IN GOD WE TRUST: DEFINING "AMERICAN" RELIGION

By

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(Under the Direction of Baruch Halpern)

ABSTRACT

I undertake to examine answer to a deceptively simple question: How does America define religion? This question is the heart of struggles to integrate rapidly growing minority religions in the United States and the increased rise of secularism as a potent political ideology. The answer to this question, for proponents of both privileged Christianity and an open and pluralistic legal "hands-off" approach to religion, have a meaningful and direct connection in people's minds to the essence of what it means to be an American.

I will focus the current project on the legal definition of religion in America as adjudicated by the courts. The judicial system has evolved in its views over time, but the derived powers of the court at least provide a mechanism by which answers can be decidedly authoritative, even if only for the limited purposes of the justice system.

INDEX WORDS: Law, Constitution, Supreme Court, Religion, Pluralism

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TABLE OF CONTENTS

Chapter 1:

In God We Trust: Defining "American" Religion

In recent years discussion has intensified over the place of religion in American society. Lawsuits and political activism against Islamic communities across the country have passionately put forward the view that Islam is both incompatible with the American civic structure and also a political ideology masquerading as religion. The rise of the so-called "New Atheist" movement has put questions about the place of religion in our civic institutions and culture directly to the test, continuing a conversation about whether or not the absence of a religious identity should itself be considered a protected faith position. The continuing mythologizing of America as a distinctly and emphatically Christian nation is opposed by both religious pluralists and secularization movements alike. In the academic study of religion, I might further complicate the issue by discussing theories of civic religion and whether or not the country's history, founding figures, and political ideals have become the focus of a sense of religious reverence and interpretation in which they take on mythic and moral qualities. Generally, it seems that whether or not certain kinds of religion "belong" to the American landscape has become a matter of interest in the general public once more.

In light of our own history, this presents a problem of sobering dimensions for those who are interested in civil justice and social progress. To put it as simply as possible, we have seen this before. In the Orange Riots of 1871, the New York Militia were reported responsible for the vast majority of the deaths and injuries suffered by Irish Catholic Immigrants, who were then widely made scapegoats as the press and law enforcement sought to justify the violence.[1]

[1] Michael A. Gordon, *The Orange Riots : Irish Political Violence in New York City, 1870 and 1871*(Ithaca, N.Y.: Cornell University Press, 1993).

In the era of the First World War and the period leading up to World War II, Jews in America were accused of blood libel, sexual perversion, and all manner of crime, depravity, and disloyalty to the United States. When a Jewish man in Georgia was accused of the rape and murder of a teenage girl in 1913, the trial brought such a circus of continually embellished accusations and writing about the Jewish threat in the state, followed by the man's lynching at the hands of a public mob, that it spurred the creation of the Anti-Defamation League in order for the Jewish community to defend itself in the future. And of course, virtually every student of American religious history will remember the "Extermination Order" of 1838, made in Missouri, where those who claimed to be members of the Church of Latter-Day Saints were declared to be enemies of the state who should be either exterminated or driven out.[2] Shockingly, the order was not formally rescinded by the state until 1976.

On the level of the common citizen the proposition at hand is simple and direct. It is the belief that the religious affiliation one professes can be a fundamental measuring stick for how "American" an individual or community is. On one extreme of the frames in this proposition is the concept that America is a country especially chosen by God to embody Christian ideals, and therefore other religious beliefs or atheist standpoints must accept less consideration in society, or perhaps in some borderline cases not be tolerated at all without significant change. On the far side of the spectrum from that position are those who believe that the separation of church and state should be absolute, and our civic institutions and culture should not in any way involve the promotion of one religion over another, nor even privilege having a religion over atheism and secularism.

[2] Lilburn Boggs, "Missouri Executive Order 44," ed. Governor's Office(St. Louis, Missouri1838).

Moderate positions could be sketched between these positions, but the unexamined proposition remains the same in all of them, that some beliefs or traditions are not "truly" religious, at least not in America. Some would even argue those beliefs, which are judged not "truly" religious but merely "personal preference" , are potentially subversive and dangerous to the public order. In this paper I will undertake to examine the fundamental assertion of the issue in order to answer an initial question: How does America define religion? When one works past the rhetoric employed in the courtrooms and the media, this question is the foundational heart of the struggles to integrate rapidly growing minority religions in the United States and the increased rise of secularism as a potent political ideology. The answer to this question, for proponents of both privileged Christianity and an open and pluralistic legal "hands-off" approach to religion, have a meaningful and direct connection in peoples' minds to the essence of what it means to be an American.

I will focus the current project on the legal definition of religion in America as adjudicated by the courts. As with any legal issue, the judicial system has evolved and changed in its views over time, but the derived powers of the court at least provide a mechanism by which some answers can be decidedly authoritative, even if only for the limited purposes of the justice system. To make the point in plainer language, in the legal context, the definition of "religion" in America is whatever the courts decree to be so. On this level, messy discourses about American culture are avoided, and we can proceed with some assurance that our footing will remain at least marginally firm. This is speaking only relatively of course, even in the technical and detailed world of jurisprudence religion can be a contentious and difficult to define subject. In fact, after more than 200 years of legal wrangling, it might be argued that we still do not have a wholly adequate definition of religion in the courts.

Early American colonies had officially established state churches, with mandatory worship attendance in some legal jurisdictions. However, the process of disestablishment in the eighteenth century abolished state religion until the last hold-out, Massachusetts, abolished their state-established religion in 1833. In these early years, recognition of belief structures outside of the traditional Theistic, and specifically Judeo-Christian, concepts remained wanting. The vast majority of legal cases involving religious questions revolve around the free exercise of the religious obligations in various Christian denominations, very few cases directly involve questioning whether a given sect or belief is or is not a religion. This is especially true in the very early days of the Republic when the population was still fairly homogenous in belief by today's standards. In *Davis v. Beason*, one of the relatively few early court decisions that directly addressed some definition of religion, the Courts clearly understood religion to be "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."[3]

This interpretation of religion carried on largely until the middle of the twentieth century when the courts began moving in a functionalist direction that focused on the role of religious beliefs in the life of the individual. Appellate courts arrived at different conclusions on whether religion requires a belief in a traditional concept of God, but opinions that it did not slowly appeared in several cases until 1965 when the accepted test for whether something was a religious belief or not became based almost purely on a sort of analogical reasoning as to whether the sincerely held belief occupied a position of ultimate importance and dependency similar to the traditional Theistic conception of God.[4] This approach did expand the definition of legally protected religions beyond the Judeo-Christian paradigm but failed to provide any

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[3] *Davis v. Beason 133 US 333 (1890)*

[4] Laszlo Blutman, "In Search of a Legal Definition of Religion: Lessons from U.S. Federal Jurisprudence," *Americana: E-Journal of American Studies in Hungary* V, no. 1 (2009).

explicit guidelines as to how this position should be recognized or how one was to draw the distinction between positions based purely on moral/ethical reasoning and those which were religious. In fact, the court has consistently emphasized that purely "philosophical" or personal "ethical" choices are not protected by the First Amendment without actually providing specific instruction as to how a "religious" belief should be differentiated from a "merely" philosophical one. In the absence of any further explicit legal definitions by the court, we find that religion in American law shares a feature with obscenity, the courts "know it when they see it".

The Circuit Courts of Appeals, in the absence of the Supreme Court choosing to more explicitly define religion, have created various tests to determine whether something is or is not a religion. Generally speaking the most influential and wide-spread of these tests involve three elements: A religion must address fundamental questions having to do with deep or existential matters, must be comprehensive in nature consisting of an interlocking belief system, and should display certain formal and external signs such as definitive membership rolls, specified criteria for leadership, or any number of various other possible structural expressions of identifying adherents.[5]

This state of affairs has drawn a variety of criticisms from legal commentators. It could rightly be pointed out that in the broad plain sense of these criteria, practically every large organized group of importance could be considered religion. Secular humanism, Socialism, Philosophical nihilism, virtually any political system or social organization based on a detailed philosophical or ethical set of beliefs could qualify as a religion under the current definition. It also could be argued that determining how sincerely a belief is held, or whether or not it is of ultimate importance to the believer, is an obviously futile subjective exercise. It would seem to

[5] Jeffrey Omar Usman, "Defining Religion: The Struggle to Define Religion under the First Amendment and the Contributions and Insights of Other Disciplines of Study Including Theology, Psychology, Sociology, the Arts, and Anthropology," *North Dakota Law Review* 83, no. 1 (2007).

make the unreasonable demand on judges that they look into men's souls and determine whether or not a group *really* believes something to whatever degree is thought to be required in order to define the group as "religious". Unfortunately, it is not clear what, if any, change could be made that would more adequately encapsulate the evidence of the human religious experience. Religious expression has varied so widely in different times and cultures that it seems inevitable that any attempt to narrow the legal interpretation would necessarily lay an unjust burden on any number of eclectic and benign religious groups.

There are many more cases of interest, but for the brief purposes of foreshadowing the rest of this thesis and establishing a legal definition, we can conclude that based on the currently standing legal precedents, something is a religion if: "a given belief that is sincere and meaningful occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God of one who clearly qualifies for the exemption."[6] Together with the above mentioned representative three-part test, this definition is the most wide-spread and commonly accepted in American jurisprudence at the moment. One of the tasks of my current work will be to both more fully explore the implications of this method of defining religion, as well as provide the reader with a more thorough background of its development.

"Un-American Religions"

This definition of religion, while unsatisfactory in many ways because of its vagueness, serves adequately for the current purpose of providing a certain baseline of what is required to legally be considered a religion in America. Under this definition, it is hard to see how any religion could be more or less American than any other religion. The tolerance our justice system displays for a staggering range of religious expression is widely considered a point of

[6] *United States v Seeger 380 US 163 (1965)*

pride by Americans. However, the texts of statutes and rulings of legal cases do not exist in a vacuum, standing for all time as self-evident obelisks. So, I will also undertake the somewhat messier task of looking at how these rulings, definitions, and tests have been applied by the courts in First Amendment cases relating to the Free Exercise clause. I will look to establish if there is a pattern or extrapolated principles by which it can be reasonably predicted what behaviors courts in the US will consider religious versus merely the result of personal choice, if there are forms of religion that justice remains blind to.

The most immediate example in recent history of religions that seems to be proclaimed by significant, or merely highly vocal, segments of society as not being "real" religions would be the current situation of American Muslims. Republican Representative Peter King held hearings in Congress on "The Extent of Radicalization in the American Muslim Community", citing what he felt was insufficient cooperation with law enforcement from American Muslims in the problem of combatting terrorism.[7] A former Representative, Tea Party Caucus member Allen West, once stated that Islam is a "totalitarian theocratic political ideology, it is not a religion."[8] The building of mosques in places as diverse as New York, Tennessee, and California have all been met with protests, law-suits, and intense political debate. In fact, according to the Council on American Islamic Relations, which has itself been painted as a terrorist organization by certain right-wing activist groups, civil rights complaints filed on behalf of Muslims who felt their constitutional rights were infringed rose more than six hundred percent over a six year period,

[7] Dana Bash, "Peter King: The Man Behind Muslim Hearings," CNN, http://edition.cnn.com/2011/POLITICS/03/09/king.profile/index.html.
[8] George Zornick, "Gop Candidate Allen West: People with 'Coexist' Bumper Stickers Want to 'Give Away Our Country'," Thinkprogress.org, http://thinkprogress.org/politics/2010/08/18/113874/allen-west-islam/?mobile=nc.

from 366 cases in 2000 to 2,728 cases in 2009.[9] There is a small but significant portion of the population for whom Islam and American society are fundamentally and irreconcilably opposed.

Islam cannot be considered wholly unique in this regard. Generations ago, it was the Catholics who were an unwelcome religious minority within the country. In the mid 1800's there were mob attacks on priests and churches, the formation of a political party explicitly dedicated to combating Catholic influence, and by 1875, public figures were warning Americans about the wide spread dangers of the foreign and untrustworthy influence of the Catholic religion. One such example, which uses rhetoric which brings to mind immediate and obvious parallels to things said of Muslims in the modern day, urges readers to have no fear of the Catholics as a religious denomination, but warns that their political ideologies and clergy are based on a system adverse to liberty and opposed to our principles of government. The source further remonstrates that they seek to use our electoral system to unify church and state if the government is not preserved against them.[10]

There are other religions that could go on this historical list as having received persecution for being somehow not quite American enough to be fully tolerated. Judaism at certain points in our history fits this description, and of course most of the earliest freedom of religion cases revolved around what came to be popularly known as the Mormon religion, or more properly The Church of Jesus Christ of Latter-Day Saints. A full treatment of the history of persecuted religions in America is quite outside the scope of this paper. But it quickly becomes clear, from even the brief examination of that history with my purposes allow, that many religions which people today think of as fully integrated within American society and part of the

[9] CAIR, "The Status of Muslim Civil Rights in the United States 2009: Seeking Full Inclusion,"(Washington, DC: Council on American-Islamic Relations, 2009).
[10] Lyman Beecher, *A Plea for the West*, Second edition. ed.(Cincinnati. New York: Truman & Smith; Leavitt, Lord & Co., 1835).

American identity were in fact at one time viewed as subversive and dangerously radical and frequently decried as not being real religions at all.

The reasons for this initial rejection followed by the gradual and often contentious absorption of a religious community in the process of becoming fully "American" are complex and varied, bound to show unique features in each individual case. However, some common denominators can be found in the cyclical process by which the various religions have been alienated, confronted, and accepted. I propose that the most important factors for the integration of any religious group within the American cultural landscape are not merely how near or far apart from the most popular theological positions they fall. The perception of the religion as individualistic or communal is a powerful predictive factor of note. This point of tension will be examined in the attempt to arrive at solid conclusions about what sorts of religions are considered "real" religions by Americans. For now, I will only present a brief introduction of the theme.

I intend to examine the perceived emphasis that a religion places on individual and internal belief, as opposed to public performance of faith and communal responsibility for regulating the life of the believer. Every particular faith tradition comes with a wide spectrum of expressions for which we have come up with an absolutely dizzying array of terms. Religious movements can be traditionalist, fundamentalist, neo-conservative, reformationist, liberal, progressive . . . the parade of potential labels marches on. This seems to make it quite an impossibility, or at the very least a daunting task, to pigeon-hole a faith tradition to a single "true" grounding along the spectrum of private and public. In reality all faiths will contain a tension and play between both aspects. In Christianity the individual acceptance of Christ is of clearly of definitive importance. However, there is also a rising movement, particularly in

modern Western Christianity, which emphasizes that Christianity cannot be considered complete without a commitment to progressive social change.[11] In Islam, the Qur'an seems quite clear in multiple verses that, in the Day of Judgment, only the individual will be responsible for their deeds. (41:16, 17:7, 10:108, 17:15) But it also explicitly provides the authority, indeed the obligation, of the state to regulate moral conduct and requires each believer to enjoin the good and forbid evil in their fellow men. (3:104, 3:110, 9:71, 9:112)

America has long been a country that prides itself on an ideal of rugged individualism. From the very beginning our political philosophy was based largely on the contributions of people such as John Locke, who was hugely influential on modern concepts of the self and the individual. Enlightenment ideologies of individual freedom and limitation on the power of government to interfere with a man's private life developed into American Romanticism. In the works of people such as Emerson, Thoreau, and Whitman, American authors championed self-reliant individualism, personal spiritual intuition, and the ideal that the emotional and individual satisfaction of creative power was the highest fulfillment of man.

With some periods of exception, mostly periods such as the World Wars or large natural disasters like the Dust Bowl of the 1930s, this ideal has carried over largely into the modern age. In the 2012 election season we saw a resurgence of discussion centered on the principles of small-government and individual freedom. The Tea Party in America, which is regarded to have swept the 2010 mid-term elections in which they had candidates, is partly neo-conservative and partly Libertarian in makeup and includes as one of their fifteen "non-negotiable core beliefs" a statement that "intrusive government must be stopped."[12] In general, the rhetoric of complete individual autonomy seems to have become a rallying cry of certain political segments of our

[11] K. Tanner, *The Politics of God: Christian Theologies and Social Justice*(Fortress Press, 1992).
[12] Teaparty.org, "About Us | Tea Party - America Protecting Americas Foundations," Teaparty.org, http://www.teaparty.org/about-us/.

society that liberty and freedom should largely be defined by the absence of all except the most minimal restraints necessary to ensure a functioning society.

With that demonstrated, it is no wonder that certain religious expressions, which require strict conformity to ritual regulations, often along with reliance on a sense of the religious community as of a superior and normative quality when compared to individual belief, struggle in American soil. Orthodox Judaism, Mormonism, Islam, Catholicism—all have a stronger sense of the moral and regulatory authority of the believing community than one finds in mainstream American Protestantism. This is true whether the authority is taken to be the *`ijima* (consensus) of qualified Islamic scholars, the ecclesiastical authority of the papal seat, or the divinely inspired revelation of a prophet in the Church of Latter-Day Saints. They also each encourage their believers to see themselves as members of the religious community first and members of other communities second. The Muslim *ummah* and its obligations are binding on the Muslim individual wherever he or she is in the world. The *Doctrines and Covenants* of the Mormon faith teaches that human law cannot be allowed to interfere with proscribed worship, which is a verse that continues to be used by fundamentalist groups today to justify polygamy in defiance of federal law. (D&C 134:4)

So we see that the space is created for a conflict between what might be considered the stereotypical American ideal of liberal individualism and those religious expressions which emphasize the regulatory authority of the faith community. As recently as the 1980s, public and legal controversies over the practices and doctrines of some religious sects were widespread, with small religious groups, which required a totality of commitment combined with extensive prayer, meditation, and ascetic practices meant there was wide-spread panic over “brain washing” and “mind control.” It was widely believed by family and friends of those who joined

such religious groups that they exerted an unnatural and aggressive indoctrination and degree of control when they demanded extreme levels of rigorous commitment. [13] These fears for the health and safety of people who converted to these forms of religious expression were occasionally tragically confirmed. Arguably the most famous incident stands as a stark example in many American minds of a certain generation; The People's Temple Agricultural Project, commonly referred to as 'Jonestown', where in the famous Jonestown Massacre over 200 children were murdered and a total of 909 Temple members died of ritual suicide. The disaster, with its mix of religious fervor and political radicalism, has continued to spawn academic debate over to what degree it might be considered to be an example of a "religion".

The fear of cults aside, we can see that many expressions of even otherwise respected and historic faith traditions share in some ideal sense of communal commitment combined with a "totality of commitment combined with extensive prayer, meditation, and ascetic practices." Catholicism combines a commitment to the legitimate authority of the ecclesiastical hierarchy with a deep sense of ritual requirement and rigidly proscribed criteria in the conduct of communal worship, features that are also shared with Eastern Orthodox and other non-Protestant Christian traditions. Islam encourages strict adherence to the *sunnah*[14]and an idealized goal of a holy law (*shari'a)* which provides guidelines for behavior in practically every single aspect of life, so much so to the point that some scholars have made the claim *Sunni*, the term for the majority sect of Islamic belief, should be translated as "orthoprax" rather than "orthodox".[15] Judaism and Islam both share this orientation; they are religions of law and ethics, traditionally far more concerned with regulating interpersonal behavior than they are with

[13] Abraham Burstein, *Religion, Cults, and the Law*, Rev. 2d ed., Legal Almanac Series No 23 (Dobbs Ferry, N.Y.: Oceana Publications, 1980).
[14] The collected normative traditions and sayings of the Prophet Muhammad
[15] W.C. Smith, *Islam in Modern History*(New American Library, 1959).

enforcing proper internal belief, and containing complex rules for daily life that the pious are commanded or encouraged to comply with. Obviously, despite this basis, none of these religions are widely considered to be cults at the present time.

