Notes

Constitutional "Religion" A Survey of First Amendment Definitions of Religion

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Newly-elected President George W. Bush erected a new hurdle in the Supreme Court's Religion Clause adjudication. Fulfilling his vision of America, he created a program through which faith-based organizations may receive federal monies for doing public good. Already promised by the American Civil Liberties Union to be a legal brawl for Establishment Clause reasons, the program had yet to get off the ground before the first problem squarely presented itself. Like any other federal program, criteria must be set to determine who will be included. In this case, that means a determination of exactly what constitutes a "religion." While no clear definition may be necessary, the issue will provide an opportunity for the Court to address a question that has troubled it for some time.

I. Introduction

When the Bill of Rights was passed in 1791, there was little debate, indeed very little doubt, about the purpose of the First Amendment's Religion Clauses. They were designed both to prevent the

establishment of a national religion by the new federal government and to protect the right of individuals to freely exercise their religious beliefs. While the Founders argued over the precise wording of the final product, the proceedings of the debate and writings in the ratification period show that the Religion Clauses were construed much more narrowly than they are today. For example, Judge Joseph Story, a noted authority on the ratification debates and the purpose of the Constitution, wrote extensively about the Framers' intentions behind the Bill of Rights in his *Commentaries on the Constitution of the United States.*[1] He argued that the Religion Clauses were simply a vehicle through which the Federalists could assure Americans that the federal government would not become involved in the business of establishing a national religion or preventing people from pursuing their own religious inclinations. Rather, Judge Story maintained, the real purpose of the amendment was "to exclude all rivalry among Christian sects" and leave the "whole power over the subject of religion . . . exclusively to the state governments, to be acted upon according to their own sense of justice, and the state constitutions . . . ."[2] Thus, the entire realm of religious jurisprudence was not an issue for the national government; rather, the states were to be allowed to legislate in this area without the interference of national decrees. As a result of this perception of the First Amendment, which dominated until the mid-1900's, few cases involving the Religion Clauses reached the Supreme Court because the federal government stayed out of the religion business.

However, all of this changed in 1947, when the Supreme Court forever altered the nature of Religion Clause jurisprudence. In *Everson v. Board of Education,*[3] Justice Black outlined the theory that the Fourteenth Amendment made applicable to the states the First Amendment's Religion Clauses, particularly the Establishment Clause. With this, the Court effectively changed the nature of religious adjudication from a jurisdictional issue to a substantive one, which revolutionized the process of deciding such cases.

Since the new conception of the Religion Clauses was presented in *Everson* and resulted in more religious freedom cases than ever before, the Court has attempted to clarify both the Establishment Clause and the Free Exercise Clause, but at times with little success. For example, its Establishment Clause jurisprudence has wavered between strict separation on the one hand and accommodation on the other.[4] With its

1. JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES (Carolina Academic Press 1987) (1833).

2. *Id.* § 992, at 702-03.

3. 330 U.S. 1 (1947).

4. Cases embracing the strict separationist viewpoint include: *Everson*, 330 U.S. 1; McCollum v. Board, 333 U.S. 203 (1948); Engel v. Vitale, 370 U.S. 421 (1962); Sch. Dist. of Abingdon v.

recent decisions, however, the Court appears to currently hold a more separationist view of the relationship between church and state, saying that government officers must be careful not to do or say anything that can be interpreted as promoting any sort of religious ideas.[5] Meanwhile, the Court also has struggled in its Free Exercise jurisprudence, at first denying nearly all religious claims, then following the notion that the Constitution mandates religious exemptions from otherwise valid laws, and then explicitly overruling this idea.[6] At present, *City of Boerne v. Flores* has hinted to scholars that the Court may be ready to accept a narrower view not only of the Free Exercise Clause, but the Establishment Clause as well.

To clarify its Religion Clause jurisprudence, the Supreme Court might address several issues. For example, the relevance of the Strict Scrutiny test to Free Exercise jurisprudence has been in doubt as of the decision in *Employment v. Smith.*[7] In addition, the Court's interpretation of "establishment" is troublesome and has been perhaps the most controversial aspect of Supreme Court adjudication of the Religion Clauses. Furthermore, there is the inherent conflict between the two Clauses, as an overly "separationist" view of the Establishment Clause can actually lead to an infringement on people's free exercise of religion, and vice versa.[8]

Yet, before one can resolve these questions, there is a problem more fundamental to religious jurisprudence. The definition of religion, which appears not to have even been a consideration at the time of the Founders, is perhaps the most troubling aspect of Religion Clause adjudication. One might assume that for the Court to be able to police religion through the First Amendment, it must be able to define exactly what it is policing. On the other hand, if the Court is able to define

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Schempp, 374 U.S. 203 (1963); Lemon v. Kurtzman, 403 U.S. 602 (1971); Wallace v. Jaffree, 472 U.S. 38 (1985); and Lee v. Weisman, 505 U.S. 577 (1992). Cases embracing a more accommodationist approach include: Zorach v. Clauson, 343 U.S. 306 (1952); Lynch v. Donnelly, 465 U.S. 668 (1984).

5. Editors' Note: The article went to press too late to account for the Court's most recent Establishment Clause decision, *Mitchell v. Helms*, 530 U.S. 793 (2000).

6. Initially, the Court only granted a religious exemption in *Cantwell v. Connecticut*, 310 U.S. 296 (1940). For example, it refused to grant a religious exemption to Jehova's Witnesses in *Minersville School Dist. v. Gobitis*, 310 U.S. 586 (1940), although it did relieve them later in *West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624 (1943) on free speech grounds. Later, however, the Court supported the idea that the First Amendment formed a constitutionally-guaranteed religious exemption from otherwise valid laws, such as in *Sherbert v. Verner*, 374 U.S. 398 (1963), *Wisconsin v. Yoder*, 406 U.S. 205 (1972) , and *Thomas v. Review Bd. of Indiana Employment Security Div.*, 450 U.S. 707 (1981). Yet, the Court reversed this policy in *Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U.S. 872 (1990) and upheld it over Congress's passage of the Religious Freedom Restoration Act of 1993 (107 Stat. 1488, 42 U.S.C. § 2000bb et seq.), which was passed to return the Court to the doctrine of *Sherbert*, in *City of Boerne v. Flores*, 521 U.S. 507, 515.

7. The Strict Scrutiny test is the policy laid forth in *Sherbert*, 374 U.S. 398.

8. Rehnquist argued in this vein in his dissent in *Thomas*, 450 U.S. 707.

religion, then perhaps it is "establishing" what religion can and cannot be—the very action that the Religion Clauses are intended to prohibit. Despite being a basic step in the process of adjudicating cases involving the Religion Clauses, it is also the most ambiguous and avoided aspect of the Court's religious jurisprudence.

It is entirely possible, indeed probable, that the Founders never addressed this issue because they thought the definition of religion was obvious. Clearly, a theistic definition was, at that time, consistent for the most part with America's religious chemistry. However, the explosion of religious diversity since then has changed any clarity that was once evident in the concept of religion, the result being that no definition is obvious today.

Smith v. Board of Education,[9] decided in 1987 by the Southern Division District Court of Alabama, is illustrative of the current confusion in the Supreme Court's precedents regarding the definition of religion. The case dealt with the constitutionality of textbooks that the plaintiffs argued had effectively established the "religion" of secular humanism. The crux of this case turned upon whether or not District Court Chief Judge Brovert Hand thought that secular humanism was, in fact, a religion. Although it has never addressed the issue directly, the Supreme Court has never found that the general movement of secular humanism is a religion, and most scholars and judges would be astounded at the thought of this philosophy constituting a religion. However, Judge Hand found for the plaintiffs, ruling that secular humanism is indeed a religion for purposes of the First Amendment and that the textbooks in question promoted this religion in an unconstitutional manner. Remarkably, Hand was able to reach this decision using Supreme Court precedent. In fact, Hand put forth one of the most careful analyses of judicial definitions of religion in concluding that secular humanism fits within a constitutional definition of religion. Judge Hand's decision was overturned in the Court of Appeals, but on other grounds than the definition of religion issue.[10]

Considering the importance of this issue in the lives of both believers and non-believers, it is appropriate to say that it is one that demands clarification.[11] The purpose of this paper is to survey the

9. 655 F.Supp. 939 (S.D. Ala. 1987).

10. Specifically, the Court of Appeals felt that the textbooks in question did not advance secular humanism, regardless of its religious nature. See infra for further discussion

11. To be sure, given that few cases in recent years have brought the definition of religion squarely before the Court, it could be argued that this issue is of more theoretical than practical importance. That argument simply shows that the purpose of this Note is a modest one; indeed, solving the problem of how to define religion will not drastically impact the overall Religion Clause jurisprudence. Still, the issue has been brought squarely before a number of lower courts,

various definitions of religion used by courts and scholars, concluding with a recommendation of the definition best suited for constitutional discourse. The Note begins by defining the problem more specifically, including a consideration of the argument that defining religion is unnecessary and even unconstitutional. Next, it reviews the judicial attempts at defining religion, both at the Supreme Court and lower federal court levels. In this discussion, the Note analyzes each case for both implicit and explicit statements regarding a constitutional definition of religion, concluding that both levels of the judiciary have yielded little precedent for a future definition. Subsequently, the Note examines the scholarly analyses on the definition of religion problem. Scholars have tended towards three kinds of approaches—functional, content-based, and analogical—that have yielded a variety of definitions worthy of consideration. This Note analyzes the usefulness of several arguments from each category and concludes that a content-based definition of religion focusing on the supernatural is the most appropriate approach. While the functional and analogical methods are initially appealing to theoretical concerns, the inherent impracticality alienates them from fulfilling the purposes of the Religion Clauses. Finally, this Note suggests a definition that best meets the needs of the First Amendment and discusses the application of this definition and the changes that it will make in the Supreme Court's religious jurisprudence.

II. The Need for a Definition of Religion

"Determining whether or not adherence to a particular philosophy constitutes a religious belief entitled to constitutional protection is 'more often than not a difficult and delicate task.' "[12] Thus begins nearly every judicial discussion of the constitutional definition of religion. While the Supreme Court seemingly has made every effort to avoid the issue of defining religion, lower courts have been more adventurous in attempting this challenge. However, every analysis of the concept of religion ends with the same uncertainty as it began, as judges propose a set of guidelines no more useful than having no definition at all. For example, in *Patrick v. LeFevre*,[13] the Court of Appeals used William

who have struggled in their analysis. For this reason, it is plausible to suggest that the Supreme Court should be the court to determine the issue.

12. *Amos v. Corporation of Presiding Bishop of Church*, 618 F.Supp. 1013, 1026 (D. Utah 1985); quoting in part *Thomas v. Review Bd. of Indiana Employment Security Div.*, 450 U.S. 707, 714 (1981).

13. 745 F.2d. 153 (2d Cir. 1984).

James's definition of religion as their standard: "the feelings, acts, and experiences of individual men in their solitude, so far as they apprehend themselves to stand in relation to whatever they may consider the divine."[14] However, the definition seems to hold more uncertainties than the problem it seeks to resolve.

The reason behind the hesitancy of judges in attempting to define religion is two-fold. First, there is the obvious danger that the definition will be either too narrow or too broad, and therefore will exclude or include too many groups. Second, judges have been timid in forming a definition because some scholars have argued that defining religion will necessarily violate the demands of the Establishment Clause. Sharon Worthing observes: "If a government can define what is a 'church,' it can also define was it not a church, and can do so in a manner that excludes religions that are not favored by government officials. The very existence of such a power would be unconstitutional under the Establishment Clause."[15] Other analysts have argued that even if the power of defining religion is constitutional, it is futile to do so because the concept of religion is impossible to define. In this vein, George Freeman has argued that religion has no universal essence and hence is not definable.[16] In a somewhat different but related argument, Anita Bowser has claimed that religion is definable, but that the process of defining religion is "inherently arbitrary."[17]

However, the practical necessity of defining religion outweighs these concerns. The lack of a definition seems to make policing the First Amendment all but impossible in marginal cases. Certainly, judges must be able to comprehend what is included in the concept of religion if they will be required to regulate the way that government and individuals may act religiously. The first claim—that the act of defining religion is itself unconstitutional—may be said to confuse the relationship between the First Amendment itself and the subject about which the Amendment is designed to protect. To merely propose a classification is to define the scope of the Amendment, and not to use it in an unconstitutional manner. In other words, defining religion is a more fundamental step than the application of the Establishment and Free Exercise Clause because the definition is necessary for the application of the First Amendment. To say that "religion," for purposes of the First

14. JAMES, WILLIAMS. THE VARIETIES OF RELIGIOUS EXPERIENCE. 31 (Penguin Books 1985).

15. Sharon L. Worthing, *"Religion" and "Religious Institutions" Under the First Amendment*, 7 PEPP. L. REV. 313, 345-346 (1980); *see Sherr v. Northport-East Northport Union Free Sch. Dist.*, 672 F.Supp. 81, 92 (E.D.N.Y. 1987).

16. George C. Freeman III, *The Misguided Search for the Constitutional Definition of 'Religion,'* 71 GEO. L.J. 1519 (1983).

17. Anita Bowser, *Delimiting Religion in the Constitution: A Classification Problem*, 11 VAL. U. L. REV. 163, 164 (1977).

Amendment, cannot be defined is to give no meaning at all to the Religion Clauses, because it disallows judges from effectively using them.

