



1-1-2007

Defining Religion: The Struggle to Define Religion Under the First Amendment and the Contributions and Insights of Other Disciplines of Study Including Theology, Psychology, Sociology, the Arts, and Anthropology

Jeffrey Omar Usman

[How does access to this work benefit you? Let us know!](#)

Follow this and additional works at: <https://commons.und.edu/ndlr>



Part of the [Law Commons](#)

Recommended Citation

Usman, Jeffrey Omar (2007) "Defining Religion: The Struggle to Define Religion Under the First Amendment and the Contributions and Insights of Other Disciplines of Study Including Theology, Psychology, Sociology, the Arts, and Anthropology," *North Dakota Law Review*: Vol. 83: No. 1, Article 6. Available at: <https://commons.und.edu/ndlr/vol83/iss1/6>

This Article is brought to you for free and open access by the School of Law at UND Scholarly Commons. It has been accepted for inclusion in North Dakota Law Review by an authorized editor of UND Scholarly Commons. For more information, please contact und.common@library.und.edu.

DEFINING RELIGION:
THE STRUGGLE TO DEFINE RELIGION UNDER THE FIRST
AMENDMENT AND THE CONTRIBUTIONS AND INSIGHTS
OF OTHER DISCIPLINES OF STUDY INCLUDING
THEOLOGY, PSYCHOLOGY, SOCIOLOGY, THE ARTS, AND
ANTHROPOLOGY

JEFFREY OMAR USMAN*

I. INTRODUCTION.....	125
II. RELIGIOUS LIBERTY IN HISTORICAL PERSPECTIVE: THE COLONIES AND THE FOUNDERS	127
A. RELIGIOUS LIBERTY IN THE COLONIES	128
B. THE FOUNDERS' VIEW OF RELIGIOUS LIBERTY	138
III. OVERARCHING ISSUES IMPLICATED IN DEFINING RELIGION.....	144
A. SHOULD RELIGION BE DEFINED?.....	144
B. THE FUNDAMENTAL DIFFICULTY IN DEFINING RELIGION	149
C. TWO DEFINITIONS OF RELIGION	149
D. ONE PROBLEM WITH A BROAD DEFINITION OF RELIGION	157
IV. HISTORICAL EVOLUTION OF THE CONCEPT OF RELIGION.....	159
A. THE FOUNDERS	160

* LL.M., Harvard Law School, June 2006; J.D. Vanderbilt University Law School, May 2003; A.B. Georgetown University, May 2000. The author can be reached at jeffreyomarusman@post.harvard.edu. The author dedicates this article to Elizabeth Mary Adamo Usman, whose kindness and generosity are limitless, and to Elna Behrman, Bonnie Kleinschmidt (*in memoriam*), and Susan Dulin, who have offered patience and great answers. The author would also like to thank Professor Lisa Schultz Bressman for her extremely interesting seminar on Government and Religion, Professor John Mansfield for his generous mentorship in developing this paper, and the staff of North Dakota Law Review for their fine assistance. Any mistakes are exclusively the author's.

B.	STATE COURTS DEFINING RELIGION IN THE MID-NINETEENTH CENTURY	165
C.	ORTHODOXY IN THE LATE NINETEENTH CENTURY	167
D.	BROADENING THE DEFINITION OF RELIGION IN THE MIDDLE OF THE TWENTIETH CENTURY	168
E.	RESPONSE OF THE FEDERAL CIRCUIT COURTS TO A BROADER DEFINITION OF RELIGION	173
F.	STATE COURTS' RESPONSE TO A BROADER DEFINITION OF RELIGION	176
V.	THE SIGNIFICANCE OF OTHER DISCIPLINES' DEFINITIONS OF RELIGION	188
VI.	CONTRIBUTIONS TO THE DEFINITION OF RELIGION FROM PAUL TILlich, A THEOLOGIAN, WILLIAM JAMES, A PSYCHOLOGIST, AND EMILE DURKHEIM, A SOCIOLOGIST	193
A.	PAUL TILlich'S INFLUENCE ON THE COURTS	193
B.	WILLIAM JAMES'S INFLUENCE ON THE COURTS	195
C.	EMILE DURKHEIM'S INFLUENCE ON THE COURTS	195
VII.	REACHING DEEPER INTO OTHER DISCIPLINES FOR INSIGHTS INTO DEFINING RELIGION FOR FIRST AMENDMENT PURPOSES	196
A.	ONE ULTIMATE CONCERN FOR EVERYONE	196
B.	LACK OF UNITY OF SELF/MORE THAN ONE ULTIMATE CONCERN	197
C.	DIVINE AND DEMONIC	200
D.	INDIVIDUALIZED OR COMMUNAL, INTERNAL OR EXTERNAL	207
E.	HOW ULTIMATE AN ULTIMATE CONCERN?	213
F.	IS EVERYTHING REALLY SACRED?	218
VIII.	CONCLUSION	219