Summary of Thesis

Our thesis then is this: Taking Mormonism, Judaism, Catholicism, and Islam to be a representative sample of religions that were widely considered to be "Un-American", the involved theologies and doctrines are too different, in too many significant ways, for the perceived conflict to be based on belief. A factor that they do have in common is an emphasis on the authority and normative regulating power of the religious community to exercise control over the individual lives of believers. It is our belief that the history of these religions' integrations in America show that the degree to which a faith community in America is accepted depends largely on the degree to which they adapt and de-emphasize these elements of their traditions. In the one case, this could mean integrating with the larger community, establishing roots and social capital, the natural process of inter-marriage, and most of all enduring long enough in an area to become a part of its historic background. In the other case, this could mean a return to their traditions to find threads of teaching that emphasize liberal ideas about personal freedom, a relational or devotional orientation towards divinity, and the importance of belief over practice.

Of course, these are not the only factors that will influence the perception of a religion in the United States, neither in the courts nor in the mind of the public. The perceived socio-economic status is also important, and we cannot forget that frequently the prejudice against Jews in particular seems intimately linked to the common stereotypical trope of their affluence and involvement in the banking industry. Additionally, historical factors like the religion's

relationship with Christianity (particularly Protestant Christianity) and any armed conflicts that take place are major influences. It is inconceivable to think that how Muslims are perceived in America has not been enormously altered by the events of Sept 11th, 2001. But I believe that the issue of communal authority, which I have made study of in this paper, are the two most major predictive factors, which can tip the balance of the scales from one side to the other, even in the presence of many smaller mitigating factors.

At present in our exploration, I have introduced the clear presumption in the rhetoric of the general public that some religions are more "American" than others, and that some religions are in some sense not "real" religions, but instead should be taken to be cults or political ideologies. History has provided us every reason to believe that the increase in such rhetoric, as well as the anger and passion with which it is promoted, is a clear and dangerous problem that confronts the study of Religion in America in modern times. It has provided us this evidence in the form of riots, persecution, governmental "kill orders", and hundreds, if not thousands of examples, in terms of bigotry, assault, and desecration of sacred spaces.

I have briefly introduced the legal precedent and thought on the issue, and we find the current American definitions of religion provided by the court are arguably vague and unsatisfying. However, they show a clear and continued development from the early days of state-established religion in the colonies to a broadened perspective, which allows even for non-theistic religions to receive the protections and exemptions afforded by the U.S. Constitution and by federal law. The current refusal of the Supreme Court to revisit the definition of religion has placed the burden on Circuit Courts of Appeals to adjudicate their own opinions, based on tests that are widely accepted but not universal. The current situation legally bears further study but at least provides an authoritative basis from which to begin.

Culturally, the matter is much more complex. There are a number of factors which might contribute to whether or not a religion is accepted as “American” in the public mind, but I contend that the largest of these factors is whether or not the religion emphasizes strict adherence to ritualized behavior in everyday life, along with emphasizing the authority of the community consensus over individual belief.

Chapter 2:

Know It When They See It: American Courts Defining Religion

The outset of our quest to find a definition of "American" religion should rightly begin with the courts. The First Amendment famously reads that Congress shall "make no law respecting an establishment of religion, or prohibiting the free exercise thereof," and in the system of checks and balances set up by the founding document of our nation, the Supreme Court is the final arbiter of how that language is to be interpreted and enforced. In the adversarial justice system of our country, parties who have had their rights infringed can press a claim to the courts and must abide by their decision as to whether their rights were in fact infringed upon. Through laws passed by Congress, whether or not an organization is "religious" or not affects legal purposes such as tax breaks, land grants, direct federal aid, and a plethora of other benefits. The courts ultimately have the authority, when called upon by citizens with standing in a complaint, to determine whether or not that particular group of citizens should be considered in their actions to be representative of a religion under the law, as opposed to some other kind of organization.

Of course, the struggle to define religion in the legal sense is burdened by the definitional problem of religion in general. It is difficult to conceive of a definition of religion that can avoid essentializing a broad and complex category of phenomenon; by some opinions even the attempt to define religion would violate the First Amendment protections of religious liberty. In this train of thought, if the court were to define religions then they would be dictating what a religion must or must not be in order to be considered "real", which would automatically

violate the establishment clause.[16] Additionally, some scholars have long argued that there simply is no such thing as "religion" in the first place, such that systems of belief or behavior could be easily categorized into them. Religion may be a "second order" category, an arbitrary abstraction, which we have found to be a useful schema to organize certain human expressions into, but one without reality. Assessing the "definitional problem" faced by the category of religion is outside the scope of this paper. There have been a great number of volumes written about the subject. However we must acknowledge at the outset it could reasonably be argued that the task of finding a definition is already a fool's errand for the Court.

As a practical matter, it seems inevitable that as long as we collectively agree on the political ideal that religious freedom deserves special protections, then the court must seek at least some rudimentary definition of religion. The Court's ultimate purpose is to protect the rights of citizens against infringement and, in our adversarial system of justice, to decide between two competing claims. As long as citizens disagree on what is and is not religious, these disagreements will potentially rise to such a level that no other option remains but to seek redress in the justice system. To put these kinds of cases in a sort of untouchable limbo and deny hearing them would open the door to great injustice.

The scope of the current work will primarily address and focus on issues of the First Amendment and its Constitutional protections. The Internal Revenue Service's definitions for non-profit/religious status are of interest and will serve a comparative purpose later in this thesis, and many corporate rights belonging to churches and denominations as corporate bodies *per se* avoid religious definition or disagreement entirely by focusing on civil statutes and regulations to adjudicate disputes. However interesting the strange and often twisted maze

[16] Usman, "Defining Religion: The Struggle to Define Religion under the First Amendment and the Contributions and Insights of Other Disciplines of Study Including Theology, Psychology, Sociology, the Arts, and Anthropology."

that American jurisprudence finds itself in when it comes to the matter of how to handle church bodies, these circumstances do not provide a great deal of illumination as to what religion *is*, in the eyes of the court. The question of ruling on religious meaning or expression is, as we will see later, a difficult problem that the courts seem to work hard at avoiding, and it is in the First Amendment that they most often are forced to address the issue head on. Therefore, while I may choose selected other cases from time to time in order to better illustrate a contrast in approach or theoretical difficulty; I will primarily deal with First Amendment and other Supreme Court cases.

For a surprisingly long period of time, the courts were able to remain silent on the meaning of the First Amendment clauses relating to religion, for the simple fact that the text of the Amendment itself reads, "*Congress* shall make. . ." The protections provided by the Constitution did not extend down to the state level, one amongst many reasons that government established churches lingered so long in many of the original states. Instead constitutional protections were only applicable in federally held and controlled territories. Accordingly, the clauses promising freedom of religious expression were not truly tested until the members of the early Church of Jesus Christ of Latter Day-Saints, colloquially known as Mormons, were pushed by social pressures and persecutions into the western territories.

The earliest legal challenge which required the Supreme Court to speak directly to the nature of religion was in the late 1800's in the case *Davis v Beason*[17] which, like many early cases on religious freedom in America, dealt with the Church of Jesus Christ of Latter-day Saints. The appellant Samuel Davis was charged with "conspiracy to pervert and obstruct" the administration of an Ohio County when he attempted to register to vote. At the time, an oath

[17] *Davis V Beason*, 133 U.S. 333(1890).

was required of each elector that they were not a member of any group which supported the practices of bigamy, polygamy, plural, or celestial marriage. Discovered to have been a member of what then and today is still commonly called the Mormon Church, Mr. Davis was charged and found guilty. He filed a claim that his imprisonment was motivated “by virtue of his conviction” and thus illegal as the oath he was asked to swear and the laws against polygamy violated his right to freely practice his religion and constituted a violation of the First Amendment’s establishment clause.

The Supreme Court found against Mr. Davis and arrived at a decision that had wide implications for religious liberty. In the decision the Justices argued that marriage was not only a sacred institution but also a civil one that forms a foundation for any society, that accordingly society has the right to regulate it with laws, and that bigamy and polygamy were crimes according to the current law. They felt it clear that it should not seriously be contended that the whole punitive power of the justice system should bend in order for any religion to seriously teach and encourage activity that is criminal. For the purposes of our current exercise, the most salient point is that the court established “The term ‘religion’ has reference to one’s views of his relations to his Creator, and to the obligations they impose of reverence for his being and character, and of obedience to his will.” They further contended that the First Amendment was intended to allow everyone to entertain such notions respecting his relations to his Maker as their conscience led them to believe in but was never intended to protect against legislation against acts which would be damaging to the “peace, good order, and morals of society.” The judgment of the court was that to call the encouragement of crimes that “shock the moral judgment of the community” a tenet of religion is to offend common sense.

The first thing established by this decision is a fairly straightforward definition of religion. A religion, according to *Davis v. Beason,* is a set of references to how one views a Creator God and what obligations one believes that relationship compels him to feel in obedience. This is obviously a *very* Judeo-Christian understanding of religion that at least in the plain language requires an idea of definite and creative deity which is possessed of a will that must be followed by man—an active, monotheistic deity. The language also seems to implicitly argue that in order to be counted as a religion the tenets must conform to at least some degree to the moral judgment of the community at large, and that they could not actively encourage crime or "shocking" moral behavior. The second precedent established by the Supreme Court in the case was a "neck up" definition of religion by which one is allowed to *believe* whatever they want but is required to *behave* in accordance with well-established laws, or at the least in a manner that is conducive to safety and public order.

This creates the first cracks in the court's legal treatment of religion at the same time that it introduces a definitive definition. By separating belief and action, a strong argument could be made that what is actually protected is not merely Judeo-Christian religion, but the sort of particular Western Protestantism under which religion is a deity-relational and private matter rather than a lived and ritual communal obligation. A theme begins to emerge that we will see time and again throughout American legal history: Religious practitioners can be burdened, often quite substantially when their religious faith requires concrete action and ritual. In the early case of *Reynolds v United States* just a year before[18] the court positively held that religious belief could not be a protection against indictment. Specific actions could be prosecuted regardless of whether they constituted a clear and specifically religious obligation if they went against the common law of the land or were seen as destructive to the fabric of society. The

[18] *Reynolds V United States*, 98 U.S. 145(1879).

problem becoming, as any first year student of political science might be able to describe, that what is seen as "destructive to the fabric of society" is quite often fluid over time. It is occasionally even a distinctly prejudicial expression of the tyranny of a majority. After all, at some points in American history the idea of educating African-Americans, inter-racial marriage, or allowing Catholics to hold public office were all seen as "destructive to the fabric of society" in the popular imagination. At the same time that the *Beason* case provides an explicit definition of religion for further reference, it holds the door open for judges to exercise fairly unlimited discretion in what religious *actions* must be regulated "for the good of society." The state in this case subordinates religion to the common good in a move not unlike Mill's utilitarianism.

This all fits in general with American jurisprudence during the early years of our history. Only 80 years earlier than the Davis case, a man was convicted of blasphemy in New York by a court which stated that Christianity has "always" been understood as the basis for sound civil government and that irreverence to Christianity could not be protected by constitutional guarantees.[19] In one form or another, this judicial definition of religion, as referencing only belief systems that related man to an omnipotent Creator, continued throughout much of America's early history. The early history of the Free Exercise clause established precedents that laws may be passed limiting religious expression when such expression is somehow harmful to persons or the structure of society itself, as the courts determined polygamy to be. In the case of a vested interest in seeing to the safety and security of the public, the right of free religious expression could be over-ruled. As an example, early American court decisions disqualified those without belief in God or ultimate punishment as legal witnesses in direct discrimination

[19] *People V Ruggles*, 133 8 Johns. R. 290 N.Y. 333(1811).

against the irreligious, and held that "even a father may be deprived of the guardianship of his child if he professes a belief in a sect adjudged to be obnoxious to society."[20]

Movement Toward A More Functional Definition

This legal situation continued well into the mid-twentieth century, when a series of court cases, which mostly revolved around conscientious objection, first began to open the door for an interpretation of religion that focused on the way that the beliefs might function in the life of an individual. In *United States v Kauten*[21] in 1943, the defendant had attempted to conscientiously object to the draft and be classified as exempt from his military duty, but the local draft board and appeal board concluded that his objection to war was not based upon any religious training, as the defendant had self-reported that he was an atheist or agnostic. Moreover, conscientious objector status would be granted only for those who were morally opposed to all wars, opposing only specific wars would not qualify. Mr. Kauten was ordered to report for duty and then arrested when he failed to appear.

The Second Court of Appeals ruled in favor of the draft board and upheld the conviction on technical grounds; it was ruled that Mr. Kauten did in fact have a legal obligation to appear and report for duty to the military, and that what he should have done was to apply for a writ of habeas corpus and procure judicial review of his classification. His rights, the court insisted, were not actually infringed upon in any practical sense until he was actually subjected to military service against his will. The situation prior to actually reporting for duty was an administrative inconvenience at best, and during basic training he would have had ample time to apply for judicial review.

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[20] Burstein, *Religion, Cults, and the Law*.
[21] *United States V Kauten*, 133 F.2d 703(1943).

Of much more interest for our purposes is the last part of the rendered decision in which Second Circuit court Judge Augustus Hand somewhat amusingly observed that it was unnecessary for the court to attempt a definition of religion since the case was resolved on grounds of administrative due process, and then promptly set about attempting to vaguely define religion anyway:

"Religious belief arises from a sense of the inadequacy of reason as a means of relating the individual to his fellow-men and to his universe – a sense common to men in the most primitive and in the most highly civilized societies. . . . There is a distinction between a course of reasoning resulting in a conviction that a particular war is inexpedient or disastrous and a conscientious objection to participation in any war under any circumstances. The latter, and not the former, may be the basis of exemption under the Act. The former is usually a political objection, while the latter, we think, may justly be regarded as a response of the individual to an inward mentor, call it conscience or God, that is for many persons at the present time the equivalent of what has always been thought a religious impulse."

This was a first key case that moved the concept of religion away from relating directly to a supreme being and toward a focus on how the belief in question related the individual toward the universe and his fellow men. The approach clearly used by the court's musings is to examine the role of the beliefs in the life and mind of the believer, and it was an approach that increasingly began to appear in cases across the nation. In a case the very next year[22] involving accusations of fraud against a small group of "faith healers", the Supreme Court determined that they must look primarily to the sincerity of a person's beliefs to help decide if those beliefs constitute a religion for the purposes of constitutional protection. The court held that the judicial system has no business in deciding whether or not the religious claims of an organization are *actually* true, only whether or not the members seem to sincerely believe them to be true. Then, in 1961, came *Torcaso v Watkins,* a case which landed right in the middle of the "incorporation" debates of the 40's-60's when the American legal landscape was dealing with

[22] *United States V Ballard*, 322 U.S. 78(1944).

how to apply the Fourteenth Amendment to the Bill of Rights. In this case a challenge was made to the Maryland state constitution disqualifying those from public office who refused to declare their belief in the existence of God, and it contained a footnote that most explicitly signaled this shift in thinking. Outside of the main text, a footnote described by at least one author as "dicta upon dicta"[23] was used by one of the justices to note, "Among religions in this country which do not teach what would generally be considered a belief in the existence of God are Buddhism, Taoism, Ethical Culture, Secular Humanism, and others."[24]

Now this sort of footnote does not set legal precedent, and in fact had very little to do with the reasoning involved in arriving at the verdict. It has caused a great deal of contentious commentary about where the proper line should be between philosophical non-religious beliefs and religion. But avoiding that conversation entirely for this paper, the purpose of quoting it is to demonstrate that the court had slowly made a remarkable shift from a definition of religion that required belief in a traditional Judeo-Christian creator God and teachings of obedience to Divine Will. Instead, the court had broadened the definition of religion considerably.

German-American Theologian and philosopher Paul Tillich was enormously influential on the modern understanding of religious attitudes and the essence of religious perception. In his book *Dynamics of Faith,* he developed a theory of "ultimate concern" that defined faith and the essence of the religious experience itself as perception of an overwhelming reality separate from ordinary realities, a concern in the face of which it seems all other concerns must be sacrificed and subordinated. Tillich even did not exclude atheists from the ranks of the faithful, since one imagines that nearly every person who has concerns at all would place one of them as ultimate and prior to the others. Tillich's manner of defining religion in such a way did more

[23] R.B. Flowers, *That Godless Court?: Supreme Court Decisions on Church-State Relationships*(Westminster John Knox Press, 2005).
[24] *Torcaso V Watkins*, 367 U.S. 488(1961).

than provide grist for philosophers and theologians to analyze in countless papers and debates, it provided what would become the legal definition of religion in America as dictated by the Supreme Court.

The Universal Military Training and Service Act governed the draft in the 1960's, and incidentally also contained the government's regulations for defining a conscientious objector who qualified for exemption on religious grounds. The text of the regulations required belief in a "Supreme Being" in order to be awarded the exemption, and the Supreme Court in 1965 considered three consolidated cases which objected to this regulation on constitutional grounds. The relevant objection in the case was that such a regulation was alleged to discriminate between different forms of religious expression. Put simply, it was a government regulation which clearly privileged theistic religious impulses over non-theistic ones. None of the three defendants considered themselves atheist, but all of them held that their various religious beliefs, which did not include any traditional conception of an active God, should qualify under the standard because their conscientious objections were based on beliefs in the existence of a supreme reality or universal power beyond that of man.

In their decision, rendered in *United States v Seeger*, the Supreme Court essentially adopted a Tillich definition of religious faith wholesale, in words that could nearly read like a quotation from the theologian's work. They quoted Tillich multiple times within the dicta of the decision, among other quotations meant to display the breadth and diversity of religious beliefs respected as part of American society. The court held that the term "Supreme Being" in the regulation must, at the least, mean the concept of a power or being or faith to which all else is subordinate or upon which all else is ultimately dependent. The court established a test for determining whether or not a belief was religious, as opposed to "merely" philosophical, social,

or practical in nature: The belief must be "A sincere and meaningful belief that occupied in the life of its possessor a place parallel to that filled by the God of those admittedly qualifying for the exemption."[25] Freedom of conscience, the court decided, was a principle that must show respect and even admiration for a person's innate convictions, and that such convictions, when not found in conflict with public order and safety, should be honored as the very grounds of liberty. The right to act, or refuse to act, according to one's most deeply held beliefs must be accorded the categorical designation of a "religion", at least for purposes of the law, and this was to occur, regardless of whether these beliefs were part of an already recognized religious system.

