the belief in the life of the believer and, as such, they worried that "ultimate concern" was over-inclusive as a definition of religion.[45] Along with Greenawalt, Freeman also worried that "ultimate concern" was under-inclusive.[46] Unlike Freeman and Novit Evans, McBride understood the "ultimate concern" inquiry as an affective determination regarding the sincerity and depth with which the believer held the belief, yet he too was worried that "ultimate concern" was over-inclusive as a definition of religion.[47] Nor were scholars uncritical of the Third Circuit's tripartite framework; Novit Evans challenged the framework's first prong as over-inclusive[48] and its third prong as both over- and under-inclusive.[49]

In light of the issues that plagued the constitutional concept of religion put forward in *Seeger* and developed in the circuits, scholars were quick to respond

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44. *See* George C. Freeman III, *The Misguided Search for the Constitutional Definition of "Religion,"* 71 GEO. L.J. 1519 (1983); Greenawalt, *supra* note 33; Bette Novit Evans, *Contradictory Demands on the First Amendment Religion Clauses: Having It Both Ways*, 30 J. CHURCH & STATE 463 (1988); McBride, *supra* note 24, at 268.

45. *See* Freeman, *supra* note 44, at 1535–36 ("[S]elf-interest itself might be an individual's ultimate concern. Perhaps the main objection to protecting the egoist under the free exercise clause is that his ultimate concern is not a moral concern and, therefore, he does not violate his conscience when he acts against his own self-interest. But this objection is unsound. Some philosophers have argued that, however unattractive egoism may be, the theory is, nonetheless, a moral theory.") (internal citations omitted); Novit Evans, *supra* note 44, at 468–69 ("Focusing on the function of the belief in the life of the believer . . . raises boundary problems. If religion is defined by the function of the belief[,] . . . then any ultimate system of values should qualify for First Amendment protection.") (internal citations omitted).

46. *See* Freeman, *supra* note 44, at 1536 ("[T]he test discriminates . . . against the individual who has no ultimate concern but who is, nevertheless . . . committed to certain principles and to a certain way of life. Such an individual might be called an 'intuitionist.1' . . . Intuitionist theory has been described as having two features: '[F]irst . . . a plurality of first principles which may conflict . . . ; and second, . . . no priority rules, for weighing these principles against one another.'") (quoting J. RAWLS, A THEORY OF JUSTICE 34 (1971)) (internal citations omitted); Greenawalt, *supra* note 33, at 806–07 ("Ultimate concern is fundamentally flawed as a single criterion for religiousness. . . . In part, the approach is flawed because some claims that do not . . . implicate ultimate concerns . . . should count as religious.").

47. *See* McBride, *supra* note 24, at 268 ("[T]he 'sincerity test' by which beliefs are judged religious or nonreligious is conceived in the minds of justices and attorneys alike solely in terms of the 'affective attitude' of the individual in question. Hence, any belief at all might be considered religious . . . .").

48. *See* Novit Evans, *supra* note 44, at 470 ("[S]ome opinions have focused on the kinds of questions addressed . . . . This approach . . . too, is incapable of posing adequate boundaries: How . . . could an ultimate question definition distinguish religion from theoretical physics . . . or philosophy?").

49. *See id.* ("Another approach focuses on the . . . institutional characteristics of a community . . . . However, such a characterization is both under and over inclusive.").

with alternatives.[50] As early as 1983, Freeman invoked Wittgenstein's theory of language to show "that the search for essences is misguided" and that a concept is formed, not in accordance with any essence of the objects it encompasses, but as a result of custom.[51] In other words, Freeman cited Wittgenstein to demonstrate that "there is no one feature or set of features that is both necessary *and* sufficient" for an object to be included in a concept, and that whether an object is included in a concept is merely a question of how the customary deployment of the concept relates to the object.[52] With respect to the concept of religion, Freeman argued that it could not be articulated in a definition because a definition would suggest that there were necessary and sufficient conditions for something to count as religion and Wittgenstein had shown the implausibility of just such conditions.[53] Greenawalt agreed[54] and, ultimately, both Freeman[55] and Greenawalt proposed an analogical approach in which courts could compare alleged religions with the "indisputably religious" without regarding any "single characteristic . . . as essential to religiousness."[56]

By the late 1990s, the scholarly alternatives were under attack.[57] The most formidable challenge came from Eduardo Peñalver,[58] whose approach to understanding the meaning of religion in the First Amendment ultimately influenced the courts.[59] Drawing on the work of Freeman and Greenawalt,[60] Peñalver formulated modifications to the analogical approach that were

50. *See* Joel R. Cornwell, *Totem and the God of the Philosophers: How a Freudian Vocabulary Might Clarify Constitutional Discourse*, 35 J. CHURCH & STATE 521, 521–25 (1993) (arguing that, because Freud shows that all normative language invokes transcendence, religion is only distinguishable as that which invokes a deity); Stanley Ingber, *Religion or Ideology: A Needed Clarification of the Religion Clauses*, 41 STAN. L. REV. 233, 332 (1989) (arguing that "[r]eligion acknowledges the existence of a . . . transcendent reality from which basic human obligations emanate").

51. Freeman, *supra* note 44, at 1549–52; *see* McBride, *supra* note 24, at 270 (arguing that, if Tillich's theology "were to be applied as a standard in judicial interpretation," courts would merely ask whether a given belief "has an object which transcends the . . . phenomenal world" without inquiring into the content of the belief or into the function of the belief in the life of the believer).

52. Freeman, *supra* note 44, at 1550–51.

53. *See id.* at 1549–52

54. *See* Greenawalt, *supra* note 33, at 753.

55. *See* Freeman, *supra* note 44, at 1563.

56. Greenawalt, *supra* note 33, at 753.

57. *See* Eduardo Peñalver, Note, *The Concept of Religion*, 107 YALE L.J. 791, 813–14 (1997) (arguing that pro-Western and pro-Christian "bias is most likely to emerge" in "the assumption that belief in God is an essential aspect of religion"); Rudra Tamm, *Religion Sans Ultimate: A Re-Examination of Church-State Law*, 41 J. CHURCH & STATE 253, 255–58 (1999) (arguing that all policy considerations ultimately depend upon that which is unconditional).