I. INTRODUCTION

With the callousness of an unfeeling coroner, Nietzsche announced a dramatic societal shift with a simple three-word phrase: “God is dead.”¹ Regardless of the metaphysical validity of Nietzsche’s statement, he illuminated a fundamental truth in Western civilization—the declining role of the Augustinian model of God² as a functional all defining and exclusive paradigm, which provides absolute and definitive meaning to the world. With the traditional image of God and religion being subsumed in the United States beneath a potent force of materialistic progress, relativist/postmodernist thought, alternative scientific paradigms for defining the world, and exploding cultural and religious diversity,³ the courts face an increasingly varied and complicated religious environment. Within that dynamic, religion, including traditional religion, remains a powerful force.⁴ Defined by “its diversity and radical pluralism,”⁵ the United States, in large part due to the religious liberty available in this nation, has the most diverse religious landscape in the world.⁶

1. FRIEDRICH NIETZSCHE, *THE GAY SCIENCE* 167 (Walter Kaufmann trans., 1974) (1882).

2. Augustine’s understanding of God is of an all encompassing unitary figure, who is, [t]he greatest and the best, mightiest, almighty, most merciful and most just, utterly hidden and utterly present, most beautiful and most strong, abiding yet mysterious, suffering no change and changing all things: . . . gathering all things to Thee and needing none; sustaining and fulfilling and protecting, creating and nourishing and making perfect; ever seeking though lacking nothing.

AUGUSTINE, *THE CONFESSIONS OF ST. AUGUSTINE* 5 (F.J. Sheed trans., 1943).

3. Andrew Koppelman, *Secular Purpose*, 88 VA. L. REV. 87, 125 (2002) (“The United States is not a purely theistic nation; this country is home to 1,032,000 Hindus, 1,150,000 atheists, and 2,450,000 Buddhists.” (citing BRITANNICA BOOK OF THE YEAR 801 (2001)); see *Steele v. Blackman*, 236 F.3d 130, 132 n.2 (3d Cir. 2001) (“1,558 religious groups sufficiently stable and distinct to be identified as one of the existing religions in this country.” (citing J. GORDON MELTON, *ENCYCLOPEDIA OF AMERICAN RELIGIONS* 870-71 (1991)); Note, *Toward a Constitutional Definition of Religion*, 91 HARV. L. REV. 1056, 1069 & n.78 (1978) [hereinafter Harvard Note] (“In 1960 there existed ‘more than 400 more or less definitely organized bodies . . . [not including] the multitude of store-front churches, local sects, cults, and unclassifiable quasi-religious associations which operate ephemerally but often vigorously in the American scene. . . .’ The listed groups ranged in size from the 35-million-member Roman Catholic communion to the Church of Jesus Christ (Cutler) with a single congregation of sixteen members.” (citing A. Jamison, *Religions on the Christian Perimeter*, in 1 RELIGION IN AMERICAN LIFE 162, 167 (J. Smith & A. Jamison eds., 1961))).

4. Grant H. Morris & Ansar Haroun, “*God Told Me to Kill*”: *Religion or Delusion?*, 38 SAN DIEGO L. REV. 973, 979 (2001) (“We were a religious country when our country was founded; we continue to be a religious country today. A recent Newsweek poll revealed that eighty-four percent of adult Americans believe that God performs miracles and forty-eight percent report that they personally have experienced or witnessed a miracle.” (citing *What Miracles Mean*, NEWSWEEK, May 2000, at 55-56)).

5. Harvard Note, *supra* note 3, at 1069 n.77 (citing S. AHLSTROM, *A RELIGIOUS HISTORY OF THE AMERICAN PEOPLE* 3-4 (1972)).

6. John C. Knechtle, *If We Don’t Know What It Is, How Do We Know If It’s Established?*, 41 BRANDEIS L.J. 521, 522 (2003) (citing DIANA L. ECK, *A NEW RELIGIOUS AMERICA: HOW A*

Protecting religious liberty from governmental encroachment, the First Amendment to the United States Constitution begins with the guarantee that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.” Thomas Jefferson described “the constitutional freedom of religion as ‘the most inalienable and sacred of all human rights.’”⁷ Jefferson is not the only American then, or now, that would agree with this statement. Professor Mary Ann Glendon has indicated that although legal academics do not normally give religious liberty such primacy, the American people generally believe that religious freedom is the most important right enshrined in the Constitution.⁸

Although the significance of religious liberty in the United States is of paramount importance, confusion surrounds the core of this protection because uncertainty exists as to what exactly constitutes “religion.” Courts often assume religion is implicated in a case, or presume that it is not, without expressly defining the term, and commentators, despite numerous scholarly efforts, have been unable to reach any consensus as to the meaning of religion under the First Amendment.⁹ The United States Supreme Court has noted that defining what is religious is a delicate and difficult task.¹⁰ Courts struggling with the changing religious climate in the United States have offered divergent formulations and made varying assumptions about what constitutes a religion. Beginning in the 1940s, courts started to look beyond traditional legal tools to define religion turning to psychologists such as William James, and in the 1960s to theologians like Paul Tillich.