Additionally, Freeman's argument that defining religion is futile because it is a concept with no essence, and thus an arbitrary endeavor, has been successfully rebutted by Andrew Austin.[18] Theoretically, Austin argues, Freeman's assertion that words have no essence is debatable because "it is not philosophically unsound to assert that there is something common to those things we call 'religion,' and to attempt to isolate those common things."[19] Thus, because the term "religion" is a linguistic tool, it is only natural that we will seek to form rules about it. In addition, Austin argues pragmatically that Freeman's argument is "not helpful" because "a definition that does not help resolve [the hard cases] is not of great practical value" since "it is prone to inconsistency."[20]

Eduardo Penalver has provided another justification for defining religion. In *The Concept of Religion*,[21] Penalver argues that "many words used in the Constitution...are assigned completely different meanings for purposes of constitutional adjudication from those they possess in everyday language," while other words possess the same meaning in both contexts.[22] For example, "speech" carries a totally different meaning in constitutional discourse than in everyday language, while "majority" has only one clear meaning. "To argue, then, that no definition of religion is necessary is to say that 'religion' is more like 'majority' than it is like 'speech.' "[23] Clearly, such a position requires justification from anyone alleging that the term "religion" needs no definition, leading Penalver to point out that "even to deny the need for a definition of religion for the purposes of constitutional adjudication is to propose a definition of sorts (that is, 'the everyday, clear meaning of the term'), one that must be defended."[24] In this way, Penalver says that not defining religion is implicitly proposing a definition that demands justification.

As a result, religion should be defined for purposes of the First Amendment. The arguments to the contrary—both from Establishment Clause concerns and from the impossibility of the process—do not outweigh the practical and theoretical demands of classifying religion

18. Andrew W. Austin, *Faith and the Constitutional Definition of Religion*, 22 CUMB. L. REV. 1 (1991).
19. *Id.* at 9.
20. *Id.* at 8.
21. Eduardo Penalver, *The Concept of Religion*, 107 YALE L.J. 791 (1997).
22. *Id.* at 792.
23. *Id.*
24. *Id.*

more specifically than has been done by the Supreme Court. While the Framers, including James Madison, apparently did not see the need to define religion, the environment within which they lived shows that this was simply because they thought the meaning of the term "religion" was self-evident. However, their conventional conception of religion has changed over time, and the need to clarify the meaning of "religion" is now a concern that deserves attention.

III. Judicial Attempts at Defining Religion

Having concluded that religion should be defined, it is appropriate to consider which conception best suits the purposes of the First Amendment. In this inquiry, this Note will first review the judicial endeavors at addressing the definition problem, both at the Supreme Court and lower court levels.

A. Supreme Court

While the Supreme Court has never explicitly addressed the notion of a constitutional definition of religion, many of its decisions have implied certain definitions and therefore have had a great impact on the issue. However, the cumulative effect of these opinions has been unclear. To be sure, this appearance of confusion may not be an accident; the Court might believe that no definition is necessary, or it may be more willing to avoid the question because of the inherent difficulties in formulating a definition. As to the former possibility, Section II shows that this at least requires some justification that the Court has yet to give; as to the latter, recognition of the muddled lineage of cases it has produced in this area demands an explanation.

1. God or no God: Davis *to* Everson

The first significant decision regarding the definition of religion came in *Reynolds v. United States*,[25] nearly 87 years after the ratification of the First Amendment. Finding against a Mormon's claim that the First Amendment protected his practice of polygamy, the Court provided the

25. 98 U.S. 145 (1878).

most traditional definition of religion in Supreme Court history. Writing for the majority, Chief Justice Waite states that "the word 'religion' is not defined in the Constitution. We must go elsewhere, therefore, to ascertain its meaning."[26] Waite proceeded to survey the writings of various Founders, including Thomas Jefferson and James Madison, specifically searching for their notions of the meaning of religious liberty. Waite quoted Madison " 'that religion, or the duty we owe the Creator,' was not within the cognizance of civil government." Waite's use of Madison's words shows that he followed Madison in equating the word "religion" with the "duty we owe the Creator," implying a theistic definition of religion.[27]

More importantly, this theistic notion of religion was explicitly stated—indeed, purposefully developed—in *Davis v. Beason*,[28] another case addressing Mormon polygamy. Decided twelve years after *Reynolds*, the Court upheld a law requiring an oath from voters denying any involvement with the practice of polygamy. Justice Field explicitly acknowledged the requirement of a deity in order to classify a belief as "religion," stating that "the term 'religion' has reference to one's views of his relations to his Creator."[29] Therefore, the First Amendment according to this Court was designed to ensure that government actions could not interfere "[w]ith 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."[30] These cases serve as an important beginning to the Court's jurisprudence concerning the definition of religion because they reflect the more traditional view that beliefs deemed "religious" have to do with the idea of a Supreme Being.

The next case to impact the definition of religion issue came over 50 years later, in *United States v. Ballard*.[31] Edna and Donald Ballard were indicted and convicted for using the mails to defraud when they organized the "I Am" movement and used it to sell literature and solicit funds. In the District Court, the judge advised the jury that "the religious beliefs of these defendants cannot be an issue of this court. The issue is: Did these defendants honestly and in good faith believe those things?"[32] The counsel for both parties agreed to this stipulation with no objection, and the jury then found against the Ballard's. The Circuit Court of Appeals reversed the judgment and granted a new trial,

26. *Id.* at 162.
27. *Id.* at 163.
28. 133 U.S. 333 (1890).
29. *Id.* at 342.
30. *Id.*
31. 322 U.S. 78 (1944).
32. *Id.* at 81 (quoting District Court).

saying that the restriction of the issue to whether or not the defendants really believed in what they said was in error. The court stated that courts could, and sometimes must, examine the truth or falsity of one's beliefs. The Supreme Court disagreed, saying "that the truth or verity of respondents' religious doctrines or beliefs" should not have been submitted to the jury. "Whatever this particular indictment might require, the First Amendment precludes such a course . . . ."[33] Therefore, the Court found that the District Court had properly withheld from the jury all questions of truth or falsity. Justice Douglas, writing for the majority, stressed the importance of not examining people's beliefs: "The religious views espoused by respondents might seem incredible, if not preposterous, to most people. But if those doctrines are subject to trial before a jury charged with finding their truth or falsity, then the same can be done with the religious beliefs of any sect."[34]

The single most important finding in this case concerning the definition of religion is the proposition that the truth and falsity of religious beliefs are outside of the scope of judicial examination. In the majority opinion, Justice Douglas wrote:

> Heresy trials are foreign to our Constitution. Men may believe what they cannot prove. They may not be put to the proof of their religious doctrines or beliefs. Religious experiences that are as real as life to some may be incomprehensible to others. Yet the fact that they may be beyond the ken of mortals does not mean that they can be made suspect before the law.[35]

This holding, in the strong form, left religion untouchable by the Court in the sense that beliefs thought completely ridiculous and perhaps formed just to avoid a law cannot be examined as to religious worth. Implicit in this decision is an understanding that the classification of religion has broadened and that more groups now call themselves "religious" than ever before. In this way, the Court set the stage for myriad cases in which it will have to decide how far it can go into examining the nature of religious beliefs. The precedent set in this case continues to exist today–namely that a court may only judge the sincerity of a person's belief, and not the verity of the belief as such.

In his dissenting opinion, Justice Jackson pointed out the difficulty that lies with trying to separate the truth/falsity of a belief and whether or not one truly believes it. "The most convincing proof that one

33. *Id.* at 86.
34. *Id.* at 87.
35. *Id.* at 87.

believes his statements is to show that they have been true in his experience."[36] He proposes that the Court should not get involved in examining truth/falsity, nor should they deal with whether or not one really believes the things he professes to believe. Quoting William James, Jackson says that the essence of religion is in the personal experiences of people. Following this logic, he states that one's beliefs "cannot be verified to the minds of those whose field of consciousness does not include religious insight."[37] Therefore, while the principles laid down in this decision are somewhat radical as far as religious jurisprudence is concerned, the dissenter in the case did not argue against what is radical about the decision—on the contrary, he wanted to keep government out of religious analysis even more than the majority. "It is plain that there is wide variety in American religious taste. I would . . . have done away with this business of judicially examining other people's faiths."[38]

Just three years later, the Court handed down *Everson v. Board of Education*, which involved the right of the Board of Education to reimburse parents of parochial school students for bus transportation. In a majority opinion written by Justice Black, the Court found for the school board and ruled that the reimbursement practice does not violate the Establishment Clause because the transportation, like the police, is a basic service that must not discriminate on the basis of religion. This ruling drastically altered the course of religious jurisprudence in several ways. First, Black applied the Establishment Clause to the states through the Fourteenth Amendment for the first time. Next, he shifted the Court's view of the Establishment Clause from accommodation to strict separation by spelling out that the government cannot aid any religion in any way, whether the aid is financial or influential. Most importantly, however, Justice Black asserted (and the other justices accepted) that the First Amendment was meant to protect both believers and non-believers, which was a crucial step in the Court's gradual expansion of the definition of religion. Throughout his opinion, Black emphasized this point: "[neither the federal or state government] can pass laws that aid one religion, aid all religions, or prefer one religion over another . . . . That Amendment requires the state to be neutral in its relations with groups of religious believers and non-believers."[39] For the first time, non-theists are recognized as being protected under the Establishment Clause.

36. *Id.* at 92.
37. *Id.* at 93.
38. *Id.* at 95 (Stone, C.J., dissenting).
39. *Id.* at 18.

Justice Frankfurter reasoned that the "First Amendment does not have two meanings, one narrow to forbid 'an establishment' and another, much broader, for securing 'the free exercise thereof.' "[40] Frankfurter said that the word "religion" "connotes the broadest content, determined not by the form or formality of the teaching or where it occurs, but by its essential nature regardless of those details."[41] He also stated that the meaning of "religion" is not to be taken in "any formal or technical sense."[42] All of this would seem to imply that he, like the other Justices in this case, interpreted "religion" in a much broader sense than was previously recognized by the Court, setting a precedent that would soon be widened even further. However, his assertion that religion should be defined the same for Establishment and Free Exercise cases is important, as much scholarly discussion has been focused on this very issue.

The impact of *Everson* cannot be underestimated. Prior to this case, the Supreme Being criterion was still a requirement of the Court in defining religion. After *Everson*, there would no longer be any difference between believers and non-believers in the eyes of the Court concerning Establishment Clause cases. Future cases building on this precedent widened the "religion" classification even further by expanding the general definition of religion in the way that *Everson* expanded the Establishment Clause's coverage of the issue.

2. *The Definition Broadens:* Torasco *to* Welsh

In *Torasco v. Watkins*,[43] decided in 1961, a man who was refused a commission to serve as notary public because he would not declare his belief in God brought suit under the Establishment Clause. The Supreme Court, reversing the courts below, ruled that the Maryland statute violated the Establishment Clause. By instituting a religious test oath, "the power and authority of the State of Maryland thus is put on the side of one particular sort of believers—those who are willing to say they believe in 'the existence of God.' "[44]

Perhaps the most significant aspect of this case is not only that it restates *Everson*, but that it is even more explicit in its acceptance of non-theistic belief systems. Justice Black reaffirmed the ruling in *Everson* by stating, "[n]either [federal nor state governments] can

40. *Id.* at 32.
41. *Id.* at 33.
42. *Id.*
43. 367 U.S. 488 (1961).
44. *Id.* at 490.

constitutionally pass laws or impose requirements that aid all religions as against non-believers, and neither can aid those religions based on a belief in the existence of God as against those religions founded on different beliefs."[45] In a footnote, Black went further by specifying that "[a]mong 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."[46] From *Torasco*, the Court would be even more adventurous in widening the definition of religion in First Amendment jurisprudence.

Four years after *Torasco*, in a case involving conscientious objector laws during the Vietnam War, the Supreme Court ventured into perhaps its broadest expansion of the definition of religion. Combining several cases into one hearing, *United States v. Seeger*[47] involved federal prosecutions of individuals who claimed conscientious objector status. The defendants challenged the constitutionality of a law that defined the term "religious training and belief" as "an individual's belief in 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."[48]

The Supreme Court found for the defendants, holding that the conscientious objector statute protected those whose beliefs were "sincere and meaningful [and occupy] 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."[49] Instead of holding the law to be unconstitutional, the Court merely interpreted the statute to allow non-theistic believers to be conscientious objectors. Justice Clark, writing for the Court, argued that "Congress deliberately broaden[ed] [the term 'religious training and belief'] by substituting the phrase 'Supreme Being' for the appellation 'God.' "[50] Therefore, the Court decided that the best test for deciding whether beliefs are "religious" was to use the parallel-belief test, which would accept deeply held beliefs stemming from secular roots if they are analogous to traditional religions.

Seeger deals almost exclusively with the definition of religion problem. Interestingly, in Justice Clark's decision, the Court almost assumed the idea that religion encapsulates a larger realm than "God." The Court not only asserted that "religious training and belief" in the statute includes non-theistic faiths, but it implied that the constitutional definition of religion also should be construed as broadly. Surprisingly,

45. *Id.* at 495.
46. *Id.* at 495 n.11.
47. 380 U.S. 163 (1965).
48. *Id.* at 165 (quotation marks omitted).
49. *Id.* at 166.
50. *Id.* at 175.

the *Seeger* Court believes the test is simple and straightforward: "it is essentially an objective one, namely, does the claimed belief occupy the same place in the life of the objector as an orthodox belief in God holds in the life of one clearly qualified for exemption?"[51] This test is hardly objective and anything but straightforward, as its vagueness creates its own problems for a court's application. Still, this test persists today in varied form. While several Supreme Court cases before this one argued for non-theistic beliefs being protected under the First Amendment, the Court became willing to extend a benefit traditionally reserved for theistic believers to those admittedly espousing beliefs from ethical and moral roots.