Since 1965 this has largely been the law of the land in terms of a legal definition of what religion is in America – determining which beliefs are religious and which are not. It is an admittedly vague and subjective definition, but it does at least fulfill the requirements of seeming able to encompass everything which might be considered a religion without excluding anything unnecessarily or in a prejudicial way. Later decisions through the years such as *Welsh v United States*[26] and *Thomas v. Review Board*[27] reaffirmed this definition of religion by the Supreme Court, while slightly narrowing and attempting to navigate the distinguishing line between personal philosophical choice and truly "religious" belief. Despite this occasional narrowing or clarification, there have been no major cases to be heard before the Supreme Court that have challenged the religious test set out by *Seeger* in the 1960's.

[25] *United States V Seeger*, 380 U.S. 163(1965).
[26] *Welsh V United States*, 398 U.S. 333(1970).
[27] *Thomas V. Review Board of the Indiana Employment Security Division*, 450 U.S. 707(1981).

Problems with the Functional Definition

The astute reader will of course already have thought of an obvious problem of this functional approach of "ultimate concern". It does have the advantage of being as inclusive as is possible in respecting the great varieties of religious experience, but in some respects its greatest strength is also a weakness, as it seems impossible to exclude almost anything from being a religious belief. As some commentators have observed, such a definition of religion as outlined in *Seeger* could potentially include practically any position imaginable. If the terms "religion" or "Supreme Being" are taken to mean whatever occupies a place in a person's life such that they order their actions based upon it and all other concerns are subordinate to it, then one can imagine that communism, capitalism, ethical utilitarianism . . . even a particularly fanatical fan's love of his sports team is potentially a religion that we are obliged to constitutionally protect. Indeed, in Tillich's formulation, every single thinking person has an ultimate concern, which need not necessarily be expressed as a religious conception of deity.[28]

This is fine for the philosopher or theologian, but in the practical terms of a judicial system that must review regulations and ascertain the guilt or innocence of a party accused of harm, it seems immediately problematic. "Mere" philosophical, moral, ethical, or political affiliations and convictions are not placed under the penumbra of the Bill of Rights, but the functional definition adopted in *Seeger* provides no easy method for distinguishing between these and religion. But drawing that distinction, however arbitrary one is aware the line placement may be, is precisely the function of the court. The Supreme Court had expressed a worry about this function far before in 1879 while reviewing a case connected to the practice of polygamy:

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[28] Paul Tillich, *Dynamics of Faith*(HarperCollins, 2011).

> "Can a man excuse his practices to the contrary because of his religious belief? The permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself. Government could exist only in name under such circumstances."[29]

The current Supreme Court definition of religion is directly comparable to the famous description of Justice Stewart in a case deciding whether or not the film *The Lovers* was obscenity and thus not protected as free speech, "I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it. . . ."[30] Religion in the current courts shares this same position of vagueness and unsatisfactory definition. When the question is whether or not a belief is an "ultimate concern," or occupies a place "parallel" to that of well-established religions, it seems that inevitably the criteria are subjective and totally in the hands of the individual judges involved. This is problematic in a legal sense. One of the reasons laws are codified to begin with is to attempt to provide neutral and standard expectations for societal and governmental behavior. It is desirable for the law to be written and judged in such a way that a reasonably intelligent person familiar with the law could read the relevant statutes and know whether or not the action that they were about to undertake was legally protected, or not. For the most part, this is not the case if your question hinges on whether or not your actions are "religious", which is hardly a desirable state of affairs.

It is also a very problematic situation from the point of view of religious believers and unbelievers alike who, all theorizing of academics quite to the side, often prefer to draw some sort of separation between the sacred and the profane. The *Seeger* definition of religion can lead to decisions that seem to fly in the face of conventional wisdom, sometimes in ways that

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[29] *Reynolds V United States*.
[30] *Jacobellis V Ohio*, 378 U.S. 184(1964).

can actually be quite offensive to the people involved. The perfect example here is the decision of the Seventh Circuit Court which treated atheism, within the context of the case, as religion. The court overturned a ruling that had prevented a prison inmate from starting a humanism and atheism group because the appellant's atheism was "sincerely and deeply held" and "central to his life" and thus the court decided it must be granted protections. The irony involved in the case is that although this decision provided the appellant with the result they had desired, it did so while directly ignoring his own insistent feelings on the matter.

> "The problem here was that the prison officials did not treat atheism as a "religion," perhaps in keeping with Kaufman's own insistence that it is the antithesis of religion. But whether atheism is a "religion" For First Amendment purposes is a somewhat different question than whether its adherents believe in a supreme being, or attend regular devotional services, or have a sacred scripture."[31]

While I think that the question of whether atheism and other stances of unbelief are "religious" or not is certainly a fascinating one worthy of discussion, for this paper's purpose it is enough to note that many atheists would themselves find such a categorization grossly offensive, if not indeed antithetical, as Mr. Kaufman felt, to everything that they believe in. It serves as just one example of how the functional definition of "ultimate concern" occasionally could lead an observer to determine behavior is "religious" in a way that encompasses so broad a variety of activities as to be completely emptied of meaning and content.

Mr. Kaufman's case is illustrative. In actual cultural and governmental practice, some argue that atheism in particular has fallen to the bottom of a nebulous legal hierarchy in a position that opens it up to persecution. There remains only one openly atheist representative in Congress, and widely cited opinion polls show that atheists are the "most mistrusted

[31] *Kaufman V Mccaughtry*, 419 F.3d 678(2004).

minority" in America.[32] Research cited by legal scholar Weiler-Harwell points to poll trends indicative that most Americans are comfortable opening their arms to embrace, at least superficially, new religious groups as long as they eagerly pledge their allegiance to the nation, the flag, and to God in a sort of "generic monotheism." The argument given is that American society cannot accept atheists, because there is a ceremonial-deistic aspect to the culture at large that views irreligion as non-normative and even subversive. One illustrative example occurs in the Seventh Circuit Court of Appeals, in *Welsh v Boy Scouts of America*. This case is only twenty years old, and in it the courts explicitly questioned the litigant's patriotism because of their rejection of an oath that mentioned God. The judge implied that rejecting the Boy Scout oath was somehow also a rejection of the Declaration of Independence, on the grounds that the document also contains references to God.[33] The actual decision of the court avoided the constitutional question, ruling strictly on the statute and arguing that the Boy Scouts did not qualify as a "place of public accommodation" under the legislation. The Supreme Court declined to hear the case, leaving its constitutional challenges currently unanswered. However, it illustrates here the connection in the minds of the public, and even occasionally of the judicial branch, of irreligion with lawlessness.

For these reasons of inexactness, there exist within the government alternative definitions of religion that are much stricter, used for narrow purposes where allowed by law. The penultimate example is the definition of a religious organization found within the tax code of the Internal Revenue Service. Section 501(c)(3) of the Tax Code uses much more clearly defined guidelines for determining whether or not an institution is a "church" while still leaving room for judgment and flexibility in individual cases. Among the requirements are that an

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[32] N. Weiler-harwell, *Discrimination against Atheists: A New Legal Hierarchy among Religious Beliefs*(LFB Scholarly Publishing LLC, 2011).
[33] *Welsh V Boy Scouts of America*, 993 F. 2d 1267(1993).

organization must have, a distinct religious history, a recognized creed and form of worship, established places of worship, a roster of membership by which members can be distinguished from non-members, and certification or special training for leaders.

There is a famous saying that seems to apply, “Damned if you do, and damned if you don’t.” Obviously this definition of religion is much more utilitarian, allowing the potential IRS agent to easily determine whether or not a particular organization qualifies as a church under the code, avoiding the subjectivity and lack of clarity inherent in the functional definition. But one can immediately see that it is also a more exclusionary definition. Judaism, Protestantism, Catholicism, Islam, and other religions with established organizational structures and recognizable codified doctrines obviously fit the criteria, but a number of new religious movements along with many pagan religions would equally, obviously struggle to meet one or more items on the “checklist”. The example serves to highlight the difficulties and tensions involved in formulating any definition of religion at all, and the debate continues in legal journals as to precisely what methods the courts should undertake. Put simply, the *Seeger* definition seems to be one with which very few people are actually happy, but that even fewer people seem to be able to offer a clearly and decisively better alternative to.

From this examination, by no means exhaustive, we can form a few rudimentary conclusions about what the definition of a religion is in the American context, at least from the point of view of the justice system and the courts. This definition began as essentially identical to the Judeo-Christian tradition, in which other religions were considered subordinate at best, primitive or mystical traditions that did not correspond in any real way to what the law considered a religion deserving of protection under the constitutional amendment. The early

years of American jurisprudence carved out clear preference for the majority religious tradition, privileging the Christian paradigm as the fundamental foundation of all good government.

In the early twentieth century, the scope of religion expanded under cases that addressed issues such as freedom of speech, freedom of assembly, and conscientious objection until a functionalist definition of religion was adopted that fully embraced Paul Tillich's language of "ultimate concern." Under this definition, which has continued with minor modifications since the 1960's, a religion is a matter of whatever concerns and beliefs a person subordinates all other concerns to—an over-riding imperative which functions "parallel" to a traditional belief in active Deity. In effect, it leaves the decision as to whether behavior and beliefs are "religious" or "merely" philosophical/moral/ethical to the individual judges involved in the case, while acknowledging that language is inherently flawed and falls short of being able to encompass the essence of religion in an inclusive way. This leads me to directly compare it to the famous court definition of obscenity; the court system "knows it when they see it".

There are serious objections that can be raised against such an exclusive but subjective definition of religion in the legal system. The first and most serious is that it seems to destroy the predictive power that is fundamentally assumed to be the advantage of having a codified law in the first place. The rulings and precedent set can, and this has been borne out in the practice, vary widely depending on which court and which judges might hear the case in question. Additionally, from the standpoint of either believer or unbeliever, this may result in categorizations that are not only contrary to conventional wisdom, but directly offensive to those involved. Lastly, but certainly a matter of grave concern, is the way the law's continued focus in the functional definition is on beliefs "parallel" to that occupied by the traditional belief in Deity. Atheists and other secularists argue that this continues to privilege belief systems that

are recognizably Deistic. It might be said looking through the lens of this viewpoint that in America it is culturally acceptable to believe in *any* God, just so long as one believes in *a* God.

Even though this understanding of religion in the American courts is necessarily a matter of continued debate and contention, it provides us with a solid frame from which to understand certain key questions in our search for a definition of what makes a religion "American". It seems that an answer to that question must at least partially be understood in terms of our legal system and government, which is meant to reflect the will of the people and the general consensus of society, while at the same time providing a limiting border to the tyranny of the majority. An examination of the Supreme Court cases that have touched on defining religion, supplemented by certain appeals and circuit court decisions, shows that the definition has continued to evolve throughout the history of our country, but that the definition can be said to at least be this: To be considered a religion in America, the beliefs in question must involve a concept of the Ultimate, which is both sincerely held and the basis and source of subordinate beliefs and decisions.

Chapter 3:

Applying The Rule: The Construction of Religion in American Law

Of course it is one thing to have a definition of religion, however imperfect, and quite another thing to apply that definition. One of the primary features of a robust legal system is the way that it remains flexible and adaptable over time. As precedent is built up in the case law and legal professionals make their arguments throughout history the laws based in statute become interpreted and re-interpreted. Features of earlier cases also become obscured or re-evaluated in the course of time, taking on new meanings in new contexts. In this, law shares a common feature with many of the world's religions. There is a constant call and refrain stretching back in time to texts and sources that are considered authoritative but flexible. Law changes and decisions are overturned, sometimes in radical ways, but ostensibly not without some justification or grounding in the tradition—a tradition which is believed to be safeguarded by carefully trained and thoughtful experts.

In this respect, the dealings of American jurisprudence with issues of religion and religious freedom are not exceptions. Earlier, we discussed the evolution of the legal definition of religion over time, and how that definition has been applied in cases with a legal component has had no less of a thorny growth process. The history of religious cases in America is filled with dead-end branches, expansions and contractions of the behaviors considered to be protected, and an often bewildering array of litmus tests designed to instruct legal professionals on what constituted "unacceptable" infringements on a religious belief. Even early on in American history, judicial discretion in religion cases often resulted in anomalies and a diversity of opinions among the different courts. Later, the Fourteenth Amendment was interpreted to

extend the Bill of Rights to the states for the first time, and the number of religious cases exploded in growth. This situation alluded to earlier, has resulted in a state of affairs that can be most frustrating to the scholar of law and religion. While the Supreme Court has not directly addressed the issue of defining religious behavior in decades, the result is that in the mid and late twentieth century a maze of district court decisions were passed down, often contradictory in a way that meant whether or not a behavior was "religious" could often legally depend on which side of a dividing line between districts the jurisdiction was held.

This morass of varying approaches will now be the target of my examination. The hope remains that by selecting a variety of cases over time and examining them for key analogical similarities, there might be discovered an unspoken blueprint for what is considered "real" religion in the American court system. Initially one expects that these cases will primarily revolve around the First Amendment protections in question and in fact this would be ideal for our scholarly assessment; in American law the Constitution is the foundational law of the land. A ruling on constitutional challenges by the Supreme Court sets the standard by which all other American courts must abide, a ruling which can only be overturned by another act of the same Court. Constitutional cases thus provide solid bedrock which would be able to definitively answer the question, at least as concerns the legal scholars, thus providing a solid framework to build the blueprint upon. It is precisely for this same reason, that I have mostly to this point limited myself to Supreme Court cases in seeking out an explicit legal definition of religion.

Unfortunately, when we begin to address the issue of application in that definition and attempt to predict what actual courts will decide is "protected religious behavior" vs. "merely personal choice" we come to a rather surprising conclusion. Conflicts centering on religion are rarely addressed constitutionally by the courts. In fact, the courts seemingly make every effort

to avoid addressing whether or not a behavior or group is "religious" and have left a legacy of legal decisions in which virtually any other possible means of deciding the case will be used. In some respects, this is not unusual, and a variety of Supreme Court cases have explicitly set forth a legal doctrine in America that ruling a case on constitutional grounds should be strictly avoided unless there is no other means of deciding the case. "If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality . . . . unless such adjudication is unavoidable."[34] Even in cases where constitutional questions have been directly addressed, the religious aspects of the case are frequently subsumed under the umbrella of freedom of expression, or the rights of free assembly, leading some authors to speculate that the precedent on religious cases in America has gradually evolved to a state in which religious freedom "is not even an independent discrete freedom"[35] but must be coupled with other constitutional protections in order to be judged.

A fine example of this is the way that judicial practice on questions of *corporate* religious liberty, the liberty of congregations and groups of believers as opposed to individuals *qua* individuals, developed under laws of corporation. Over the years in cases such as *Watson v Jones*[36]*, Kedroff v Saint Nicholas Cathedral*[37]*,* and *Jones v Wolf*[38]*,* the court interpreted the constitutional requirement for the government to avoid establishing a religion as requiring the courts to avoid using theological or religious principles in adjudicating property or financial disputes between feuding congregational members or sects. In essence, the courts felt the only way to avoid inappropriately establishing "official" government interpretations on the

[34] *Spector Motor Serv., Inc. V Mclaughlin*, 323 U.S. 101(1944). – See also *Ashwander v Tenn. Valley Auth 297 U.S. 288* and *White v. State of Ala.* 74 F.3d 1058
[35] Flowers, *That Godless Court?: Supreme Court Decisions on Church-State Relationships*.
[36] *Watson V Jones*, 80 U.S. 679(1872).
[37] *Kedroff V. Saint Nicholas Cathedral*, 344 U.S. 94(1952).
[38] *Jones V Wolf*, 443 U.S. 595(1979).

correctness of religions was to handle most legal disputes as a matter of existing corporate and property law. This is the foundational beginnings of the approach of the courts in slowly redefining freedom of religion to be coupled with, if not outright replaced, by a robust interpretation of the freedom of speech. Under circumstances where we are not laying judgment on the ontological *truth* of religious claims, what is left for the courts is to judge the manner in which those claims are *expressed* publically. The churches and groups involved in these cases had disputes over who owned or controlled certain church properties and which body of believers were the "true" representatives of their respective theological philosophies. Rather than brand one group "true believers" and the other group "heretics", the courts awarded or overturned rulings based on two tests. The first of these was acquiescence to previously established organizational bylaws, or hierarchy, and the second was to rule in favor of the majority membership in the absence of such organization.

This series of decisions established the precedent that has continued to this day, in which the courts avoid any judgment on religious belief at all in these cases, and instead use established corporate law as a guideline. In fact, many of the religious liberty cases currently percolating their way through the courtrooms hinge directly on ideas about whether corporations can have, as corporations, a religious liberty or belief. These corporate cases are dependent on tax law, or some version of not-for-profit status, neither of which typically has anything to do with a functionally religious definition or academic categorization of behavior. The IRS and other administrative functions in local and federal governments are allowed to maintain their own separate criteria for determining whether a group is non-profit, and whether they are categorized as religious or not. The *Internal Revenue Manual* of the IRS has quite lengthy sections on charitable tax-exempt organizations in general and religious organizations specifically, in a way that relegates religion to a sub-category of charity. The Internal Revenue

Service relies on the court's holdings that religious individuals and organizations are not exempt from general laws that advance a compelling public interest, however they have provided statutory regulation exempting organizations that have the sole or primary cause of charity and public welfare from taxation. Then they have, again statutorily, defined an incorporation or organization with the primary cause of "advancing religious belief" to be a charitable contribution to public welfare.

Doubtless, some militant atheists would agree with this generous assessment of the purpose of religion. Regardless of that fact however, the IRS has both impinged upon and avoided the juridical problem of defining religion by regarding it as "merely" another type of public welfare or charity. The law, both statutorily and in the form of case law, certainly recognizes the perversion of religious organizations for the purpose of tax evasion. The IRS manual states several times that those organizations which "are operated for private benefit" do not qualify.[39]

While the classification schemes for tax law are interesting in the ways they place emphasis on some criteria over others, they are ultimately outside the scope of this particular paper. Here, it suffices to use them as an example of an interesting workaround that, until recent legal tactics have begun being explored, have allowed the government to avoid passing judgment on religion directly, and instead simply assess traditionally easier to understand property rights.

Another long-standing tactic of the American court system that I have already outlined is that of coupling the religious freedom at stake, with another constitutionally protected behavior, either one that is better understood or less controversial. Out of a selection of forty-

[39] I.R.C. § 7.25.3.6

two of the most often cited and influential Freedom of Expression cases, a full fifth of them were decided on the basis of arguments or grounds which revolved around the right to freedom of assembly, or the right to freedom of expression. The courts have frequently argued, most notably in a case such as *United States v Ballard*[40] that the court cannot, and should not, involve itself in attempting to identify the sincerity of depth of religious conviction as a determining factor. The reasons for this reluctance are sound, as long as it remains impossible for us to reach into someone's head and determine their inner emotional states, we can regulate only actions, not beliefs. This was in fact the direct holding of *Reynolds v United States*[41] in 1878. The Court, quoting writings of Thomas Jefferson, held that there was a distinction between religious belief and the actions which flow from it, and that the Courts can rule only on actions, not opinions. But if only actions and behaviors can be judged and regulated, we immediately run into a difficulty when discussing what scholars of religion call "lived" or "practiced" religion. It seems that a separation of belief from action that favors only the first with protections disadvantages those religions which have real, communal, and public requirements of either ritual or expression. The founders chose to distinguish freedom of speech from the practice of religion, but that doesn't seem to be a distinction that the US legal system has been able to adequately address.

