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RESEARCH ARTICLE

Religion as Liberal Politics

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Abstract

US and UK courts define religion as a belief system dealing with existential concerns, which is separable from politics, and need not be theistic. Where does this concept of religion come from? Some scholars trace it to the advent of the Protestant Reformation when religion became a matter of competing theological propositions. My analysis of both John Calvin and Roger Williams shows that those Protestant thinkers emphasized the view that religion is essentially a belief system. However, Protestantism cannot explain all of the features of the US and UK concept of religion. It is because of the liberal belief in individual rights and in popular sovereignty that early liberals like Roger Williams and contemporary courts embrace the separability of religion from politics. These courts also reject the view that religion is necessarily theistic given their liberal commitment to treating citizens that subscribe to certain non-theistic ideologies as equal citizens to citizens with theistic ideologies.

Keywords: religion; liberalism; religious freedom; Protestantism; definition

Introduction

Religion matters in law. If someone counts as religious, they will often be entitled to certain legal rights, such as the freedom to live according to certain beliefs and not to be compelled by the state to renounce them. Religious individuals and institutions may also, more mundanely, be entitled to certain tax breaks, legal exemptions, and accommodations that the non-religious will not always be entitled to. So, it matters what counts as religious in law.

In some respects, the legal understanding of what counts as religious is more important than what other fields of knowledge, such as anthropology or philosophy, count as religious. This is because the anthropological or philosophical categorization of religion is primarily for the purposes of scholarly study. But scholarly study hardly ever directly affects the lived experience of the subjects of such study. Not so for the legal understanding of religion. It makes a big difference to the lived experiences of individuals whether or not courts will categorize their way of life as religious.

Sometimes, it makes the difference between being found criminally liable or being criminally excused;[1] between having the ability to register a charitable organization or being denied that legal option;[2] or between paying a significant tax bill or instead being

[1] During prohibition in the United States, when alcoholic beverages were banned by the now-repealed Eighteenth Amendment to the US Constitution, sections 3 and 6 of the Volstead Act 1920 exempted the use "of wine for sacramental purposes, or like religious rites." Volstead Act, ch. 85, § 3, 6, 41 Stat. 305 (1920) (repealed 1933).

[2] Charity Commission of England and Wales, "Charity Commission Registration Decision for The Gnostic Centre," December 16, 2019, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_

given a tax credit.[3] From this perspective, what counts as religious in law has primary significance over other areas of inquiry.

Judges in the United States and the United Kingdon[4] have been trying to specify what counts as religious in law by providing specific definitions or criteria.[5] They have come up with four main principles: (1) religion is a belief system; (2) it deals with existential concerns; (3) it is separable from politics; and (4) it may, but need not, be theistic. But where do these principles come from? Several religious studies scholars have long argued that these principles, or at least some of them, come from a particular history of ideas. Among other scholars influenced by the critical postcolonial studies movement,[6] Talal Asad has famously argued that this legal concept of religion results from partisan Christian history originating in Protestant thinkers.[7] Similarly, Brent Nongbri and Peter Harrison trace the origins of this concept to the schism of Christianity brought about by the Protestant reformers Martin Luther and John Calvin.[8]

These scholars are only half right. The US and UK legal concept of religion is indeed indebted to a particular Protestant history. One need only to look to the legal concept of religion in places with a different history—that of Egypt or Iran, for example—to see that the US and UK courts' conceptualization of religion is historically and geographically contingent. However, a more granular analysis of the origins of the US and UK legal concept of religion reveals that not all can be explained by pointing to its Protestant origins. First, some elements, such as an emphasis on beliefs, were already present in the writings of pre-Protestant Christian thinkers such as Aquinas. Secondly, Protestant thinkers rejected the separability of religion and politics even though they appreciated the distinction between secular and spiritual authorities.

Calvin (as did Aquinas) advocated for what I call *theistic politics*, a form of political governance whose main aim is to fulfil the perceived wishes of a deity, in Calvin's case, the Christian one. It was not until thinkers like Roger Williams, the founder of Rhode Island and an early advocate of a constitutional right to religious freedom, that there arose an

data/file/324274/gnosticdec.pdf. The commission declined to register the Gnostic Centre given that it was, in its view, insufficiently religious because it did not have an identifiable positive, beneficial, moral, or ethical framework.

[3] In Canada, religious organizations are classified as charitable organizations that are exempt from paying federal taxes. See Income Tax Act, R.S.C. 1985, s 149(1)(f).

[4] I do not wish to simplify the historical complexity of the United Kingdom's constituent parts vis-à-vis legal religion. As one anonymous reviewer commented, the term *UK law* applies only to legislation or judicial rulings that apply to the whole of the United Kingdom. Furthermore, certain features, of the religion-state relation pertain only to national subdivisions of the United Kingdom, for example, the senior clergy sitting in the House of Lords belong to the Anglican Church of England and not to the Church of Scotland (each respectively established in England and Scotland). Also, in the latter, the monarch is not the head of the church, whereas the monarch is the supreme governor of the former. There are no formally established churches in Northern Ireland or Wales.

[5] I provide a more extensive analysis of legal definitions of religion in a US context elsewhere. See John Olusegun Adenitire, *A General Right to Conscientious Exemption: Beyond Religious Privilege* (Cambridge: Cambridge University Press, 2020), 47–101.

[6] Winnifred Fallers Sullivan et al., eds., *Politics of Religious Freedom* (Chicago: University of Chicago Press, 2015); Elizabeth Shakman Hurd, *Beyond Religious Freedom: The New Global Politics of Religion* (Princeton: Princeton University Press, 2017); Winnifred Fallers Sullivan, *The Impossibility of Religious Freedom*, new ed. (Princeton: Princeton University Press, 2018).

[7] Talal Asad, *Genealogies of Religion: Discipline and Reasons of Power in Christianity and Islam* (Baltimore: Johns Hopkins University Press, 1993), 27–54.

[8] Brent Nongbri, *Before Religion: A History of a Modern Concept* (New Haven: Yale University Press, 2015), 26–34; Peter Harrison, *The Territories of Science and Religion* (Chicago: University of Chicago Press, 2017), 7–11; see also William T. Cavanaugh, *The Myth of Religious Violence: Secular Ideology and the Roots of Modern Conflict* (Oxford: Oxford University Press, 2009), 60–69.

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appreciation for separating religion from politics. Finally, and notably, the view that religion need not be theistic would have been rejected by all Protestant thinkers, including Williams.

What then is a more accurate history of the US and UK legal concept of religion? Alongside Protestant Christianity, we must consider the prevailing ideology that pervades the socio-historical context in which US and UK judges define religion. That ideology is liberalism. The liberal features of individualism, ideological pluralism, and popular sovereignty help to fully explain the four principles underlying the US and UK legal concept of religion.

Without the liberal insistence that political authority should be justified through popular legitimacy rather than through adherence to a divine will, we cannot appreciate the separability of religion from politics that US and UK courts insist on. Furthermore, given the liberal adherence to ideological pluralism in matters of the good life, it is not fully clear why religion in US and UK law may be godless. Protestant Christianity is not enough; we need to also incorporate liberalism to understand why US and UK courts define religion as they do.

Religion as Distinct Reality

Courts on Religion as Distinct Reality

Courts view religion as something that can be distinguished from something that is not religion. To demarcate the religious from the nonreligious, judges provide definitions or at least a set of criteria that can be used in adjudication. Once the criteria or definitions have been authoritatively established, they can be used to tell ordinary citizens whether their practices, beliefs, and self-identity conform to the court's view of what is to be counted as religious.

To be sure, courts may appreciate that their understanding of religion is confined to a particular legal context, say the religion clauses of the US constitution, or is different from those of previous or different courts. However, they think that their definitions or criteria for religiosity sufficiently distinguish the religious from the nonreligious.[9]

Take the US case of *Africa*,[10] which is a paradigmatic instance of this approach of religion as distinct reality. In *Africa*, Judge Adams, writing for the federal Third Circuit Court of Appeals, had to decide whether Frank Africa, an incarcerated minister of the self-declared religious association MOVE, belonged to a religious group. If he were so considered, the prison authorities would have to accommodate his need for a raw diet. According to Judge Adams, the fundamental doctrines of the association were as follows: "MOVE's goals, [Africa] asserted, are '*to bring about absolute peace ... to stop violence altogether, to put a stop to all that is corrupt.*' Toward this end, Africa and other MOVE adherents are committed to a 'natural,' 'moving,' 'active,' and 'generating' way of life."[11]

To validate or invalidate Africa's claim that MOVE was a religious association, Judge Adams developed three criteria as to what is to be considered a religion.[12] "First, a religion addresses fundamental and ultimate questions having to do with deep and imponderable matters. Second, a religion is comprehensive in nature; it consists of a belief system as opposed to an isolated teaching. Third, a religion often can be recognized by the presence of certain formal and external signs."[13]

[9] This is the approach taken by Judge Adams (discussed in more detail below) in Malnak v. Yogi, 592 F.2d 197, 207 (3d Circuit 1978).