58. *See* Peñalver, *supra* note 57.

59. *See, e.g.*, Adams v. Stanley, 237 F. Supp. 2d 136, 143 n.10 (D.N.H. 2003).

60. *See* Peñalver, *supra* note 57, at 794.

designed to "minimize the risk of judicial . . . bias"[61] that favors the "needs of western, Protestant society."[62] Peñalver's modifications took the form of a requirement that "judges . . . compare the belief system in question with at least one theistic religion (for example, Judaism, Christianity, or certain Hindu sects), one nontheistic religion (for example, Buddhism), and one pantheistic religion (for example, Santeria)," and the "adoption of certain negative guidelines" to "eliminate the most common . . . biases observed in the case law."[63] With respect to the negative guidelines, Peñalver offered three proposals: "religious status may not be denied to a belief system because of its failure to contain a concept of God";[64] "religious status may not be denied to a belief system because of its . . . lack of institutional features";[65] and "religious status may not be denied to a belief system because of its failure to . . . distinguish the . . . other-worldly."[66]

In the same year that Peñalver formulated his modifications to the analogical approach, Novit Evans published a book in which she emphasized the importance of a constitutional concept of religion that could serve a pluralistic America.[67] In her book, Novit Evans added her voice to the communitarian-liberal debate, sketching a vision of a society that "provides space for individuals to make . . . their own meanings" yet maintains "social cohesion" among individuals.[68] Referring to "this vision" by using "the term pluralism,"[69] Novit Evans found "[t]he use of analogies" to be "especially compatible with" a "pluralist approach to religious freedom," and she thus contended that a "pluralist theory" should "use[] Wittgenstein's 'family resemblances'" when faced with First Amendment questions regarding the meaning of religion.[70] In other words, Novit Evans argued in favor of using Wittgenstein's theory of language to inform First Amendment law because she believed that the "pluralist approach . . . resonates with the nonessentialist 'family of indicators' approach . . . ."[71] If, for Novit Evans, the analogical approach could serve a pluralistic America, then, for Peñalver, modifications to the analogical approach designed to counter Western bias were all the more important for American pluralism to thrive.

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61. *Id.* at 814.

62. *Id.* at 812.

63. *Id.* at 817–18.

64. *Id.* at 818.

65. *Id.*

66. *Id.*

67. *See* BETTE NOVIT EVANS, INTERPRETING THE FREE EXERCISE OF RELIGION: THE CONSTITUTION AND AMERICAN PLURALISM (1997).

68. *Id.* at 230.

69. *Id.* (emphasis omitted).

70. *Id.* at 67.

71. *Id.* at 238.

II. BIASES IN THE CONSTITUTIONAL CONCEPT OF RELIGION

A. The Increasing Relevance of a Constitutional Concept of Religion

In light of the recurring discord between religious freedom and civil rights, questions surrounding the meaning of religion in the First Amendment no longer can be deemed unimportant. Indeed, Lauren Sudeall Lucas goes so far as to argue that the ongoing conflict between religious freedom and civil rights in the courts stems from a misunderstanding of the meaning of religion in the First Amendment.[72] Sudeall Lucas expresses concern about "court clerks [who] have refused to issue marriage certificates" to same-sex couples on religious grounds, business owners who have refused to provide same-sex couples with "services such as wedding photography" for religious reasons, and corporations that have refused "to facilitate employment-based group health insurance plans that cover certain contraceptive devices" because doing so allegedly "violates their right to free exercise of religion under the First Amendment."[73] Sudeall Lucas argues that, when courts credit the religious arguments of those who refuse to abide by laws intended to promote equality, they fail to understand the basis of "cognizable religious exercise claims."[74] According to Sudeall Lucas, only "protective claims of religious identity should be deemed cognizable under the Free Exercise Clause, while projective claims of religious identity should fall outside of First Amendment protection."[75] Whereas a protective claim is that one's "beliefs and actions should be protected" only "[t]o the extent that they are critical to achieving or maintaining [religious] identity within the internal sphere," a projective claim is that one's religious "identity [must] dictate how the law should operate with regard to the rights of others."[76] For Sudeall Lucas, the claim that an individual's religious identity should exempt the individual from a law intended to promote equality is projective, as the claim demands that, insofar as it relates to the individual, the law should cease to protect the rights of others. Thus, Sudeall Lucas' response to the repeated clashes between religious freedom and civil rights in the courts is that an "individual should retain control over her identity within the internal sphere" but that "the protection of her identity cannot trump forces that properly govern relationships among individuals" within "the external sphere."[77]

Sudeall Lucas' response to the recurring discord between religious freedom and civil rights in the courts amounts to a constitutional concept of religion narrower than that of the courts. It is not difficult to imagine that, as the repeated clashes between religious freedom and civil rights in the courts

72. *See* Lauren Sudeall Lucas, *The Free Exercise of Religious Identity*, 64 UCLA L. REV. 54 (2017).

73. *Id.* at 56 (internal citations omitted).

74. *Id.*

75. *Id.* at 88.

76. *Id.* at 84–85.

77. *Id.* at 113.

intensify, judges may take a course similar to the one charted by Sudeall Lucas, revisiting—and perhaps narrowing—the meaning of religion in the First Amendment to address the ongoing conflict between religious freedom and civil rights.