As a way of trying to avoid this privileging of "neck up" religions which require little in the way of concrete actions, judgments providing protection have come to rest on a foundation of sufficiently robust laws that protect freedom of expression, freedom of assembly, or some other positive freedom of civic interaction that covers the particular ritual or public expression being invoked. Particularly in the latter half of the 20th century, with the interpretation of the

[40] *United States V Ballard*.
[41] *Reynolds V United States*.

court that religious belief was not protection from a law of neutral and general applicability[42], cases often come to be decided on other grounds than an actual claim to Free Exercise.

Lemon, Sherbert, and Religious Tests

Perhaps the most common way in which the courts have proven to avoid the question entirely is the series of tests meant to determine what is and is not an "acceptable" burden on religious practice. These tests have been created, refined, and replaced over the years in a variety of court cases that spread over behavior such as cemetery coverings, ritual animal sacrifice, and mandatory school prayers. They have been so fundamentally important to case law revolving around the First Amendment religious rights that they deserve an in-depth look at their development. One thing that all the proposed tests have in common though is simple: The courts take completely at face value the claims of a party that their behavior is religiously motivated. In other words, the courts are able to avoid the attempt to apply some definition of religion, and instead take it for granted that what the case deals with is, by the mere act of claiming it is so, a religious matter. The tests then are not so much an application of the definition, but instead side-step the question and ask: *Given* that the behavior being regulated or burdened is religious, *is* the burden or regulation being imposed of such importance that it remains permissible even if the right to religious freedom is infringed.

The proto-example of such a test occurred in the *Reynolds* case already discussed. The Court, fearing the anarchy that might result if religious beliefs were allowed to be positive defense for ignoring any laws a group wished, ruled that while the Court could not constitutionally legislate belief, it certainly had the authority to regulate action. The Court ruled that the outlawing of polygamy was a neutral law to safeguard the fabric of society, a law that

[42] *Employment Division, Department of Human Resources of Oregon V. Smith*, 494 U.S. 872(1990).

had been part of the cultural and common law tradition of Western civilization for some time, and thus it did not fit within the constitutional argument made. The Court essentially ruled that religion was no protection against a law of general applicability. For many decades this would remain the standard applied to cases, and though occasionally viewed as problematic for the seemingly wide-sweeping powers of infringement that it offered to the government, the bedrock principle is one that would later return to dominance in American law, and remains dominant even today.

In the early 1960's, the case of *Sherbert v Verner*[43] was brought before the Supreme Court involving a member of the Seventh-Day Adventist church, Adell Sherbert, who was fired for refusing to work on what she believed to be the Sabbath day in accordance with her church's teaching of Biblical commandments. Her claim to unemployment compensation, a category of claims that would historically provide numerous cases investigating religious questions, was denied by the state of South Carolina. The denial of her unemployment was, the plaintiff held, a substantial and significant burden on her ability to freely exercise her religion. At the time, her case was that the only option available to her in lieu of unemployment was to accept positions which required her to work on the Sabbath. Given this choice between financial destitution and adherence to her religious beliefs seemed to create a constitutionally unacceptable compulsion.

The Supreme Court found in Adell's favor and created what came to be called the *Sherbert* test for determining whether or not a government infringement on Free Exercise was unacceptably substantial. Writing for the majority, Justice Brennan argued what was at the time a dramatic victory for religious freedom, ". . . we held that the imposition of such a condition upon even a gratuitous benefit inevitably deterred or discouraged the exercise of First

[43] *Sherbert V Verrner*, 374 U.S. 398(1963).

Amendment rights . . ."[44] The text of the decision created a four point test: First, the person's claim must involve a sincere religious belief. Secondly, the government's action must place a substantial burden on the person's ability to act on that belief. If it has placed such a burden, the government must prove that it is acting on behalf of a compelling public interest, and finally that no other manner of pursuing that interest is possible which would be less restrictive on religion.

A related but different test was created in 1971 when the justices were forced to face a case involving the use of public funds to reimburse religious schools for teacher's salaries and textbooks in the case *Lemon v Kurtzman*.[45] This case essentially involved the other side of the religious freedom coin, addressing charges of the government establishing religion. In their decision the court sided for the plaintiff, along with delivering a three-prong test for future use in determining whether or not the government's action would be deemed unconstitutional under the Establishment Clause, failure on any one of the three prongs would render a law or policy in violation: The government's action must have a secular legislative purpose, the government's action must not have the primary effect of either advancing or inhibiting religion, and the government's action must not result in an "excessive government entanglement" with religion.

These tests, which would remain the established standard for law until late into the 1980's, share a few relevant key features. First, they both partially avoid the question of religious identity *per se*. In both tests the identity of beliefs as authentically religious is relegated to only one among many criteria for judging a legal dispute. As expected in most cases in which the tests are applied, the question of whether something is "really" religious or not is either not even addressed at all, is taken for granted, or is of only passing interest in the decision before

[44] Ibid.
[45] *Lemon V Kurtzman*, 403 U.S. 602(1971).

deciding the case on the grounds of one of the other criteria. Indeed, the explicit purpose of the tests is to provide guidelines not for whether something is genuinely an exercise or establishment of religious orthodoxy, but instead to provide criteria meant to determine whether or not the burden or support at question in the legal case is of a permissible nature or not. They also indicate the first of what will be many attempts on limiting the subjectivity and wide-ranging power of judicial interpretation by providing guidelines that more directly guide decisions. Unfortunately they provide mixed results, at best, in this effort. The phrase "excessive government entanglement" particularly proved for many years after to be a thorn in the side of legislators and judges alike.

Regression in Religious Freedom, and RFRA

In the landmark case *Employment Division v Smith* these tests were, though not formally overturned, largely ignored and overruled by the court's surprising return to what can be seen as a *Reynolds*-era criteria on determining infringement of religious freedom that many commentators and the general public felt vastly restricted religious liberty in the context of the United States. The Court, in a majority opinion delivered by Justice Scalia, for the first time in the history of these cases found against the believer and for the state and, also for the first time, explicitly tied protection of religious freedom to protection of other related constitutional rights. The Court found that when a law is "a neutral law of general applicability" that does not have regulating religious behavior as a specific and obvious goal, that religious beliefs *by themselves* offer no reasonable exemption from the law. Observing that in every other case of defending against such "neutral" laws, the courts had found in favor of believers who asserted a "hybrid" right – that is to say that the Court held former plaintiffs had succeeded in successfully arguing their protection because their particular religious expressions were also protected under

another generally recognized constitutional right. The Supreme Court urged the believers in this case to lobby their legislature, arguing that states did have the right to explicitly or specifically exempt religious activity from laws, but that the states could not be *required* to do so.

The public outcry against what was seen as a vast restriction on religious freedom lead to congressional efforts to rectify the situation legislatively in the passage of the Religious Freedom Restoration Act of 1993[46]. The Congressional Act reinstated the Sherbert test, and restored a standard of "strict scrutiny," which would require the government to affirmatively prove an important and compelling state interest before restricting or burdening the practice of religion. Unfortunately, the act itself failed to shed any definitional light on a legislative understanding of religion, the definitions section merely defining religion as follows: The term "religion" means the exercise of religion under the First Amendment of the Constitution. Clearly, no one had given Congress the old schoolyard advice that you cannot use a word to define its self. The law was later ruled unconstitutional when applied to the states, with the Court ruling that Congress had overstepped its authority in attempting to directly reverse judicial decisions, and so is applicable only at the federal level. However, it spawned a supplemental law in the Religious Land Use and Institutionalized persons act, as well as a host of copy-cat laws and legislative motions in other states.

An examination of those state-focused "copy-cat" laws is somewhat illuminating to the legislative application of the definition of religion. The ideas behind RFRA have proven to have wide-spread appeal, and as of 2005 there were twelve different states with direct RFRA analogues passed by their legislature. It is the case that the majority of these statutes simply refer to "freedom of religion" by pointing back to an assumed definition of "the exercise of

[46] "Religious Freedom Restoration Act of 1993," ed. United States Congress(1993).

religion under the First Amendment. However, some of them carve out specific definitions of religion in the state statute itself without referencing the constitution. For ease of comparison, direct quotations from the five state bills related to the RFRA movement which do provide explicit definitions of religion are quoted together:

Arizona: The ability to act or refusal to act in a manner substantially motivated by a religious belief, whether or not the exercise is compulsory or central to a larger system of religious belief. (A.R.S. § 41-1493 [2003])

Florida: An act or refusal to act that is substantially motivated by a religious belief, whether or not the religious exercise is compulsory or central to a larger system of religious belief. (Fla. Stat. § 761.01 [2002])

Illinois: An act or refusal to act that is substantially motivated by a religious belief, whether or not the religious exercise is compulsory or central to a larger system of religious belief. (775 ILCS 35/5 [2003])

New Mexico: An act or refusal to act that is substantially motivated by a religious belief. (N.M. Stat. Ann. § 28-22-1 [2003])

Texas: An act or refusal to act that is substantially motivated by sincere religious belief. In determining whether an act or refusal to act is substantially motivated by sincere religious belief under this chapter, it is not necessary to determine that the act or refusal to act is motivated by a central part or central requirement of the person's sincere religious belief. (Tex. Civ. Prac. & Rem. Code § 110.001 [2003])

Accompanied by the fact that the other state-sponsored RFRA acts which are not quoted here merely refer religion to the Constitution, what we have is a masterful display of circular reasoning. Judicially we have examined a variety of methods, whether deferring the question of religion to instead use corporate law in decision or creating a test to take “at face value” religious claims as genuine and merely decide whether the infringement is substantial, by which the courts have been able to avoid a strict or predictable application of a definition for religion. On the legislative side of the law we see that avoidance brought to its nadir as religion is defined as any behavior which is religiously motivated. This is hardly an illuminating revelation

and it continues to leave up to the present day a situation in which the definition of what will be considered religious behavior is given to individual judge's discretion with almost unprecedentedly wide latitude.

Nor is this failure to apply a definition merely an abstract problem of legal philosophy or religious musing. The courts are asked to navigate the rocky terrain of avoiding establishment of "official" religious criteria yet also protecting "religion" from persecution, along with the inability to set firm and definite boundaries has, past and present, contributed to a legal culture in which deciding whether or not behaviors are protected for individuals under the First Amendment is confusing and often contradictory. The courts have declared that atheism was a protected religious stance under the law[47] when many atheists would themselves reject that label and in at least one case have sued to prevent the government labeling their group as religious.[48] Various Federal District Courts have ruled that the school-sponsored performance of religious music, religious dramas, religious symbols, and religious poetry were not an establishment of religion in public schools during the holidays.[49] They have ruled in Florida that grave-side religious shrines were merely personal in nature due to a lack of religious authority explicitly promoting them as necessary, despite Florida's definition of religion not requiring expressions of religion to be central to a larger system of belief.[50] The 10th Circuit Court of Appeals, in an Affordable Health Care Act case, has ruled that the contraceptive mandate requiring employers to provide insurance which covers contraception is not an infringement of the religious liberty of business-owners[51], but the 7th Circuit Court of Appeals explicitly argued, in a nearly identical case less than one week later, that such coercion against religious beliefs is

[47] *Kaufman V Mccaughtry*.
[48] *Freedom from Religion Foundation, Inc. V. Us*,(2012).
[49] *Florey V. Sioux Falls School Dist. 49-5*, 619 F. 2d 1311(1980).
[50] *Warner V. City of Boca Raton*, 887 So. 2d 1023(2004).
[51] *Hobby Lobby Stores, Inc. V. Sebelius*, 870 F. Supp. 2d 1278(2012).

unconstitutional.[52] These cases have not yet risen to the level of the Supreme Court but seem bound to determine whether or not government regulations of corporations can put a "substantial burden" on the religious lives of the individuals who own them. All of these are very real cases which directly impact the lives of average Americans, and all show the often conflicted results that come about from the lack of legal clarity.

Many countries have avoided this problem by setting up a religion, or irreligion in the case of some avowedly secular states such as France, as the national standard. Though these countries might enjoy varying levels of religious freedom, the establishment of an officially privileged state stance on religion generally tends to provide a much clearer and more distinct set of guidelines by which judgments can be handed down, in effect acknowledging a privileging of certain points of view. This seems very problematic to the American mind, which is often generalized as being consumed with individual liberties. However it does at least provide a specific and definite framework from a point of straight-forward honesty, a self-awareness of bias in the system that is permitted to operate within certain boundaries considered tolerable, which also vary from country to country. Alternatively, it has been suggested by Dr. Winnifred Sullivan, author of *The Impossibility of Religious Freedom*, that religious freedom as an independent right is too conceptually incoherent to stand, and that religious groups should receive no special protections above and beyond whatever a country normally gives to its citizens in terms of freedom of association and freedom of expression.[53] This view on first glance seems quite controversial, but the Supreme Court appears to have implicitly agreed by the *Smith* decision which distinctly linked freedom of religion to having been historically protected in America as a "hybrid" right.

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[52] *Korte V. United States Department of Health and Human Services*,(2012).
[53] W.F. Sullivan, *The Impossibility of Religious Freedom*(Princeton University Press, 2011).

Whatever the answer is, what becomes clear, by even this all too brief survey into the way that the standard legal definitions of religion have been applied in major court cases in America, shows that the problem is quite a mess of conflicting opinion. One can see quite clearly the tension inherent in judicial decisions which must avoid defining something as religious in order to respect the Establishment clause, while simultaneously embracing and protecting expressions of religion with a constitutionally mandated privilege distinct and separate from other forms of expression. There seems to be no easy way to navigate through this maze at the present day. There have been more in-depth commentaries and studies of the conflicting opinions and twisting history of the legal religious landscape in America, and most of them share one thing in common, no one is quite satisfied with the status quo, but there seems to be few better alternatives.

Chapter 4:

Blind Spots in the Vision

Up to now I have attempted to show the tangled jungle of jurisprudential anomalies and contradictions that have occurred in the history of religion in the American courts. This is, in itself, not precisely news; there has been a staggering amount of literature written about the problem in law journals and books. The point that I would like to raise as an addition to the conversation is that there *is* a loose logic which seems to hold in the minds of the American judiciary on which behaviors are religious and thus protected. This is, as noted in the last chapter, not immediately obvious from an examination merely of the decisions themselves. The mere fact that the decision was found for or against the plaintiff is less helpful than if we study the logic of the questioning involved in a sampling of cases, and in this instance a pattern begins to emerge.

Religions tend to be protected in the American court system when they emphasize the importance of belief over practice, and emphasize a personal and relational orientation towards divinity which promotes a "private" religion over the idea of a binding and authoritative community which relies on the weight of lived tradition for its doctrine. In a move that seems paradoxical to that but makes sense on closer examination, religions are also more likely to be protected when they have definite hierarchal structures of ecclesiastical authority and a canon of authoritative textual tradition.

The examples of this bias away from "lived" religions are all too easy to come by. One has already been mentioned obliquely earlier, *Warner v City of Boca Raton*[54] in which plaintiffs argued that the city's enforcement of cemetery regulations infringed on their rights to free

[54] *Warner V City of Boca Raton*, 64 F.Supp.2d 1272(1999).

religious expression, namely the city's forced removal of various statuary, symbols, and what I believe could fairly be described as grave-side shrines for the dead. The court was the first Florida court to publish an opinion interpreting the state's RFRA act, and ruled that the law applied only to conduct that "reflects some tenet, practice or custom of a larger system of religious beliefs" and did not apply to "conduct that reflects a purely personal preference regarding religious exercise." The case was upheld on appeal.

On the face of it, this is obviously and directly opposed to Florida's RFRA statute which reads that protected acts are religious "whether or not the religious exercise is compulsory or central to a larger system of religious belief." The Florida court seems, in effect, to have ruled that the statute means precisely the opposite of what the words say. I have paid special attention to this case because it is the most recent that I have discovered and because the contradiction to the "plain text" of the law is so stark and the religious test so focused on the primacy of scriptural authority and consistent unchanged doctrine. However, the history of legal decisions in America is rife with similar examples of religious sects with communal religious traditions losing out when those religious traditions are founded in lived "folk" custom and tradition, rather than in ecclesiastical authority or textual source.

In an early case involving the loss of goods in a Boston port on what was by tradition a religious day of fasting and rest from labor, the courts ruled that the mere fact it was the city's custom did not make it either a religious or legal requirement.[55] A selective service case in 1953 ruled that classification as a minister, for purposes of the law, is not available to all members of a sect regardless of doctrine to the effect that all believers in the sect are ministers.[56] Yet, in a

[55] *Richardson V Goodard*, 64 U.S. 28(1859).
[56] *Dickinson V. United States*, 346 U.S. 389(1953).

1984 Eighth Circuit Court case from Nebraska, *Quaring v Harry Peterson*[57], the court ruled that the plaintiff's belief in a literal interpretation of the second commandment against making graven images qualified her for an exemption to driver's license photograph requirements, despite the woman professing membership in no particular denomination, and in fact being a member of a congregation which did not teach such a doctrine.

Perhaps most illustrative of the point I am trying to make, however, is the case of *Africa v The Commonwealth of Pennsylvania* (1981)[58] which warrants a brief sketching out of both the New Religious Movement involved, and the facts of the case itself. The MOVE Organization was a Philadelphia based New Religious Movement founded in the 1970's as a mostly black group who advocated a variety of radical green politics and beliefs, relating to a "back-to-nature" lifestyle, communal living, and opposition to modern systems of government and technological advance. The group was universally vegan, as well as large supporters of animal rights. They taught a health and environmentally centered message of interacting with animals, the Earth, and each other: A message that frequently focused on questions of air, water, and food purity. Members of the organization also adopted the surname "Africa" to show reverence to what they regarded as the source of their ancestry and beliefs. As a very politically active group, the organization experienced friction with their neighbors over frequent political demonstrations, their practice of urban composting and farming, and occasional clashes with the Philadelphia police.[59]

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[57] *Quaring V Harry Peterson, Director of the Department of Motor Vehicles, State of Nebraska*, 728 F.2d 1121(1984).

[58] *Africa V Com. Of Pa.*, 662 F.2d 1025(1981).

[59] For more on the MOVE organizations origins and conflicts see: *The MOVE Crisis in Philadelphia* by Hizkias Assefa or *Discourse and Destruction: The City of Philadelphia Versus Move* by Robin Wagner-Pacifici

Frank Africa, a member of the organization, had been convicted of several offenses and was sentenced to serve up to seven years in the state prison. During this time he had requested, in keeping with his beliefs, a special diet of uncooked vegetables and fruits. On the occasion that he was transferred to a different facility, he was informed that the new facility would no longer be willing to accommodate his desired dietary requests, and he filed a motion in federal district court alleging that by failing to provide him with his special diet the state prison system was substantially burdening the freedom of his religious expression without just cause, causing the district court to launch an inquiry into the case to determine, in part, whether the diet was in fact an expression of religion.