[10] Africa v. Pennsylvania, 662 F.2d 1025 (3d Circuit 1981).

[11] *Africa*, 662 F.2d at 1026 (citing *Malnak*, 592 F.2d at 207).

[12] In so doing he was relying on his concurring judgment in *Malnak*, 592 F. 2d at 200-215 (Adams J., concurring).

[13] *Africa*, 662 F.2d at 1032.

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Such signs included "formal services, ceremonial functions, the existence of clergy, structure and organization, efforts at propagation, observation of holidays and other similar manifestations associated with the traditional religions."[14] This concept of religion does not collapse into theism. None of the criteria presuppose the existence of a deity or even require belief in the existence of a deity.

In *Africa*, rather than equating religion with theism, Judge Adams held that religion is a belief system, that it deals in a comprehensive fashion with existential matters, and that it displays certain distinct signs. Judge Adams, applying his criteria, held that MOVE, as described by Africa, was not a religion. He said that "We conclude first, that to the extent MOVE deals with 'ultimate' ideas, a proposition in itself subject to serious doubt, it is concerned with secular matters and not with religious principles; second, that MOVE cannot lay claim to be a comprehensive, multi-faceted theology; and third, that MOVE lacks the defining structural characteristics of a traditional religion."[15]

In sum, Judge Adams held that MOVE was not a religion because it did not look similar enough to traditions that he thought were paradigmatically religious. The chief tradition he had in mind was Protestant Christianity. In fact, the formulation of his first criterion (that is, a religion addresses fundamental and ultimate questions having to do with deep and imponderable matters) was explicitly based on the theology and existentialist philosophy of Protestant theologian Paul Tillich, who Judge Adams referenced in a previous decision.[16] So not only does Judge Adams's decision presuppose that he is accurately describing a distinct reality that can be labeled as *religion.* He is modeling that distinct reality based, at least partially, on a partisan theological framework.

The *Africa* case shows at least three important components of the US definition of religion: religion is a belief system; it deals with existential matters; and it need not be theistic. The fourth principle of the US legal concept of religion is that religion is separable from politics in the following way: judges and state bodies more broadly need to be neutral arbiters between religious doctrines. The establishment clause of the US Constitution ("Congress shall make no law respecting an establishment of religion") broadly encapsulates the principle. However, this principle is also at play in the free exercise clause ("Congress shall make no law … prohibiting the free exercise [of religion]").

The principle was at play in the seminal case of *Hobby Lobby*,[17] where the US Supreme Court exempted a for-profit corporation from the obligation to provide insurance coverage, which would enable Hobby Lobby's employees to have free access to contraception. That decision was reached under the Religious Freedom Restoration Act 1993, which prohibits the government from substantially burdening a person's religious freedom except in pursuance of a compelling interest and through the least restrictive means available to pursue that interest.[18]

The Supreme Court held that providing coverage for contraception would substantially burden the free exercise of religion of Hobby Lobby's owners, who were Evangelical Christians that believed some of those contraceptives to be abortifacient. The secretary of the US Health and Human Services argued that "providing the coverage would not itself result in the destruction of an embryo; that would occur only if an employee chose to take advantage of the coverage."[19] The Supreme Court refused to be involved in having to assess the merits of the beliefs of Hobby Lobby's owners. It said that the department's argument

[14] *Malnak*, 592 F.2d at 209.
[15] *Africa*, 662 F.2d at 1036.
[16] *Malnak*, 592 F.2d at 208.
[17] Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014).
[18] Religious Freedom Restoration Act (RFRA) of 1993, 42 U.S.C. § 2000bb–2000bb-4 (1993).
[19] *Hobby Lobby*, 134 S. Ct. at 2777.

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"addresses a very different question that the federal courts have no business addressing (whether the religious belief asserted in a RFRA case is reasonable). ... [The department's argument] in effect tell[s] the plaintiffs that their beliefs are flawed. For good reason, we have repeatedly refused to take such a step."[20]

The Supreme Court then went on to list a series of authorities, including *Thomas* and *Smith*,[21] which had affirmed that doctrine. The court stated that "repeatedly and in many different contexts, we have warned that courts must not presume to determine ... the plausibility of a religious claim"; "our 'narrow function ... in this context is to determine' whether the line drawn reflects 'an honest conviction.'"[22] This principle and the other three components of the US legal concept of religion are also recognized in the UK case law.

Take, for example, the UK Supreme Court case of *Hodkin.* In this case, the UK Supreme Court had to consider whether a chapel of the Church of Scientology could be viewed as a place of religious worship where legally valid marriages could be conducted under the Places of Worship Registration Act 1855 and the Marriage Act 1949.[23] Justice Toulson held that the term *religion* ought to be understood thus:

> For the purposes of the PWRA, I would describe religion in summary as a spiritual or non-secular belief system, held by a group of adherents, which claims to explain mankind's place in the universe and relationship with the infinite, and to teach its adherents how they are to live their lives in conformity with the spiritual understanding associated with the belief system. ... Such a belief system may or may not involve belief in a supreme being, but it does involve a belief that there is more to be understood about mankind's nature and relationship to the universe than can be gained from the senses or from science. I emphasise that this is intended to be a description and not a definitive formula.[24]

Although Justice Toulson insisted that this was not a definitive formula, he held that "on the approach which I have taken to the meaning of religion, the evidence is amply sufficient to show that Scientology is within it." This was mainly on the basis that Scientology was described as involving belief in a deity that could be understood through successive stages of enlightenment.[25] Justice Toulson also described the church as having a structured congressional service and liturgical system, including the recitation of prayers and the church's creed and the performance of naming ceremonies, funerals, weddings, and sermons.[26] In effect, what Lord Toulson was doing was to show that Scientology resembled what he took to be well-established religious traditions.

As in the US case of *Africa*, Justice Toulson's definition of religion places emphasis on understanding religion as a belief system, and one which is to explain existential matters ("to explain mankind's place in the universe and relationship with the infinite").[27] Furthermore, just like in the *Africa* case, Justice Toulson does not equate religion with theism. He

[20] *Hobby Lobby*, 134 S. Ct. at 2778.

[21] Thomas v. Review Bd. of Indiana Employment Security Div., 450 U.S. 707 (1981); Employment Division v. Smith, 485 U.S. 660 (1990).

[22] *Hobby Lobby*, 134 S. Ct. at 2778–79.

[23] Both pieces of legislation apply only in England and Wales. They have no application to Northern Ireland and Scotland where marriages are legally recognized under a totally different framework. Accordingly, the definition of religion provided by the UK Supreme Court here technically refers only to English and Welsh law.

[24] R (on the application of Hodkin and another) v. Registrar General of Births, Deaths and Marriages [2013] UKSC 77 (appeal taken from EWHC).

[25] *Hodkin* [2013] UKSC, at para. 16.

[26] *Hodkin* [2013] UKSC, at para. 17–22.

[27] *Hodkin* [2013] UKSC, para. 57.

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explicitly said that religion "may or may not involve belief in a supreme being."[28] Therefore, the case shows that the first three components of a UK definition of religion are the same as those of the US legal concept pf religion.

The fourth principle—the separability of religion from politics—was affirmed in an earlier case, the *Williamson* case. In that UK House of Lords case, parents objected to the legislative ban on corporal punishment in schools of pupils on the basis that certain biblical passages supported loving corporal chastisement of children.[29] The High Court[30] and then the Court of Appeal[31] rejected the assertion that religious doctrines sufficiently supported corporal punishment. In the Court of Appeal, Lord Justice Buxton even reviewed some Biblical passages and held they could not clearly support the parents' stance.[32] The House of Lords rejected this approach. Similarly to the US Supreme Court in *Hobby Lobby*, the House of Lords held that it was not the state's role to judge the veracity of religious beliefs. Lord Nicholls accordingly said, "emphatically, it is not for the court to embark on an inquiry into the asserted belief and judge its 'validity' by some objective standard such as the source material upon which the claimant founds his belief or the orthodox teaching of the religion in question or the extent to which the claimant's belief conforms to or differs from the views of others professing the same religion."[33]

It seems then that UK law, as does US law, recognizes that judges cannot be arbiters in matters of religious doctrine. This supports, to some measure, the view that the United Kingdom's legal understanding of religion is as something separable from state power. However, in a regime where the monarch is also the supreme governor of the established Church of England and where bishops of this church have permanent seats in the House of Lords, this argument seems complicated to make, given the clear mixture of religion and UK politics.

In what sense then does UK law recognize the separability of religion from politics? In the sense that it is not the role of the state to compel a citizen to recognize the truth of certain doctrines dictated by any particular deity, even a deity that the state endorses through its public institutions. This principle is common to the United Kingdom and the United States, even though both hold opposing constitutional stances on establishing a state church.