B. Religious American Jews and the Constitutional Concept of Religion

1. The Christianization of Judaism in Legal Discourse

Scholars who advance constitutional concepts of religion consistently conflate Judaism and Christianity. In his attempt to revive Paul Tillich's theology for a constitutional concept of religion, McBride writes of "the tenets of Judeo-Christian theism" that nineteenth century courts recognized,[78] "the narrow limits of Judeo-Christian theism" that early twentieth century courts questioned,[79] and "the Judeo-Christian tradition" that later twentieth century courts "abandon[ed]."[80] In her critique of various constitutional concepts of religion, Novit Evans underscores the importance of an expansive meaning of religion in the First Amendment by highlighting the fact that "many major faiths do not countenance the existence of a Supreme Being in the sense that Judaism and Christianity do."[81] Cornwell, whose implausible definition of religion incorporates Freud and emphasizes the invocation of a deity, also associates "U.S. Supreme Court" precedents with "Judaeo-Christian theism."[82] Even Gidon Sapir, whose broad conception of religious exercise highlights the importance of social realities over inner convictions, writes of a "Judeo-Christian culture."[83]

While religious American Jews do not share an ideology,[84] the thought of Yeshayahu Leibowitz, a twentieth century Jewish thinker and Israeli intellectual,[85] sheds light on why conflating Judaism and Christianity is profoundly problematic. In addition to claiming that the "very concept" of a "common 'Judeo-Christian heritage'" is "absurd,"[86] Leibowitz also presents an increasingly relevant[87] approach to Judaism that stands in stark contrast to Christianity. "[W]hile lecturing to an audience in the restaurant of the Hebrew

78. McBride, *supra* note 24, at 250.

79. *Id.* at 245.

80. *Id.* at 251.

81. Novit Evans, *supra* note 44, at 468.

82. Cornwell, *supra* note 50, at 530.

83. Gidon Sapir, *Religion and State—A Fresh Theoretical Start*, 75 NOTRE DAME L. REV. 579, 637 (1999).

84. *See A Portrait of Jewish Americans*, PEW RSCH. CTR. (Oct. 1, 2013), https://www.pewforum.org/2013/10/01/jewish-american-beliefs-attitudes-culture-survey/.

85. Daniel Rynhold, *Yeshayahu Leibowitz*, STANFORD ENCYC. PHIL. (Mar. 6, 2019), https://plato.stanford.edu/entries/leibowitz-yeshayahu/.

86. YESHAYAHU LEIBOWITZ, JUDAISM, HUMAN VALUES, AND THE JEWISH STATE 258 (Eliezer Goldman, ed., Eliezer Goldman et al. trans., 1992).

87. *See infra* II.B.2.

University of Jerusalem, Leibowitz declared that even if the content of the prayer . . . were that of the restaurant menu, he would have recited it" because, in his estimation, "to appeal to God with words [was] absurd, no matter which words [were] used."[88] Leibowitz prayed only because "religion commands" as much.[89] For Leibowitz, then, religion is not a set of beliefs about a God with which one can communicate, but a set of commands that one accepts upon oneself in the service of God. Leibowitz asserts that "[t]he essence of faith" in Judaism is constituted, not by the content of one's beliefs about God, but by one's decision "to serve God" through practices to which one relates as commands.[90] Thus, in Leibowitz's approach to Judaism, "the relation between man and God is established exclusively through . . . practice."[91] Put differently, "[t]he essential characteristic of Leibowitz's concept of Judaism is the reduction of this religion to its . . . practical aspect"[92] because, in his estimation, "[f]aith in Judaism is not a belief that precedes the recognition of the Halakha as God's commandment, but is this recognition itself."[93] In part, Leibowitz's theology underpins his approach to Judaism. Leibowitz argues that "[o]nly one uniqueness is absolute" and that "[w]ithin human reality there is no absolute uniqueness."[94] For Leibowitz, God is absolutely unique and, since humans cannot experience absolute uniqueness, God is radically transcendent vis-à-vis humanity. In other words, "Leibowitz espouses a radically negative theology."[95] Because "God is," in his view, "a transcendent entity," Leibowitz believes that "using our . . . experience to describe God . . . is illegitimate and tantamount to idolatry."[96] And, as a result of his negative theology, Leibowitz necessarily equates Jewish faith with practice rather than with belief. "[S]ervice of God, when understood according to Leibowitz's negative theology, should be interpreted as the negation of the worship of anything in the world" so that "Halakhic practice is," for Leibowitz, "a form of negative praxis."[97] Since God, in Leibowitz's theology, transcends human experience, any attempt to relate to God through belief is ill-fated, as the content of belief reflects human experience. In Leibowitz's estimation, the "concept 'God' must be inferred

88. Roi Benbassat, *Yeshayahu Leibowitz: Jewish Existentialism*, 51 RELIGIOUS STUD. 141, 157 (2014).

89. *Id.*

90. YESHAYAHU LEIBOWITZ, SICHOT AL MADAH VEARACHIM 74 (1985) (translation by author).

91. Benbassat, *supra* note 88, at 157.

92. *Id.* at 141.

93. *Id.* at 145.

94. LEIBOWITZ, *supra* note 86, at 80.

95. Yonatan Brafman, *Yeshayahu Leibowitz's Axiology: A "Polytheism of Values" and the "Most Valuable Value*,*"* 43 J. RELIGIOUS ETHICS 146, 158 (2015).

96. Avi Sagi, *Yeshayahu Leibowitz—A Breakthrough in Jewish Philosophy: Religion Without Metaphysics*, 33 RELIGIOUS STUD. 203, 204 (1997).

97. Brafman, *supra* note 95, at 160–61.

from the . . . form of life espoused by Judaism as a religion constituted by Halakha."[98]

Although thinkers like Leibowitz demonstrate that, for certain religious Jews, religious belief is secondary to religious practice (hereinafter, "Judaism as praxis"),[99] scholars who advance constitutional concepts of religion consistently conflate Judaism and Christianity. Some scholars go so far as to claim that "the basic rationale . . . for giving special respect to . . . religion" under the law is that "believing is central to what makes us persons"[100] because, amongst other things, "believing is an orientation toward truth: to believe something is to believe it to be true" and "[i]t seems not too much to assert a special dignity in a life lived with that sort of orientation."[101] Even those scholars who do not so explicitly emphasize belief in their theories of the First Amendment nevertheless fail to account adequately for the role of practice in Judaism. In her analysis of *Goldman v. Weinberger*,[102] a case involving the extent of First Amendment protections for Jewish practices in the military, Novit Evans criticizes the Supreme Court for ignoring "the distinction between a religious obligation and a personal choice" and argues that "appreciation of the obligatory character of religious commands would surely have led to a decision more respectful" of Goldman, the Jewish petitioner whose exercise of religion was at stake.[103] In Novit Evans's view, the Supreme Court should "have asked Captain Goldman whether he *believed* covering his head to be a command of God, or whether it was an act of cultural identity."[104] Seemingly, even as she laments the Supreme Court's inability to distinguish the voluntary from the obligatory in the adjudication of a Jewish religious exercise claim,