Five years later, in *Welsh v. United States*,[52] the Supreme Court again dealt with the conscientious objector laws and the definition of religion. In this case, petitioner Welsh contended that he deserved conscientious objector status, although he admitted that his beliefs were not religious in the general meaning of the term. The Supreme Court granted Welsh conscientious objector status because his beliefs were held "with the strength of traditional religious convictions," and that "[i]f an individual deeply and sincerely holds beliefs that are purely ethical or moral in source and content but that nevertheless impose upon him a duty of conscience to refrain from participating in any war at any time, . . . such an individual is . . . entitled to a . . . conscientious objector exemption . . . ."[53] The majority opinion in *Welsh*, decided five years after *Seeger*, served two important functions. First, it upheld *Seeger* so closely that it showed an unwavering commitment by the Court to this non-theistic, broad definition of religion. Secondly, Black's majority opinion actually extended *Seeger* with even more leniency in granting conscientious objector status. In *Seeger*, the Court said that while the definition of religion must not limit itself to only theistic pursuits, it also must not include mere philosophical and personal beliefs. However, in *Welsh* the Court obscured that line by making the primary determinant the strength with which beliefs are held. The Court decided that those beliefs that are ethical or moral by nature, if they are held as fervently as traditional religious beliefs, can be deemed "religious." Due to the *Welsh* Court's far-reaching interpretation of the term "religion," however, this can be seen as the most extreme definition that the Court will adopt.

51. *Id.* at 185.
52. 398 U.S. 333 (1970).
53. *Id.* at 340.

3. *The Court Retreats:* Yoder

The most perplexing of the Court's decisions in this area is *Wisconsin v. Yoder.*[54] Decided just two years after the expansive definition of *Welsh*, *Yoder* is one of the more conservative, traditional definitions of religion by the Court. The defendants, members of the Old Order Amish religion, were convicted of violating Wisconsin's compulsory school attendance law by not sending their children to high school after they had graduated from the eighth grade.[55] The defendants argued that their children's participation in formal education in high school was contrary to the Amish religion, such that the law violated the Free Exercise Clause.[56] The Supreme Court ruled that the compulsory education law, while serving a secular, violated the Amish people's free exercise of religion.[57] As a result, the Court granted an exemption to the Amish from the compulsory education law. In the majority opinion, Chief Justice Burger relied extensively on the Amish tradition and way of life in establishing the dramatic negative impact that would result if the Amish people were not allowed to continue their practice of not attending school past the eighth grade.[58] While holding that the law is prima facie valid, he demonstrated that the added benefit of a few more years of high school would not outweigh the damage that would be done to the Amish religion if its people were not allowed to practice their religion.[59] In fact, Burger argued that the Amish way of life is more than effective in preparing its people for productive and useful lives in society.[60] The Court decided that the compulsory education law substantially burdened the defendants and, absent a compelling interest on the government's part, the defendants were entitled to an exemption.

Burger directly addressed the issue of how one can determine whether or not a Free Exercise claim merits First Amendment protection, as well as the importance of doing so:

> [T]o have the protection of the Religion Clauses, the claims must be rooted in religious belief. Although a determination of what is a 'religious' belief or practice entitled to constitutional protection may present a most delicate question, the very concept of ordered liberty precludes

54. 406 U.S. 205 (1972).
55. *Id.* at 207.
56. *Id.* at 213.
57. *Id.* at 236.
58. *Id.* at 213-15.
59. *Id.* at 214.
60. *Id.* at 216.

> allowing every person to make his own standards on matters of conduct in which society as a whole has important interests.[61]

Burger continued by stating that those beliefs based only upon philosophical or personal reasons, rather than religious ones, "do not rise to the demands of the Religion Clauses."[62] He specifically asserted that secular values, such as those espoused by Thoreau, do not qualify for protection.[63] According to Burger, however, the Amish clearly deserved protection because of their organizational structure, established way of life, and long tradition as a religious group.[64] As a result, the Amish should be granted protection despite the uniqueness of their beliefs: "A way of life that is odd or even erratic but interferes with no rights or interests of others is not to be condemned because it is different."[65]

In a bitter dissent, Justice Douglas bemoaned the Court's reliance on the history and tradition of the Amish people in granting them Free Exercise protection.[66] His main focus, however, was the children's religious rights.[67] He advocated a definition of religion that did not examine a sect's history and tradition, but instead one that treated religion as a personal experience.[68] Arguing for a return to the definition used in *Seeger* that did not use history or tradition as a factor, Douglas said that "what we do today...opens the way to give organized religion a broader base than it has ever enjoyed . . . ."[69] He also pointed out that the Court's assertion that Thoreau-like beliefs do not merit First Amendment protection strays from their prior decisions, which had included such beliefs in the definition of religion.[70] Following *Seeger* and *Welsh*, Douglas stated that he adheres "to these exalted views of 'religion' and see[s] no acceptable alternative to them now that we have become a Nation of many religions and sects, representing all of the diversities of the human race."[71]

When viewed in context of the decisions surrounding it, *Yoder's* presentation of the definition of religion seems anomalous. In *Seeger* and *Welsh*, the Court ruled that religious protection should be extended to include those whose belief systems stem from ethical and

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61. *Yoder*, 406 U.S. at 215-16.
62. *Id.* at 216.
63. *Id.*
64. *Id.* at 215.
65. *Id.* at 224.
66. *Id.* at 241.
67. *Id.* at 242.
68. *Id.* at 243.
69. *Id.* at 247.
70. *Id.* at 247-48.
71. *Id.* at 249.

philosophical roots, which dramatically expanded the definition of religion. However, in *Yoder* the Court seems to retreat by using history and tradition as key factors in assessing the religious nature of the Amish. After this decision, the Court avoided examining religious claims in most cases and adhered to a view more closely following *Seeger*, explaining that it is not a judicial function to determine the religious content of belief systems or the centrality of particular practices. *Yoder* marks a wavering in the Court's decision to open up religious protection to ethical and moral beliefs, as it attempted to bring the more traditional aspects of religion back into consideration.

4. The Confusion Continues: Thomas *to* Lee

In 1981, the Supreme Court again considered the definition of religion in *Thomas v. Review Board.*[72] The petitioner, a Jehovah's Witness, quit his job at a company that fabricated turrets for military tanks because he said that his religious beliefs prevented him from taking part in the production of weapons.[73] He applied for unemployment compensation from the state of Indiana, who refused to pay him benefits because his voluntary termination, though executed for religious reasons, "was not based upon a 'good cause [arising] in connection with [his] work.' "[74] The Supreme Court, in Chief Justice Burger's majority opinion, ruled in favor of Thomas and awarded him unemployment compensation benefits because the denial of the benefits violated his free exercise rights.[75] Following *Torasco* and *Ballard*, Burger emphasized the Court's disapproval of the Indiana Supreme Court's attempt to evaluate the beliefs of the petitioner, saying that the "determination of what is a 'religious' belief or practice . . . is not to turn upon a judicial perception of the particular belief or practice in question."[76] In addition, the Court disagreed with the Indiana Supreme Court's ruling because it seemed to rely heavily on their finding that Thomas was "struggling" with his beliefs and that another Jehovah's Witness interpreted their religion differently from Thomas.[77] Both of these findings, according to Burger, were not a judicial function and should be irrelevant:[78] "Religious beliefs need not be acceptable,

72. 450 U.S. 707 (1981).
73. *Id.*
74. *Id.*
75. *Id.* at 720.
76. *Id.* at 714.
77. *Id.*
78. *Id.*

logical, consistent, or comprehensible to others in order to merit First Amendment protection."[79] In addition, Burger averred that "Thomas drew a line, and it is not for us to say that the line he drew was an unreasonable one."[80] Thus, *Thomas* affirms more clearly the idea first stated in *Ballard* that courts should not engage in substantive examinations of religious beliefs.

Following *Thomas*, no case has directly addressed the definition of religion. Yet, even the Court's adjudication of these cases show a commitment to the broad definition used from *Everson* to *Thomas*. The Supreme Court's decision in *Lee v. Weisman*, handed down in 1992, involved the constitutionality of prayer at public school graduation ceremonies. The plaintiff, Daniel Weisman, brought suit seeking to enjoin such prayers during graduation ceremonies, claiming a violation of the Establishment Clause. The Supreme Court agreed. Justice Kennedy's majority opinion held that although the prayer is non-sectarian, officially sanctioned prayer amounts to a sort of "civic religion" that is unconstitutional. Kennedy cited the school officials' direct performance of the prayer, the children's attendance that was "in a fair and real sense obligatory" because of the importance of graduation, and the peer pressure associated with participation in the prayer.[81] As support for his decision, Kennedy concluded that the prayer imposed religious meaning on the students and therefore violated the separation of church and state. In a concurring opinion, Justice Souter added that the prayer was theistic, and the fact that this theistic prayer fell on impressionable minds made it very dangerous and in direct violation of the First Amendment.

As in previous cases, the Supreme Court took a broad view of the concept of religion by holding that non-sectarian prayer constituted a sort of "civic religion" that is a violation of the First Amendment. Admitting that the prayer was non-sectarian, Kennedy stated that it is "within the embrace of what is known as the Judeo-Christian tradition, [a] prayer which is more acceptable than one which, for example, make explicit references to the God of Israel."[82] He also rejected the argument that this "civic religion" is "one which is tolerated when sectarian exercises are not."[83] Kennedy argued that until all religions come to an agreement that there is "an ethic and a morality which transcend human invention," government cannot make statements promoting one view over another, even if those statements are nonsectarian in and of

79. *Id.* at 714.
80. *Id.* at 715.
81. *Id.* at 586.
82. *Id.* at 589.
83. *Id.*

themselves.[84] He concludes that this nonsectarian, "civic" prayer still excludes non-theistic believers, and as such is an establishment of religion. Thus, while *Lee* gives us no clearer a definition of religion than did any of its predecessors, it does signal that the Court is probably willing to take a broad view of religion that lies somewhere between *Seeger* or *Welsh* and *Yoder*.

5. Why the Confusion?

From this analysis of the judicial definitions of religion at the Supreme Court level, one naturally wonders why the Court has not clarified the issue. First, the concern that defining "religion" could violate the Establishment Clause may make the Court hesitant to address the definition of religion. However, this fear is not a valid justification for avoiding the issue because the "no definition" approach lacks clarity and, even if valid, itself requires a justification. Furthermore, as noted earlier, there is a difference between defining the scope of the Amendment and using it unconstitutionally. Second, the Court may believe that the evolving nature of the term "religion" has placed it beyond a reliable definition. However, the fact that the term "religion" is evolving does not mean that the Court can escape defining it. Simply put, if the Court wished to make "religion" an evolving conception, this in itself demands a justification that the Court has yet to give. Third, the Court's reasoning could be even more practical: as a matter of institutional competency, the Court could want to avoid the issue in order to protect its legitimacy, given the sensitive and difficult nature of defining "religion." The legitimacy concerns are indeed real because judges, most of whom are untrained in theology themselves, may not be the best able to define the term. It is worth noting, though, that the decision not to define "religion" has brought a lack of clarity that itself has the potential to cause legitimacy concerns. Bringing clarity to the issue by defining religion, while risky in some respects, may increase the Court's credibility.

84. *Id.*

B. Lower Courts

The lower federal courts have been bolder and much more direct in dealing with the definition of religion problem. While it is virtually impossible to cover all of the lower court cases dealing with this issue, this Section reviews some of the more important opinions in which judges have conducted extensive surveys of judicial and scholarly work and proposed novel definitions for future use.

1. Early Expansions of the Definition of Religion

One of the first lower court cases to deal with the definition of religion was *United States v. Kauten*,[85] a 1943 case concerning a conscientious objector. The defendant, Mathias Kauten, was convicted for neglecting to appear for induction into the United States Army. The Second Circuit Court of Appeals reviewed Kauten's professed beliefs, noting that "the registrant admitted that he was an atheist or at least an agnostic. It is his belief that organized religion is detrimental and a hindrance to science."[86] The court therefore ruled against the defendant, saying that "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.' "[87] In *Kauten*, Judge Augustus Hand directly addressed the definition problem:

> 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 . . . 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.[88]

85. 133 F.2d 703 (2d Cir. 1943).
86. *Id.* at 707.
87. *Id.* at 707-08.
88. *Id.* at 708.

Although the court executes a more traditional ruling on the definition of religion by denying Kauten an exemption, the Court begins to accept a broader view of religion by not requiring a Supreme Being in the belief system.

By leaving the door open for cases like *Seeger*, *Kauten* showed that not only the Supreme Court but also lower courts were starting to accept a broader definition of religion. Indeed, the Court in *Seeger* explicitly mentioned *Kauten* as having preceded—indeed, as having influenced to a large extent—the decision in *Seeger*.[89] *Kauten* would be cited extensively in the draft board cases, as it represents the first attempt to determine the proper classification for conscientious objectors without the Supreme Being requirement.