Religion as Distinct Reality

We may impute to the judicial opinions described above that across time and space there are several beliefs systems that explain existential matters. Prehistoric people, to the extent that they had belief systems that dealt with the inexplicable mysteries of life (Who are we? Where do we come from? Where are we going?), had a religion. Similarly, because existential questions are presumably part and parcel of the human condition, belief systems have arisen around the globe to provide answers.

However, the view of religion as a distinct reality existing across time and space has long been undermined by the careful work of several religious studies scholars. They have shown that the idea of religion as a belief system has a precise history that originates in the early

[28] *Hodkin* [2013] UKSC, para. 57.

[29] R v. Secretary of State for Education and Employment and others [2005] UKHL 15, [10], (Eng.). The relevant legislation under challenge, section 548 of the Education Act 1996, only applies to England and Wales. Accordingly, strictly speaking, the reasoning of the court applies only to the law of England and Wales, and not to Scotland or Northern Ireland.

[30] Williamson v. Secretary of State for Education and Employment, HRLR 14 (QBD (Admin) 2001).

[31] Ex parte Williamson & Ors, 2002 EWCA Civ 1926 (2002).

[32] Ex parte Williamson & Ors, 2002 EWCA Civ paragraph 23.

[33] *Williamson* [2005] UKHL, para. 22.

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European modern period (sixteenth century), specifically in the schism of Christendom brought about by the Protestant reformers. Before this, the term *religion* stood for several concepts that do not match those employed by the courts surveyed above.

The Latin term *religio*, from which the English *religion* originates, had several meanings in ancient Rome, including moral scruples, a system of human or divine rules, rites offered to divinities but also to humans (care for orphans and widows), monastic orders, a virtue related to justice, and a form of worship.[34] Accordingly, over several centuries, Europeans did not conceive of religion as a belief system.[35] Instead, they understood that concept in a multiplicity of ways.

Peter Harrison documents that the idea of religion as a belief system did not crystalize until the Protestant Reformation, when Luther and Calvin insisted that lay Christians ought to know and be able to defend the doctrines they professed as opposed to simply engaging in the rituals determined by the Catholic Church.[36] While the reformers did not discard the notion that knowledge of Christian doctrines should be in service of godly piety, they nevertheless placed primary focus on the acquisition of these doctrines. Thus, religion as a belief system crystalized: "A largely unintended consequence of an insistence on explicit belief and creedal knowledge was thus the invention of the Christian religion, constituted by beliefs. Henceforth both Protestant and Catholic reform movements will emphasize the importance of doctrinal knowledge, with the consequence that propositional beliefs become one of the central characteristics of the new 'religion'."[37]

Catholicism, Lutheranism, Calvinism, and newer forms of Christianity brought by the Reformation were thus to be conceptualized as *-isms* standing for distinct sets of propositional beliefs generally about how to obtain eternal salvation and that provided answers to deep existential concerns. But if various forms of Christianity could compete in their doctrines, so could older traditions known to Europeans, such as the multiple forms of Judaism and Islam, and newer ones came to be known through the advent of European exploration and colonialism.

So, Buddhism, Jainism, Hinduism, Confucianism, and many other traditions discovered by Europeans could also be classified as religions because they were belief systems that provided answers to existential concerns. Never mind that many of these *-isms*, Hinduism in particular, were not distinct traditions with which the indigenous populations originally self-identified. They were instead categories which European colonialists first used to classify the people and regions they encountered.[38]

Some scholars have used this genealogy to argue that the concepts of religion and religious freedom, rather than being universal and neutral categories as some courts and scholars depict them, are instead partisan concepts that disadvantage traditions, such as Islam or Judaism, which differ from these Protestant-derived concepts.[39] For example, Lena Salaymeh and Shai Lavi have rearticulated this argument in the context of a German district

[34] Nongbri, *Before Religion*, 26–34. See also Harrison, *Territories of Science and Religion*, 7–11; Cavanaugh, *Myth of Religious Violence*, 60–69.

[35] As I discuss below, there is an exception in the writings of Tertullian, an early Christian.

[36] Harrison, *Territories of Science and Religion*, 83–116. See also Cavanaugh, *Myth of Religious Violence*, 69–85; Nongbri, *Before Religion*, 89–98.

[37] Harrison, *Territories of Science and Religion*, 93–94.

[38] For more on this notion see Cavanaugh, *Myth of Religious Violence*, 85–101. For a more detailed account see Tomoko Masuzawa, *The Invention of World Religions: Or, How European Universalism Was Preserved in the Language of Pluralism* (Chicago: University of Chicago Press, 2005).

[39] Some of the scholars that make this argument include Asad, *Genealogies of Religion*; Saba Mahmood, *Religious Difference in a Secular Age* (Princeton: Princeton University Press, 2015); Hurd, *Beyond Religious Freedom*; Sullivan, *Impossibility of Religious Freedom.*

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court finding that infant male circumcision infringes a child's right to bodily autonomy and self-determination.

According to Salaymeh and Lavi, the court used the concept of religious freedom to undermine circumcision because it views religion as a matter of freely chosen belief. Given that an infant cannot express a free choice to be circumcised, circumcision undermines the infant's religion. By contrast, Salaymeh and Lavi point out that for Jewish and Muslim individuals, circumcision and other practices emanating from their traditions, are not a matter of choice but instead of assigned identity. They say: "The notion of religiosity as choice diverges from how Jewish and Islamic traditions historically constructed the practice of circumcision. For both Jews and Muslims, one is born into a tradition in which male circumcision is a normative practice; one does not choose to become Jewish or Muslim and then choose to manifest this choice by being circumcised. Indeed, with the exception of apostasy, even extreme violations of law do not release one from the community."[40]

I agree with Salaymeh and Lavi that other concepts of religion show that the UK and US legal concept (which appears to be similar to that of Germany) is historically and geographically contingent. In fact, a different concept of religion found in Egypt and Iran (which I analyze below), confirms Salaymeh's and Lavi's claim that religion is a matter of unchosen personal identity for certain Muslim traditions rather than a matter of freely chosen belief. Nevertheless, even though I agree with the view that the US and UK legal concept of religion is historically and geographically contingent, the commonly held view of religious studies scholars that it is a Protestant concept is, on closer analysis, only a partial truth.[41]

While the Protestant origins of the concept may explain the insistence by US and UK courts that religion is a belief system that deals with existential concerns, this Protestant origin cannot properly account for the principle that religion need not be theistic and for the separability of religion from politics. To account for these, I refer to the ideology of liberalism. It is this ideology, together with Protestantism, that provides a more complete account of the genealogy of the US and UK concept of religion.

Concepts of Religion

Religion as Fixed Identity

Perhaps the idea that religion is a belief system is so ingrained in Western consciousness that it is impossible to discover the contingency of this concept from within. It is thus useful to consider a different contemporary legal concept of religion, for example, that of the non-Western courts of Egypt and Iran.[42] The courts in Egypt and Iran view religion as a matter of assigned fixed identity rather than as a freely chosen existential belief system. They hold that religion is necessarily theistic; and, they reject religion's separability from politics.

[40] Lena Salaymeh and Shai Lavi, "Religion Is Secularised Tradition: Jewish and Muslim Circumcisions in Germany," *Oxford Journal of Legal Studies* 41, no. 2 (2021): 431–58, at 443.

[41] My critique builds in part on Daniel Philpott and Timothy Samuel Shah, "In Defense of Religious Freedom: New Critics of a Beleaguered Human Right," *Journal of Law and Religion* 31, no. 3 (2016): 380–95. However, I fundamentally reject their view that *religious* freedom is a valuable concept. I am more sympathetic to the response to the religious studies scholars in Udi Greenberg, "Is Religious Freedom Protestant? On the History of a Critical Idea," *Journal of the American Academy of Religion* 88, no. 1 (2020): 74–91.

[42] My claim is not that Egypt and Iran are nonsecular states whereas the United Kingdom and the United States are secular states or that these jurisdictions do not exercise the power to say what religion is and is not in law, for, in fact, they do. My point is simply that jurisdictions define religion differently given their ideological aversion (as in the case of Egypt and Iran) or commitment (as in the case of the United Kingdom and the United States) to liberalism.

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Consider Article 12 of the 1979 constitution of Iran (revised in 1989): "The official religion of Iran is Islam and the Twelver Ja'farî school [in usul al-Dîn and fiqh], and this principle will remain eternally immutable."[43] It recognizes other Islamic schools, "including the Hanafî, Shafi'î, Malikî, Hanbalî, and Zaydî, [which] are to be accorded full respect, and their followers are free to act in accordance with their own jurisprudence in performing their religious rites."[44] The constitution recognizes that there are other religions. Article 13 states that "Zoroastrian, Jewish, and Christian Iranians are the only recognized religious minorities, who, within the limits of the law, are free to perform their religious rites and ceremonies, and to act according to their own canon in matters of personal affairs and religious education."[45]

It seems that as a matter of constitutional law in the Iran, there are only four religions: Islam, Zoroastrianism, Judaism, and Iranian Christianity. Each is often, though not always, categorized as a monotheism.[46] This designation is important because it signals that the legal concept of religion in Iran is necessarily theistic and, in fact, monotheistic. Therefore, this concept differs from one of the principles guiding the US and UK legal concept, namely, that religion need not be theistic.