98. Sagi, *supra* note 96, at 213.

99. Interestingly, Leibowitz draws inspiration from Wittgenstein, the philosopher whose theory of language animates the analogical approach advanced by Freeman, Greenawalt, and Peñalver. *See* AVI SAGI, JEWISH RELIGION AFTER THEOLOGY 114 (Batya Stein trans., 2009) ("Like Wittgenstein, Leibowitz understood that using the word 'God' does not require a full grasp of what this word represents. Leibowitz would certainly agree with Wittgenstein's statement concerning the word God whereby, primarily, we understand 'what it didn't mean.'"); *id.* at 110 (Leibowitz was "a scientist nurtured in the tradition of Popper, Wittgenstein, and logical positivism" who "was aware of the epistemic difficulty entailed in all attempts to justify metaphysical claims regarding God."); *id.* at 132 (Leibowitz "seems to follow Wittgenstein" in asserting that the "key question concerning God . . . is not his objective character . . . but the way in which human beings, in their language and in their lives, use the concept of God."). Despite the connections between Leibowitz and Wittgenstein and the fact that the former distinguishes Judaism from Christianity, nowhere do the proponents of the analogical approach—who explicitly rely upon Wittgenstein—challenge their assumption that Christianity and Judaism are similarly situated for purposes of the First Amendment.

100. Steven D. Smith, *Believing Persons, Personal Believings: The Neglected Center of the First Amendment*, 2002 U. ILL. L. REV. 1233, 1281–82 (2002).

101. *Id.* at 1267.

102. *See* 475 U.S. 503 (1986).

103. NOVIT EVANS, *supra* note 67, at 25.

104. *Id.* (emphasis added).

Novit Evans remains wedded to the notion that religious exercise—whether voluntary or obligatory—is a function of belief.

To be sure, Novit Evans discusses religious practice apart from religious belief. She concedes that, while "practices seem to be an epiphenomena to the beliefs they represent, . . . some observers of religion find them to be the heart of religion itself"[105] and that, as such, "[i]f courts focus on beliefs, they may give far too little protection to . . . practices."[106] Nevertheless, Novit Evans's discussion of what it means for practices "to be the heart of religion" ultimately falls short. She writes:

> In both functional and content definitions . . . belief is the defining element; the practices that follow from them are considered derivative. The implicit model here is that religious *actions* flow from religious *beliefs*. But . . . practices may in fact be crucial in *creating* beliefs. In short, we believe *as a result of* what we do.[107]

In Novit Evans's model, either religious belief entails derivative religious[108] practice or religious practice cultivates derivative religious belief. Although Novit Evans may be correct that religious practice influences religious belief, she fails to account for religious practice that is indifferent to, or even hostile towards, religious belief; while, for Novit Evans, religious practice shapes faith, for adherents of Judaism as praxis, religious practice itself constitutes faith. Seemingly, even in Novit Evans's pluralistic methodology, there is gravitation towards belief—whether it results from, or in, practice—as a sine qua non of religion.

Sudeall Lucas also gravitates toward belief, as opposed to practice, in offering a constitutional concept of religion that responds to the recurring discord between religious freedom and civil rights in the courts. Although she concedes that both "beliefs and actions should be protected" by the First Amendment, Sudeall Lucas contends that, when a religion veers away from "identity within the internal sphere," it no longer qualifies for First Amendment protections.[109] The constitutional concept of religion put forward by Sudeall Lucas withholds recognition from religions that operate solely beyond the internal sphere, such as Judaism as praxis.

Unfortunately, as Sudeall Lucas notes, "much of existing Religion Clause jurisprudence is consistent with [her] thesis" about the meaning of religion in the First Amendment.[110] Indeed, the courts have "protected religious identity . . . primarily with regard to inward-focused exercises of religious

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105. *Id.* at 103.

106. *Id.* at 62.

107. *Id.*

108. *See id.* at 53 ("An adequate definition of religion must at least suggest why the actions that stem from beliefs warrant special protection.").

109. Sudeall Lucas, *supra* note 72, at 84–85.

110. *Id.* at 60.

identity."[111] To the extent that the courts have extended First Amendment protections to Judaism, they have understood the religion through a Christian lens, remaining oblivious to Judaism as praxis. When judges have purported to come to the defense of American Jews' religious freedom, they have done so by using terms from the Christian Bible to refer to the experiences of religious American Jews.[112]

Even scholars who recognize that legal discourse about religion has developed from a Christian perspective often conflate Judaism and Christianity.[113] An ethnographer of American Jews, Jonathan Boyarin notes that scholarly "critiques aimed at the dominant Christian ethos effectively denigrate the Jewish voice" when they adopt the "highly ideological and power-laden reduction" that is manifest "in the phrase 'Judaeo-Christian.'"[114] Vera Sánchez's critical scholarship exemplifies the phenomenon to which Boyarin refers; using the term "Judeo-Christian" on fifty-five occasions within a single article,[115] Sánchez baselessly claims both that a higher "value [is] given to the written word in Judeo-Christian religions" than is given to "oral traditions" and that the "need for certainty and answers is a part of Judeo-Christian tradition . . . ."[116] In thus coupling Judaism and Christianity, Sánchez ignores the recurring theme within "Jewish history" of "radical opposition" to the codification of oral traditions[117] and to the fact that, for many who identify with it, Judaism is "a faith based on asking questions" rather than a religion rooted in certainties.[118] In the words of Boyarin, Sánchez's use of "the phrase 'Judaeo-Christian' eradicates the specificity and autonomy of Jews."[119] Seemingly, the Christianization of Judaism in legal discourse runs deep, both in the courts and in scholarship.