During the trial, Africa described the religion as having “no governing body or official hierarchy”, but instead being one where the members all considered themselves one family, indeed one “member” united. He described the church’s goals as being committed to a natural and active way of life that avoided the degenerating effects of current education and government systems in favor of returning to the “pure and original” forms of society and survival. He admitted under questioning that members participated in no distinct ceremonies or rituals, but considered every action to be completely infused with religious meaning and every day of life a sacred day.

> “We are practicing our religious beliefs all the time: when I run, when I put information out like I am doing now, when I eat, when I breathe. All of these things are in accordance to our religious belief.... We don't take a date out of the week to practice our religion and leave the other days and say that we are not going to practice our religion ... It is not a one-day thing or a once-a-week thing or a monthly thing. It doesn't have anything to do with time. Our religion is constant. It is as constant as breathing.... Every time a MOVE person opens their mouth, according to the way we believe, according to the way we do things, we are holding church.”

While this sort of language will be immediately familiar and resonant to any scholar of religion, the judges presiding over Mr. Africa's case did not see anything on which they felt they could hang their hat. The court record indicates that Africa "did not provide the district court with any purportedly official guidelines setting forth MOVE's religious credo." Accordingly, the judge ruled that MOVE was a "social philosophy" and not a religion. Constitutional protection was denied because the court found that MOVE had failed to establish itself as a religion but was "merely a quasi-back-to-nature social movement". This ruling was upheld on appeal, and Mr. Africa was denied his diet.

Neither the state nor the court, both in the original decision and in the appeal to the 3rd Circuit Court of Appeals, once questioned the sincerity in Mr. Africa's beliefs. On the contrary, the appeals court judge specifically admitted that he felt the convictions of group-members were deeply held and sincerely advanced. The judges even openly addressed a need and concern for avoiding any bias towards organized or traditional religions, and enumerated several of the very cases I addressed earlier in the last chapter, showing the judge's understanding that religion is a broad term that accompanies many non-theistic forms of belief and allows any belief which functions as ultimate concern to qualify.

Despite this, the court applied an analogy test that required three assessments to be made of the case. First, a religion should address fundamental and ultimate questions having to do with deep and imponderable matters. Second, a religion should be comprehensive in nature, a full system of beliefs and not isolated unconnected teachings. Third, a religion should be recognized by the presence of formal and external signs. They argued that the MOVE organization failed this analogical comparison to religion on all three fronts.

First that the concerns of the movement were largely "social" and "personal" dealing with matters of health, environmental policy, and governmental organization and not things that were spiritual, other-worldly, or of an existential matter. The court also argued that Africa's teachings were not comprehensive, that the organization consisted of a single governing idea based around purity in the environment but was unable to articulate ethical or behavioral prescriptions or stances on other issues. And finally, that MOVE lacked all formal identifying characteristics common to recognized religions. There were no special services, no official customs. There was no organizational structure, no holidays, no specific duties or separation of ministers from members, and, most tellingly, "the record contains nothing that arguably might pass for a MOVE scripture book or catechism."

A sizable excerpt of this case, given its centrality in demonstration to my point, is available in the Appendices. The point to be drawn out at present is this: If my earlier assertion that religion in American law is a case of "we know it when we see it" is true, then the judges clearly have blind spots in their vision. I have difficulty believing any fair and competent religious scholar could read the texts associated with this trial and not see religion. The judges involved in the case, agreed that there was room for reasonable and strong disagreement with their analogical findings. But the end result was the denial of constitutional protections to a man whose religion was unrecognizable as such to the legal system. It was too communal, too active, and placed too many stringent requirements on his behavior.

Religion Without Borders

In an America that has largely progressed down the road of an individualized religion of conscience and internal belief, a religious movement focused on the consuming totality of a religion, and the concomitant authority of its believers and ritual obligations over the individuals

life is simply hard to recognize, and when recognized, is often ostracized. The judges in Mr. Africa's case continued to press him for an external or formal sign of religion. They wanted to see some scripture, some feast day, some special ceremony or ritual that clearly delineated the sacred from the secular. They were unable to understand Africa's contention that, "while religion is seen as a way of life, our religion is simply *the* way of life, as our religion in fact *is* life."[60]

In this respect, the MOVE organization joins some august company in American history. Working backwards through time, Islam in modern times has come under suspicion for precisely these reasons, a variety of articles have been written in the press, and briefs filed in federal courts across the country as part of mosque-building controversies or lawsuits, alleging that Islam is not a religion, but rather a system of foreign law. These neo-conservatives allege that because Islam provides its believers with a total system of laws, punishment, social regulations, and even banking and finance regulations, that religion constitutes only "part" of Islam, but that the rest is a legal and governmental system which, in their minds, is opposed to American values. In a 2010 lawsuit in Rutherford County, seat of my own undergraduate alma mater Middle Tennessee State University, plaintiffs suing to stop construction of a mosque directly questioned at trial whether or not the United States Government could recognize Islam as a religion.[61] A speaker to the political group ACT! For America in 2011 delivered a speech in which she alleged, "One thing we can definitely say about Islam is that is it [sic] solely confined to a belief system. If it is a religion it is not a religion only. Islam is a total system of life and contains within itself a particular social system, judicial system, and political system. . . "[62] A host of

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[60] *Africa V Com. Of Pa.*
[61] *Estes, Et Al. V Rutherford County Regional Planning Commission*,(2010).
[62] Rebecca Bynum, "Why Islam Is Not a Religion," New English Review, http://www.newenglishreview.org/custpage.cfm/frm/100100/sec_id/100100.

authors such as Frank Gaffney, Robert Spencer, Laurie Cardoza-Moore, and others all stand ready with a deluge of books informing the American public that Islam is dangerous because it is not in fact a religion, but an all-encompassing way of life which demands obedience.

Another particularly strong example is Catholicism in the late 1800's and early 1900's. In recent decades Catholicism has risen in support, numbers, and assimilation into American culture. But as recently as the 1960's, John F. Kennedy was required to repeat, emphatically and frequently, his strong support for the separation of church and state from an electorate who presumed he would be required to take orders from the Pope, that the Church's long history of active and occasionally aggressive involvement in political and social issues indicated cause for suspicion in a Catholic candidate. As with Islam and the MOVE Organization, the "problem with Catholics" appears to have been that the religion was viewed to be not merely a private and internal matter of orthodox belief, but a system encompassing a totality of social and political issues demanding the authority of, along with loyalty to, the community over individualism. In the late 1800's Lyman Beecher's *A Plea for the West*[63] attacked the Catholic church as hostile and foreign to republican and democratic values. Catholics, he argues, need to be held accountable for "the political bearings" of their creed and the fact that they set up religion whose rights and obligations extend "as far as possible . . . and ought to be as a matter of duty enforced by the civil power." Again, the complaint lodged over and over again in numerous pamphlets was that Catholicism is not merely another denomination of worship among the American milieu, it is not a religion which restricts itself to the interpretation and primacy of the individual. Instead Catholicism was viewed as a religion which demands awareness and extension of the religious to every aspect of life.

[63] Beecher, *A Plea for the West*.

The pattern holds in the cases of the Church of Latter-Day Saints, as well as with the denomination known as Jehovah's Witnesses, which feature in freedom of religion cases so frequently during the early history of the United States that one can fairly say these two sects of Christianity formed the first experiment of religious liberty in this country—the first test cases which laid the pattern for all religious freedom in the United States would follow. It is a pattern which yields spotty results at best.

The Mormon cases such as *Reynolds v. United States*[64] and *Davis v. Beason*[65] gave us our first legal definitions of religion in America, but it is important to note the Mormons lost these cases and others like them on the basis that their religious belief in polygamy "offended the common sense of mankind" and was "a return to barbarism." The infamous Missouri Executive Order Forty-four, which was levied against the Mormon church and used as pretext to drive them out of the state of Missouri on pain of death, was the result of suspicion and hostility due to the Mormon's tendencies to vote in blocs, support abolitionism, and to dominate local economies because of the efficiency and resources available to them acting as a communal economic unit. The religion was, and is still today in some circles, viewed as a cult and not a proper branch of Christianity, because of its very strict requirements of submission and loyalty to the community, the external political, financial, and social obligations of the believers, and finally because of its expansion away from matters "solely religious" and into political, economic, and legal arenas.

The cases of the Jehovah's Witnesses are not too different, with virtually every single one of the 72 cases serving as a foundational guideline for later Supreme Court decisions all throughout American history. But we must keep in mind that a full third of those cases were

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[64] *Reynolds V United States*.
[65] *Davis V Beason*.

decided against the denomination, in ways that show the ambivalence of the courts towards a religion possessed of strict political views and requiring robust and active public commitments. The Witness's refusal to salute the flag, holding to their doctrine that to do so was idolatry, was cause for persecution and hostility on more than one occasion, culminating in a decision in favor of a Pennsylvania school district where the Supreme Court held that the school was within its rights to compel students to salute the flag regardless of religious beliefs.[66] Though later overturned by *West Virginia State Board of Education v Barnette,*[67] the decision and then its reversal only two years later both serve as example of uneasiness with which the court views religions which emphasize a communal loyalty and strict requirements on public behavior.

The above examples are by no means exhaustive and only scratch the surface of religious persecution in America, a subject about which many books have been written. A scholar could research the trajectory of any one of these religions in America for years, but the examples I have chosen are illustrative of my main point. Americans, and by extension the American Courts, generally prefer religions that have distinct borders. The courts find religions comfortable and recognizable which have distinct separations between the sacred and profane, religions which have explicit and recognizable sources of authority (ecclesiastical or textual, preferably both) that remain more or less static over time, and religions which embrace the supremacy of private internal belief over external commitments which spill into public action. Religion without borders, religion in which authority is derived from a shared and lived communal tradition that remains fluid over time, remains suspect. This provides a compelling and intuitive explanation for how American courts may rule in the *Quaring*[68] case, that a woman is constitutionally protected in her refusal to pose for driver's license photos because of the

[66] *Minersville School District V Gobitis*, 310 U.S. 586(1940).
[67] *West Virgina State Board of Education V. Barnette*, 319 U.S. 624(1943).
[68] *Quaring V Harry Peterson, Director of the Department of Motor Vehicles, State of Nebraska*.

Exodus commandment to make no graven image, while a Florida Court rules and upholds on appeal that Sultaana Freeman, a Muslim homemaker, may have her license suspended for refusing to photograph without her face veil.[69] One has a distinct and long-recognized textual commandment on her side. The other has only the shared communal tradition of those who choose to wear the *niqab*, a veil whose status in Islam is unclear for many and only considered to be a necessity by a minority.

This continual appeal to an ecclesiastical or textual legitimating structure makes a great deal of sense from the standpoint of the legal mind. The murky and uncertain legal definition of religion means that a judge may be asked to determine whether behavior is religious or "merely personal preference" with very few guidelines. Legal professionals are taught rather strictly that their decisions should avoid being arbitrary as much as possible. A clear and recognized ecclesiastical hierarchy , or the black and white written text of a holy scripture, provide external sources of authority which allows the judicial professional to feel more grounded in their judgment. If the judgment is called into question, the judge is able to point to an external sign of validity and demonstrate a line of reasoning based on "widely-accepted" standards. Appeal to priestly authority or textual tradition also allows for a greater degree of reproducibility and stability over time. Interpretations of scriptures along with the legitimation and scope of ecclesiastical authority can, and have, changed dramatically over time in most of the world's religions. But change in these areas on the whole tends to be slower and/or easier to trace the history and process of change in a way that makes it more likely to be stable and predictive in future cases in a way that purely tradition-oriented beliefs typically are not.

[69] *Sultaana Lakiana Myke Freeman V Department of Highway Safety and Motor Vehicles*,(2006).

To return to the example of our competing legal cases revolving around driver's license photos it is very likely that in fifty years, outside of a staggering paradigm shift in Christianity, Exodus will still command us not to make graven images. The fate of the *niqab*, the Islamic face-veil which reveals only the eyes, is less certain. Its popularity has waxed and waned over Islamic history, its mandatory status is debated and largely based off appeal to lived tradition, and it is not unreasonable, though it is unlikely, to imagine scenarios in which fifty or one hundred years in the future it will have virtually disappeared. Granted that Quaring's plaintiff is certainly in an extreme minority view in believing that photographs constitute "graven images" for the purpose of Exodus, and that the interpretation of the plain text of the Bible can change, it appears to the religiously untrained legal professional to be a much more stable and reliable criteria for determining the belief is in fact part of her religion, and one that provides a distinct source for that criteria, which at least appears to exist external to the judge's own opinion, in a way that becoming the interpreter and keeper of lived tradition does not.

Impossible Tensions

The supposed *externality* of these sources to the judicial system is a key factor, not just a preference of the judicial system, and it does more than provide cover against questioning for judicial decisions. In fact the externality is everything, a vital part of our current constitutional law. The First Amendment does not *only* guarantee the freedom of religious expression, it also safeguards against the establishment of state religion. This creates a tension between the two clauses, leaving judges pulled in two opposite directions. The logic is stunningly simple when stated out loud: In order to grant religious expression special privileges, we must define what behavioral expressions are religious set against expressions that are not. But for the judicial system to rule unilaterally that some behaviors are recognized as religious and some behaviors

are not, is no less than the establishment of state religion. Defining the borders of religion and not acknowledging the fringe cases of religion that would be left out is the very definition of an official state religion.

When put forward in that formulation, we can see that the American judicial system is left with a rather impossible linguistic task. They are constitutionally obliged to protect religious expression but are equally obligated to avoid saying just what religious expression *is*. The Free Exercise clause provides an ideal of special protections and privileges due to religious behavior above and beyond other behaviors, even to the point of being partially exempt from other laws. But that kind of special benefit has two problems from the constitutional standpoint: The first problem is that it privileges religious belief over irreligion. The second is that it opens the door for some religions to receive special treatment as other religions fail to be recognized by the courts.

This fact has led some to call the First Amendment clauses on religion to be "theoretically incoherent"[70]; one simply cannot faithfully adhere to both of the religion causes at the same time. The courts themselves are explicitly aware of this problem, as it has come up in mention from time to time in various Supreme Court cases. The most explicit of which is *Thomas v. Review Board* in 1981, one of the many unemployment cases to bear fruit in the religious freedom arena. Thomas, who had been fired for refusing to work on manufacturing weapons of war, was awarded his benefits on appeal. But in the dissent Justice Rehnquist mused:

> The Court correctly acknowledges that there is a "tension" between the Free Exercise and Establishment Clauses of the First Amendment of the United States Constitution. Although the relationship of the two Clauses has been the subject of much commentary, the "tension" is of

[70] Sullivan, *The Impossibility of Religious Freedom*.

fairly recent vintage, unknown at the time of the framing and adoption of the First Amendment.[71]

Justice Rehnquist's dissent is instructive, and thus included in the Appendix, but here serves mainly to illustrate that the courts are explicitly aware of the impossibility of their position in a way that serves to explain much of the long and uneven history of decisions in Free Exercise cases. Being pulled in two directions, the courts sometimes fall closer to one side of the issue and sometimes to the other. That sort of uneven and ultimately unpredictable behavior is hardly desirable in a system of law, and has led secularists and legal scholars, such as Dr. Sullivan, alike to openly wonder if it might not be time to do away with the issue entirely.

Again, the logic is very simple and straight-forward. In modern times, almost any sense of the word "justice" seems to require a component of fairness and equity. The current model of justice in our system is a justice which is largely procedural and formal in nature, the system is considered just if every person, given identical circumstances, is treated the same way. If a specific characteristic is deserving of special protection, then all groups which share that characteristic should receive the benefits.

If the situation is that some groups receive the benefits while other groups do not, and there is no mitigating other circumstance justifying the decision, then the system is behaving in an unjust manner. In the case of special protections for religion, the history of case law in America seems to indicate that it is *impossible* to equally provide protection to all religious beliefs and behaviors. Some religions or behaviors will always necessarily be excluded. Therefore, the only just way to handle them is for *none* of them to receive special protections or

[71] *Thomas V. Review Board of the Indiana Employment Security Division*.

benefits. This would be a "just" outcome; all members of all groups would be treated equally with respect to the law.

This is the direction that Scalia took the courts back to with the *Smith* Oregon unemployment peyote case, ruling that religious expression could not be an adequate defense against a "neutral law of general applicability."[72] Explicitly connecting the protection of religious expression to other rights such as freedom of association and freedom of speech, Scalia is essentially making this argument. The logic appears to be that any kind of religious behavior we would think of as deserving protection can be adequately protected under another constitutional right which does not have this inherent contradiction within it. Perhaps a robust enough freedom of speech would adequately cover religions. Taken to the ultimate conclusion, this paradigm would result in a world where all religions, and the irreligious, are treated equally under the law, receiving no special dispensations. Religions would have to compete in the "open marketplace of ideas" with the same tools and platforms as any other citizen's ethical or philosophical beliefs.

Another possible alternative would go the opposite way and provide for the establishment of an official state religion, the way that many European or South American countries recognize forms of either Protestantism or Catholicism as receiving special privileges and the only governmentally supported religion. The country could even take a milder and less controversial move such as establishing official and explicit definition of features that will be considered religious. As I have previously mentioned and noted, the IRS already keeps such an explicit definition of religion which serves most of their purposes under tax law. This "checklist" approach would simply collect all the features that the government would decide makes a

[72] *Employment Division, Department of Human Resources of Oregon V. Smith*.

behavior or group “religious” and allow one to go down the bullet points: If you can check off all, or most, of the boxes, then your group will be recognized as religious under the umbrella of constitutional law. This would obviously necessitate the exclusion of many groups which might feel very deeply and strongly about the religious or “ultimate” nature of their beliefs but fail to match whatever elements are included on the checklist.

This may seem at first, to a mind raised with the rhetoric of religious freedom, to be rather unjust, but we must remember the current model of justice in use by our court systems does not revolve around treating all people equally. More narrowly, it revolves around treating all members of a certain category, so far as they match the traits of that category, the same. The difference is subtle but important. If all Protestant Evangelicals received special treatment and all other religions did not that could be considered a just application of the law, provided that the laws were in fact written as such. What matters generally in a legal sense is not creating equality *between* groups, though there are elements of our legislative culture that has made this a legal concern in some areas, but to make sure that whatever relationships exist are *consistently* upheld. Justice in the broader sense of the word very well may include concepts such as the equalizing of treatment between groups so they are all held on the same level. But justice in the legal sense relates more directly, albeit not exclusively, to consistent application of the law and statutes. This is why we hear the oft-repeated phrase that judges should not “legislate from the bench”. Our model of jurisprudence requires that judges confine themselves to the law and constitution as it exists, not as it “should” be.