Moreover, the four constitutionally identified religions are the only legally recognized religions in Iran. When the 2016 Report of the UN Special Rapporteur expressed "serious concern at the continuing systematic discrimination, harassment and targeting facing adherents of the Baha'i faith in [Iran]," the Iranian government denied that the Baha'i constitute a religious group. Instead, the government replied to the accusations stating that "followers of the Baha'i *cult* enjoy the rights of citizens pursuant to the country's laws and ... allegations presented to the contrary in the report are baseless."[47] According to Iranian authorities, the Baha'i faith is not a religious group but is instead a cult, given that it is not recognized as a religion in the constitution.

I call the Iranian legal concept of religion *religion as fixed identity*. Only certain religious groups are constitutionally recognized, and those that are recognized are markers of unchosen legal identity, which are indefinitely fixed for many practical purposes. While the Iranian penal code does not criminalize conversions from Islam to other religions, as a matter of sharia law, such conversions are prohibited and punishable by death.[48] While conversions from the recognized religious minority groups to Islam are permitted, Article 500 of the penal code criminalizes anti-Islam acts of proselytizing. In essence, anyone born a Muslim in Iran is fated by law to remain a Muslim. While non-Muslims can convert to Islam, the fact that almost all Iranians are Muslims means that recognized religious groups are fated to remain in a minority.[49]

Egypt's legal concept of religion is similar. Articles 2 and 3 of the Egyptian constitution respectively recognize Islam as the official state religion and recognize Egyptian Christianity and Judaism as minority religions. Traditions other than those three are denied recognition

[43] Constitution of the Islamic Republic of Iran 1979 (rev. 1989), Article 12, Constitute, https://www.constituteproject.org/constitution/Iran_1989.pdf.

[44] Constitution of the Islamic Republic of Iran 1979 (rev. 1989), Article 12.

[45] Constitution of the Islamic Republic of Iran 1979 (rev. 1989), Article 13.

[46] On whether Zoroastrianism is a dualist or monotheistic tradition, see James W. Boyd and Donald A. Crosby, "Is Zoroastrianism Dualistic or Monotheistic?," *Journal of the American Academy of Religion* 47, no. 4 (1979): 557–88.

[47] Human Rights Council, *Report of the Special Rapporteur on the Situation of Human Rights in the Islamic Republic of Iran*, May 26, 2016, para. 56, https://documents.un.org/doc/undoc/gen/g16/105/97/pdf/g1610597.pdf?token=bkFHjl5wBbmLKkdHnJ&fe=true.

[48] US Department of State, Office of International Religious Freedom, *2020 Report on International Religious Freedom: Iran*, May 12, 2021, 5, https://www.state.gov/reports/2020-report-on-international-religious-freedom/iran/.

[49] The US Department of State reports that "[a]ccording to Iranian Government estimates, Muslims constitute 99.4 percent of the population." US Department of State, *2020 Report on International Religious Freedom: Iran*, 4.

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as religions in official documents, including on identification cards, according to the Egyptian Civil Code Act 143 of 1994. Members of the Baha'i faith in Egypt have had either to identify themselves on official documents as belonging to one of the three recognized religions or to have a dash (that is, a blank) in the section of their documents that identifies their religious group.[50]

Egyptian administrative courts have also generally refused to allow the recognition in official documents of the conversion of Muslims to other recognized religions.[51] While apostasy from Islam is not officially criminalized, Egyptian administrative courts have taken it upon themselves not to recognize such conversions under the heading of public order. Accordingly, a 2008 decision states:

> [W]hile Egyptian legislation lacks a text that explicitly outlines the act of and punishment for [apostasy], an administrative judge, on assuming his constitutional and legislative role of settling administrative disputes related to what an apostate claims is a right of his, need not stand about waiting for a cleric or religious organization to issue a fatwa no matter the religious nature of the case. Rather, it is his duty to concern himself with the public order, which is grievously wounded by the harm the sins of apostasy and deviation from Islamic precepts cause to the official national religion a majority of the Egyptian people has taken to heart.[52]

As a considerable majority of Egyptians are Muslims,[53] and given the general inability of Muslims to choose and change their legal religious identity, in Egypt, the legal concept of religion is as fixed identity: there are only three legally recognized religions and, in general, and especially for Muslims, it is impracticable to legally choose or change that identity. The legal designation of belonging to a particular religious group carries important personal and legal consequences. Some of these are the inability to enter into certain intra-religious marriages (Muslim women can marry only Muslim men) and certain outcomes in inheritance and custody of children (for example, in divorce, a Muslim parent married to a non-Muslim is awarded custody of minors).[54]

The fact that in these countries religion is conceptualized as an *assigned fixed identity* rather than as a matter of *chosen belief system* carries several implications. First, limiting the number of legally recognized religions limits the commitment that Iran and Egypt make to religious freedom. Article 64 of the Egyptian constitution recognizes that "[f]reedom of belief is absolute."[55] Yet, because religion is not characterized in terms of belief, it can without contradiction limit the freedom "of practicing religious rituals and establishing places of worship" to only the three constitutionally recognized religions.

[50] This was the object of litigation in Decision Regarding Communication 357/07 (Hossam Ezzat & Rania Enayet (represented by Egyptian Initiative for Personal Rights & INTERIGHTS) v. The Arab Republic of Egypt), Case No. ACHPR/COMM/357/07 (Afr. Comm'n Hum. & Peoples' Rts. February 17, 2016).

[51] Some courts have accepted that some individuals not born Muslim who converted to Islam were able to re-convert to their original religion (usually Christianity). See Mona Oraby, "Authorizing Religious Conversion in Administrative Courts: Law, Rights, and Secular Indeterminacy," *New Diversities* 17, no. 1 (2015): 69–70. See also US Department of State, Office of International Religious Freedom, *2020 Report on International Religious Freedom: Egypt*, May 12, 2021, 4–5, https://www.state.gov/reports/2020-report-on-international-religious-freedom/egypt/.

[52] Mah. kamat al-Isti'nāf [Court of Appeal], case no. 35647, session of 29 Jan. 2008, year 61, quoted in Oraby, "Authorizing Religious Conversion in Administrative Courts," 71.

[53] US Department of State, *2020 Report on International Religious Freedom: Egypt*, 3 ("Most experts and media sources estimate that approximately 90 percent of the population is Sunni Muslim and 10 percent is Christian.").

[54] US Department of State, 5.

[55] Constitution of the Arab Republic of Egypt 2014 (rev. 2019), Article 64, Constitute, https://www.constituteproject.org/constitution/Egypt_2019.pdf.

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Similarly, in Iran, Article 23 of the constitution states that "[t]he investigation of individuals' beliefs is forbidden, and no one may be molested or taken to task simply for holding a certain belief."[56] Because Iran rejects religion as a belief system, even less as an existential belief system, only the recognized religions are, according to Article 13, free "to perform their religious rites and ceremonies, and to act according to their own canon in matters of personal affairs and religious education."[57]

The concept of religion as fixed identity precludes separation of religion and politics. Instead, it enables the perpetuation of theistic politics, the view that politics is appropriately devoted to inculcating belief in and worship of divinities. Both the Egyptian and Iranian constitutions are theistic polities in this sense. Iran is the most explicit. Article 2 of the Iranian Constitution states that

The Islamic Republic is a system based on belief in:

1. The One God (as stated in the phrase "There is no god except Allah"), His exclusive sovereignty and the right to legislate, and the necessity of submission to His commands;
2. Divine revelation and its fundamental role in setting forth the laws;
3. the return to God in the Hereafter, and the constructive role of this belief in the course of man's ascent towards God.[58]

Article 3 explicitly confers on the government of the Islamic Republic the mandate to pursue theistic politics: "In order to attain the objectives specified in Article 2, the government of the Islamic Republic of Iran has the duty of directing all its resources to the following goals: the creation of a favourable environment for the growth of moral virtues based on faith and piety and the struggle against all forms of vice and corruption."[59]

This is complemented by Article 4, which provides that "All civil, penal, financial, economic, administrative, cultural, military, political, and other laws and regulations must be based on Islamic criteria."[60] The pursuit of a political and social environment favorable to the growth of Islamic virtues is more easily accomplished by legally recognizing only four religions and trapping the vast majority of the population into Islam and the remaining minority into the three minority religions.

Even though the Egyptian constitution is less explicit than Iran's, Article 2 proclaims that "Islam is the religion of the state ... The principles of Islamic Sharia are the principle [*sic*] source of legislation."[61] It is true that this somewhat resembles the English establishment, given that the Church of England is the official church in England and given the legislative role played by bishops and the British monarch as the supreme governor of the Church of England. Nevertheless, the issue in Egypt is that Egyptian law must conform to Islamic precepts and, importantly, that Egyptian public bodies, including the judiciary, can interpret and enforce Islamic principles on their citizens. As the 2008 administrative court decision considered above illustrates, Egypt is committed to a concept of public order that is threatened by "the sins of apostasy and deviation from Islamic precepts."[62] Egypt, like Iran, is committed to theistic politics.