2. Fewer Protections for Judaism as Praxis

In twenty-first century America, Judaism as praxis is likely to become increasingly relevant. As recently as 2014, Jay Lefkowitz noted that, for a

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111. *Id.*

112. *See* Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet, 512 U.S. 687, 732 (1994) (Scalia, J., dissenting) (using the term Mammon, which is from the Christian Bible, in relation to Jews, Justice Scalia writes, "The Grand Rebbe would be astounded to learn that after escaping brutal persecution and coming to America with the modest hope of religious toleration for their ascetic form of Judaism, the Satmar had become so powerful, so closely allied with Mammon, as to have become an 'establishment' of the Empire State").

113. *See* Verna C. Sánchez, *All Roads Are Good: Beyond the Lexicon of Christianity in Free Exercise Jurisprudence*, 8 HASTINGS WOMEN'S L.J. 31 (1997).

114. JONATHAN BOYARIN, THE ETHNOGRAPHY OF READING 213 (1993).

115. *Id.*

116. Sanchez, *supra* note 113, at 58–60, 73.

117. Isadore Twersky, *The Shulhan 'Aruk: Enduring Code of Jewish Law*, 16 JUDAISM 141, 149 (1967).

118. Rabbi Lord Jonathan Sacks, *The Necessity of Asking Questions*, ORTHODOX UNION, https://outorah.org/p/861/ (last visited Oct. 27, 2019).

119. BOYARIN, *supra* note 114, at 213.

growing number of religious American Jews amongst whom he counts himself, "the key to Jewish living is not our religious beliefs but our commitment to a set of practices . . . ."[120] In all likelihood, changes underway in American society will only further the trend amongst religious American Jews that Lefkowitz describes as "engaging first in religious practices and letting matters of faith come later."[121]

The youngest generation in American society is its most diverse[122] and, while "[p]luralism is only one of the possible responses" to this trend, "[f]or those who welcome the new diversity, creating a workable pluralism" is the desired "achievement."[123] Indeed, Novit Evans sees in pluralism "a vision that appreciates . . . multiple sources of meaning and provides space for individuals to make . . . their own meanings, while . . . recognizing the need for social cohesion."[124] However, as it becomes popular in the liberal West, "pluralism poses a . . . challenge to [religious] believers who see themselves as members of Western liberal societies"[125] because religious "[b]elievers supporting . . . pluralism must renounce a traditional assumption inconsistent with . . . pluralism, namely, that religion is true."[126] In other words, "to enable . . . pluralism, a fundamental conceptual revolution about the meaning of religious statements is required."[127] Ultimately, "the Leibowitzian revolution"[128] may prove a worthy candidate.

According to Avi Sagi, the Jewish "religious revolution required to enable . . . pluralism relies on the following claims:"

> (1) Jewish religion is a value system that does not make truth claims . . . but constitutes a value system.
>
> (2) The system's meaning . . . is not contingent on outside facts. Instead, it emerges as a conclusion from an analysis of the cluster of . . . values through which Jewish religion is constituted.

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120. Jay P. Lefkowitz, *The Rise of Social Orthodoxy: A Personal Account*, COMMENT. MAGAZINE (Apr. 2014), https://www.commentarymagazine.com/articles/the-rise-of-social-orthodoxy-a-personal-account/.

121. *Id.*

122. *See* Richard Fry & Kim Parker, *Early Benchmarks Show 'Post-Millennials' on Track to Be Most Diverse, Best-Educated Generation Yet*, PEW RSCH. CTR. (Nov. 15, 2018), https://www.pewsocialtrends.org/2018/11/15/early-benchmarks-show-post-millennials-on-track-to-be-most-diverse-best-educated-generation-yet/.

123. *From Diversity to Pluralism*, THE PLURALISM PROJECT AT HARV. U. (2020), http://pluralism.org/encounter/todays-challenges/from-diversity-to-pluralism/.

124. NOVIT EVANS, *supra* note 67, at 230.

125. SAGI, *supra* note 99, at 32.

126. *Id.* at 27.

127. *Id.*

128. *Id.* at 128.

> (3) A person's commitment to religion results from an autonomous decision to realize these particular . . . values.[129]

Ultimately, Leibowitz's approach to Judaism satisfies Sagi's conditions for a religion that can accommodate pluralism. Leibowitz recognizes "a distinction between a world of cognitive components and a world of conative components," asserting that, "in the first of these worlds is a place for science" and, "in the second, a place for values." [130] He thus distinguishes between "knowledge,"[131] which he places in the domain of science, and Jewish "faith," which he places in the "domain of values."[132] For Leibowitz, Jewish "faith is established when a person sees standing before God as a value," not when a person has knowledge of (or belief in) propositions about God.[133] Because Jewish faith is, in Leibowitz's estimation, a matter of values, he asserts that "no person needs to accept upon himself the burden of the kingship of heaven and the burden of Torah and Mizvoth," but that "there are people who see in this [acceptance] . . . a value."[134] Additionally, since Leibowitz views Jewish faith as a question of values, he contends that "[t]he notion that Jewish man is endowed with characteristics that non-Jews lack . . . derogates the significance of Judaism"; he argues that, "[i]f by nature there is something special about a Jew[,] . . . then Judaism is . . . a *factual datum*" that is "devoid of value," as "[v]alues are not rooted in reality" but "are objects of aspiration beyond reality."[135] In other words, "the Torah," for Leibowitz, "speaks in the language of values rather than of facts."[136] For Leibowitz, then, Judaism is a value system whose meaning is not contingent on outside facts and whose practice follows an autonomous decision to realize the values of the system.

In addition to satisfying Sagi's conditions for a Jewish religion that can accommodate pluralism, Leibowitz's approach to Judaism often endorses axiological pluralism. For instance, Leibowitz discusses the possibility of values decisions, not only in the realm of religion, but also in the realms of ethics[137] and national identity,[138] at times equating the values decisions of whether "to be a virtuous or a vicious person, to be a patriot or a cosmopolitan, [or] to be a believing or a denying person."[139] Indeed, Leibowitz recognizes that, while "there are shared values for many individuals," ultimately, "a value

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129. *Id.* 28

130. LEIBOWITZ, *supra* note 90, at 48.

131. *Id.* at 29.

132. *Id.* at 34–35.

133. *Id.* at 78.