Fellowship of Humanity v. County of Alameda, a state appellate court decision, is also insightful as to the lower federal courts' impression of the concept of religion because the court's reasoning plays a significant role in the development of the Supreme Court and other federal courts' definitions of religion.[90] The Fellowship, a nonprofit corporation claiming to be a "religious organization" exempt from city and county property taxes, sought to recover the taxes that they paid under protest. The court, affirming the judgment from the court below, ruled that the corporation qualified for the tax exemption. Judge Peters explained that "religion," for constitutional purposes, must be defined very broadly so as to include the followers of any faith, or of no faith.[91] In like manner, the tax exemption must be given in a broad manner that does not use the Supreme Being requirement—"[i]f the state can constitutionally subsidize those functions of religious groups which are not related to 'religion' in its narrow sense, then it must subsidize those non-theistic groups which perform the same function."[92]

Fellowship is significant because the court conducted an extensive judicial search for a definition of religion and decided that the theistic requirement should no longer be imposed. Instead, any belief that "occupies the same place in the lives of its holders that the orthodox beliefs occupy in the lives of believing majorities" should be protected.[93] This important insight reflects the view that would later be embraced by the *Seeger* Court. Judge Peters argued that "there are forms of belief generally and commonly accepted as religious worship . . . which do not include or require as essential the belief in a deity. Taoism, classic Buddhism, and Confucianism, are among these religions."[94] Peters also

89. United States v. Seeger, 380 U.S. 163, 178 (1965).
90. Fellowship of Humanity v. County of Alameda, 315 P.2d 394, 397 (Cal. Ct. App. 1st 1957).
91. *Id.*
92. *Id.* at 409.
93. *Id.* at 406.
94. *Id.* at 401.

examined the views of scholars concerning the definition of religion, stating that they too doubt that the theistic requirement is fair.[95] He then concluded that to limit the definition to only theistic pursuits could "lead to some strange results," and so "[i]n a country where religious tolerance is accepted it would not seem that the limited definition is in accord with our traditions."[96] Relying on *Kauten*'s broad definition and the fact that "many of the great religious faiths with hundreds of millions of followers have no god," the court decided that the theistic requirement is not constitutional.[97]

In dissent, Judge Bray stated that granting this exemption to a society like Fellowship that, at the very least, discourages belief in theistic features of religion, undermines the very purpose of the tax exemption adopted by Congress.[98] Bray relied on history and tradition to argue that the general theistic definition of religion "has been accepted over the years by the people, Legislatures and the Congress," and that there is no need to change it now.[99] Bray argued that the authors of the statute clearly did not have merely ethical or moral systems of belief in mind when they created the tax exemption, and that to now extend it to these people would undermine its very purpose.

2. *The Influence of Judge Adams:* Malnak *to* Alvarado

In *Malnak v. Yogi*,[100] a 1979 case from the Third Circuit, Judge Alvin Adams began to leave his mark on the definition of religion issue. In the case, an action was brought to stop the teaching of a course entitled Science of Creative Intelligence Transcendental Meditation (SCI/TM) in New Jersey public high schools because it violated the Establishment Clause. The plaintiff, Malnak, claimed that the course was religious in nature and that the school's sponsoring of it was therefore an establishment of religion. Yogi, the author of the textbook used in the class and the founder of the Science of Creative Intelligence, actually claimed that his studies were not religious in nature and therefore did not violate the Establishment Clause. The district court found for Malnak, saying that the course being offered by the school was in fact a violation of the First Amendment.[101] The Third Circuit

95. *Id.*
96. *Id.* at 405.
97. *Id.* at 402.
98. *Id.* at 414.
99. *Id.*
100. 592 F.2d 197 (3d Cir. 1979).
101. *Id.*

affirmed, holding that the SCI/TM was religious in nature and that the teaching of it was therefore prohibited. In making this judgment, the majority used the broad definition of religion that had been set forth by recent Supreme Court cases, such as *Everson* and *Torasco*. This decision is particularly noteworthy because it was a rare case in which a court used these precedents to rule against a non-believer and find his beliefs to be religious, despite the fact that he proclaimed his beliefs to be non-religious.

However, the primary significance of this case comes from the concurring opinion of Judge Adams. Adams can be viewed as a pioneer in the definition of religion area because of *Malnak*, where he performed one of the most complete analyses on the issue. In his opinion, he attempted to review various judicial definitions of religion over time in order to generate a cumulative, workable definition that all courts could use in the future. Adams began by separating the case law relating to the definition of religion into four groups: cases adopting a traditional definition of religion, school prayer cases, conscientious objector cases, and cases dealing with the new constitutional definition of religion. First, Adams reviewed the cases dealing with the traditional definition of religion. Decisions such as *Davis* and *MacIntosh* espoused this definition, which is firmly set in theistic notions of religion. Next, he analyzed the school prayer cases and showed that these do little to change the traditional definition of religion because judgments such as *Engel* and *Schemp* "are unquestionably and uncompromisingly Theist."[102]

Third, relying on *Seeger* and *Welsh*, Adams showed how the conscientious objector cases broadened the definition of religion.[103] Adams also noted that the Supreme Court has somewhat retreated from its broadest definition of religion—that found in *Seeger* and in *Welsh*—but that, at the very least, "*Seeger* and *Welsh* point to a definition at least somewhat broader than that advanced in the earlier decisions of the Supreme Court."[104]

Finally, Adams discussed the cases suggesting a new constitutional definition of religion, one that rejects the traditional notion of a Supreme Being. For example, in *Torasco*, the Court rejected the view that religion could only be defined in terms of a Supreme Being, as did a number of other lower federal court cases. He concluded from this survey that "it would thus appear that the constitutional cases that have actually alluded to the definitional problem, like the selective service cases, strongly support a definition for religion broader than the

102. *Id.* at 203.
103. *Id.*
104. *Id.* at 205.

Theistic formulation of the earlier Supreme Court cases."[105] Adams considered the "modern definition of religion" not only in the arena of law, but also in the realms of theology and sociology. From this brief analysis, he suggested that the new definition was best described as a "definition by analogy . . . . The modern approach thus looks 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.' "[106]

Following this "definition by analogy" approach, Adams created three useful indicia that would be helpful in finding belief systems that are religious in nature. First, a court must examine the content of the religion to determine whether it addresses fundamental questions or fulfills people's ultimate concerns. However, courts should not confuse this responsibility with the one of determining the truth or falsity of a religion, which the judiciary should never do. Next, a court must determine the comprehensiveness of the belief system in question. "A religion is not generally confined to one question or one moral teaching; it has a broader scope."[107] A religious belief, then, will not only answer a single question, but it will provide guidelines to answering all of the questions in life. Third, Adams said that a useful indicia for determining religiosity is "any formal, external, or surface signs that may be analogized to accepted religions," such as ceremonies or organization.[108] While a religion may exist without these features, acknowledging them can be helpful in determining the question.

Of course, Adams warned that his indicia should be used merely as an aid: "Although these indicia will be helpful, they should not be thought of as a final 'test' for religion...[f]lexibility and careful consideration of each belief system are needed. Still, it is important to have some objective guidelines in order to avoid Ad hoc justice."[109] In his judgment, SCI/TM contained all three of these characteristics and therefore was classified as "religious" for First Amendment purposes. Since no other purpose could be found for the class but to advance this religion, Adams concluded that the course violated the Establishment Clause.[110]

Finally, Adams considered the idea that there should be two separate definitions of religion—one for Free Exercise Clause jurisprudence and another for Establishment Clause jurisprudence.

105. *Id.* at 207.
106. *Id.*
107. *Id.* at 209.
108. *Id.*
109. *Id.* at 210.
110. *Id.*

Many have argued that the courts need to give a very expansive definition of religion in Free Exercise cases so that believers are given the benefit of the doubt, but that a limited definition in Establishment Clause cases is suitable so that the government can function without constant challenges. Professor Laurence Tribe of Harvard, for example, "has advanced the argument that the free exercise clause should be read broadly to include anything 'arguably religious,' but that the establishment clause should not be construed to encompass anything 'arguably non-religious.'"[111] However, Adams disagreed with these scholars and instead proposed a unitary definition of religion, citing Justice Rutledge's dissent in *Everson* supporting one definition for both clauses.[112] Adams pointed out that a dual definition would have troubling results by enabling some groups to claim religious standing only under the Free Exercise Clause and not under the Establishment Clause, thereby being free from governmental regulation but able to receive governmental support.[113] Therefore, Adams supported a unitary definition of religion that reads religion broadly in both clauses.

Judge Adams himself used his test in a majority opinion just two years later, in *Africa v. Pennsylvania*.[114] Frank Africa, a prisoner of the Commonwealth of Pennsylvania, sought an injunction requiring the state prison authority to provide him with a special religious diet or else transfer him to a county institution where his dietary needs could be met. The district court found against Africa, and Africa took an appeal to the Third Circuit. Judge Adams, writing for the court in affirming the district court, held that Africa, who claimed to be a "Naturalist Minister" for the MOVE organization, did not have "religious" reasons to demand a special diet. Africa contended that MOVE was a religion, saying that "'there is no comparison between the absolute necessity of our belief and this system's interpretation of religion.'"[115] He also claimed that the religious diet is central to MOVE's belief system and way of life, and that to deny this diet would be to rob its members of their spiritual needs. However, Adams and the court disagreed with Africa and found that the belief system more closely resembled a personal and philosophical choice than a religious one.[116]

The court first found that Africa sincerely believed in the MOVE creed.[117] However, using the three-part test that Adams first introduced in his concurring opinion to *Malnak*, the court found that Africa's belief

111. *Id.*, summarizing LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW, 827-28 (1978).
112. *Id.*
113. *Id.*
114. 662 F.2d 1025 (3rd Cir. 1981).
115. *Id.* at 1027.
116. *Id.* at 1036.
117. *Id.* at 1030-31.

system was not religious in nature.[118] First, he concluded that Africa's beliefs did not address "fundamental and ultimate questions," but rather personal and social concerns.[119] Next, the court decided that the MOVE system did not pass the test of "comprehensiveness" because it was a "single governing idea, perhaps best described as philosophical naturalism."[120] Finally, the court asserted that MOVE lacked any of the "structural characteristics" common to orthodox religions.[121] Therefore, MOVE could not be classified as a "religion" for the purposes of the First Amendment.[122]

In this way, the importance of *Africa* lies in the fact that for the first time the three-part religious test was used in a majority opinion, even though it is still only at the court of appeals level. In addition, the court was able to demonstrate more clearly how the test is to be applied. Finally, this case is notable because of its analysis of the Supreme Court's and other courts' decisions relating to the definition of religion. In tracing the court's records in this area, Adams tried to bring together all of the cases to yield a cumulative, workable definition of religion.

The influence of Judge Adams' three-part test put forth in *Africa* and *Malnak* can be seen in that several judges have used it in their own decisions. For example, an Ohio District Court in *Carpenter v. Wilkinson*[123] used the test from *Malnak* to decide that Satanism was not a religion for constitutional purposes. In addition, the Eighth Circuit Court of Appeals used Adams' test in *United States v. DeWitt*[124] to find that an individual could not claim religious beliefs as a defense to his drug use.

Another case that used Adams' test is *Alvarado v. City of San Jose*[125] from the Ninth Circuit. In 1991, the City of San Jose commissioned the creation of a sculpture to commemorate the contributions of Mexican and Spanish culture to the city.[126] The commissioned sculpture was intended to represent Quetzalcoatl, the "Plumed Serpent" of Aztec mythology.[127] However, controversy arose in the community over the religious nature of the sculpture.[128] Judge Nelson, writing for the court, recognized that "[i]n dispute here is the current religious significance, if any, of Quetzalcoatl or the Plumed

118. *Id.* at 1031-36.
119. *Id.* at 1032.
120. *Id.* at 1035.
121. *Id.* at 1035-36.
122. *Id.* at 1037.
123. 946 F.Supp. 522, 525-26 (N.D. Ohio 1996).
124. 95 F.3d 1374, 1375 (8th Cir. 1996).
125. 94 F.3d 1223 (9th Cir. 1996).
126. *Id.* at 1225.
127. *Id.*
128. *Id.* at 1226.

Serpent. Plaintiffs submit 'New Age' writings to support their claim that worship of this ancient deity is a going concern."[129] Therefore, the court proceeded to determine whether the submitted New Age writings supported the plaintiff's contention that belief in the symbolism of the sculpture was genuine.

To consider this issue, Judge Nelson turned to the three-part test put forth by Judge Adams in *Malnak* and used in the *Africa* majority decision. First, the court analyzed the New Age movement and stated that "there is no national organization, no hierarchy, no clearinghouse for information . . . . The New Age represents social, political, economic, psychological, and spiritual efforts to recognize and include all that our modern society has tended to exclude."[130] Pointing out that *Yoder* disallowed "personal" "isolated" beliefs from First Amendment protection, the court concluded that the New Age movement was not a religion for First Amendment purposes. Judge Nelson continued that classifying it as a religion would result in a definition so broad that it would take away the government's ability to control society: "Few governmental activities could escape censure under a constitutional definition of 'religion' which includes any symbol or belief to which an individual ascribes 'serious or almost-serious' spiritual significance."[131] Thus, it is important to see that Judge Adams' "test" for determining whether a given belief system is a religion has had a significant influence on courts even outside of the Third Circuit. Indeed, it is the most widely embraced definition proposed by any lower court.