[56] Constitution of the Arab Republic of Egypt 2014 (rev. 2019), Article 64.
[57] Constitution of the Islamic Republic of Iran 1979 (rev. 1989), Article 23.
[58] Constitution of the Islamic Republic of Iran 1979 (rev. 1989), Article 2.
[59] Constitution of the Islamic Republic of Iran 1979 (rev. 1989), Article 3.
[60] Constitution of the Islamic Republic of Iran 1979 (rev. 1989), Article 4.
[61] Constitution of the Arab Republic of Egypt 2014 (rev. 2019), Article 2.
[62] Mah. kamat al-Isti'nāf [Court of Appeal], case no. 35647, session of 29 Jan. 2008, year 61, as quoted in Oraby, "Authorizing Religious Conversion in Administrative Courts," 71.

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To clarify, I do not mean the concept of religion as fixed identity to be confused with the notion of religion as orthopraxy. I argue below for a concept of religion as belief that insists that religion is primarily an issue of correct belief about a deity. Orthodoxy is central to that concept. By contrast, one could interpret religion as fixed identity as a concept of religion that insists that religion is primarily an issue of correct practices toward a deity—that is, religion as orthopraxy.[63] However, such an interpretation would not be correct in my view. Religion as fixed identity does not revolve around orthopraxy. Rather, it involves the claim that certain individuals are born with a particular religious identity (for example, Muslim) and are fated to remain within that identity irrespective of what they believe or how they practice. For example, in Egypt and Iran, one legally remains a Muslim whether or not one believes in the tenets of the recognized Islamic schools and whether or not one acts contrary to prescribed practices of Islam. Legally assigned identity, rather than correct belief or correct practice, is what is crucial for identifying religion as fixed identity.

Religion as Virtue

Religious studies scholars are right in one important respect: The US and UK legal concept of religion is contingent rather than universal. However, they are only half right, for the idea of religion as an existential belief system has strong antecedents before the Reformation. Robert Louis Wilken credits Tertullian, a Christian writer who lived in the third century, with the earliest concept of religion as a belief system that should be freely chosen. Tertullian said, "It is only just and a privilege inherent in human nature that every person should be able to worship according to his own convictions; the religious practice of one person neither harms nor helps another. It is not part of religion to coerce religious practice, for it is by choice, not coercion that we should be led to religion."[64]

Tertullian speaks of religion in terms of worship, convictions, and practice. This is not a univocal antecedent for the US and UK legal concept of religion, which focuses on religion as an existential belief system. Nevertheless, the fact that Tertullian speaks of religion in terms of individual conviction and in terms of chosen practice is sufficiently familiar to the US and UK legal concept of religion. The familiarity is even more pronounced when contrasted with the concept of religion voiced by a much later Western writer, Thomas Aquinas, for there are seeds of familiarity in Aquinas's concept of faith. In pre-Reformation writers like Tertullian and Aquinas there was already a fertile soil for religion as an existential belief system, thus casting further doubt on the uniquely Protestant origins of the US and UK legal concept of religion.

For example, in the *Summa Theologiae*, Aquinas argues that religion is a moral virtue.[65] Aware that the term *religion* stood for a variety of concepts, he mentions the biblical idea that religion consists of "visit[ing] the fatherless and widows in their tribulation"[66]; he also mentions the view that religion consists in paying due respect to divinities and humans; finally, he recognizes that the term *religion* is a synonym for monastic orders. Yet he insists that these are only secondary meanings of *religion*.[67] In the strict sense, he says, religion is "to pay due honour to someone, namely, to God," and he insists that "it is evident that religion is a virtue."[68] Religion, he says is an aspect of the more general moral virtue of

[63] This interpretation was implied by some comments of an anonymous reviewer.

[64] Robert Louis Wilken, *Liberty in the Things of God: The Christian Origins of Religious Freedom* (New Haven: Yale University Press, 2019), 1.

[65] Thomas Aquinas, *Summa Theologiae*, trans. Fathers of the English Dominican Province (London: Burns Oatis & Washbourne, 1920–1922), II-II, q. 81.

[66] James 1:27, as quoted in Aquinas, *Summa Theologiae*, II-II, q. 81.

[67] Aquinas, *Summa Theologiae*, II-II, q. 81, a. 1.

[68] Aquinas, II-II, q. 81, a. 2.

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justice[69] (which consists in giving to another what is properly due) and is in fact the supreme moral virtue.[70]

The idea of religion as a moral virtue is lost to the contemporary Western courts, given that they consider it an existential belief system. While the idea of religion as involving the worship of a deity is not foreign to contemporary sensibilities, contemporary Western courts do not equate religion with theism. Hence, Aquinas's view that religion is the virtue of worshipping the Christian deity would be at odds with the contemporary courts' view that religion need not involve belief in a deity. Theism is, however, crucial for Aquinas. It is crucial of course for his understanding of religion as virtue but also, fundamentally, for his political philosophy, which rejects the separability of religion and politics. The two are strictly linked, as they are in contemporary Iran's and Egypt's theistic politics.

For Aquinas, religion is the supreme moral virtue. Also, as Aquinas explains in his political treatise *De Regimine Principum*, the ruler of a political community ought to ensure that the subjects pursue a life of virtue. In this regard, Aquinas says, "[t]he king ... must strive with special care to ensure that the community subject to him lives well ... But the good life for each man requires two things. The first and chief requirement is activity according to virtue, for virtue is that quality by which we live well. The other requirement is ... a sufficiency of bodily goods, the use of which is necessary to virtuous conduct."[71]

But if the chief task of the ruler is to ensure that the community acts according to virtue, and if religion is the supreme moral virtue, it follows that the ruler ought to ensure that the community practices religion. That entails that the ruler should ensure that the community worships the Christian deity.

Aquinas's concept of faith provides a pre-Reformation precedent for the idea of religion as a belief system. Faith, for Aquinas, involves belief in the First Truth—that is, the Christian Deity; it makes "the intellect assent to what is non-apparent."[72] The objects of faith are things unseen related to the Christian deity that need to be assented to by the intellect of the believer by a positive act of will.[73] In short, faith involves a choice to believe in things related to the Christian deity, such as the resurrection and passion of Christ.[74] It is apparent, then, that contemporary US and UK courts' understanding of religion as a belief system is much closer to Aquinas's understanding of faith. Crucially, Aquinas sees belief as central to faith, whereas contemporary Western courts see belief as central to religion. However, the main difference is that Aquinas's understanding is necessarily theistic and Christian, whereas Western courts' understanding is not necessarily theistic.

Aquinas's understanding of both religion and faith has drastic political implications. Aquinas categorizes both as virtues and given his view that politics should involve the pursuit of virtue, this entails that those in political power have competence in enforcing religion and faith. In essence, his categorization of religion and faith as virtues ensures that Christian theology plays a central role in politics: he rejects the distinction of the separability of religion, faith, and politics. To be sure, Aquinas was receptive to the institutional division between civil and spiritual authority.[75] Nevertheless, despite acknowledging the separate spheres of spiritual and civil power, it is the concept of religion and faith as virtues that allow matters that pertain to the soul's salvation to fall within the proper scope of civil authority.

[69] Aquinas, II-II, q. 81, a. 5.
[70] Aquinas, II-II, q. 81, a. 6.
[71] Thomas Aquinas, *Aquinas: Political Writings*, ed. R. W. Dyson (Cambridge: Cambridge University Press, 2002), 43.
[72] Aquinas, *Summa Theologiae*, II-II, q. 4, a. 1.
[73] Aquinas, II-II, q. 1, a. 4.
[74] Aquinas, II-II, q. 1, a. 6.
[75] Aquinas, *Aquinas*, 278.

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Religion as Belief

Religious studies scholars argue that religion as a belief system that deals with existential concerns is a Protestant concept. They are right. In their writings, the Protestant reformers, place great emphasis on religion as belief.[76]

Analysis of Calvin's work undermines in part the religious studies scholars' claim that the origins of the US and UK legal concept of religion stems from Protestantism. For Calvin, religion is necessarily theistic: it is primarily about the knowledge of the Christian deity; also, the will of the Christian deity should guide political governance.

There are three senses in which Calvin characterizes religion in the *Institutes.* The first, evidenced in the title of the volume, *Institutes of the Christian Religion*, and in the preface to the second edition of his treatise, is that religion is a system of doctrines that believers ought to know. In the preface, he says "For I believe I have so embraced the sum of religion in all its parts, and have arranged it in such an order, that if anyone rightly grasps it, it will not be difficult for him to determine what he ought especially to seek in Scripture, and to what end he ought to relate its contents."[77]

Here and in his title, Calvin is referring to the *Christian religion.* And he refers to it as a system of theological doctrines that are the object of knowledge and belief. This is the sense of religion that Peter Harrison and other religious scholars emphasize.