134. *Id.* at 34–35.

135. LEIBOWITZ, *supra* note 86, at 80.

136. Sagi, *supra* note 96, at 210.

137. *See* LEIBOWITZ, *supra* note 90, at 78.

138. *See id.* at 33–34; YESHAYAHU LEIBOWITZ, AM, ARETZ, MEDINAH 13–18 (1991) (translation by author).

139. LEIBOWITZ, *supra* note 90, at 35.

is an expression of a personal decision."[140] Moreover, "Leibowitz does not give reasons why we must accept the Halakha . . . and not . . . any other system" and it thus appears that, for Leibowitz, it is "a matter of choice . . . whether to regard oneself in the framework of Judaism, or in a different framework."[141] Since much of Leibowitz's thought indicates that "all human beings are free to choose their own values,"[142] Leibowitz is, at times, an "axiological pluralist"[143] who believes that "the human being is presented with a plurality of . . . values" and "is free to accept or reject any one of them, including serving God through halakhic practice."[144]

Certain American Jewish attitudes toward broader social phenomena suggest that Judaism as praxis already is relevant for religious American Jews committed to living in a pluralistic society. For example, the first public Orthodox Jewish response to the growing social acceptance of LGBTQ-identifying individuals "acknowledg[ed] the halachic (Jewish legal) ban on homosexual sex," yet "asserted that gays should be welcomed as full and equal members of Orthodox communities" and "declined to weigh in on the question of whether homosexual orientation is genetic and unchangeable, or if it is a choice, as some people contend."[145] For the more than two hundred and twenty-five Orthodox Jewish signatories,[146] it was possible to articulate a statement about Jewish practice in response to practical questions arising out of LGBTQ identity without also articulating a statement about Jewish belief regarding the nature of LGBTQ identity. Seemingly, by highlighting Judaism as praxis, the signatories were able to reject practices deemed at odds with Jewish law while also signaling agreement with broader social acceptance of LGBTQ-identifying individuals. Lefkowitz certainly connects this "joint statement" to the rise of a Judaism that is oriented towards practice.[147] It is not a stretch of the imagination to assume that, as society grows more diverse and questions surrounding social issues proliferate for religious American Jews, Judaism as praxis will occupy the center of discourse for those American Jews who wish both to actively participate in society and cling to religious norms. Nor is it implausible that, in a pluralistic society, similar approaches to other religions will not take root. Accordingly, the legal discourse surrounding the

140. *Id.* at 47.

141. Benbassat, *supra* note 88, at 153.

142. Brafman, *supra* note 95, at 151.

143. *Id.* at 152.

144. *Id.* at 156.

145. *Gender and Sexuality: Orthodox Judaism and LGBTQ Issues*, MY JEWISH LEARNING, https://www.myjewishlearning.com/article/orthodox-judaism-and-lgbtq-issues/ (last visited Sept. 9, 2020).

146. *See* Nati Helfgot, *Statement of Principles on the Place of Jews with a Homosexual Orientation in Our Community*, STATEMENT OF PRINCIPLES NYA (Feb. 2017), http://statementofprinciplesnya.blogspot.com/.

147. Lefkowitz, *supra* note 120.

First Amendment ought to be prepared to adequately account for Judaism as praxis.

Unfortunately, however, the legal discourse surrounding religion in the courts is ill-prepared to account for Judaism as praxis. In *Smith*, the Supreme Court distinguished "a free exercise claim unconnected with any communicative activity or parental right" from a "hybrid" claim involving both free exercise and another constitutional guarantee.[148] The Court held that, whereas an ordinary free exercise claim fails to overcome a neutral and generally applicable law, a hybrid claim may subject a neutral and generally applicable law to heightened scrutiny.[149] Since *Smith* was decided, courts in the various circuits have split over the legal status of hybrid claims. The First, Seventh, Eighth, Ninth, and Tenth Circuit Courts of Appeals have explicitly held that hybrid claims subject neutral and generally applicable laws to strict scrutiny,[150] while the Fifth and D.C. Circuit Courts of Appeals have cited *Smith*'s dispensation for hybrid claims approvingly.[151] On the other hand, the Second and Sixth Circuit Courts of Appeals have explicitly held that, even where hybrid claims are put forward, neutral and generally applicable laws are not subject to strict scrutiny.[152] On this view, *Smith*'s language about hybrid claims is mere dicta.[153] While the Eleventh Circuit Court of Appeals has yet to address the legal status of hybrid claims, district courts in the Eleventh Circuit have sided with the Second and Sixth Circuit Courts of Appeals on the matter.[154] Meanwhile, the Third and Fourth Circuit Courts of Appeals have expressly opted not to take a position on the legal status of hybrid claims.[155]

Overall, then, the majority of circuit courts have adopted the rule that those claiming the protection of the Free Exercise Clause may submit neutral and generally applicable laws to strict scrutiny so long as they also claim the protection of another constitutional guarantee. Under the rule, those whose exercises of religion are not expressions of belief are less likely to succeed in shielding their religious exercise from neutral and generally applicable laws

148. Emp't. Div., Dep't of Hum. Res. of Or. v. Smith, 494 U.S. 872, 882 (1990).

149. *See id.* at 905.

150. *See* Gary S. v. Manchester Sch. Dist., 374 F.3d 15, 18 (1st Cir. 2004); C.L. for Urb. Believers v. Chicago, 342 F.3d 752, 764–65 (7th Cir. 2003); Telescope Media Grp. v. Lucero, 936 F.3d 740, 759–60 (8th Cir. 2019); San Jose Christian Coll. v. Morgan Hill, 360 F.3d 1024, 1031 (9th Cir. 2004); Axson-Flynn v. Johnson, 356 F.3d 1277, 1294 (10th Cir. 2004).

151. *See* Fairbanks v. Brackettville Bd. of Educ., 218 F.3d 743, 743 n.2 (5th Cir. 2000) (unpublished table opinion); Opulent Life Church v. Holly Springs, 697 F.3d 279, 289 n.10 (5th Cir. 2012); Henderson v. Kennedy, 253 F.3d 12, 18–19 (D.C. Cir. 2001).