3. *Variations of* Malnak: Smith v. Board *to* Meyers

Smith v. Board,[132] decided by an Alabama district court in 1987, contains a unique analysis of judicial and scholarly definitions of religion. Although the case was reversed on appeal based on Establishment Clause analysis, Judge Hand's thorough and fresh approach is important because of his surprising conclusion that secular humanism is a religion under the First Amendment. In *Smith*, the plaintiffs brought suit to allege that secular humanism had been established as a religion in the Alabama public school system.[133] The defendants, however, argued that

129. *Id.*
130. *Id.* at 1229.
131. *Id.* at 1230.
132. Smith v. Bd. of Sch. Comm'rs., 655 F. Supp. 939 (S.D. Ala. 1987), *rev'd*, 827 F.2d 684 (11th Cir. 1987) (assuming for purposes of the decision that secular humanism is a religion, and reversing the district court based on Establishment Clause analysis).
133. *Id.*

secular humanism was not a religion and, even if it were a religion, it was not being established in the public schools. Chief Judge Hand found for the plaintiffs and held: 1) the philosophy of "secular humanism" was a religion for First Amendment purposes;[134] and 2) the textbooks used in the schools, which were alleged to be teaching moral values of secular humanism, impermissibly promoted the religion of secular humanism.[135] In doing so, Hand reviewed existing scholarly and judicial work on the definition of religion and secular humanism. Judge Hand began by tracing the influence of John Dewey and his philosophy of secular humanism on the public education system. Relying on Dewey's works and the clearly moral values and philosophy that Dewey's works teach, Hand stated that "the American system is that we do not teach religion in public schools, yet we teach Dewey's philosophy, and that is a religion."[136]

Judge Hand provided a detailed discussion of the definition of religion from two different aspects: the theoretical and the constitutional. First, in considering the theoretical definitions of religion, Hand relied heavily on three experts that testified at trial. One expert advocated a functional definition, saying that this approach "generally defines religion according to what it does."[137] Since the functional definition focuses on the role that the belief system plays in the life of the believer, it can recognize non-theistic and other modern moral systems as religious. Another expert focused on the concepts of religion prevalent at the time of the adoption of the First Amendment. From the thoughts of the Founders, he concluded that "it is not the business of the state to tell us what to believe at the deepest levels of our human existence," which also results in a broad conception that includes humanism.[138] A third expert "define[d] religion as a body of belief and practice which has some view of the cosmos . . . which posits a moral system; which has a body of doctrine or dogma; which proselytizes with zeal; and which strongly criticizes or denounces rival creeds."[139] Using these theoretical conceptions of religion, Hand concluded that secular humanism fits within the expert's descriptions. Pointing to Dewey as the authority in the movement, Hand pointed out that "Dewey repeatedly declared that he was trying to found a new religion, a religion to supplant earlier religions."[140]

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134. *Id.*
135. *Id.*
136. *Id.*
137. *Id.*
138. *Id.* at 968.
139. *Id.*
140. *Id.* at 969.

Judge Hand turned next to a detailed inquiry of the First Amendment definition of religion. He began by noting that the Supreme Court has never explicitly given a definition of religion, but that the issue "has been one of deciding whether conduct in a particular case falls within the protection of the free exercise clause or the prohibitions of the establishment clause."[141] Hand then traced the cases in which the Court dealt with the conception of religion, summarizing that "the [C]ourt's focus has shifted over the years from monotheism to a broad and mayhap vague notion of ultimate concerns and equivalent beliefs."[142] From these cases, Hand discerned several patterns:

> First, the requirement of neutrality affirmed in every one of the above cited cases means that the Constitution protects every religious belief without regard to its theological foundations . . . Second, what is religious is largely dependent on the way people in America currently think of religion . . . Third, the government cannot hinder or prohibit the growth of new beliefs by its definition of religion . . . Fourth, the government is still obligated to perform its essential functions . . .[143]

Turning to his own formulation of a constitutional definition of religion, Hand stated that "any definition of religion must not be limited, therefore, to traditional religions, but must encompass systems of belief that are equivalent to them for the believer . . ."[144] Hand's proposed definition, closely paralleled the test proposed by Judge Adams in *Malnak.* In particular, the first part of Judge Hand's test required that all religious beliefs address fundamental assumptions of the following kind: "1) the existence of supernatural and/or transcendent reality; 2) the nature of man; 3) the ultimate end, or goal or purpose of man's existence, both individually and collectively; 4) the purpose and nature of the universe."[145]

Yet Hand explicitly rejected the second part of Adams' test, saying that the comprehensiveness aspect "is too vague to be an effective definition under the religion clauses . . . . A religious system should thus be comprehensive, but only in that the potential exists to resolve as yet unasked moral questions."[146] Finally, Hand embraced the third aspect of Adams' test, saying that external characteristics of groups

141. Smith v. Bd. of Sch. Comm'rs., 655 F. Supp.at 975 (S.D. Ala. 1987).
142. *Id.*
143. *Id.* at 976.
144. *Id.* at 978-79.
145. *Id.* at 979.
146. *Id.*

that can help in defining religion. For example, the sincerity of the adherents' claims is relevant to the analysis: "Sincerity is an important factor because the courts are accustomed to deciding questions of credibility and veracity, while the state is incompetent to issue decrees on the validity of a belief."[147] Other significant factors include group organization, hierarchical structure, literary manifestations of the movement, ritual and worship.[148]

Applying Adams' test to the case, Hand concluded that secular humanism is a religion because it "makes a statement about supernatural existence a central pillar of its logic; defines the nature of man; sets forth a goal or purpose for individual and collective human existence; and defines the nature of the universe, and thereby delimits its purpose."[149] Further, the movement erected a moral code, had organizational characteristics such as literature and leaders, and was based on faith assumptions.[150] This faith aspect became crucial to his subsequent analysis because Hand pointed out that there is no supernatural reality is based on faith, just as is the opposite, and that the First Amendment precluded the advancement of one-faith theory to the exclusion of others.[151]

By consulting so many noted authorities on the subject, *Smith* can be seen as perhaps the most thorough study of the social sciences in determining a proper definition of religion. Hand's definition, which is a quasi-functional approach because it also contains some aspects of a substantive approach, is still an analogy-based definition and therefore has a broad sweep. Normally, the Establishment Clause has relied on a more traditional conception. Thus, the fact that Hand used the broad definition in an Establishment Clause case, and found a non-mainstream group such as secular humanism to be religious in nature, makes this case very significant.

Importantly, although Judge Hand's decision was overturned on appeal, the Court of Appeals noted that the Supreme Court "has never established a comprehensive test for determining the "delicate question" of what constitutes a religious belief for purposes of the [F]irst [A]mendment..." and declined to address whether secular humanism was a religion.[152] Rather, the case was resolved on the grounds that the appellees "failed to prove a violation of the establishment clause through the use ... of the textbooks at issue in this case."[153] Thus, in saying only

147. *Id.* at 980.
148. *Id.*
149. *Id.*
150. *Id.*
151. *Id.*
152. Smith v. Board of Sch. Comm'rs, 827 F.2d 684, 689 (11th Cir. 1987).
153. *Id.*

that the textbooks did not advance secular humanism, the Court of Appeals did not reject Hand's analysis of the definition of religion, nor his assertion that secular humanism is in fact a religion.

There have been several other cases from lower courts that have attempted to resolve the definition of religion. For example, judges in both *Patrick v. LeFevre*[154] and *United States v. Sun Myung Moon*[155] have argued that the judiciary should embrace the definition of religion proposed by William James, which is an extremely broad one resembling *Seeger*. Additionally, the judge in *United States v. Meyers*[156] developed a broad set of external and internal criteria that resembles the test proposed by Judge Adams.

C. Conclusions from Judicial Attempts at Defining Religion

Several conclusions can be drawn from the preceding analysis of Supreme Court and lower federal court attempts to clarify the meaning of religion. First, it is clear that no court is willing to delve into determining the validity of beliefs; only the sincerity of the believers is proper for judicial determination. This principle was unofficially the standard before *Ballard*,[157] became the law in *Ballard*, and has not been challenged since. Second, courts at all levels since *Ballard* have refrained from defining religion in terms of a traditional theistic belief, and it seems apparent that future courts should refrain from defining religion on that basis.

Third, while the Supreme Court has largely avoided the issue, it appears to accept an expansive, over-inclusive definition. The lower courts, heeding this notion, have also used expansive definitions, indicating that their solution for protecting religious liberty is to extend the protection to as many people as possible. Fourth, one can also see from lower court decisions that the most common definitions of religion are analogical ones that contain elements of several types of standards, including a functional analysis and some content-based features such as the organizational structure of the church.

Finally, the long strain of Supreme Court and lower court decisions has yielded very little precedent regarding a specific definition of religion. The last explanation of the term "religion" by the Court was in *Thomas*,[158] in which the justices merely upheld *Torasco*[159] and the

154. 745 F.2d. 153 (1984).
155. 718 F.2d 1210 (1983).
156. 906 F. Supp. 1494 (D. Wyo. 1995), *aff'd* 95 F.3d 1475 (10th Cir. 1996).
157. United States v. Ballard, 322 U.S. 78 (1944).
158. Thomas v. Review Bd., 450 U.S. 707 (1981).

prior cases holding that government may not discriminate between believers and non-believers. Yet just before this, the Court had given a more conservative ruling of a traditional definition of religion in *Yoder*.[160] Preceding that case, however, was the broad notion of religion in *Seeger*.[161] Thus, one may conclude that the ephemeral definitions the Court has used do not evince any precise guidelines for defining religion from a judicial perspective. Realizing this, scholars too have attempted to define religion.

IV. Scholarly Attempts at Defining Religion

The quandary of defining religion has received considerable attention from academics and other scholars. Critics cover all disciplines and all sides of the debate, as there have been proposals for definitions from anthropologists, sociologists, theologians, philosophers, and a range of legal experts. These scholars have defined religion from a variety of perspectives, including content-based, functional, and analogical definitions, as well as those advocating no definition at all. Given the mass and variety of analyses from scholars, this Note attempts merely to provide a representative view of the existing literature on the topic by surveying some of the more comprehensive and unique works by . In order to do so, this Section separates the scholarship into three major approaches to defining religion: functional, content, and analogical approaches.

A. Functional Approaches

The most popular of the scholarly methods, the functional approach, is also the most commonly used method by the judiciary. As the name implies, a functional approach to defining religion seeks to classify beliefs based on what function the belief serves in people's lives. Thus, it does not matter what the beliefs actually are or what types of duties they involve, but rather the role that they play.

159. Torasco v. Watkins, 367 U.S. 488 (1961).
160. Wisconsin v. Yoder, 406 U.S. 205 (1972).
161. United States v. Seeger, 380 U.S. 163 (1965).

1. The Beginning of Scholarly Attention: Harvard *Note*

A student Note in the Harvard Law Review, titled *Toward a Constitutional Definition of Religion*, began the debate over this issue by proposing a functional definition of religion.[162] Framing the discussion, the note aptly states that "before courts apply any of the standards developed to effectuate the First Amendment, they must know that they are dealing with religion or religious belief."[163] The note then argues that the Court has, and should, develop a definition of religion that adjusts to the changing nature of religious experiences. Thus, the author points out that in *Seeger*, for example, the majority explicitly relied on the view of the progressive theologian Paul Tillich and his conception of religion as man's "ultimate concern."[164] The most important aspect of this definition is that "the meaning of the term 'ultimate' is to be found in a particular human's experience rather than in some objective reality."[165] A phenomenological approach to religion such as this, the note argues, is better than a content-based test for religion for two reasons.[166] First, the increasing diversity within traditional Christianity, where new theologians offer a redefinition of the content of Christianity, would result in these new forms being discriminated against when a content-based test is used because they sometimes contain features very different from the tradition.[167] Second, the "new religions" that do not speak in the familiar terms of classical traditions, and therefore cannot be tested by normal means, would be subject to instances of religious chauvinism under a content-based approach.[168]

As a result, the author decides that the *Seeger* Court's "ultimate concern" test is ideal for Free Exercise investigation because, by focusing on functional criteria, it avoids religious chauvinism as much as possible and accounts for the evolving nature of religion, but at the same time will exclude those belief systems that are not "ultimate." [169] Implicit in this standard is the notion that the only person able to decide what constitutes an ultimate concern is the believer himself, which admittedly opens up the possibility of government programs being

162. Note, *Toward a Constitutional Definition of Religion*, 91 HARV. L. REV. 1056, 1068 (1978).
163. *Id.* at 1056.
164. *Id.* at 1066.
165. *Id.* at 1067.
166. *Id.*
167. *Id.* at 1068.
168. Note, *Toward a Constitutional Definition of Religion*, 91 HARV. L. REV. 1056, 1070 (1978).
169. *Id.* at 1075.

impeded by a multitude of unverifiable and fraudulent claims.[170] The author quickly dismisses this contention, however, retorting that the *Sherbert* test was made such that government can show a compelling interest, which will curtail the amount of exemptions, and therefore will not allow government programs to be impeded.[171] Further, the author argues that fraudulent claims will not result because people would still have to prove the sincerity of their beliefs.[172] The note also alleges that history has shown that people are generally unwilling, because of religious scruples, to simply profess adherence to an established religion in order to gain an exemption.[173]

Importantly, however, the note admits that this broad conception of religion, while proper for Free Exercise jurisprudence, would wreak havoc in the Establishment Clause area.[174] As a result, the author advocates the use of a bifurcated definition of religion, using a narrower conception in Establishment Clause cases The note justifies using a bifurcated definition because it would respond most sensitively to the values underlying the Religion Clauses, it would perform the heuristic function of distinguishing the two clauses and highlighting each clause's purpose, and it would reduce the tension between the two clauses.[175] The proposed definition for Establishment Clause cases is an operational one, focusing on the actual power and perceived religiousness of a group to which the believer belongs. The note offers three main criteria for this test: (1) organization, which refers to structural elements that are common to associations; (2) theology, which is the nature of the tradition or practice (comprehensiveness and formalization); and (3) attitudinal conformity, which refers both to the ideological homogeneity of the group and to the importance of the beliefs in the lives of the believers. Therefore, by using a broad, functional definition in the Free Exercise realm, and using a narrower, operational conception in the Establishment area, the judiciary would be able to more effectively resolve disputes relating to the Religion Clauses. This dual definition more "fairly accommodates the individual's liberty of belief within the confines of the affirmative secular state."[176]

The ideas presented in the *Harvard* note have been widely influential on the contemporary definition of religion debate. The note makes a considerable argument both for the broad definition useful in a

170. *Id.* at 1077.
171. *Id.* at 1078-79.
172. *Id.* at 1079-80.
173. *Id.* at 1081.
174. Note, *Toward a Constitutional Definition of Religion*, 91 HARV. L. REV. 1056, 10684 (1978).
175. *Id.* at 1085.
176. *Id.* at 1089.