The second sense of religion is made explicit in the definition of *religion* that he proposes: "Here indeed is pure and real religion: faith so joined with an earnest fear of God that this fear also embraces willing reverence, and carries with it such legitimate worship as is prescribed in the law."[78] This definition would not be complete without Calvin's definition of *faith:* "For faith consists in the knowledge of God and Christ, not in reverence for the [Catholic] [C]hurch."[79]

In this second sense of religion, Calvin fuses Aquinas's concepts of religion and faith. For Aquinas, religion consists of paying due worship to the Christian deity, and faith involves a choice to believe in things related to the same. Calvin incorporates Aquinas's definition of faith within his definition of religion. Religion is thus about belief or knowledge of the Christian deity coupled with reverence, which results in worship of the same.

But note that this second sense of religion is bound up with the first. To have true religion, one cannot simply believe in whatever the Catholic Church says about the Christian deity. In an explicitly polemical invective against the church's concept of implicit faith,[80] Calvin passionately argues that to have true faith, and thus true religion, a person needs to have explicit knowledge of God and Christ. He describes the required knowledge in the *Institutes*, which therefore form the entirety of the Christian religion.

The third sense of religion, the instinctual awareness of the Christian deity that has been implanted within the human mind, is what Calvin refers to as "the seed of religion."[81] Even atheists and idolaters, says Calvin, have this knowledge of the Christian deity.[82] This instinctual knowledge is ubiquitous in time and space: "since from the beginning of the world there has been no region, no city, in short, no household, that could do without

[76] I focus here, chiefly for reason of space, on Calvin's *The Institutes of the Christian Religion.* John Calvin, *Calvin: Institutes of the Christian Religion*, ed. John T. McNeill, illustrated ed. (Louisville: Westminster/John Knox Press, 1960). While a longer discussion might also engage the work of Martin Luther, Calvin was a more systematic writer than Luther and much of his theology is more easily accessible because it is contained in the *Institutes.*

[77] Calvin, *Institutes of the Christian Religion*, 1:4.

[78] Calvin, 1:43.

[79] Calvin, 1:545.

[80] Calvin, 1:545–46.

[81] Calvin, 1:44.

[82] Calvin, 1:43–44.

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religion, there lies in this a tacit confession of a sense of deity inscribed in the hearts of all."[83]

Because this knowledge of the Christian deity is not grounded in explicit theological knowledge but is instinctual, it cannot be defined as *religious* proper. However, it can be termed a *seed of religion* because it has the core of religiosity—that is, knowledge (however imperfect and misdirected) of the Christian deity.

These three senses of religion found in Calvin's thought support the religious scholars' claim that the Western concept of religion as a belief system that deals with existential concerns has Protestant origins. The concept not only has Protestant roots in the work of Calvin, but it is also grounded in anti-Catholic rhetoric, given that Calvin's notion of faith and explicit theological knowledge comes from his opposition to Catholic ideas of implicit faith and reliance on the authority of the church. Moreover, the three senses of religion found in Calvin's thought are based on *belief in a deity*. This belief system qualifies as an existential system, given that Calvin believed that "man never achieves a clear knowledge of himself unless he has first looked upon God's face, and then descends from contemplating him to scrutinize himself."[84]

However, Calvin's view does not explain the aspect of the US and UK legal concept of religion that insists that religion is not necessarily theistic. In fact, the opposite is the case: for Calvin, even atheists have a seed of religion because, despite their assertions to the contrary, they have a natural knowledge of the Christian deity. Accordingly, for Calvin, religion is necessarily theistic. Further, Calvin also rejects the separability of religion from politics. He makes this clear in the last chapter of the *Institutes*, "Civil Government."

There, Calvin follows Aquinas's distinction between spiritual power and civil power. Spiritual power pertains to achieving eternal life, whereas civil power pertains "to the establishment of civil justice and outward morality."[85] While the two powers are distinct, they are not so distinct to be antithetical. Calvin, like Aquinas, is another proponent of theistic politics. He says accordingly: "Yet civil government has as its appointed end, so long as we live among men, to cherish and protect the outward worship of God, to defend sound doctrine of piety and the position of the church, to adjust our life to the society of men, to form our social behaviour to civil righteousness, to reconcile us with one another, and to promote general peace and tranquillity."[86]

Calvin summarizes his position thus: "In short, [civil government] provides that a public manifestation of religion may exist among Christians, and that humanity be maintained among men."[87] Clearly, Calvin rejects the separability of religion and politics. The civil government's task is to enforce the worship and sound doctrine of the Christian deity because, among other reasons, officers of the civil government "have a mandate from God, have been invested with divine authority, and are wholly God's representatives, in a manner, acting as his vicegerents."[88]

Calvin is thus not the source of the notion of separability of religion from politics that is part of the US and UK concept of religion. However, the notion of separability is fundamental to the work of Roger Williams. While Williams was indeed a Protestant (he was the founder of the first Baptist church in North America before becoming ecumenically unaffiliated), the separability of religion from politics stems from his liberalism rather than his theology. Understanding his liberalism, and liberalism in general, is therefore fundamental to gaining a complete picture of the origins of the definition of religion in US and UK law.

[83] Calvin, 1:43.
[84] Calvin, 1:37.
[85] Calvin, 2:1485.
[86] Calvin, 2:1487.
[87] Calvin, 2:1488.
[88] Calvin, 2:1489.

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Religion as Conscience

Roger Williams experienced firsthand the consequences of a concept of religiosity closer to those of Aquinas and Calvin. Williams was born and lived in England at the beginning of the seventeenth century, when civil authorities enforced worship and belief in the Christian deity with the consequence of persecution of dissenters and civil strife.

Williams was aware of the various changes in state religion in England in the sixteenth and seventeenth centuries (back and forth between Catholicism and Protestantism, depending on the monarch of the day). He also experienced persecution from 1630 onward, when he moved to the English colonies and was then exiled by the authorities in Salem, Massachusetts, because of his political and theological views.

Williams contributed to the consolidation of the Protestant trend of considering religion as a belief system based on theological doctrines. His concept of religion as conscience advocates the separation of religion and politics, which sets the foundations for this feature in the US and UK legal concept of religion. Yet, his idea of religion as conscience is necessarily theistic. This, then does not explain this aspect of the US and UK legal concept of religion.[89]

As does Calvin, Williams considers religion to be a belief system based on theological doctrines. Changes in those doctrines signify changes in religion. So, within Christianity itself there is a diversity of *religions*, reflecting the variations in theological doctrines. In his most well-known treatise, *The Bloody Tenent*, he says as much when reflecting upon the changes in relations between the English monarchs and the theistic traditions they supported: "how many wonderful changes in religion has the whole kingdom made, according to the change of the governors thereof, in the several religions which they themselves embraced! Henry VII finds and leaves the kingdom absolutely popish. Henry VIII casts it into a mold half popish, half Protestant. Edward VI brings forth an edition all Protestant. Queen Mary within a few years defaces Edward's work and renders the kingdom (after her grandfather Henry VII's pattern) all popish. Mary's short life and religion end together, and Elizabeth revived her brother Edward's model, all Protestant."[90]

For Williams, religion is a matter of conscience, which he understands to be "a persuasion fixed in the mind and heart of a man, which forces him to judge ... and to do so and so, with respect to God [and] his worship. This conscience is found in all mankind, more or less, in Jews, Turks, Papists, Protestants, and Pagans."[91]

Williams thus considers religion to be a matter of belief with respect to God. In this sense, unlike that of the US and UK courts, his view of religion is necessarily theistic. Yet, unlike Aquinas's understanding of faith, and unlike Calvin's understanding of the seed of religion, Williams's view of religion is not necessarily Christian: religion is found in all mankind, whether Christian or not, because conscience is more or less found in all mankind.

[89] Some may wonder why I focus on Roger Williams rather than on John Locke, given that Locke is arguably more influential than the former. In short, Locke's famous refusal to extend legal toleration to atheists and Catholics makes him a poor predecessor for the contemporary notion of religious freedom that clearly extends to both atheists and Catholics. Williams's view of religious liberty is much broader, and therefore it is closer to contemporary notions. Indeed, an anonymous reviewer suggested that categorizing Williams as an early liberal is anachronistic. Yet Locke, his contemporary, is commonly regarded as a classical liberal because of his defense of individual liberty as a limitation to government. See Shane D. Courtland, Gerald Gaus, and David Schmidtz, "Liberalism," in The Stanford Encyclopedia of Philosophy, ed. Edward N. Zalta, pt. 1.1, https://plato.stanford.edu/archives/spr2022/entries/liberalism/. Because Williams also defended individual rights and limited government at a similar time, I do not think that it is anachronistic to label Williams an early liberal.