152. *See* Leebaert v. Harrington, 332 F.3d 134, 143–44 (2d Cir. 2003); Watchtower Bible & Tract Soc'y of N.Y. v. Stratton, 240 F.3d 553, 562 (6th Cir. 2001).

153. *See Leebaert*, 332 F.3d at 143.

154. *See* Warner v. Boca Raton, 64 F. Supp. 2d 1272, 1288 n.12 (S.D. Fla. 1999); Sephardi v. Surfside, No. 99-1566-CIV, 2000 WL 35633163, at *14 (S.D. Fla. July 31, 2000); Chabad of Nova, Inc. v. Cooper City, 575 F. Supp. 2d. 1280, 1297 (S.D. Fla. 2008).

155. *See* McTernan v. York, 564 F.3d 636, 647 n.5 (3d Cir. 2009); Workman v. Mingo Cnty. Bd. of Educ., 419 Fed. App'x 348, 353 (4th Cir. 2011).

because they cannot claim the protection of both the Free Exercise Clause and the Free Speech Clause. Indeed, in *Tenafly Eruv Association v. Borough of Tenafly*, the Third Circuit Court of Appeals concluded that, because "the [Jewish] plaintiffs ha[d] not introduced evidence that [their religious practice was] meant to demonstrate a belief,"[156] a hybrid claim was unavailable to them,[157] and so, in order to succeed, they had to prove that the law at issue was not neutral or generally applicable.[158] Yet, in *Telescope Media Group v. Lucero*, the Eight Circuit Court of Appeals concluded that a law could not compel the Christian appellants "to produce videos of same-sex weddings" whose "message would conflict with their own beliefs"[159] because:

> [T]he [law] burdens their religiously motivated *speech*, not their religious *conduct*. So their claim falls into the class of "hybrid situation[s]" in which "the Free Exercise Clause *in conjunction* with other constitutional protections, such as freedom of speech," can "bar[ ] application of a neutral, generally applicable law."[160]

Seemingly, as the fight between religious freedom and civil rights rages in the courts, the majority of circuit courts are set to extend fewer constitutional protections to Judaism as praxis than to Christianity under the guise of the hybrid-rights doctrine.

Although Gidon Sapir offers what he terms a "fresh theoretical start" for the legal discourse surrounding religion,[161] his approach also would not prepare the courts to adequately account for Judaism as praxis. On Sapir's approach, "freedom of religion" is understood as "a prerequisite for free choice" because "religion" is viewed "as one type of comprehensive culture" and "one's membership in his cultural society" is understood as "a prerequisite for his ability to live autonomously."[162] Sapir understands one's membership in his or her cultural society as a prerequisite for his or her ability to live autonomously because, in his view, "people's culture plays a role in their decision-making process" in two ways: "one's culture *creates* the pool of options available to one" and "one's tools of evaluation are heavily . . . shaped by the culture in which one grows and lives."[163] Sapir thus argues that, for "members of all-encompassing cultural groups" who "will never succeed in assimilating into other cultures," maintenance of "culture [is] a necessary condition to exercise [the] freedom to choose" and, as such, "a state that cherishes autonomy must

156. 309 F.3d 144, 162 (3d Cir. 2002).

157. *See id.* at 163–64.

158. *See id.* at 167–68.

159. Telescope Media Grp. v. Lucero, 936 F.3d 740, 747 (8th Cir. 2019).

160. *Id.* at 759 (quoting Emp't. Div., Dep't of Hum. Res. of Or. v. Smith, 494 U.S. 872, 881–82 (1990)).

161. Sapir, *supra* note 83, at 579.

162. *Id.* at 622.

163. *Id.* at 626–27.

protect such cultures from structural debasement . . . ."[164] With respect to religious American Jews who insulate themselves from American cultural influences, such as those whose community interests were at stake in *Board of Education of Kiryas Joel Village School District v. Grumet*,[165] Sapir's justification of religious freedom may prove compelling. After all, such Jews often experience immense difficulty in assimilating into other cultures.[166] However, religious American Jews who do not distance themselves from American cultural influences may very well succeed in assimilating into other cultures. Indeed, if a religious American Jew is committed to pluralism, whether in a weak or a strong form, it may be immensely difficult for others to distinguish between this individual and a secular American. Ultimately, such difficulty may create a problem for adjudication involving the First Amendment.

III. COUNTERING BIASES

A. Rejecting the Hybrid-Rights Doctrine

Unfortunately, the hybrid-rights doctrine extends fewer protections to Judaism as praxis than to religion as a function of belief.[167] Accordingly, judges must abandon the hybrid-rights approach to religious freedom adopted by the majority of circuit courts. The better approach is that of the Second and Sixth Circuit Courts of Appeals, in which hybrid claims warrant the same standard of review as do claims involving religious exercise alone. Under this approach, a religion that is a function of belief is less likely to occupy a privileged constitutional position as compared to a religion with a potentially different outlook, such as Judaism. Thus, as the Supreme Court agrees to hear cases involving questions at the intersection of religious freedom and civil rights, it is imperative that the Court counter biases by once and for all designating *Smith*'s discussion of hybrid claims as mere dicta.

B. Developing the Analogical Approach

Despite its relative inclusiveness, Peñalver's conceptual framework does not prepare the courts to adequately account for Judaism as praxis. Peñalver argues that, when judges adjudicate whether a phenomenon is religious, they should do so by appealing to paradigmatic religious phenomena.[168] Although Peñalver insists that judges look to a wide variety of paradigms and utilize negative guidelines to protect against potential bias, there remains a serious possibility that, within Peñalver's conceptual framework, religious American Jews will not receive adequate constitutional protection. Even if judges utilize

164. *Id.* at 629–30.

165. *See* Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet, 512 U.S. 687 (1994).

166. *See* ONE OF US (Loki Films 2017).

167. *See infra* II.B.2.

168. *See infra* I.B.