Free Exercise context and the narrower conception called for by the Establishment Clause, as well as an independent argument for why a bifurcated definition is the best solution. However, the note is based on several assumptions that are not as evident as the author suggests. For example, the author assumes that the First Amendment is intended to prescribe complete separation of church and state without considering the matter any further.[177] Yet, this is a debatable point. The writer avoids using original intent arguments in this area because there is little support for the notion of complete separation of church and state in the founding era. Then, in other issues the author turns to historical interpretivism by citing the drafters of the Bill of Rights periodically, showing a rather selective (and questionable) use of history.[178]

Also, the note proposes the "ultimate concern" test and perhaps too quickly dismisses the arguments opposing the test. For example, the author whisks away the argument that an expansive definition of religion presents the possibility of fraudulent claims by saying that this fear "rests on somewhat shaky foundations."[179] Yet in arguing against it, the note presents little more than the "honor code," meaning that people would not make fraudulent claims because they would not want to risk falsifying their creed and cheapening their central ideals. To show that people are unwilling to falsify their claims because of their consciences, the author points to the fact that people like Seeger and Welsh did not profess adherence to an established religion, but instead fought the system by the demands of their conscience. However, this rebuttal seems to ignore the fact that Seeger and Welsh are outlying cases and in no way represent the majority of people seeking exemptions.

Another problem with the note's conclusions is that in its justification for using a different, narrower conception of religion in the Establishment Clause context, the author begins by saying there are only two ways of mitigating the tension between the two clauses. First, the tension could be alleviated by using the same broad, functional conception from the Free Exercise context in both clauses. Alternatively, the Court could use a bifurcated definition that broadly defines religion with functional criteria for Free Exercise Clause cases, and would narrowly define religion for Establishment Clause cases. Yet this portrayal of the available alternatives neglects at least one important option: using a single, narrow definition for both clauses and leaving out the functional conception altogether. The note's neglect of this option is possibly due to the fact that it has already endorsed the more expansive Free Exercise definition. However, this does not allow the author to

177. *Id.* at 1056.
178. *Id.* at 1059.
179. *Id.* at 1080.

simply ignore the unitary, narrow definition of religion that is itself justifiable.

2. *More Recent Scholars*

An interesting use of the functional approach to defining religion is Craig Mason's *"Secular Humanism" and the Definition of Religion.*[180] Specifically written to cover two cases dealing with secular humanism—one concerns Free Exercise issues and the other relates to Establishment issues. In addition, his essay provides a thorough analysis of past scholarly and judicial definitions and proposes a single, expansive definition resembling the "ultimate concern" test of *Seeger.*[181] Using a functional definition, Mason argues, is better than the alternative approaches because it more appropriately captures the essence of religious liberty. Thus, Mason proposes that the Court embrace a modified form of the functional definition proposed in the *Seeger* decision for use in both Free Exercise and Establishment Clause cases. A unitary definition would be more consistent in its application for religious jurisprudence, according to Mason. To make the definition work, he argues, the term "ultimate" must be understood to mean "all values and 'knowledge' which cannot be proven true, or even tested, by empirical evidence. 'Ultimate' judgments rest upon some type of non-rational 'faith.' "[182] Therefore, the role of the courts is not to attempt to objectify values, but rather to determine if the belief system is religious by analyzing whether or not it rests on some non-rational faith.

To show how his definition works in practice, Mason considers two cases dealing with secular humanism as they relate to the modified-*Seeger* definition of religion. In *Mozert v. Hawkins County Public Schools,*[183] a Free Exercise Clause case, the plaintiff objected to new texts that allegedly advanced secular humanism. In *Smith v. Board,* an Establishment Clause case, the plaintiffs attacked the public school curriculum and said that it was establishing secular humanism. In both cases, the question that Mason focuses on is whether secular humanism is a religion. Mason, disagreeing with the approach taken by the appellate court in both cases, argues that his modified-Seeger approach

180. Craig Mason, Comment, *"Secular Humanism" and the Definition of Religion: Extending a Modified "Ultimate Concern" Test to* Mozert v. Hawkins County Public Schools *and* Smith v. Board of School Commissioners, 63 WASH. L. REV. 445 (1988).

181. *United States v. Seeger,* 380 U.S. 163 (1965).

182. *Supra* note 207, at 456.

183. 579 F.Supp. 1051 (E.D. Tenn.. 1984), *rev'd,* 765 F.2d 75 (6th Cir. 1985), remanded to 647 F. Supp. 1194 (E.D. Tenn. 1986), rev'd, 827 F.2d 1058 (6th Cir. 1987).

would find secular humanism to be a "religion" under both the Establishment and Free Exercise Clause. Recognizing that the definition used in Free Exercise Claims may already be broad enough to encompass secular humanism, Mason argues that the Court needs to finally "finish, under the Establishment Clause, what it began under the Free Exercise Clause."[184] Since the Court cannot return to nineteenth century "Christian theocentrism" in order to correct the gap between the two clauses, Mason suggests that it "undertake the weighty task of protecting the full range of First Amendment values by broadening the scope of the Establishment Clause."[185] He argues that the secular humanism cases show the need to address the problem of defining religion, for without first acknowledging the problem "it would be a dangerous pretense of innocence to restrict the Establishment Clause to traditional beliefs. Instead, the Court must protect democratic culture from tyranny in all of its guises."[186]

Mason's essay is particularly interesting in the larger context of the definition of religion problem because he is advocating a single, broad definition of religion. This combination is not very common, as most people advocating an expansive definition for Free Exercise cases also adopt a narrower one for Establishment Clause cases. Simply put, using an expansive definition for Establishment Clause cases is a hard case to make, since doing so would put the government under a great deal of pressure in all of its actions. The uniqueness of Mason's view is further seen in the fact that he explicitly includes secular humanism as a religion under the First Amendment, which is a point not easily made in scholarly or judicial work.

Yet, the article's largest shortcoming is that he merely assumes many basic points. When it says that "the constitutional rules within each clause are relatively settled" and proceeds to argue that these "settled" points, such as complete separation of church and state, lead to his proposed definition.[187] Moreover, an obvious drawback to the article's approach is that, while admitting the fact that many people have multiple ultimate concerns, Mason never attempts to conclude how this problem will be handled under the "ultimate concern" test.[188] As a result, the definition could lead to an enormously broad and expansive view of religion that is too vague for practical application and, if taken to its extreme, would make the Establishment Clause an enormous obstruction of government power. This is most evident in the conclusion that secular humanism should be considered a religion for

184. *Supra* note 207 at 467.
185. *Id.* at 467-68.
186. *Id.* at 468.
187. *Id.* at 447.
188. *Id.* at 454-55.

First Amendment purposes, both under Free Exercise and Establishment Clause cases, an idea which would be rejected by most courts and scholars as too outlandish and problematic for government operations.

Of course, there are many other scholars advocating a functional definition of religion. For example, a well-known essay by James Donovan from the *Seton Hall Constitutional Law Journal* has received a significant amount of attention.[189] His essay, which approaches the definition of religion problem from an anthropologists' perspective, proposes what he calls a "generative functional definition" that focuses on the role that the belief system serves in the life of adherents while only using a few independent variables with which to differentiate religious beliefs from non-religious ones. While Donovan's paper is rich with insightful analysis on the anthropological viewpoint of the definition of religion, he does not actually propose one specific definition, but instead just gives an example of one that might work.[190] Furthermore, the article ends the discussion by stating, "whether this definition can be operationalized remains unclear."[191] Thus, while Donovan's paper is truly helpful in its fresh analysis of the definition of religion problem, in the end the reader is no clear definition for practical application.

3. Conclusions from Functional Approach

The preceding analyses are a sample of the kinds of arguments made by those embracing a functional definition of religion for purposes of the First Amendment. From these works, several conclusions can be drawn. First, the functional approach attempts to define religion by the role that it plays in the life of believers and stays away from any content-based standards that will inevitably favor established religions. The problem with the functional definitions of religion is that they tend to be too broad and abstract to be useful.

Those that do attempt to make them work in practice, such as the *Harvard* note or Mason's article, do not show much promise because they transform "religion" into something more like "conscience." Furthermore, as Professor Choper points out, the functional definition of religion can be either under-inclusive or over-inclusive, depending on the circumstances, and therefore is very troubling as a guide to

189. James Donovan, *God is as God Does: Law, Anthropology, and the Definition of "Religion"*, 6 SETON HALL CONST. L.J. 25 (1995).

190. *Id.* at 95.

191. *Id.*

constitutional doctrine.[192] Since the definition deems systems of belief as religious depending on the devotion that a person pays to a particular belief, regardless of whether or not it is religious in any other sense, any strongly held belief can be found to be a religion for First Amendment purposes. Thus, the definition can effectively include anyone, which contradicts with a limited interpretation of the Religion Clauses. Alternatively, since the definition appears to qualify beliefs as religious based on the strength of convictions—in other words, concerns must be "ultimate"—then it is possible that a believer from an established church who cannot pinpoint a particular ultimate concern, or even someone whose clearly religious beliefs inherently are not geared to make them zealots, can be excluded from First Amendment protection.

Therefore, while proponents of an expansive reading of the Religion Clauses advocate a functional definition of religion because it avoids the religious chauvinism of restrictive content-based approaches, the expansive approach does not provide a practical solution. Furthermore, attempting to solve the over-inclusiveness problem by adding other restrictions, such as in Mason's modified-*Seeger* test, muddles the subject.

B. Content-Based Approaches

The more traditional method of defining religion, the content-based approach, attempts to classify beliefs as "religious" depending on specific features. For example, the most traditional definition of religion is that espoused in *Reynolds* and *Davis*, which only deemed religious those systems of belief that include a belief in God. By requiring a theistic element to be present in religious beliefs, this definition attempts to classify beliefs based on the content of the beliefs, as opposed to the role that the beliefs play in the life of the adherents. Thus, the content-based approach is sharply distinct from, if not diametrically opposed to, the functional method of defining religion. Whereas a functional definition normally results in a broad, expansive conception, the content-based definition usually restricts the number of systems that can be deemed religious and therefore narrows the conception of religion.

192. Jesse Choper, *Defining "Religion" in the First Amendment*, 1982 U. ILL. L. REV. 579.

1. From Theistic to Non-Theistic

Since the theistic requirement in *Reynolds* and *Davis* was rejected in *Everson*, no scholar has seriously argued that the Supreme Court should revert to a belief in God as a constitutional definition of religion. However, a 1992 article by Anand Agneshwar proposed a definition that slightly changes the theistic requirement so as to make it more defensible for modern times.[193] Expanding the nature of the theistic requirement, Agneshwar defines religion in this way: "Religion is a system of beliefs, *based on supernatural assumptions*, that posits the existence of apparent evil, suffering, or ignorance in the world and announces a means of salvation or redemption from those conditions."[194] Admittedly, this definition is narrow; but Agneshwar argues that a narrow definition that includes the supernatural element is more appropriate to people's intuitions about religion, as well as the purposes of the First Amendment. Such a definition, he says, is more concrete and therefore easier to use than other definitions, primarily functional ones.

To the argument that a narrow, content-based definition will exclude belief systems that do not involve a supernatural element, Agneshwar quips, "the fact that not all ethical belief systems posit supernatural powers is simply evidence that those belief systems are not religious."[195] Furthermore, he maintains that it is important, that the Court return to a more traditional concept of religion that is based on content because the modern, broad definition has estranged the public from the normal meaning of the word "religion." Returning to a narrower conception, Agneshwar says, is simply to recognize that religion is a limited concept that the Framers decided was deserving of constitutional protection, and that opposing viewpoints based only on humanistic assumptions are inherently different. He states that "constitutional law must recognize that religion is not an all-embracing concept, but represents one particular way of organizing communities and framing existential questions."[196]

Importantly, Agneshwar does not reach the theistic definition of *Reynolds* and *Davis* because his category of "supernatural assumptions" was meant to be broader than just "God." Similarly, other authors have strayed from the theistic conception of the Framers but have still espoused a narrow classification of religion leading them to adopt some

193. Anand Agneshwar, *Rediscovering God in the Constitution*, 67 N.Y.U. L. REV. 295 (1992).
194. *Id.* at 319, emphasis added.
195. *Id.* at 321.
196. *Id.* at 323.

other content-based definition. One of the most often-cited scholars offering such a definition is Professor Jesse Choper, who calls for a definition of religion based on the existence of "extra-temporal consequences."[197] Under Choper's conception, a person's belief will be deemed religious if it holds that "effects of actions . . . extend in some meaningful way beyond his lifetime . . . ."[198] His definition has been criticized, however, because it necessarily discriminates against those systems of belief that do not include an afterlife.