[90] James Calvin Davis, ed., *On Religious Liberty: Selections from the Works of Roger Williams*, annotated ed. (Cambridge, MA: Belknap Press of Harvard University Press, 2008), 113.

[91] Davis, 275.

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Religion as conscience establishes the separability of religion and politics. Williams believes that it is futile to coerce someone's conscience.[92] Indeed, Williams rejects altogether the view of Aquinas and Calvin that civil authorities have competence in matters related to the salvation of the soul. As do Aquinas and Calvin, Williams distinguishes between "a two-fold state, a civil state and a spiritual ... these states being of different natures and considerations, as far differing as spirit from flesh."[93]

Unlike Aquinas and Calvin, however, Williams argues that the civil sword is to be used only "for the defense of persons, estates, families, [and the] liberties of a city or civil state, and the suppressing of uncivil or injurious persons or actions by such civil punishment."[94] On the other hand "the Spirit of God never intended to direct or warrant the magistrate to use his power in spiritual affairs and religion's worship, I argue from the term or title it pleases the wisdom of God to give such civil officers: God's ministers."[95]

By contrast to Aquinas and Calvin, who argued that "[s]piritual and secular power are both derived from the Divine power,"[96] Williams argued that "the sovereign, original, and foundation of civil power lies in the people."[97] This is a tectonic shift from Aquinas and Calvin and is enough to categorize Williams as an early liberal. According to Jeremy Waldron, in fact, there are at least two foundations to liberal thought: a commitment to individual freedom[98] and the requirement that political society be justifiable to the individual through a form of consent.[99]

Williams's commitment to religious freedom satisfies the first of the two criteria. His commitment to popular sovereignty, as opposed to divine justification for political power, satisfies the second of Waldron's criteria. We should therefore contrast Williams's liberalism with Aquinas's and Calvin's opposite stance, theistic politics. Aquinas and Calvin want politics to be devoted to religion. By contrast, Williams wants politics to be separate from religion because religion is a matter of individual conscience and civil government ought to concern itself only with persons, estates, families, and the liberties of a city.

Williams's separation of civil and spiritual spheres of competence leads him to endorse religious freedom, which he likens to freedom from *soul rape.* He says: "The forcing of a woman, that is, the violent action of uncleanness upon her body against her will, we count a rape. By proportion, that is a spiritual or soul rape which [forces]... the conscience of any person to acts of worship ... What is it to force a Papist to church but a rape, a soul rape? He comes to church, that is, comes to that worship which his conscience tells him is false, and this to save his estate [and] credit."[100]

For Williams, religion is a matter of conscience, an internal persuasion of the mind and heart. State coercion of external acts of worship impermissibly ravishes this internal persuasion. And such ravishing is impermissible because civil authorities have no jurisdictions in matters of the salvation of the soul. This is not only a matter of intellectual commitment for Williams: he spends much time and effort to ensure that this freedom is recognized as a matter of law in the royal charter he obtains for his colony of Rhode

[92] As Williams describes it, "An arm of flesh and sword of steel cannot reach to cut the darkness of the mind, the hardness and unbelief of the heart, and kindly operate upon the soul's affections to forsake a long continued father's worship and to embrace a new, though the best and truest. This work performs alone that sword out of the mouth of Christ." Davis, 148.

[93] Davis, 115.

[94] Davis, 118–19.

[95] Davis, 119.

[96] Aquinas, *Aquinas*, 278; Calvin, *Institutes of the Christian Religion*, 2:1489.

[97] Aquinas, *Aquinas*, 278.

[98] Jeremy Waldron, *Liberal Rights: Collected Papers 1981–1991* (Cambridge: Cambridge University Press, 1993), 37.

[99] Waldron, 50.

[100] Davis, *On Religious Liberty*, 205.

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Island.[101] After much persuasion, the Charles II explicitly recognized the following in the charter of the colony:

> [we] do hereby publish, grant, ordain and declare, that our royal will and pleasure is, that no person within the said colony, at any time hereafter shall be any wise molested, punished, disquieted, or called in question, for any differences in opinion in matters of religion, and do not actually disturb the civil peace of our said colony; but that all and every person and persons may, from time to time, and at all times hereafter, freely and fully have and enjoy his and their own judgments and consciences, in matters of religious concernments, throughout the tract of land hereafter mentioned.[102]

This is the first-known constitutional declaration of religious freedom in what was to become the United States. It should not be thought, however, that it is a celebration of religion. To be sure, Williams, as an ordained minister and theologian, was positively committed to his own theistic beliefs. However, the defense of religious freedom is primarily based on Williams's aversion to theistic politics of the kind that Aquinas and Calvin championed. Theistic politics led, in Williams's view, to persecution and political instability.

By contrast, Williams is committed to liberalism: the power of the state is justified through popular sovereignty alone, not divine will, and individuals ought to be free in matters of conscience. Religious freedom is thus first and foremost an instrument to establish a liberal polity vis-à-vis theistic politics. This is no celebration of religion. Instead, it is a stark realization of the danger to civil peace when the state is empowered to enforce religion.

Religion as Liberal Politics

The US and UK legal concept of religion is indebted only in part to Protestantism. The idea of religion as a belief system that deals with existential matters has precursors in the writings of Aquinas on faith. Furthermore, while analysis of Calvin shows that his concept of religion as belief is a good precursor to the idea of religion as an existential belief system, the US and UK legal concept of religion has other principles that he explicitly rejected. It is not until Roger Williams's liberal ideology of limiting civil power through religious freedom and legitimizing it through popular consent (rather than assuming divine will), that we can explain the separability of religion from politics. But even the writings of the liberal Roger Williams cannot fully explain why US and UK courts insist that religion is not necessarily theistic.

What then can explain US and UK courts' rejection of theism as a necessary ingredient of religion? In my view it is liberalism, the prevailing ideology in the social context in which those courts operate. More specifically, the fact that theism is not a necessary ingredient is the result of a commitment to ideological pluralism, which is a natural bedfellow of liberalism.[103]

[101] This is recounted in Charlotte Carrington-Farmer, "Roger Williams and the Architecture of Religious Liberty," in *Law and Religion in the Liberal State*, ed. Md Jahid Hossain Bhuiyan and Darryn Jensen (Oxford: Hart, 2020), 22–29.

[102] "Rhode Island Charter 1663," accessed December 29, 2021, https://www.sos.ri.gov/divisions/civics-and-education/for-educators/themed-collections/rhode-island-charter.

[103] An anonymous reviewer helpfully suggested that the road to ideological pluralism in the United States and United Kingdom was very different, given their differing constitutional relationships with established churches. In particular, the reviewer suggested that the influence of the Church of England on the development of the legal doctrine on religion in England and Wales deserved detailed analysis. While discussion of this point is beyond the

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As I have explained elsewhere, the fundamental problem for which contemporary liberalism seeks a solution is the possibility of a legitimate polity that is characterized by deep ideological disagreements between its members.[104] How can we design a legitimate political order in which people with different and opposing ideological commitments can coexist in civil peace? This is a question prominently raised by Rawls in *Political Liberalism*[105] but others, following his work, have also seen this as the chief problem to be addressed by liberal politics.[106]

To be sure, the framing of this question is biased in two ways. First, it is biased to the liberal tradition because deep disagreements between members of a polity are made possible by the fact of political freedom to pursue different and conflicting ideological commitments. Without political freedom and associated rights to think and be different, citizens are more likely to be homogeneous in their ideologies. Illiberal states that require uniformity, say Egypt or Iran which do not allow Muslims to renounce Islam, are not likely to host much ideological diversity. The question is also biased in that it assumes that ideological pluralism is not only a necessary feature of a liberal order but also a valuable one. The question assumes that it is good that there are Christians, atheists, Muslims, secularists, Hindu, vegans, LGBT supporters, LGBT detractors, and more. Diversity is good not because these different ideologies are all morally correct or are all equally valuable. Rather, because diversity is the result of freedom and results in more options citizens can choose, and because freedom is assumed to be the chief value within liberalism, diversity is also considered valuable.

The liberal commitment to ideological pluralism has led US and UK courts to classify certain belief systems as religious even though they are not theistic. Judge Adams, for example, refused to include theism within his criteria because he did not want to exclude Buddhism, Confucianism, and other non-theistic belief systems within the legal category of religion. He said as much in another US judgment that preceded *Africa.* In *Malnak v. Yogi*,[107] a case in which he held that transcendental meditation was a religion, he noted that the US Supreme Court had moved away from a theistic definition of religion to a non-necessarily theistic one. He said:

> It seems unavoidable, from [US Supreme Court recent case law], that the Theistic formulation presumed to be applicable in the late nineteenth century cases is no longer sustainable. Under the modern view, "religion" is not confined to the relationship of man with his Creator, either as a matter of law or as a matter of theology. Even theologians of traditionally recognized faiths have moved away from a strictly theistic approach in explaining their own religions. *Such movement, when coupled with the growth in the United States, of many Eastern and non-traditional belief systems, suggests that the older, limited definition would deny "religious" identification to faiths now adhered to by millions of Americans. The Court's more recent cases reject such a result.*[108]

scope of this article, fortunately, this analysis has already been expertly carried out by others. See Julian Rivers, *The Law of Organized Religions: Between Establishment and Secularism* (Oxford: Oxford University Press, 2010), 1–31; Russell Sandberg, *Law and Religion* (Cambridge: Cambridge University Press, 2011), 17–38; Javier García Oliva, *Religion, Law and the Constitution: Balancing Beliefs in Britain* (London: Routledge, 2019), 50–126.