So, we could create a situation in which one religion is preferred for special treatment above all others as a matter of official policy, or we could create a situation in which there is a strict delineating list of features which are recognized as religious and anything which doesn’t fit

the template is rejected as not being "true" religion. Either one of these, while clearly being a less inclusive model, would potentially be quite a bit more "fair" than our current situation attempting to balance the Free Exercise and Disestablishment Clauses of the First Amendment. I have actually spent quite a bit of time in the previous section forming the argument that this situation, of some types of religion being clearly privileged above others, is more or less the current state of religious freedom in America. If such privilege already exists then one could make the argument that formalizing it as a matter of law with better boundaries and definitions would at least make legal judgments more predictable and religious groups more certain in their footing. The ambivalent and often contradictory nature of legal judgments creating a morass of conflicting opinions would be able to be done away with, and the average grouping of religious practitioners would be able to understand their rights and privileges quickly and with certainty.

What Is The Constitution For?

Neither of those solutions seems wholly satisfactory. The rhetoric around and presumed steady march towards greater and greater religious freedom is something that we as a culture have long prided ourselves on. The Bill of Rights in general, and the First Amendment in particular, are foundations of American history that as Americans we proudly uphold to the rest of the world as an example. As I alluded to earlier, there is something about dissolving the theoretical tension in these ways that seems to offend a perceived innate sense of justice in the broader sense. I was discussing with someone the move by Scalia's court to explicate the linking of religious freedom to freedom of speech or other constitutionally protected rights when I was asked a question, "Then why did the founding fathers separate the two?" It seems to me that this question strikes to the very heart of the tension in the religion clauses of the First Amendment, a tension that from our current standpoint seems unsolvable.

I argue that it may be this very unattainability, the status of the First Amendment religious freedom protections as an ideal rather than a reality, which brings meaning and justification to the imperfect attempts to match it. The Bill of Rights has been called the "high temple" of the constitution, an explicit comparison to religion which indicates the centrality and importance of the document to our very identity as Americans.[73] I believe this religious language can be rightfully used to go quite a bit further than merely a linguistic indicator of importance. The nature of constitutional law, and the explicit purposes of the document itself, both lend themselves to immediate comparisons with religious tradition, both in the function they serve and the way they are approached.

Judges and lawyers address Constitutional Law from a position somewhere on a spectrum between two well-established positions, those who are "Originalists" and those who believe in the constitution as a dynamic "Living Document". These two extreme positions on a spectrum will be immediately and intimately familiar to the religious scholar, as they closely mirror scriptural literalism/fundamentalism and progressive ideas of a living evolving scripture. Many of the foundational disagreements on legal issues come from authors or judges who fall on different sides of this spectrum, and it is important to understand for the resolution of our definitional problem.

Originalism rests on the idea that the Constitution must be interpreted according to the viewpoints and purposes that the authors themselves held at the time. All Originalists believe that the text and structure of the Constitution, and the knowable intentions of those who drafted the clauses, should reign supreme in interpreting and applying the law. Those who subscribe to this belief hold that Originalism preserves our government and culture against

[73] A.R. Amar, *The Bill of Rights: Creation and Reconstruction*(Yale University Press, 2008).

courts that might otherwise seize power to change the law as they see fit. They believe that Originalism preserves the authority and unity of the government and better respects the idea of the Constitution as unshakable bedrock, a foundation of law which is binding in perpetuity. The most extreme Originalists are sometimes called textualists. They hold that the plain “black and white” language of the text in its ordinary and most obvious meaning should govern the application and interpretation of the law, without regard for outside sources.

The opponents of Originalism, in a view sometimes called the "The Living Constitution" theory of interpretation, believe in a responsive and dynamic interpretation of the Constitution. They argue that no written document, and certainly not one written 200 years ago, can anticipate the evolution and changes that a country might face. As philosophy, social policy, and technology develop, new issues spring up practically every day that have no referent in the Constitution’s text. In order to meet the demands of society, judges must pay attention to the principles, the “animating spirit” of the Constitution. In giving decisions a judge who subscribes to this philosophy may refer to the social, economic, or ethical consequences of certain interpretations and explicitly choose to interpret or “refine” the law in a way that seems to promote the greater overall good, even if it overturns previously established legal thought. It is not the text of the document, nor even the intent of the writers, that matters as much as the basic moral principles of the Constitution.

These are obviously very brief sketches of legal positions which can be complex and contested. It also bears repeating that the divide between them is a sliding scale, and that a judge or author may fall in many different places on the spectrum in between the two, but it is still a difference of interpretation that has had drastic effects on the issue of religious freedom in America over our history. The original text of the First Amendment of course reads

"*Congress* shall make no law", and as mentioned previously there were state established religious institutions until surprisingly late into the 19th century. It was only after the passage of the 14th Amendment that judicial and cultural theory turned to the idea that the amendments in the Bill of Rights were ideals meant to apply to all citizens, regardless of their state of residence.

I believe that Judge Rehnquist is correct; the tension being faced in the First Amendment's religious clauses did not seem to exist to the Founding Fathers. Thomas Jefferson, Benjamin Franklin, and many other luminaries of early American history were, whatever else one might think of their legacy, certainly intelligent and insightful individuals with very keen minds. Did they simply miss the inherent contradiction of their amendment? Were they products of their time, unable to see what seems so obvious and clear to us after 200 years of further development in religious and philosophical thought? Or, as Judge Rehnquist asserts, has the world simply changed so much? Undoubtedly the nature of the federal government, the scope of tasks which people expect the state and federal governments to handle, and the economic and pluralistic realities of American culture have all changed a great deal in the intervening time.

Giving the benefit of the doubt, the question I alluded to earlier returns. The framers of the Bill of Rights thought it proper and important to honor and protect both freedom of religion expression and guard against establishing religion as a matter of law. They also did so in a way that makes it clear they believed this right to be distinct and separate from the other rights enumerated such as speech or assembly. Why?

In the book *Faith and Order,* Harold Berman points out, rightly I think, that religion and the law share many features. Both of them contain elements of ritual, of transcendent authority, of tradition, and of universality. He argues quite forcefully that the law and justice

system only have a real and lasting effect on us when we feel that it is, in some sense, a model of something greater than itself: That the law is most powerful and respected when it is followed not out of simple fear of punishment or the pragmatic weighing of risk and reward, but when it imbues us with a sense of its *sacredness*.

> "Law itself, in all societies, encourages the belief in its own sanctity. It puts forward its claim to obedience in ways that appeal not only to the material, impersonal, finite, rational interests of the people who are asked to observe it but also to their faith in a truth, a justice, that transcends social utility. . . ."[74]

This idea, drawn from the continued evolution of natural law theory, provides an excellent and compelling answer to our question about the purpose of the First Amendment's religion clauses. More importantly, it provides an explanation for why the seeming incoherence and contradiction of the two clauses in a way that helps to explain why the proposed solution of eliminating either side of the tension does not feel satisfactory to the average American. Perhaps we should view the Bill of Rights not as simple legislation on the same level as high-way speed limits or seatbelt regulations, but instead as a symbol, or ideal. If the Constitution set up what the form of government *would* be, then Thomas Jefferson makes it clear in his writings, most specifically in his letters to James Madison, that a Bill of Rights is needed to enshrine for the people what a government *should* be. Justice William J. Brennan Jr, one of the most influential members of the Supreme Court in American history, once supported this philosophy when he mused, "The Framers of the Bill of Rights did not purport to 'create' rights. Rather, they designed the Bill of Rights to prohibit our Government from infringing rights and liberties presumed to be existing."[75]

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[74] H.J. Berman, *Faith and Order: The Reconciliation of Law and Religion*(William B. Eerdmans Publishing Company, 1993).
[75] *United States V Verdugo-Urquidez*, 494 U.S. 259(1990).

If this is the case, the unattainability of the clause's ideals is not a *problem*, but may actually be entirely the point if we take the position that the Bill of Rights is an aspirational document as well as a legislative one. The power of an ideal is often in the very fact of its transcendence. Abstract models of ideals such as nobility, freedom, justice, and other higher order concepts are held cherished not out of real expectation that we may ever perfectly embody them. Instead they are clung to because they show us where we fall short. They provide an aspiration and goal which is believed to give purpose and meaning. When the Christian says that they must become like Christ, or the Muslim holds up the Prophet Muhammad as an image of the ideal man, very few of them would ever admit to a belief that they will be able to exceed or even match their chosen prophet. Instead, we are taught to believe it is the *struggle* that counts.

Conclusion

It seems in the contemporary context that the place of religion in civic and political life is an issue of paramount importance. The believed death of the religious impulse in a rise of secularism that scholars predicted would take place has so far not happened and the religious impulse seems to hang tenaciously to life. There has always been a cultural impulse to label some religions as more or less "American" than others, to believe that some are more deserving of protection under the Constitution. But in a rise of ultra-conservative politics, prejudice against Islam, and the rhetoric and conflict between believers and the New Atheist movement, there has been a sharp increase in public calls to push national policy and cultural acceptance based on religious standards. To any student of religious history in America or the world, this is a troubling sign in a nation that has been rocked by violent conflict, and the hate crime statistics against homosexuals, Sikhs, Muslims, and other groups are disturbing indicators.

The American justice system, through the First Amendment of the Bill of Rights, safeguards religious freedom in America. As far as the law, justice system, and government are concerned, the Supreme Court is the ultimate arbiter over what does and does not count as "real" religion in America, and which religious expressions receive special protections or not. For this reason, they should rightfully be the focus of any exploration into the legal and governmental policy towards religions in America. But examination of the case history and judicial philosophy reveals a pattern of contradictory and unpredictable judgments. The courts have run into the well-known definitional problem of religious studies, and so far failed to meet it adequately. The "functional" definition of religion the courts rely on is based off the work of Paul Tillich, has held for decades but provides for such wide-ranging judicial discretion as to have almost zero predictive power.

The religions towards which the system tends to be biased are those which either privilege individual personal belief over the necessity for public acts, rely on scriptural and ecclesiastical authority over communal lived tradition, or both. There is an inherent tension between the two clauses of the First Amendment that makes it difficult for there to be otherwise. Judges are uncomfortable defining what is and is not real religion, because to do so would be to establish official state religion. But by failing to come up with hard boundaries to the definition of religious behavior, judges necessarily must seek out external sources of authority which will define the boundaries of a religious field for them.

It may be that the best resolution to this tension, though it is not a resolution in the traditional sense, is to lean on the natural law understanding of the legal system as a symbol, imbued with the transcendent qualities of a religion. This appears to be the case of the First Amendment religion clauses, as they relate the religious impulse to the American legal system.

It is widely, almost universally acknowledged that the murky and indefinite state of affairs regarding the legal status of religion and the protection of religious behaviors in America is imperfect and unsatisfactory. As of yet, no one has proposed an alternative solution that seems more satisfying to any wide number of legal or religious thinkers. There is a deeply enculturated feeling that religious freedom is important, in an ultimate sense of the word, and that though we may protect it imperfectly, protect it we must. Ideally, as our culture and legal system continues to evolve and change over the years through turns and returns in thought, we more closely approach the ideal. More work has to be done in finding practical solutions to the matter of legal *practice* on the issue however the tension itself should not be destroyed, but embraced.

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Appendix A: Excerpts of "Definitional" Court Cases

Davis v Beason (1890) Decision:

Davis v Beason was a landmark early court decision which defined religion in the eyes of the law for the American judicial system. A member of the Church of Jesus Christ of Latter-Day Saints was charged with perjury and false oaths after voting in the 1888 election. At the time, voting in the territories required one take an oath that swore, in part, that the oath-taker was not a member of any sect or group which practiced polygamy. Samuel D. Davis protested his conviction claiming that being required to take the oath in order to vote violated his right to free exercise of his religion. Justice Field delivered the majority opinion of the court. The following excerpt is from the opening of that opinion and is part of an argument meant to establish that the lower court did in fact have proper jurisdiction of the case.

Excerpt: Nor can we inquire whether the evidence established the fact alleged, that the defendant was a member of an order or organization known as the "Mormon Church," called the "Church of Jesus Christ of Latter-Day Saints," or the fact that the order of organization taught and counseled its members and devotees to commit the crimes of bigamy and polygamy, as duties arising from membership therein. On this hearing, we can only consider whether, these allegations being taken as true, an offense was committed of which the territorial court had jurisdiction to try the defendant. And on this point there can be no serious discussion or difference of opinion. Bigamy and polygamy are crimes by the laws of all civilized and Christian countries. They are crimes by the laws of the United States, and they are crimes by the laws of Idaho. They tend to destroy the purity of the marriage relation, to disturb the peace of families, to degrade woman, and to debase man. Few crimes are more pernicious to the best interests of society, and receive more general or more deserved punishment. To extend exemption from

punishment for such crimes would be to shock the moral judgment of the community. To call their advocacy a tenet of religion is to offend the common sense of mankind. If they are crimes, then to teach, advise, and counsel their practice is to aid in their commission, and such teaching and counseling are themselves criminal, and proper subjects of punishment as aiding and abetting crime are in all other cases.

The term "religion" has reference to one's views of his relations to his Creator, and to the obligations they impose of reverence for his being and character, and of obedience to his will. It is often confounded with the *cultus* or form of worship of a particular sect, but is distinguishable from the latter. The First Amendment to the Constitution, in declaring that Congress shall make no law respecting the establishment of religion or forbidding the free exercise thereof, was intended to allow everyone under the jurisdiction of the United States to entertain such notions respecting his relations to his Maker and the duties they impose as may be approved by his judgment and conscience, and to exhibit his sentiments in such form of worship as he may think proper, not injurious to the equal rights of others, and to prohibit legislation for the support of any religious tenets, or the modes of worship of any sect. The oppressive measures adopted, and the cruelties and punishments inflicted, by the governments of Europe for many ages to compel parties to conform, in their religious beliefs and modes of worship, to the views of the most numerous sect, and the folly of attempting in that way to control the mental operations of persons and enforce an outward conformity to a prescribed standard led to the adoption of the amendment in question. It was never intended or supposed that the amendment could be invoked as a protection against legislation for the punishment of acts inimical to the peace, good order, and morals of society. With man's relations to his Maker and the obligations he may think they impose and the manner in which an expression shall be made by him of his belief on those subjects no interference can be permitted, provided always

the laws of society, designed to secure its peace and prosperity, and the morals of its people, are not interfered with. However free the exercise of religion may be, it must be subordinate to the criminal laws of the country, passed with reference to actions regarded by general consent as properly the subjects of punitive legislation. There have been sects which denied as a part of their religious tenets that there should be any marriage tie, and advocated promiscuous intercourse of the sexes, as prompted by the passions of its members. And history discloses the fact that the necessity of human sacrifices, on special occasions, has been a tenet of many sects. Should a sect of either of these kinds ever find its way into this country, swift punishment would follow the carrying into effect of its doctrines, and no heed would be given to the pretense that, as religious beliefs, their supporters could be protected in their exercise by the Constitution of the United States. Probably never before in the history of this country has it been seriously contended that the whole punitive power of the government for acts, recognized by the general consent of the Christian world in modern times as proper matters for prohibitory legislation, must be suspended in order that the tenets of a religious sect encouraging crime may be carried out without hindrance.

United States v Kauten (1943) Decision:

Like the early Mormon cases before them, the World Wars and accompanying drafts were a well-spring of judicial decisions related to religious freedom. In this case, a man was convicted of failing to appear for induction into the United States Army after he was chosen in the draft. He protested his arrest and conviction on the grounds that he should be considered exempt from the draft and granted conscientious objector status. He had in fact applied for such a status previously, but the draft review board found that his opposition to military service was

not based on “religious training and belief” but was merely personal political or social philosophy. The majority opinion of the court was delivered by Circuit Judge Augustus Hand, and Mr. Kauten’s conviction was upheld on technical grounds. In the excerpt below, the judge waxes philosophically about the nature of the religious impulse and he reasons that because Mr. Kauten was only opposed to this war, and not all wars, the conscientious objection seems to be more properly a matter of attitude towards policy, not religion.

Excerpt: Though the registrant may have been entirely sincere in the ideas he expressed, his objections to reporting for induction were based on philosophical and political considerations applicable to this war rather than on "religious training and belief." They, therefore, were properly overruled, but not because he lacked membership of any sect or organization whose religious convictions were against war. Such a status was necessary to obtain exemption under the Act of 1917, but the provisions of the present statute are more generous for they take into account the characteristics of a skeptical generation and make the existence of a conscientious scruple against war in any form, rather than allegiance to a definite religious group or creed, the basis of exemption. We are not convinced by anything in the record that the registrant did not report for induction because of a compelling voice of conscience, which we should regard as a religious impulse, but his declarations and reasoning seem to indicate that he was moved by convictions, however sincere, of quite a different character.

In the early days of the draft, many thousands of the American people distrusted our foreign policy. If men holding such views had been ipso facto classed as conscientious objectors, the military effort might well have been seriously hampered. In granting such exemption, we think Congress intended to satisfy the consciences of the very limited class we have described

and not to give exemption to the great number of persons who might object to a particular war on philosophical or political grounds.

It is unnecessary to attempt a definition of religion; the content of the term is found in the history of the human race and is incapable of compression into a few words. Religious belief arises from a sense of the inadequacy of reason as a means of relating the individual to his fellow-men and to his universe — a sense common to men in the most primitive and in the most highly civilized societies. It accepts the aid of logic but refuses to be limited by it. It is a belief finding expression in a conscience which categorically requires the believer to disregard elementary self-interest and to accept martyrdom in preference to transgressing its tenets. A religious obligation forbade Socrates, even in order to escape condemnation, to entreat his judges to acquit him, because he believed that it was their sworn duty to decide questions without favor to anyone and only according to law. Such an obligation impelled Martin Luther to nail his theses on the door of the church at Wittenberg and, when he was summoned before Emperor Charles and the Diet at Worms, steadfastly to hold his ground and to utter the often quoted words: "I neither can nor will recant anything, since it is neither right nor safe to act against conscience. Here I stand. I cannot do other. God help me. Amen." Recognition of this obligation moved the Greek poet Menander to write almost twenty-four hundred years ago: "Conscience is a God to all mortals"; impelled Socrates to obey the voice of his "Daimon" and led Wordsworth to characterize "Duty" as the "Stern Daughter of the Voice of God."

There is a distinction between a course of reasoning resulting in a conviction that a particular war is inexpedient or disastrous and a conscientious objection to participation in any war under any circumstances. The latter, and not the former, may be the basis of exemption under the Act. The former is usually a political objection, while the latter, we think, may justly be

regarded as a response of the individual to an inward mentor, call it conscience or God, that is for many persons at the present time the equivalent of what has always been thought a religious impulse.

United States v Seeger (1965) Decision:

Actually three cases combined into one, the *Seeger* case also concerned the military draft. The cases were loosely related on the basis that each defendant sought conscientious objection status on religious grounds, without belonging to any specific recognizable denomination or religious sect. A landmark case whose definition of religion largely continues to the modern day, in the opinion delivered by Justice Clark ruled that religion must be properly interpreted broadly to include non-theistic concepts and spirituality. The chosen excerpt is directly from the opening. Indeed, it is the very beginning of the text.

Excerpt: These cases involve claims of conscientious objectors under § 6(j) of the Universal Military Training and Service Act, 50 U.S.C.App. § 456(j) (1958 ed.), which exempts from combatant training and service in the armed forces of the United States those persons who, by reason of their religious training and belief, are conscientiously opposed to participation in war in any form. The cases were consolidated for argument, and we consider them together although each involves different facts and circumstances. The parties raise the basic question of the constitutionality of the section which defines the term "religious training and belief," as used in the Act, as "an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but [not including] essentially political, sociological, or philosophical views or a merely personal moral code."