2. The Search for Common Ground

Therefore, it appears that the challenge for anyone advocating a content-based definition is to find one feature that is common to all systems of belief thought to be "religious." Attempting to do so, some scholars have proposed a definition that focuses on the types of questions addressed by the belief system. For example, Mary Harter Mitchell advocates a definition under which judges would determine the religiosity of a belief by asking whether the belief offers answers to "ultimate questions" such as "the nature of reality," "the origin of being," or "the existence of a spiritual reality."[199] However, such a classification has been attacked because it acts like a functional definition, which means that it often leads to counterintuitive results because it is so expansively designed.

Perhaps the most noted scholarly work proposing a content-based definition of religion is Andrew Austin's *Faith and the Constitutional Definition of Religion*.[200] Austin's paper addresses only the definition of religion for Free Exercise cases, which he says should be a conception marked by the existence of faith. He argues that "an argument based on faith is compelling not only because it is consistent with our linguistic intuitions, but also because it is consistent with the policies the First Amendment embodies."[201] After tracing the judicial definitions of religion, Austin defines the essential features of a judicial conception of religion. Most importantly, he argues that a definition "must be consistent with the aims of the [F]irst [A]mendment," "should also be flexible," must fit with people's understanding about what is and is not

197. Choper, *supra* note 201.
198. *Id.* at 599.
199. Mary Harter Mitchell, *Secularism in Public Education: The Constitutional Issues*, 67 B.U. L. REV. 603, 661-63 (1987).
200. *Id.*
201. *Id.* at 3.

religious, and "must be able to decide the borderline, or hard cases," yet "must not be arbitrary."[202]

Austin argues that "[t]he earmark of a religious belief is that it is based upon faith. A belief based on faith is one that its adherent cannot base upon logical reasoning from a provable assumption."[203] The most devastating critique of this argument, of course, is that a person can claim religious status for anything that he believes in rather than proves, meaning that faithfully playing the lottery may be protected in some sense. To this, Austin argues that "the notion of faith does not encompass 'everything and anything,' and it should not be confused with an argument that we should protect all non-rational belief systems because they are of the same importance as religion."[204] He says that it is easy to distinguish between religious beliefs and scientific theories because the former rely only on faith, while the latter turn to empirical observations and logic.[205] However, Austin admits that it will be difficult to distinguish between moral philosophies and religion with his faith-based definition.[206] Therefore, Austin specifies further by saying that "religious beliefs are founded not only in faith, but in a faith that there is some greater power than man that demands attention."[207] While not explicitly adding a supernatural element to his definition, Austin admits that a belief must rest "upon the directions of a greater power,"[208] which would effectively distinguish it from moral or philosophical belief systems.

Still, Austin fears that commentators will think that his definition of religion is too expansive because it allows anything in which people hold a faith to be "religious."[209] To this claim, he argues that people should not forget, in developing a constitutional definition of religion, that courts can still mitigate the broad nature of the definition with other questions, such as whether the belief is sincerely held and whether the state has a compelling interest.[210] However, the problem with Austin's retort is that it avoids the question—the fact that other elements of constitutional discourse might mitigate the expansiveness of a definition of religion does nothing to argue against the claim that a definition is too expansive. Therefore, Austin is left with a definition that, while narrower than any functional or analogical approach, is still substantially

202. *Id.* at 6-7.
203. *Id.* at 36.
204. *Id.* at 39.
205. Mitchell, at 40.
206. *Id.* at 40.
207. *Id.* at 42.
208. *Id.*
209. *Id.*
210. *Id.*

subjective in that it allows for many belief systems grounded in faith, even if clearly non-religious.

3. Conclusions from Content-based Approaches

Content-based definitions of religion are narrower and more restrictive than functional or analogical ones. Yet, some content-based conceptions are even narrower than others.[211] The restrictive nature of these definitions is often looked at as their most undesirable feature, especially because they appear to be extremely biased towards traditional Western belief systems. Therefore, any definition of religion based on content ought to have a valid reason for restricting the status of "religion" to fewer, rather than more, groups of claimants. Furthermore, as noted by Austin, the definition must be broad enough to encompass the belief systems which people typically think are "religious."

C. Analogical Approaches

Closely related to the functional approach to defining religion, and often times including some content-based features, is the analogical approach. The analogical method attempts to classify beliefs as religious or non-religious depending on how they compare to those systems of belief that are popularly accepted as religious from a Western perspective, such as Christianity. In effect, the analogical approach is a particular type, or an extension, of a functional definition. For example, one of the most popular functional definitions is the "ultimate concern" standard from the *Harvard* note, which seeks to determine the religiosity of a belief system by what kind of concerns it addresses for the believer. Analogical approaches, on the other hand, do not use such a standard but instead seek to determine if the kinds of questions addressed by the belief system are similar to those addressed by systems that are clearly religious. Thus, analogical approaches are often referred to as being functional, though the distinction drawn between the two in this Note is that the decision to compare a belief system to more established religions is an extension of the functional approach; they are not one and the same.

211. For example, Agneshwar's explicit supernatural requirement would seem to be narrower than Austin's faith requirement.

1. Early Attempts at Analogizing Religion

The most well known test proposed by any judge—Judge Adams' Malnak definition—is a "definition by analogy."[212] In the test, he included some functional ("ultimate concerns") and some content-based (organizational features) ideas and then compared the belief system in question on these grounds to beliefs that he viewed as clearly religious. Thus, the analogical definition of religion has had some legal use.

Perhaps the best-known scholars proposing an analogical approach to defining religion are Professors George Freeman and Kent Greenawalt. Freeman argued that any attempt to define religion is itself misguided; instead, he proposed that judges should compare belief systems to a paradigmatic traditional religion and determine whether the belief system in question has more in common with clearly religious systems than with clearly non-religious ones.[213] Yet even this is itself a definition, and it clearly fits into the category of an analogical method.

Similarly, Greenawalt's *Religion as a Concept in Constitutional Law*[214] argues for an analogical method of determining whether or not systems of belief can be deemed religious for First Amendment purposes. His approach is almost identical to Freeman's except that he uses as a "paradigm religion" a collection of particular religions that are obviously religious instead of just one particular religion.

2. Modern Analogical Approaches

One of the more recent essays proposing an analogical definition of religion comes from Eduardo Penalver's *The Concept of Religion*.[215] Penalver advocates a variation on the work of Freeman and Greenawalt, developing a "methodology for conducting this analogical process that takes into account the evolutionary nature of language and (in an effort to improve upon the proposals of Greenawalt and Freeman) tries to

212. Malnak v. Yogi, 592 F.2d 197 (3rd Cir. 1979).

213. George C. Freeman III, *The Misguided Search for the Constitutional Definition of 'Religion,'* 71 GEO. L.J. 1519 (1983).

213. Eduardo Penalver, *The Concept of Religion*, 107 YALE L.J. 791 (1997).

214. *Id.*

215. Penalver, *supra* note 222.

minimize the scope of judicial bias."[216] His definition, which is based on the everyday meaning of the term "religion," is designed to "protect the narrow understanding of religion" (as opposed to a broader concept, like "conscience").[217] "Nonreligious belief, though certainly worthy of constitutional protection, is more appropriately covered by other provisions of the Constitution."[218] Penalver says that the original intent of the Framers and the text of the Constitution provide "compelling evidence [that] points strongly in the direction of a narrow understanding of the term."[219] Additionally, he highlights the fact that "the Framers probably never considered the issue of defining religion for the First Amendment at all, because they thought the everyday meaning of the term was clear."[220] Since it is so important to believers and its meaning-giving function is perhaps the most distinguishing feature of religion, Penalver argues that the First Amendment should be read narrowly in order to protect religion and not a broader category, such as mere conscience.[221]

Associated with this argument for the everyday meaning of religion is Penalver's analysis of the evolutionary nature of language and the problem with a dictionary-style definition of religion.[222] Using linguistics, Penalver shows that a dictionary-style definition, which gives us an abstract template from which we classify subsequent experiences as either falling into or outside of the template, is too rigid and therefore "fails to capture the flexible and evolutionary nature of language."[223] Instead, he argues that "learning a language, or merely learning the meaning of a word, involves learning how that word is used and applying it accordingly, not merely learning some abstract definitional concept."[224] Therefore, our decision to apply the word in new circumstances further defines the word, so that "there is a dialectic between our current use of the word and our future application of that word to new situations," which results in an evolutionary process of defining words.[225] This evolution, which has occurred to the word "religion" over the course of the Supreme Court's decisions, allows it to not violate the Establishment Clause because the meaning of the word changes along with the use of the word in everyday language.

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216. *Id.* at 795.
217. *Id.* at 802.
218. *Id.* at 802.
219. *Id.* at 802-03.
220. *Id.* at 804.
221. Penalver, at 807.
222. *Id.* at 808.
223. *Id.* at 809.
224. *Id.*
225. *Id.* at 809-10.

After discussing these preliminary questions, Penalver turns to his proposed methodology for determining what constitutes religion. He writes that he has three criteria in such an approach. "[F]irst, it should define religion and not some broader concept . . . ; second, it should have the potential to evolve ...; and, third, it should minimize the risk of judicial, particularly pro-western, bias ...."[226]

In order to improve upon Freeman's and Greenawalt's tests, Penalver tries to constrain judges in two ways: "first, by limiting their discretion in choosing a "baseline" of comparison . . . ; and, second, by prohibiting them from focusing on certain characteristics in their process of evaluation, characteristics that appear to be likely sources of western bias in the analogical process."[227] Penalver argues that judges "should consider a broad range of different particular religions as the baseline for comparison with the entity in question."[228] More specifically, he suggests that judges compare the belief system in question with at least one theistic religion, one non-theistic religion, and one pantheistic religion. By considering a diverse selection of religions, a judge can more fully evaluate the religion in question and is more likely to be sensitive to the extensive flexibility and nuance involved in the meaning of the word "religion." In this way, a judge will reduce the risk of discriminating against the religion because of dissimilarities with established, traditional religions. In the same way, Penalver suggests several guidelines that judges should disregard when evaluating the religiosity of beliefs. These "negative" guidelines, he states, "can be expressed as categorical and binding" but do not limit a judge's search the way that indicia do.[229] For example, three guidelines should be avoided in order to eliminate western bias: the assumption that belief in God is essential, the assumption that institutional structures are essential to religions, and a sharp distinction between the sacred and the secular.

Although Penalver's solution is an analogical method and is in some ways similar to previous analogical approaches like Freeman's and Greenawalt's, his focus on the evolution of language and how the analogical method can be applied with an everyday meaning is unique. His analysis of the western bias of the term "religion" is also very insightful and helps judges and scholars to be aware of the ways that a determination of whether a given set of beliefs is religious can be inherently biased.

226. *Id.* at 814.
227. Penlaver, at 816.
228. *Id.* at 817.
229. *Id.* at 818.

However, the proposed test is problematic for several reasons. First, while it does constrain judges by excluding some factors from analysis, there is still an incredible amount of discretion in a judge's decision-making that undermines the purpose of the test. For example, simply saying that we use the "everyday meaning" of the term "religion" is still quite ambiguous. Penalver's further clarification that one can compare the belief system in question to several different kinds of religion still allows for huge discretion because a judge will inevitably choose religions that are older and well-known, which necessarily discriminates against newer forms of religion. In other words, even by restricting religion to the "everyday meaning," he neglects to discuss the fact that there are as many different "everyday meanings" as there are people in the world—he fails to describe who's "everyday meaning" should prevail. Throughout the article, Penalver makes a persuasive argument for a narrower conception of religion; yet, in the end, the proposed definition—though narrower than the analogical approaches before him because of his qualifications to it—is still enormously broad. In other words, the proposed definition is not actually giving judges anything in particular to look at; rather, it only specifies a basis for comparison (theistic, non-theistic, and pantheistic) and then gives judges some helpful hints for what to look at and what not to look at. Due to this, although it certainly would seem to be an improvement on earlier analogical approaches if one desires to have a narrower conception of religion, Penalver's definition constrains judges in one way, but provides a lot of room for judges' values to be imputed in other areas.

Another analogical approach is advocated by Ben Clement in *Defining 'Religion' in the First Amendment: A Functional Approach.*[230] Clement reviews the historical legitimacy of defining religion, concluding that the "concept of religious liberty entails protecting matters of conscience from government interference;" as a result, Clement decides that any constitutional definition of religion should not be restricted to protecting just the theistic religions admittedly recognized by the Framers.[231] Instead, it must be broad and flexible so as to include the new forms of religious belief prevalent in society today. Moreover, Clement argues that the Constitution mandates a unitary definition of religion and that such a classification will lead to more equitable results than a dual approach. He holds that a constitutional definition of religion should meet three main criteria: it "should be specific enough to circumscribe the concept of religion, . . . it should be flexible enough to embrace new and unorthodox forms of religion, . . .

230. Ben Clement, Note, *Defining "Religion" in the First Amendment: A Functional Approach,* 74 CORNELL L. REV. 532 (1989).

231. *Id.* at 534.