[104] See John Olusegun Adenitire, "Religion, Diversity, and Conscientious Exemptions: Reply to Contributors," *Keele Law Review*, no. 4 (2022): 68–83.

[105] John Rawls, *Political Liberalism*, expanded ed. (New York: Columbia University Press, 2005).

[106] Jonathan Quong, *Liberalism without Perfection* (Oxford: Oxford University Press, 2010), 5.

[107] Malnak v. Yogi, 592 F.2d 197 (3d Circuit 1978).

[108] *Malnak*, 592 F. 2d at 206 (footnotes omitted and emphasis added).

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In short, his liberal commitment to ideological pluralism led him to exclude theism as a necessary criterion for religiosity. Justice Toulson used exactly the same reasoning in the UK case of *Hodkin.*[109] He said: "Unless there is some compelling contextual reason for holding otherwise, religion should not be confined to religions which recognise a supreme deity. First and foremost, to do so would be a form of religious discrimination unacceptable in today's society. It would exclude Buddhism, along with other faiths such as Jainism, Taoism, Theosophy and part of Hinduism."[110] Therefore, it seems that the liberal commitment to ideological pluralism motivates US and UK courts' exclusion of theism as a necessary criterion for religiosity. These courts do not want to exclude certain citizens from certain important rights and privileges that accrue to being classified as religious simply because of their non-theistic belief systems. Because, in the views of these courts, these non-theistic belief systems sufficiently resemble well-established theistic existential belief systems and are held by a significant number of citizens, they can be legally classified as religious. It is the liberal respect for ideological pluralism that shapes this feature of religion. Consequently, religion is not simply Protestant; it is also liberal.

Conclusion

Evident in the decisions of US and UK courts are four components to the legal definition of religion: (1) it is, foremost, a belief system, (2) it deals with existential concerns, (3) it is separable from politics, and (4) it need not be theistic. Where does this concept of religion come from? To ask this question is to assume that religion is not something that has a temporal or universal reality. Rather, when we look across time and space, we find differing concepts of religion determined by a particular socio-cultural history and context. For example, religion is considered a matter of fixed personal identity in Egypt and Iran.

Several religious studies scholars have long argued that the US and UK legal concept of religion is indebted to Protestant theology. They are half right. The analysis of both Calvin and Williams shows that those Protestant authors emphasized the view that religion is essentially a matter of belief in a deity. However, *pace* these religious studies scholars, Protestantism cannot explain all the four features of the US and UK legal concept of religion. First, Tertullian and Aquinas can be singled out as pre-Protestant thinkers who already conceptualized belief in a deity as a core of religion, although Aquinas uses the related concept of faith rather than religion. Second, Calvin explicitly rejected the third and fourth component of the US and UK legal concept of religion: he thought that religion was necessarily theistic and that politics was necessarily devoted to pursuing religion.

So how do we explain the third and fourth components of the US and UK legal concept of religion? We must factor in liberalism. Roger Williams was an early liberal. He believed in individual rights and popular sovereignty. Because of these commitments, he embraced the separability of religion from politics. Those with civil authority, he argued, ought not to concern themselves with things regarding the salvation of the soul. Civil government should only concern itself with persons, estates, families, and the liberties of a city. US and UK

[109] R (on the application of Hodkin and another) v. Registrar General of Births, Deaths and Marriages [2013] UKSC 77 (appeal taken from EWHC). An anonymous reviewer suggested that the United Kingdom's commitment to ideological pluralism and rejection of religion as fixed identity stems from the requirements in Article 9 of the European Convention of Human Rights (ECHR) to freedom of thought, conscience, and religion. *Hodkin* was decided after the ECHR became part of UK domestic law through the Human Rights Act 1998. Accordingly, this suggestion is plausible. Nevertheless, the judgment of Justice Toulson explicitly refused to engage with the submissions by the appellants on their rights based on the ECHR. See *Hodkin* [2013] UKSC, at para. 65.

[110] *Hodkin* [2013] UKSC, at para. 51.

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courts embrace this view when they pronounce the doctrine that the state should not be in the business of enforcing religious dogma on their citizens.

Roger Williams's liberalism could not help explain the fourth component of the US and UK legal concept of religion, which says religion is not necessarily theistic. To explain that we need to refer to the liberal commitment to ideological pluralism. That pluralism is valuable because it is a result of and because it enhances freedom. US and UK courts do not want to treat a substantial number of citizens who subscribe to certain ideologies as second-class citizens simply because those ideologies are not theistic. That is why, as they explicitly admit in their judgments, they have dropped theism as a necessary ingredient for religion. Their liberal commitment to ideological pluralism and their liberal commitment to the separability of religion from politics, respectively, explain the fourth and third features of the US and UK legal concept of religion. Protestantism is therefore not enough to explain the concept of religion in US and UK law; we also need liberalism.

What are the normative results of this inquiry? First, we should be wary of judicial or scholarly definitions of religion in law, assuming that the concept is ahistorical or universal. Such scholarship is legion[111] and should be criticized for not sufficiently engaging with the well-documented arguments of religious studies scholars. Second, we should be wary of the claims of religious studies scholars who trace the origins of Western concepts of religion solely to Protestantism. As I have shown, we need also to consider liberal ideology.[112]

Finally, by historicizing the concept of religion in US and UK law, I have aligned myself with scholars such as Salaymeh and Lavi, who have pinpointed the bias of the legal concept of religion. This concept, they decry, disadvantages Muslims and Jews who hold on to a view like that of religion as a fixed identity. I agree that the liberal origins of the US and UK legal concept of religion entail that judicial application of the concept will privilege and disadvantage some, especially non-liberals. After all, defining religion in particular ways affords essential rights and privileges. Perhaps, the fairest course of action would be to dispense with religion altogether in law.[113] If liberal principles such as free choice, individualism, and pluralism are doing the work in the background, then courts should be reporting directly to those principles. Some will complain that they do not like those principles. As liberals, we

[111] George C. Freeman III, "The Misguided Search for the Constitutional Definition of Religion," *Georgetown Law Journal* 71, no. 6 (1983): 1519–66, at 1519; Kent Greenawalt, "Religion as a Concept in Constitutional Law," *California Law Review* 72, no. 5 (1984): 753–816; Ben Clements, "Defining Religion in the First Amendment: A Functional Approach," *Cornell Law Review* 74, no. 3 (1989): 532–58; Eduardo Peñalver, "The Concept of Religion," *Yale Law Journal* 107, no. 3 (1997): 791–822; Brian Leiter, *Why Tolerate Religion?* (Princeton: Princeton University Press, 2013), 26–53; Rex Ahdar and Ian Leigh, *Religious Freedom in the Liberal State*, 2nd ed. (Oxford: Oxford University Press, 2013), 139–56; Kathleen A. Brady, *The Distinctiveness of Religion in American Law: Rethinking Religion Clause Jurisprudence* (Cambridge: Cambridge University Press, 2015), 279–99; Yossi Nehushtan, *Intolerant Religion in a Tolerant-Liberal Democracy* (Oxford: Hart, 2015), 68–126; Russell Sandberg, "Clarifying the Definition of Religion under English Law: The Need for a Universal Definition," *Ecclesiastical Law Journal* 20, no. 2 (2018): 132–57; Joshua Neoh, "The Good of Religion," *Australian Law Journal* 93, no. 9 (2019): 791–97, at 791.

[112] Some scholars, such as Salaymeh and Lavi, rather than talking about religion in law as having Protestant and liberal origins, talk about it as being Protestant and secular. Perhaps, like others such as Hussein Ali Agrama, they think that secularism is an instrument of liberal ideology. If so, they should do more to unpack the relationship between liberalism as an ideology and secularism as an instrument of liberal governance. On Agrama's view that secularism and liberalism are historically intertwined see Hussein Ali Agrama, "Secularism, Sovereignty, Indeterminacy: Is Egypt a Secular or a Religious State?," *Comparative Studies in Society and History* 52, no. 3 (2010): 495–523, at 501.

[113] I am attracted to the view that more intellectual coherence and fairness would be achieved if the law substituted the legal category of religion with other categories such as conscience, speech, and association. This is a view held by James W. Nickel, "Who Needs Freedom of Religion," *University of Colorado Law Review* 76, no. 4 (2005): 941–64, at 943.

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should confront those complaints head-on rather than hide behind the historically and geographically amorphous legal concept of religion. I leave a fuller argument for this view to another day.

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