The constitutional attack is launched under the First Amendment's Establishment and Free Exercise Clauses and is twofold: (1) the section does not exempt nonreligious conscientious objectors; and (2) it discriminates between different forms of religious expression in violation of the Due Process Clause of the Fifth Amendment. Jakobson (No. 51) and Peter (No. 29) also claim that their beliefs come within the meaning of the section. Jakobson claims that he meets the standards of § 6(j) because his opposition to war is based on belief in a Supreme Reality, and is therefore an obligation superior to one resulting from man's relationship to his fellow man. Peter contends that his opposition to war derives from his acceptance of the existence of a universal power beyond that of man, and that this acceptance, in fact, constitutes belief in a Supreme Being, qualifying him for exemption. We granted certiorari in each of the cases because of their importance in the administration of the Act. 377 U.S. 922.

We have concluded that Congress, in using the expression "Supreme Being," rather than the designation "God," was merely clarifying the meaning of religious training and belief so as to embrace all religions and to exclude essentially political, sociological, or philosophical views. We believe that, under this construction, the test of belief "in a relation to a Supreme Being" is whether a given belief that is sincere and meaningful occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God of one who clearly qualifies for the exemption. Where such beliefs have parallel positions in the lives of their respective holders, we cannot say that one is "in a relation to a Supreme Being" and the other is not. We have concluded that the beliefs of the objectors in these cases meet these criteria, and, accordingly, we affirm the judgments in Nos. 50 and 51 and reverse the judgment in No. 29.

Later in the *Seeger* Decision:

1. The crux of the problem lies in the phrase "religious training and belief," which Congress has defined as "belief in a relation to a Supreme Being involving duties superior to those arising from any human relation." In assigning meaning to this statutory language, we may narrow the inquiry by noting briefly those scruples expressly excepted from the definition. The section excludes those persons who, disavowing religious belief, decide on the basis of essentially political, sociological or economic considerations that war is wrong and that they will have no part of it. These judgments have historically been reserved for the Government, and, in matters which can be said to fall within these areas, the conviction of the individual has never been permitted to override that of the state. *United States v. Macintosh, supra* (dissenting opinion). The statute further excludes those whose opposition to war stems from a "merely personal moral code," a phrase to which we shall have occasion to turn later in discussing the application of § 6(j) to these cases. We also pause to take note of what is not involved in this litigation. No party claims to be an atheist, or attacks the statute on this ground. The question is not, therefore, one between theistic and atheistic beliefs. We do not deal with or intimate any decision on that situation in these cases. Nor do the parties claim the monotheistic belief that there is but one God; what they claim (with the possible exception of Seeger, who bases his position here not on factual, but on purely constitutional, grounds) is that they adhere to theism, which is the "Belief in the existence of a god or gods; . . . Belief in superhuman powers or spiritual agencies in one or many gods," as opposed to atheism. Our question, therefore, is the narrow one: does the term "Supreme Being," as used in § 6(j), mean the orthodox God or the broader concept of a power or being, or a faith, "to which all else is subordinate or upon which all else is ultimately dependent"? In considering this question, we resolve it solely in relation to the language of § 6(j), and not otherwise.

2. Few would quarrel, we think, with the proposition that in no field of human endeavor has the tool of language proved so inadequate in the communication of ideas as it has in dealing with the fundamental questions of man's predicament in life, in death, or in final judgment and retribution. This fact makes the task of discerning the intent of Congress in using the phrase "Supreme Being" a complex one. Nor is it made the easier by the richness and variety of spiritual life in our country. Over 250 sects inhabit our land. Some believe in a purely personal God, some in a supernatural deity; others think of religion as a way of life envisioning, as its ultimate goal, the day when all men can live together in perfect understanding and peace. There are those who think of God as the depth of our being; others, such as the Buddhists, strive for a state of lasting rest through self-denial and inner purification; in Hindu philosophy, the Supreme Being is the transcendental reality which is truth, knowledge and bliss. Even those religious groups which have traditionally opposed war in every form have splintered into various denominations: from 1940 to 1947, there were four denominations using the name "Friends," the "Church of the Brethren" was the official name of the oldest and largest church body of four denominations composed of those commonly called Brethren, and the "Mennonite Church" was the largest of 17 denominations, including the Amish and Hutterites, grouped as "Mennonite bodies" in the 1936 report on the Census of Religious Bodies.. This vast panoply of beliefs reveals the magnitude of the problem which faced the Congress when it set about providing an exemption from armed service.

Appendix B: IRS Manual Guidelines for Determining Religious Organizations

7.25.3.6.11 (02-23-1999)

Mail Order Churches

1. The term "mail order church" refers to organizations set up pursuant to "church charters" purchased through the mail from organizations that claim that the charters and other "ministerial credentials" can be used to reduce or eliminate an individual's federal income tax liability. Although a "mail order church" is not precluded from exemption, because it is possible for one to be organized operated exclusively for religious purposes, Service experience, as reflected in numerous court decisions, has shown that many are operated for the private benefit of those who control the organization. See IRM 4.70, for procedures regarding coordination with Examination function of IRC 170(c) deduction cases and assignment of income cases; and also for a general discussion of examination procedures for mail order churches; churches or conventions or associations of churches; and a discussion of IRC 7611, which sets forth certain restrictions on the examination of churches.

2. Service position regarding a common form of operation for many mail order churches is set forth in Rev. Rul. 81–94, 1981–1 C.B. 330. In Rev. Rul. 81–94 a professional nurse founded an organization under the name of ABC Church after purchasing a "certificate of ordination" from an organization selling such certificates and church charters. The nurse was the organization's minister, director, and principal officer. The nurse executed a vow of poverty and transferred all of her assets, including a home and an automobile, and income to the organization. The organization also assumed all of her liabilities, including a home mortgage and credit card balances. The organization paid all her living

expenses, and she continued to use the house and automobile for personal purposes. Rev. Rul. 81–94 concludes that, based on these facts, the organization does not qualify for exemption under IRC 501(c)(3) because it operates to serve the private interests of a designated individual rather than a public interest.

3. Numerous court cases have held that, in situations similar to that described in Rev. Rul. 81–94, an organization that serves the private interests of a designated individual rather than a public interest does not qualify for exemption under IRC 501(c)(3). See, for example,Basic Bible Church v. Commissioner, 74 T.C. 846 (1980); Church of the Transfiguring Spirit, Inc. v. Commissioner, 76 T.C. 1 (1981);People of God Community v. Commissioner, 75 T.C. 127 (1980); The Southern Church of Universal Brotherhood Assembled, Inc. v. Commissioner, 74 T.C. 1223 (1980); Bubbling Well Church of Universal Love v. Commissioner, 74 T.C. 531 (1980); and Unitary Mission Church of Long Island v. Commissioner, 74 T.C. 507 (1980); aff'd, 647 F. 2d 163 (2d Cir. 1981).

4. On a related issue, the Service has denied a charitable contribution deduction under IRC 170 for amounts contributed by an individual to an organization formed under the name of the ABC Church but operated for the individual's private benefit. See Rev. Rul. 78–232, 1978–1 C.B. 69. Numerous court cases have also held that, in situations similar to the one described in Rev. Rul. 78–232, a charitable contribution deduction under section 170 was properly denied by the Service. See, for example, McGahen v. Commissioner, 76 T.C. No. 41 (March 26, 1981); Hall v. Commissioner, T.C.M. 1981–143; Baker v. Commissioner, T.C.M. 1980–367; Manson v. Commissioner, T.C.M. 1980–315, aff'd, 628 F. 2d. 1353 (5th Cir. 1980); Abney v. Commissioner, T.C.M. 1980–27; Push v.

Commissioner, T.C.M. 1980–4; Heller v. Commissioner, T.C.M. 1978–149; and Clippinger v. Commissioner, T.C.M. 1978–107.

5. In many situations where the organization selling the church charters and ministerial credentials has been recognized as exempt under IRC 501(c)(3) (but has not received a group exemption), the organization purchasing the charter claims that it is covered by the selling organization's exempt status. This argument was made in Basic Bible Church, discussed above, where the petitioner contended that as an auxiliary of the Basic Bible Church, it shared that organization's tax exempt status (The organization had not received a group ruling). The court concluded, however, that the petitioner was legally separate and distinct from the parent church and, therefore, had to qualify for exemption under IRC 501(c)(3) on its own merits. See also United States v. Toy National Bank, 79–1 USTC ¶ 9344 (N.D.Iowa 1979), and Brown v. Commissioner, T.C.M. 1980–553, which held that organizations that had obtained a charter from the Universal Life Church, Inc. (ULC) were not covered by that organization's individual exemption. The courts in these cases concluded that because ULC had an individual rather than a group exemption, the chartered organizations had to qualify for exemption on their own merits.

Internal Revenue Manual 7.26.2.2.4 (03-30-1999)

Definition of a "Church" —Administrative Guidance

1. The current regulations under IRC 170 do not define a "church."

2. Rev. Rul. 59–129, 1959–1 C.B. 58, held the Salvation Army to be a church or convention or association of churches, without elaboration.

3. An organization qualifies as a church only if its principal purpose or function is that of a church. See Rev. Rul. 56–262, 1956–1 C.B. 131.

    A. Similarly, Reg. 1.6033–2(g)(5)(iv), Examples (1)–(5) sets forth examples of organizations that do not qualify as integrated auxiliaries of churches (a hospital, elementary school, orphanage, old age home, and university, all affiliated with a church but separately organized).

    B. Consistent with Rev. Rul. 56–262, these organizations would not appear to qualify as churches either.

    C. Of course, to determine whether certain purposes or functions are those of a church, one must know what a church is.

4. The Service considers all the facts and circumstances in determining whether an organization is a church, including whether the organization has the following characteristics:

    A. a distinct legal existence

    B. a recognized creed and form of worship

    C. a definite and distinct ecclesiastical government

    D. a formal code of doctrine and discipline

    E. a distinct religious history

    F. a membership not associated with any other church or denomination

G. a complete organization of ordained ministers ministering to their congregations

H. ordained ministers selected after completing prescribed courses of study

I. a literature of its own

J. established places of worship

K. regular congregations

L. regular religious services

M. Sunday schools for religious instruction of the young

N. schools for the preparation of its ministers

5. The above list of 14 church characteristics (first published by the Service in 1978 as a news release, IR–1930) is not exclusive—any other facts and circumstances that may bear upon the organization's claim for church status must also be considered.

   A. An organization need not have all of the characteristics (few churches do, and newly-created churches cannot be expected to); thus, no single characteristic is controlling.

   B. Some of the characteristics may be given more weight than others in a given case.

Africa v Commonwealth Appeals Court Decision:

United States Court of Appeals Third Circuit

Africa v. Com. of Pa. 662 F.2d 1025 (3d Cir. 1981)

Frank AFRICA, Appellant, v. The COMMONWEALTH OF PENNSYLVANIA, Leroy S. Zimmerman (Attorney General) Bureau of Corrections, Ronald Marks (Commissioner of B.O.C.).

No. 81-2325. United States Court of Appeals, Third Circuit.

Submitted Under Third Circuit Rule 12(6) Sept. 22, 1981. Decided Oct. 30, 1981. Rehearing Denied Nov. 24, 1981.

Albert John Snite, Jr., Asst. Defender, Defender Association of Philadelphia, Philadelphia, Pa., for appellant.

Frank Africa, pro se.

Leroy S. Zimmerman, Atty. Gen., Harrisburg, Pa., by Mark N. Cohen, Deputy Atty. Gen., Philadelphia, Pa., for appellees.

Before SEITZ, Chief Judge, and VAN DUSEN and ADAMS, Circuit Judges.

OPINION OF THE COURT

ADAMS, Circuit Judge.

Frank Africa, who claims to be a "Naturalist Minister" for the MOVE organization and who is a prisoner of the Commonwealth of Pennsylvania, appeals from a district court judgment

holding that the state government is not required, under the religion clauses of the first amendment, to provide him with a special diet consisting entirely of raw foods. He maintains that to eat anything other than raw foods would be a violation of his "religion." After a careful consideration of the record in this case, we affirm.

I.

On July 15, 1981, Frank Africa was convicted of various state offenses by a Pennsylvania court and was sentenced to serve a term of up to seven years at the State Correctional Institution at Graterford, Pennsylvania. Prior to his sentence, Africa *1026 had been incarcerated in Holmesburg Prison, a facility under the jurisdiction of Philadelphia County. While at Holmesburg, Africa requested and received a special diet of uncooked vegetables and fruits.

Africa filed a motion for a temporary restraining order in federal district court on July 16, 1981, seeking an order either that he remain in Holmesburg for the duration of his sentence or that Graterford, upon his transfer there, be required to provide him with his dietary needs. In his pleading for relief, Africa averred that, as a Naturalist Minister for MOVE, "I eat an all raw food diet in accordance with my Religious principle. To eat anything else ... would be a direct violation of my Religion and I will not violate my Religion for anyone." Africa's motion was assigned to Judge Hannum, who classified the matter as a civil rights action under 42 U.S.C. § 1983.

State authorities transferred Africa from Holmesburg to Graterford on July 17, 1981. Later that same day, at Judge Hannum's request, the Common Pleas Court of Philadelphia entered an order directing that Africa be returned to Holmesburg pending resolution of his request for injunctive relief. Pursuant to that order, Africa was sent back to Holmesburg on July 20 and his special diet was restored.

On July 27, 1981, the district court conducted a hearing on Africa's motion, which was treated as an application for a permanent injunction, and received testimony from Africa himself, Ramona Johnson, a "supporter" of MOVE, and Julius T. Cuyler, the superintendent of Graterford. At the hearing, Africa acted pro se and was questioned directly by the court. Judge Hannum sought to determine, among other things, whether Africa's diet was mandated by his "religion," and, if so, whether the Commonwealth could demonstrate a compelling interest sufficient to infringe upon Africa's dietary practices. Because our disposition of Africa's appeal depends so heavily upon the particular facts of this case, it will be necessary to set forth in some detail the evidence introduced in the proceeding below.

Based on Africa's testimony and on materials he provided the district court, MOVE is a "revolutionary" organization "absolutely opposed to all that is wrong." MOVE was founded, although the record does not reveal when, by John Africa, who serves as the group's revered "coordinator" and whose teachings Frank Africa and his fellow "family" members follow. MOVE has no governing body or official hierarchy; instead, because "everything is level" and "there are no ups or downs," all MOVE members, including John Africa, occupy an equivalent position within the organization. In fact, MOVE really has only "one member, one family, one body" since, according to Frank Africa, to talk to an individual MOVE "disciple" is to "talk to everybody."

Africa also summarized what he believed to be the tenets that defined the MOVE organization. MOVE's goals, he 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. By contrast, what they alternatively refer to as "this system" or "civilization" is "degenerating": its

air and water are "perverted"; its food, education, and governments are "artificial"; its words are "gibberish." Members of MOVE shun matters "systematic" and "hazardous"; they believe in "using things (but) not misusing things." Thus, according to Africa:

> The air is first, but pollution is second. Water is first, but poison is second. The food is first, but the chemicals that hurt the food are second.... We believe in the first education, the first government, the first law.... This is the perception that John Africa has given us. The water's existence is to be drunk and not poisoned, the air's presence is to be breathed and not polluted, the food's purpose is to be eaten and not distorted. The abuse that life suffers MOVE suffers the same.

MOVE endorses no existing regime or lifestyle; it yields to none in its uncompromising condemnation of a society that it views as "impure," "unoriginal," and "blemished."

According to Africa, MOVE is a religion. In fact, he insists that "just as there is no comparison between the sun's perfection and the lightbulb's failure, there is no comparison between the absolute necessity of our belief and this system's interpretation of religion." Africa testified that MOVE members participate in no distinct "ceremonies" or "rituals"; instead, every act of life itself is invested with religious meaning and significance. In his words:

> We are practicing our religious beliefs all the time: when I run, when I put information out like I am doing now, when I eat, when I breathe. All of these things are in accordance to our religious belief.... We don't take a date out of the week to practice our religion and leave the other days and say that we are not going to practice our religion ... It is not a one-day thing or a once-a-week thing or a monthly thing. It doesn't have anything to do with time. Our religion is constant. It is as constant as breathing....

> Every time a MOVE person opens their mouth, according to the way we believe, according to the way we do things, we are holding church.

Similarly, Africa contends that, since no one day is any more special than another, for MOVE members every day of the year can be considered a religious "holiday".

Africa did not provide the district court with any purportedly official guidelines setting forth MOVE's religious credo. He did submit, however, a document, which he apparently authored, entitled Brief to Define the Importance of MOVE's Religious Diet. That document, which Africa asserts is wholly consonant with the teachings of John Africa, sets forth an elaborate explanation of the MOVE philosophical framework and consequently constitutes extremely pertinent evidence for purposes of assessing the nature of the organization. In the Brief, Africa contends that "while religion is seen as a way of life, our religion is simply the way of life, as our religion in fact is life." Individuals who subscribe to the MOVE ideology must live in harmony with what is natural, or untainted:

> Water is raw, which makes it pure, which means it is innocent, trustworthy, and safe, which is the same as God.... Our religion is raw, our belief is pure as original, reliable as chemical free water, ... nourishing as the earth's soil that connects us to food, satisfying as the air that gives breath to all life.

By rejecting the "polluted" and the "fraudulent," and by concentrating instead on the "healthy" and the "original," men and women are put "in touch with life's vibration." Africa asserts that, "when flowing, moving along with the activity of life, ... the less you resist the power that commands this flow the more you become forceful as the flow."

Central to this conception of an unadulterated existence is what Africa refers to as MOVE's "religious diet." That diet is comprised largely of raw vegetables and fruits; 2 MOVE members who fully adhere to the diet 3 decline to eat any foods that *1028 have been processed or cooked. "There is nothing unusual or special about our diet," Africa declares in his Brief; rather, "our religious diet is common and uncomplicated because our diet is provided by God and already done." Failure to follow the diet constitutes deviation from the "direct, straight, and true" and results in "confusion and disease." In part, Africa's total commitment to specific provisions appears prudently based, since he asserts that it is "impossible" for an individual's body to adjust to more traditional fare after it has become accustomed to natural foods. But Africa also insists that he is obligated to follow his diet:

> To take away our diet is to leave me to eat nothing, for I have no choice, because when given a choice between eating poison and eating nothing, I have no choice but to eat nothing, for I can't eat other than raw. This would be suicidal and suicide is against life's ministry.

Africa contends that the diet, in conjunction with "our founder's wisdom," transformed him from a weak, timid, and ailing being to a strong, confident, and healthy individual. "Our religious diet is work, hard work, simple consistent unmechanized unscientific self-dependent work," he concludes; "our religious diet is family, unity, consistency, (and) uncompromising togetherness."