[and] it should be applicable to both Free Exercise Clause cases and Establishment Clause cases."[232] He argues that a functional/analogical approach is "far better than an approach that focuses on the more tangible physical manifestations of religion."[233]

Therefore, Clement suggests the *Seeger* definition as a "bare skeleton" of a solid approach to defining religion, but that in order to make this parallel-belief test effective, it must be determined in light of the role that religion plays in the life of a traditional believer. Clement recommends that the "definition by analogy" used by Judge Adams in *Malnak* is a good starting point. Adams said that the role of religion in the life of traditional believers is to provide "a comprehensive belief system that 'addresses fundamental and ultimate questions having to do with deep and imponderable matters.'"[234] Clement adds to Adams's basic point by saying that religions normally involve a compelling sense of devotion and duty to the believer, or duty of conscience.[235] Thus, Clement suggests a loose approach of comparing the questionable belief system to established religions, focusing on the comprehensiveness and the existence of a duty of conscience. In this way, Clement's conception joins other analogical approaches in defining religion functionally, but with reference to established and widely recognized systems of belief, in order to provide an evolving and expansive definition of religion.

3. *Conclusions from Analogical Approaches*

Despite the preference of judges and scholars for analogical definitions of religion, this method is not without flaws. Essentially, an analogical approach contains elements of both functional and content-based definitions. For example, Judge Adams' definition uses both functional and content-based features in comparing questionable systems of belief to more established religions. Therefore, the criticisms of both functional and content-based definitions apply with equal force to analogical ones.

Another weakness of analogical definitions is that they inherently favor more established religions or those systems of belief that are similar in nature. Of course, this appears to be the point of the definition—to classify as religious those beliefs that are similar in nature to traditional religions. Yet this is a flaw because it automatically

232. *Id.* at 536.
233. *Id.* at 551.
234. *Id.* at 551-52.
235. *Id.*

disregards any modern systems of belief that do not contain the same features or operate in the same way as the status quo.

Furthermore, this type of definition gives an enormous amount of discretion to judges both because they can pick the "paradigm" religion with which to compare questionable belief systems and because judges can choose the criteria, or features, with which to compare. This considerable amount of discretion can lead to an arbitrary definition with little guidance for uniform application by judges. As a result, the analogical definition leads to a broad definition, which opens it up to the same criticism as the functional definition—that it is contrary to a restricted interpretation of the First Amendment's protection of religion.

D. Conclusions from Scholarly Attempts at Defining Religion

One additional conclusion can be drawn from the preceding analysis of the scholarly attempts at defining religion. Importantly, more scholars adopt a functional or analogical definition of religion than a content-based one. This is primarily due to the fact that most academics have decided, perhaps consistent with Supreme Court precedent, that it is better to be over-inclusive than under-inclusive. Possibly due to the wider diversity of religious beliefs, or more importantly the preoccupation with individual rights that has emerged in the twentieth century, the Court and many scholars have decided that to restrict religious status to fewer groups would be antithetical to the American way. For these reasons, the functional and analogical definitions that construe "religion" more expansively have had more appeal to courts and commentators alike.

However, a substantial minority of scholars still advocates using a more restrictive definition of religion based on content. In particular, scholars concerned with the dramatic changes in the Court's interpretation of the Religion Clauses over the past century tend to adopt definitions based on more traditional notions of religion, thereby representing the belief that a more limited protection was originally designed. Thus, there is support for the notion that a more limited conception of religion would better suit a restrictive reading of the Religion Clauses.

V. Proposed Definition of Religion for First Amendment

A. Fundamental Criteria

At the most basic level, there are two essential criteria that any definition of religion should satisfy in order to be acceptable as constitutional doctrine. First, a definition must work with both the Establishment Clause and the Free Exercise Clause. Although some scholars have argued that a dual definition is more practical and will make the two clauses work together more cohesively, these arguments seem misguided. The fact that there has been any friction between the two clauses at all is, at least in part, because the Court has expanded the definition of religion so broadly. When a narrower definition was used, the two clauses were complementary and did not contradict each other. From a pragmatic perspective, a narrow conception can alleviate the conflict between the two clauses because there will not be the problem of having some "religious" groups protected under the Free Exercise Clause but not subject to Establishment Clause requirements, such as secular humanism. From a theoretical point of view, the unitary definition of religion is more constitutionally appropriate. For example, Justice Rutledge stated in *Everson*:

> 'Religion' appears only once in the [First] Amendment. But the word governs two prohibitions and governs them alike. It does not have two meanings, one narrow to forbid 'an establishment' and another, much broader, for securing 'the free exercise thereof.' 'Thereof' brings down 'religion' with its entire and exact content, no more and no less, from the first into the second guaranty . . . .[236]

In this way, the best view is that the Constitution demands a single definition of religion that can be used in the same way for both the Establishment and Free Exercise Clauses..

The definition of religion used for the First Amendment also should be consistent with the goals and aims of the Religion Clauses. While the increase in religious diversity in America and the degree of expansion in the definition over the past century make it implausible to use the same definition as the Founders envisioned—a theistic conception—it is still desirable to uphold the intended purpose of the Religion Clauses. The Founders' goal was to protect the religious

236. Everson v. Board of Educ., 330 U.S. 1, 32 (1947) (Rutledge, J., dissenting).

liberty of individuals and to prevent the government from dictating the religious beliefs of members of society. Therefore, today a definition of religion must be developed that sustains this goal of protecting the individual's religious rights.

Several scholars have argued that the Religion Clauses were not intended to protect just religious beliefs in a traditional sense, but instead were designed to protect a broader set of beliefs. In fact, this is what the Court effectively stated not only in *Seeger* and *Welsh*—its broadest extensions of the First Amendment—but even in *Everson*, where it first stated that non-believers deserve First Amendment protection as well. However, one can see that the broader the Religion Clauses are extended by using a more expansive definition of religion, the more that the protection afforded by the Free Exercise Clause resembles that granted by the Free Speech Clause. In other words, if one takes such an expansive view of "religion" so that ethical systems are given religious protection, such as in *Welsh*, then the differences between the Free Exercise Clause and the Free Speech Clause soon disappear, and someone like Welsh could be granted protection under either clause.

The problem with this analysis is that the Founders surely did not create two clauses in the First Amendment to serve the same purpose. Thus, they must have meant for the Religion Clauses to protect something different than the Free Speech Clause. Of course, this is not to argue that, together, the Religion Clauses and the Free Speech Clause are intended to adjudicate all claims of expression. However, it is clear that an overly broad view of the Religion Clauses may take away their "religious" aspect and reduce them to nothing more than clauses to which people can turn in order to protect the expression of their views—which is exactly the purpose of the Free Speech Clause. Logically, the Founders seemed to have intended that the Religion Clauses protect a narrower realm than just the expression of people's views—specifically, they intended to protect religious claims, with "religion" being defined narrowly enough to not include any and all views.

B. Proposed Definition

In order to achieve the goal of defining religion so as to meet the needs of both Religion Clauses, make the Clauses work together cohesively, and be consistent with the goals of the First Amendment, a narrow conception of religion is necessary. While returning to the theistic conception advocated in *Reynolds* and *Davis* is not

recommended, a narrow, more traditional definition is preferable to today's broad definition. Before the term "religion" was interpreted as broadly as in *Everson* and *Seeger*, less controversy surrounded the Religion Clauses. Returning to a narrow definition of religion will simplify adjudication of the Religion Clauses.

The functional approach is flawed because it is too broad and over-inclusive. Additionally, it is dangerous to apply the functional approach to the Establishment Clause because it would lead to "wholesale invalidation" of government's ability to pass laws. In like manner, the analogical approach suffers from these same faults, as well as the fact that comparing belief systems to known religions adds a significant amount of judicial discretion in the form of regional and personal bias.

The content-based definition, on the other hand, can be used in both the Establishment Clause and the Free Exercise Clause. While a content-based approach narrows the amount of Free Exercise claims by virtue of excluding potential claims of non-religious groups, this is a necessary result and seems consistent with the original intent of the First Amendment. In other words, using a content-based definition merely reflects the fact that the Free Exercise Clause was not designed to exempt adherents of purely moral or ethical systems of belief from reasonable government regulations. Furthermore, the content-based definition of religion allows the two clauses to work together because only one conception of "religion" is prohibited from establishment and protected from government intrusion. Finally, this type of definition is consistent with the original intent of the Framers by restricting religious protection to a narrow realm of beliefs, thereby preserving the sanctity of religion and religious liberty.

In formulating a content-based definition, as indicated earlier, the key challenge is to find the appropriate features by which to base the classification of religion. While Andrew Austin's definition based on faith is initially appealing, even his definition has the potential to become too broad. Deeply held convictions on obviously secular ideas, such as patriotism, should not receive Religion Clause protection merely because they are forms of belief. Therefore, a constitutional definition of religion must be more specific than merely requiring a faith element in order to give it any meaning and strength. Specifically, the supernatural element discussed by Anand Agneshwar and even contemplated (in a scaled-back form) in Austin's article is appealing because it is consistent with the intent of the Religious Clauses and would provide a more robust definition. The core foundation of religion is based upon faith rather than reason, and faith involves something unexplainable and greater than man. Therefore, including a supernatural element—

interpreted to include not only a more traditional conception of a supreme being, but also similar transcendental figures of modern religions—comports with the Constitution and with people's intuition of what is and is not religious. Such a supernatural element encompasses not only Western religions, but also religions like Buddhism and Hinduism. Moreover, as Agneshwar suggested in his own definition, religion ought to address the existence of good and evil and answer questions of morality with reference to forces of good and evil. With these elements in mind, this Note proposes the following definition of religion for use in adjudicating the First Amendment:

> *Religion is a faith-based system of beliefs and actions that makes reference to a supernatural reality that dictates the believers' perception of good and evil, and answers questions arising from the existence of such forces.*

C. Justification and Application of the Proposed Definition

Surely critics will find fault with such a narrow definition of religion. However, religion must be defined narrowly to elevate the nature of religious liberty and re-focus constitutional protection on belief systems that correspond to the intent of the Drafters of the First Amendment. The proposed definition should not be over-inclusive in its application. People may argue that this definition is under-inclusive because it will exclude many beliefs that do not include supernatural elements, or are not based on faith. To this argument, Agneshwar put it best when he said that this is simply evidence that those beliefs are not religious, rather than a fault of the definition.[237] Of course, this is not to say that such belief systems are not worthy of constitutional protection—on the contrary, they may be deserving of protection under some other constitutional provision, but not as religious beliefs.

Some may criticize this definition as plagued with Western bias because of the requirement of the supernatural. However, as pointed out by both Agneshwar and Austin, the inclusive use of the term "supernatural" alleviates this problem and encompasses Eastern religions and other belief systems. The requirement that the supernatural element be related to explanations of good and evil may also be challenged. Yet, this feature is extremely significant because it mandates that a belief system provide a moral guide for believers and inform its followers' spiritual and moral decision-making through its

237. *Supra* note 208.

explanation of good and evil. This aspect of the definition conforms with the intuitive nature of religion and would exclude a supernaturally-based system such as witchcraft that does not provide its followers with a comprehensive moral guide based on conceptions of good and evil.

Under the proposed definition of religion, courts would analyze the belief system in question and determine whether it is faith-based. Then, the court would ask whether it involves assumptions regarding supernatural realities that assert notions of good and evil and whether those forces of good and evil motivate human behavior. Of course, this definition requires that assumptions regarding supernatural elements be positive, disqualifying belief systems that address and dismiss supernatural elements. In all, this test is concise, practical, and theoretically consistent with the aim of the First Amendment. After determining the religiosity of the belief system in question, the Court will then apply the Establishment or Free Exercise doctrines to determine whether the government has established religion or prohibited the individual's free exercise of religion. For this reason, the defining of religion is not a cure-all for the Court's larger problems in Religion Clause jurisprudence. Still, this definition of religion will give the Court a better opportunity to adjudicate cases in a coherent, consistent manner that can bring some harmony to the Religion Clauses.

VI. Conclusion

The Supreme Court has changed the nature of jurisprudence on religion in the fifty-three years since *Everson*, and there has been a divide as to the proper relationship between religion and government in America. In part, this divide has been due to an incomplete, bifurcated approach to defining "religion" under the Religion Clauses. Beginning with the narrow conception in *Davis*, reaching the peak of expansiveness in *Seeger*, and wavering between the two in the interim, the Court has implied a range of definitions but never explicitly defined religion. Lower courts, more adventurous in this realm, have given the impression that defining religion is difficult and risky. Scholars have attempted to bring clarity to the issue by proposing definitions with various approaches, including functional, content-based, and analogical methods. From the analysis of each of these types, one may conclude that the functional definitions are more common but often lead to strange results, while the content-based conception results in a narrower classification.

The Religion Clauses were designed to protect the "inalienable rights" of individuals concerning religion and religious activities. In order to preserve the importance of these rights, it is necessary that a definition does not compromise the nature of religion by being so broad that systems of a purely moral and philosophical bases are given religious protection. Put another way, there are a variety of different ways of looking at the world and of approaching morality. Of these ways, the religious approach is only one. This particular way is what the Founders attempted to protect with the First Amendment. Yet, many scholars have argued that the Religion Clauses should protect the other ways of approaching the world and morality, such as humanism or other purely philosophical and ethical beliefs. However, doing so undermines the very purpose of the Religion Clauses and tears at the heart of religious protection afforded by the Constitution. For these reasons, the definition proposed by this Note promises to uphold the religious and constitutional values of America.