Judaism as a paradigm, if a religious American Jew cannot (or will not) articulate his or her observance in terminology that judges associate with Judaism, such judges may question his or her sincerity, as the paradigm of Judaism in current legal discourse characterizes Judaism in Christian terms.[169] Nor might it help that judges cannot assume that God, institutions, or the otherworldly are essential conditions of religion. If the religious American Jew fails to put forward a narrative about his or her religion that bears sufficient resemblance to a judge's paradigms of religion, then the judge may withhold First Amendment protection, not because of absence of God, institutions, or the otherworldly, but because the vernacular of the religious American Jew appears paradigmatically nonreligious. In other words, since there is no paradigm of the religious adherent who—for reasons related to pluralism or other reasons altogether—understands religion solely in terms of praxis and whose vernacular is apparently secular, religious American Jews may need to espouse theological narratives that they otherwise reject in order to receive First Amendment protections under Peñalver's conceptual framework.

1. Problematizing the Selection of Paradigms

According to Peñalver, judges must look to a wide variety of religious paradigms in order to extend First Amendment protections to non-Western religions.[170] In order to properly extend First Amendment protections, however, judges not only should look to a wide variety of religious paradigms, but also should engage in critical reflection on their characterization of each religious paradigm. It is not enough for judges to include theistic, nontheistic, and pantheistic religions in their paradigms in order to avoid bias; judges also should assess whether their characterization of each religious paradigm as theistic, nontheistic, or pantheistic is itself infected with bias. More generally, judges should question their understandings of purportedly paradigmatic religions before they compare and contrast what is at issue with what is purportedly paradigmatic. Otherwise, judges risk accepting Christianized depictions of a wide variety of religious paradigms, including Judaism. Ultimately, judges can engage in critical reflection on their characterizations of supposed religious paradigms by turning, not only to scholars who study the supposed paradigmatic religions, but also to those whose lived experiences are identified with the supposed religious paradigms. Such an approach is commonplace in contemporary anthropology, where "[c]ollaborative research involves the people who are studied in an *active way* . . . ."[171] While judicial resources certainly are limited, if judges seek to use Peñalver's conceptual framework to counter biases, then they must find ways to amplify the voices of those who participate in any supposed paradigmatic religion, Judaism included.

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169. *See infra* II.B.1.

170. *See infra* I.B.

171. Carolyn Fluehr-Lobban, *Collaborative Anthropology as Twenty-First-Century Ethical Anthropology*, *in* 1 COLLABORATIVE ANTHROPOLOGIES 175 (2008) (emphasis added).

2. Adding a Negative Guideline

In extending First Amendment protections, judges also should add a negative guideline to Peñalver's conceptual framework, aside from those proposed by Peñalver.[172] In addition to not ascribing dispositive weight to God, institutions, or the otherworldly in determinations of whether a phenomenon is religious, judges should not focus heavily on belief in adjudicating the religiosity of a phenomenon. Rather, judges should be prepared for the possibility that religious adherents conceive of their faith without recourse to metaphysical propositions. After all, adherents of Judaism as praxis may be unable or unwilling to formulate a religious narrative that prioritizes belief. The protection of such Jews' practices under the Religion Clauses should not be jeopardized because they fail to explain to judges what they do and do not believe. When utilizing Peñalver's conceptual framework, which takes inspiration from Wittgenstein's language games, judges must acknowledge that, "[i]n Wittgenstein's terms," the practicing Jew often plays "an autonomous 'language game.'"[173]

3. Potential Pitfall

Requesting that judges problematize their selection of paradigms and add a negative guideline to Peñalver's conceptual framework may run the risk of over-expanding the class of those persons, actions, or institutions protected by the First Amendment. As the conflict between religious freedom and civil rights becomes more pronounced in the wake of *Masterpiece Cakeshop*, many Americans with progressive values may find themselves unwilling to entertain a potential broadening of either of the Religion Clauses; they may worry that a broader constitutional conception of religion will provide ammunition to those who seek to use the First Amendment to prevent enforcement of civil rights laws.

Nevertheless, responding to current judicial trends regarding religion and civil rights by seeking to maintain the narrow confines of a Christianized First Amendment discourse is hardly desirable. If biases are to be effectively countered, then the approach offered by Sudeall Lucas—a strategy that further narrows the constitutional conception of religion to ensure the enforcement of civil rights laws[174]—cannot be the path forward. Rather than dismiss the importance of a broad constitutional conception of religion, advocates of progressive values should emphasize the universal applicability of neutral and generally applicable laws—attempting to revive the logic of *Smith* in a post-RFRA era—without placing the brakes on the evolution of legal discourse about religion. Without stifling the development of Peñalver's conceptual framework, advocates of progressive values should caution courts against applying the holding of *Church of the Lukumi Babalu Aye, Inc. v. City of*

172. *See infra* Section I.B.

173. SAGI, *supra* note 99, at 129.

174. *See infra* II.A.

Hialeah[175] in instances where civil rights, rather than anti-religious animus, motivates lawmakers. While the constitutional guarantee of religious freedom should not function as a means of frustrating the protection of civil rights, in cases where the First Amendment controls, biases should not operate to the disadvantage of religious American Jews.

CONCLUSION

Although over a century has passed since the Court declared that "this is a Christian nation,"[176] the dominant constitutional concept of religion remains plagued by biases that have the potential to adversely impact religious American Jews. The Supreme Court and circuit court decisions about the meaning of religion in the First Amendment, as well as scholarship from recent decades, has advanced a flexible constitutional concept of religion to help judges avoid bias, yet the constitutional concept of religion advanced by scholars and judges depicts Judaism in Christian terms and affords fewer protections to adherents of Judaism as praxis. In order to counter these biases, judges must reject an emerging doctrine in First Amendment caselaw and expand a popular framework used to determine the meaning of religion in the First Amendment—they must disavow the hybrid-rights approach to religious freedom adopted by the majority of circuit courts and develop the conceptual framework for religion proposed by Eduardo Peñalver. Indeed, the legal discourse must evolve beyond its present contours if the Constitution is to serve as the legal backbone of a pluralistic polity.

175. *See* 508 U.S. 520, 558–59, 563 (1993) (finding anti-religious motives behind a seemingly neutral and generally applicable law).

176. Church of the Holy Trinity v. United States, 143 U.S. 457, 471 (1892).