Dietary considerations excepted, Africa shed little light upon what, if any, ethical commandments are part and parcel of the MOVE philosophy. In response to specific questioning by the district court, Africa testified that MOVE members would be unable to serve in the armed forces, since "it is impossible for us to defend this system." At the same time, though, he stressed that, from his point of view, there was nothing inconsistent in seeking judicial intervention to prevent his transfer to Graterford:

> We are taught to use anything, anything that is necessary to bring about our purpose.... I have to do whatever is necessary to get my point across, to teach people.... I am using this system as a bridge to get my purpose to people (and to get) the poor people on my side.

"When you are right, you are deserving of protection," Africa declared, "and everything that is in our interest is right."

Africa's discussion of the MOVE organization and its dietary precepts was corroborated by the testimony of Ramona Johnson, a self-labeled "MOVE supporter." Johnson testified that her "brother" was "ordained" as a naturalist minister of MOVE by John Africa, and that he is an ardent follower of his religion and its mandates. Johnson confirmed, but added little to Africa's description of the concerns that lie at the heart of the MOVE ideology. She contended that the MOVE "religion is total; it encompasses every aspect of MOVE members' lives; there is nothing that is left out." And she stressed that Africa's raw food diet is both a necessary "part of" and a sincere "reflection of" his religious commitment. In support of this last observation, Johnson

testified that Africa in fact had gone without food for the four day period in July when he was imprisoned at Graterford.

The final witness at the hearing in the district court was Julius T. Cuyler, the superintendent of Graterford. Cuyler testified that his institution was unwilling to meet the dietary needs of Frank Africa. He expressed concern about the possibility of "a proliferation of other groups surfacing in our prison requesting special diets" and warned that, were a court to grant Africa's desired relief, MOVE would attract new "sympathizers." Cuyler contended that the prison's cafeteria already made available to inmates a number of raw foods, such as bananas, apples, and oranges. There were practical reasons, he explained, why Graterford could not be any more accommodating in this regard: it would be "quite a major problem to buy the items that are listed on this diet in the retail market"; the prison's accounting system would be unable to handle such a "major *1029 deviation" in the procurement process; some of the foods asked for by Africa, particularly the potatoes, rice, corn, and berries, if "not kept under strict security, ... would probably be stolen and used for other purposes," such as to "make homemade booze"; accumulation of raw food might lead to a "rodent problem"; and furnishing special diets might delay the prison's feeding process, with the result that "our entire population will be deprived of just that much of recreation (time)." In short, according to Cuyler, providing Africa with a raw food diet "could be the straw that could break the camel's back."

On August 21, 1981, the district court denied Africa's application for injunctive relief. In an opinion accompanying his order, Judge Hannum concluded that, because Africa's sentence was for a period of at least five years, it was not possible, under Pennsylvania law, to grant his request to serve the remainder of his term at Holmesburg. 4 Moreover, Africa had failed to

establish that MOVE is "a religion within the purview and definition of the first amendment." On the contrary, according to the district court, "MOVE is merely a quasi-back-to-nature social movement of limited proportion and with an admittedly revolutionary design." As an organization, it is concerned solely with "concepts of health and a return to simplistic living." This the district court found to be more akin to a "social philosophy" than to a religion:

> While MOVE members may respect and respond to religious concepts, these concepts are not subsumed by the MOVE ideology. Rather MOVE exists, as do virtually all other organizations in our society, independent of religion and with separate and distinct purposes while still respecting and abiding by external religious principles.

Consequently, the district court concluded that both Frank Africa and MOVE itself "are not entitled to the first amendment protections and rights respecting the exercise of religion." Africa immediately appealed the district court's decision to this Court. On August 28, 1981, we ordered that Africa's transfer to Graterford be stayed pending determination of his appeal, which we expedited. In addition, we directed that Albert John Snite, Jr. of the Defender Association of Philadelphia be appointed counsel for Africa for this appeal.

II.

The relevant case law in the free exercise area suggests that two threshold *1030 requirements must be met before particular beliefs, alleged to be religious in nature, are accorded first amendment protection. A court's task is to decide whether the beliefs avowed are (1) sincerely held, and (2) religious in nature, in the claimant's scheme of things. United States v. Seeger, 380 U.S. 163, 185, 85 S.Ct. 850, 863, 13 L.Ed.2d 733 (1965); Callahan v. Woods,

658 F.2d 679 (9th Cir. Oct. 5, 1981). If either of these two requirements is not satisfied, the court need not reach the question, often quite difficult in the penological setting, 6 whether a legitimate and reasonably exercised state interest outweighs the proffered first amendment claim.

A.

It is inappropriate for a reviewing court to attempt to assess the truth or falsity of an announced article of faith. Judges are not oracles of theological verity, and the Founders did not intend for them to be declarants of religious orthodoxy. See United States v. Ballard, 322 U.S. 78, 85-88, 64 S.Ct. 882, 885-87, 88 L.Ed. 1148 (1944). The Supreme Court has emphasized, however, that "while the 'truth' of a belief is not open to question, there remains the significant question whether it is 'truly held.' " Seeger, supra, 380 U.S. at 185, 85 S.Ct. at 863. 8 Without some sort of required showing of sincerity on the part of the individual or organization seeking judicial protection of its beliefs, the first amendment would become "a limitless excuse for avoiding all unwanted legal obligations."

The requirement of sincerity poses no obstacle to Africa in this case. Although the district court made no specific findings in this regard, the Commonwealth never intimated, either at the hearing below or on this appeal, that Africa's convictions, however they might be denominated, were other than deeply held and sincerely advanced. Moreover, we are persuaded from our review of the record that Africa's opinions, especially those having to do with his diet, are "truly held" within the meaning of Ballard and Seeger. We turn, therefore, to the second issue: whether Africa's beliefs, however sincerely possessed, are religious in nature.

B.

Few tasks that confront a court require more circumspection than that of determining whether a particular set of ideas constitutes a religion within the meaning of the first amendment. Judges are ill-equipped to examine the breadth and content of an avowed religion; we must avoid any predisposition toward conventional religions so that unfamiliar faiths are not branded mere secular beliefs. "Religions now accepted were persecuted, unpopular and condemned at their inception." United States v. Kuch, 288 F.Supp. 439, 443 (D.D.C.1968). Nonetheless, when an individual invokes the first amendment to shield himself or herself from otherwise legitimate state regulation, we are required to make such uneasy differentiations. In considering this appeal, then, we acknowledge that a determination whether MOVE's beliefs are religious and entitled to constitutional protection "present(s) a most delicate question"; at the same time, we recognize that "the very concept of ordered liberty precludes allowing" Africa, or any other person, a blanket privilege "to make his own standards on matters of conduct in which society as a whole has important interests." Wisconsin v. Yoder, 406 U.S. 205, 215-16, 92 S.Ct. 1526, 1533, 32 L.Ed.2d 15 (1972).

The Supreme Court has never announced a comprehensive definition of religion for use in cases such as the present one. There can be no doubt, however, that the Court has moved considerably beyond the wholly theistic interpretation of that term expressed in cases such as Davis v. Beason, 133 U.S. 333, 342, 10 S.Ct. 299, 300, 33 L.Ed. 637 (1890) (" 'religion' has reference to one's views of his relations to his Creator"). In United States v. Seeger, 380 U.S. 163, 85 S.Ct. 850, 13 L.Ed.2d 733 (1965), the Court recognized as religious for purposes of the Universal Military Service and Training Act an individual's "sincere religious beliefs," even though not theistic in nature, if "based upon a power or being, or upon a faith, to which all else is subordinate or upon which all else is ultimately dependent." A similar "parallel"-belief approach was employed in Welsh v. United States, 398 U.S. 333, 90 S.Ct. 1792, 26 L.Ed.2d 308

(1970), where conscientious objector status was extended to a military conscript even though he declined to profess belief in a Supreme Being. The four Justices in Welsh who considered the constitutional question, in addition to the statutory issue, either expressly or implicitly defined religion to include non-theistic ideologies And in Torcaso v. Watkins, 367 U.S. 488, 81 S.Ct. 1680, 6 L.Ed.2d 982 (1961), the Court struck down as a violation of the establishment clause a Maryland statute requiring public officials to declare their belief in God before taking office. Justice Black, writing for a unanimous Court, concluded that a state could not favor "those religions based on a belief in the existence of God as against those religions founded on different beliefs"; in a footnote, he observed that a number of religious groups within the United States do not hold to theistic doctrines.

Drawing upon these Supreme Court cases, a number of lower federal courts have adopted a broad, non-theistic approach to the definition-of-religion question. In considering a first amendment claim arising from a non-traditional "religious" belief or practice, the courts have "look(ed) to the familiar religions as models in order to ascertain, by comparison, whether the new set of ideas or beliefs is confronting the same concerns, or serving the same purposes, as unquestioned and accepted 'religions.' In essence, the modern analysis consists of a "definition by analogy" approach. It is at once a refinement and an extension of the "parallel"-belief course first charged by the Supreme Court in Seeger.

In conducting its inquiry in the case at bar, the district court employed what it referred to as the "inherently vague definitional approach" enunciated in the concurring opinion in Malnak, supra. Africa v. State of Pennsylvania, 520 F.Supp. 967, 970 (E.D.Pa.1981). In the Malnak opinion, which explicitly adopted the "definition by analogy" process, three "useful indicia" to determine the existence of a religion were identified and discussed. 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. Applying these three factors, the concurring opinion in Malnak concluded that the Science of Creative Intelligence-Transcendental Meditation constituted a religion under the first amendment despite the contentions of its leaders to the contrary. After considering Africa's testimony in light of these guideposts, we reach the obverse result: in spite of his protestations, we conclude that MOVE, at least as described by Africa, is not a "religion," in the sense that that term is used in the first amendment.

Fundamental and ultimate questions.

Traditional religions consider and attempt to come to terms with what could best be described as "ultimate" questions-questions having to do with, among other things, life and death, right and wrong, and good and evil. Not every tenet of an established theology need focus upon such elemental matters, of course; still, it is difficult to conceive of a religion that does not address these larger concerns. For, above all else, religions are characterized by their adherence to and promotion of certain "underlying theories of man's nature or his place in the Universe." Founding Church of Scientology v. United States, 409 F.2d 1146, 1160 (D.C.Cir.1969).

We conclude that the MOVE organization, as described by Africa at the hearing below, does not satisfy the "ultimate" ideas criterion. Save for its preoccupation with living in accord with the dictates of nature, MOVE makes no mention of, much less places any emphasis upon, what might be classified as a fundamental concern. MOVE does not claim to be theistic: indeed it recognizes no Supreme Being and refers to no transcendental or all-controlling force.

Moreover, unlike other recognized religions, with which it is to be compared for first amendment purposes, MOVE does not appear to take a position with respect to matters of personal morality, human mortality, or the meaning and purpose of life. The organization, for example, has no functional equivalent of the Ten Commandments, the New Testament Gospels, the Muslim Koran, Hinduism's Veda, or Transcendental Meditation's Science of Creative Intelligence. Africa insists that he has discovered a desirable way to conduct his life; he does not contend, however, that his regimen is somehow morally necessary or required. Given this lack of commitment to overarching principles, the MOVE philosophy is not sufficiently analogous to more "traditional" theologies.

Despite having concluded that MOVE does not deal with "ultimate ideas," we concede that the matter is not wholly free from doubt. Appointed counsel for Africa argues that MOVE members do share fundamental concern, namely, an all-consuming belief in a "natural" or "generating" way of life-a way of life that ultimately cannot be reconciled with "civilization" itself. According to counsel, Africa's insistence on keeping "in touch with life's vibration" amounts to a form of pantheism, wherein:

> The entity of God is the world itself, and God is "swallowed up in that unity which may be designated 'nature' ".... (MOVE's) return to nature is not simply a "preferred" state. It is the only state. It is the state of being in pure harmony with nature. This, MOVE calls godly. This is pantheism.

We decline to accept such a characterization of Africa's views, however. We recognize that, under certain circumstances, a pantheistic-based philosophy might qualify for protection under the free exercise clause. 15 From the record in this case, though, we are not persuaded that Africa is an adherent of pantheism, as that word is commonly defined. His mindset seems

to be far more the product of a secular philosophy than of a religious orientation. His concerns appear personal (e. g., he contends *1034 that a raw food diet is "healthy" and that pollution and other such products are "hazardous") and social (e. g., he claims that MOVE is a "revolutionary" organization, "absolutely opposed to all that is wrong" and unable to accept existing regimes), rather than spiritual or other-worldly. Indeed, if Africa's statements are deemed sufficient to describe a religion under the Constitution, it might well be necessary to extend first amendment protection to a host of individuals and organizations who espouse personal and secular ideologies, however much those ideologies appear dissimilar to traditional religious dogmas.

The Supreme Court would appear to have foreclosed such an expansive interpretation of the free exercise clause. In Wisconsin v. Yoder, the Court concluded that Wisconsin could not require members of the Amish sect to send their children to school beyond the eighth grade, where there was uncontested evidence that such a course was inconsistent with the Amish religion. The Court arrived at this result only after conducting a searching inquiry into the history and customs of the Amish people and into the nature of their religious teachings and practices. In the course of his opinion for the Court, Chief Justice Burger stressed that the objections of the Amish to compulsory secondary education derived from "deep religious conviction(s)" rather than from a "personal" or "secular" philosophy. According to the Chief Justice:

> (I)f the Amish asserted their claims because of their subjective evaluation and rejection of the contemporary secular values accepted by the majority, much as Thoreau rejected the social values of his time and isolated himself at Walden Pond, their claim would not rest on a religious basis. Thoreau's choice was philosophical and personal

rather than religious, and such belief does not rise to the demands of the Religion Clauses.- 406 U.S at 216, 92 S.Ct. at 1533.

Precisely the same distinction had been drawn by the Court in the Seeger and Welsh cases: while an individual could qualify for conscientious objector status on the basis of a genuine "religious belief," reliance upon a "merely personal moral code" was insufficient.

For purposes of the case at hand, then, it is crucial to realize that the free exercise clause does not protect all deeply held beliefs, however "ultimate" their ends or all-consuming their means. An individual or group may adhere to and profess certain political, economic, or social doctrines, perhaps quite passionately. The first amendment, though, has not been construed, at least as yet, to shelter strongly held ideologies of such a nature, however all-encompassing their scope. As the Supreme Court declared in Yoder, "(a) way of life, however virtuous and admirable, may not be interposed as a barrier to reasonable state regulation ... if it is based on purely secular considerations; to have the protection of the Religion Clauses, the claims must be rooted in religious belief." 406 U.S. at 215, 92 S.Ct. at 1533 (emphasis added). While we do not necessarily agree with the district court's description of MOVE as "merely a quasi-back-to-nature social movement of limited proportion," we conclude that the concerns addressed by MOVE, even assuming they are "ultimate" in nature, are more akin to Thoreau's rejection of "the contemporary secular values accepted by the majority" than to the "deep religious conviction(s)" of the Amish.

Comprehensiveness.

The concurring opinion in Malnak stressed that a religion must consist of something more than a number of isolated, unconnected ideas. "A religion is not generally confined to one question or one moral teaching; it has a broader scope. It lays claim to an ultimate and comprehensive 'truth.' " The Science of Creative Intelligence qualified as a religion, therefore, in part because of its comprehensive nature: its teachings consciously aimed at providing the answers to "questions concerning the nature both of world and man, the underlying sustaining force of the universe, and the way to unlimited happiness."

In contrast, we cannot conclude, at least on the basis of Africa's testimony, that MOVE members share a comparable "world view." MOVE appears to consist of a single governing idea, perhaps best described as philosophical naturalism. Apart from this desire to live in a "pure" and "natural" environment, however-a desire which we already have deemed insufficiently religious to qualify for first amendment protection-little more of substance can be identified about the MOVE ideology. It would not be possible, we believe, on the basis of the record in this case, to place Africa's dietary concerns within the framework of a "comprehensive belief system." Expressed somewhat differently, were we to conclude that Africa's views, taken as a whole, satisfied the comprehensiveness criterion, it would be difficult to explain why other single-faceted ideologies-such as economic determinism, Social Darwinism, or even vegetarianism-would not qualify as religions under the first amendment.

Again, we acknowledge that our conclusion in this regard is not unassailable. It could be argued that Africa's views are in a sense comprehensive, since, according to his testimony, his every effort and thought is attributable to and explained by his "religious" convictions. MOVE members, according to Africa, "are practicing our religious beliefs all the time," even when running, eating, and breathing. The notion that all of life's activities can be cloaked with

religious significance is, of course, neither unique to MOVE nor foreign to more established religions. Such a notion by itself, however, cannot transform an otherwise secular, one-dimensional philosophy into a comprehensive theological system. It is one thing to believe that, because of one's religion, day-to-day living takes on added meaning and importance. It is altogether different, however, to contend that certain ideas should be declared religious and therefore accorded first amendment protection from state interference merely because an individual alleges that his life is wholly governed by those ideas. We decline to adopt such a self-defining approach to the definition-of-religion problem.

Structural characteristics.

A third indicium of a religion is the presence of any formal, external, or surface signs that may be analogized to accepted religions. Such signs might include formal services, ceremonial functions, the existence of clergy, structure and organization, efforts at propagation, observance of holidays and other similar manifestations associated with the traditional religions.

MOVE lacks almost all of the formal identifying characteristics common to most recognized religions. For example, Africa testified that his organization did not conduct any special services and did not recognize any official customs. Similarly, the group apparently exists without an organizational structure, since MOVE consists of only "one member" and since "everything is level." In this connection, although Africa claimed to be an ordained "Naturalist Minister," he did not make clear what responsibilities and benefits, if any, this title conferred on him in contradistinction to other MOVE members. Moreover, MOVE apparently celebrates no holidays, since it takes the position that every day of the year is equally important. Finally,

although Africa referred to a series of guidelines that supposedly were written by John Africa and that allegedly set forth MOVE's principal tenets, no such documents were made available to the district court; thus, the record contains nothing that arguably might pass for a MOVE scripture book or catechism. Given what we know about the group from the record, we are of the view that MOVE is not structurally analogous to those "traditional" organizations that have been recognized as religions under the first amendment.

III.

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. The "new set of ideas or beliefs" presented by Africa does not appear to us to "confron(t) the same concerns, or serv(e) the same purposes, as unquestioned and accepted 'religions' ". We hold, therefore, that MOVE, at least as described by Africa, is not a religion for purposes of the religion clauses. We do not conclude that Africa's sincerely-held beliefs are false, misguided, or unacceptable, but only that those beliefs, as described in the record before us, are not "religious," as the law has defined that term.

As the result of our holding in this case, the Commonwealth of Pennsylvania is not required under the first amendment to supply Frank Africa with a special raw-food diet. Such a consequence, however troubling, follows directly from our declaration that MOVE is not a religion. We do not mean to suggest, however, that the requirements of the first amendment also define the proper scope of prudent state penological policy. Especially in light of the

apparent willingness of Graterford officials to accede to the dietary requirements of other prisoners, both for religious and for medical reasons, it is not clear from the record why special accommodations cannot be made in this instance for a prisoner who obviously cares deeply about what food he eats. Nonetheless, as a matter of constitutional law, the Commonwealth prevails. Accordingly, the judgment of the district court will be affirmed.