This article attempts to explore from many vantage points one word within one context—the word “religion” in the First Amendment of the United States Constitution. The article begins with placing our understanding of religion in a historical context. By exploring the history of religious liberty in the colonies and the Founders’ view thereof, an understanding of what the Founders were seeking to protect by safeguarding religious liberty will be gained. Having established this framework, the article then

“CHRISTIAN COUNTRY” HAS BECOME THE WORLD’S MOST RELIGIOUSLY DIVERSE NATION (HarperSanFrancisco, 2001)).

7. Steven D. Smith, *The Rise and Fall of Religious Freedom in Constitutional Discourse*, 140 U. PA. L. REV. 149, 153 (1991) (quoting Thomas Jefferson, *Freedom of Religion at the University of Virginia*, in THE COMPLETE JEFFERSON 957, 958 (Saul K. Padover ed., 1969)) [hereinafter Smith, *Rise and Fall*].

8. *Id.* at 153 n.12 (citing Mary Ann Glendon, Law, Communities, and the Religious Freedom Provisions of the Constitution, Address to the Bicentennial Conference on the Religion Clauses (May 30, 1991)).

9. See Marilyn Perrin, Note, *Lee v. Weisman: Unanswered Prayers*, 21 PEPP. L. REV. 207, 233 n.197 (1994).

10. *Thomas v. Review Bd. of Indiana Employment Sec. Div.*, 450 U.S. 707, 714 (1981).

addresses overarching issues that complicate the quest to define religion. Then, the article transitions into an exploration of the development of the definition of religion in both federal and state courts. Changes in the definition of religion are traced from the early interpretations to more recent formulations. Next, this article addresses how courts, since the 1940s, have been reaching beyond the traditional tools of legal analysis to define religion by drawing upon and applying formulations of what constitutes religion that have been offered by scholars in disciplines outside the legal field. Theologian Paul Tillich, psychologist William James, and sociologist Emile Durkheim are three of the most frequent sources of inspiration, but are not the only examples. This article demonstrates their continuing influence on courts' understanding of what constitutes religion. Finally, by drawing on insights from other disciplines, by reaching deeper within these fields than the courts have already gone, this article discusses problems with the definitions of religion that have been embraced by courts. But destroying, postmodernist deconstructionism, is easier than creating, and creation is necessary for the formulation of jurisprudence.¹¹ Therefore, drawing on understandings reached throughout this article and insights from other disciplines, which have already explored some of the same issues that courts are struggling with, this article will offer seven principles that will, hopefully, lead to a better understanding of the definition of religion under the First Amendment.

II. RELIGIOUS LIBERTY IN HISTORICAL PERSPECTIVE: THE COLONIES AND THE FOUNDERS

In trying to understand the meaning of the term religion in the First Amendment, history is the beginning of our quest, for in this context, as often is the case, “[a] page of history is worth a volume of logic.”¹² In striving to understand what religion is, the free exercise of which is protected and the establishment of which is prohibited by the First Amendment, it is important to consider why the Founders chose to protect religious liberty. Knowing the answer to this question helps reveal the contours of what it is the Founders were trying to protect and why they were trying to protect it. As a general matter,

[l]egal enactments should be interpreted to effectuate their purposes. But a law's “purpose” arises out of, and is a projection of,

11. See Owen M. Fiss, *The Death of the Law?*, 72 CORNELL L. REV. 1, 9-16 (1986) (criticizing the deconstructionist project of critical legal studies and cautioning of its deleterious impact).

12. *New York Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921).

its justification. Therefore, if we cannot articulate a convincing justification for the commitment to religious freedom then we cannot know its purpose, and we are accordingly paralyzed in our efforts to interpret the commitment.¹³

Simply stated, because the Supreme Court, “[i]n light of America’s unique founding history,” has deemed “it imperative that constitutional jurisprudence retain a loyal faithfulness to those who were central to the conception and subsequent drafting of the nation’s religious liberty protections,” history cannot be ignored.¹⁴ Indeed, having noted that “[t]he word ‘religion’ is not defined in the Constitution,” the Supreme Court has indicated that there is nowhere more appropriate than history to turn for its meaning.¹⁵

A. RELIGIOUS LIBERTY IN THE COLONIES

In examining this history, it is important to look not only at the Framers’ ideas of religious liberty, but also the context they were drawing upon, namely the traditions and practices of the colonies. As stated by Justice Rutledge, “[n]o provision of the Constitution is more closely tied to or given content by its generating history than the religious clause of the First Amendment. It is at once the refined product and the terse summation of that history.”¹⁶ Justice Rutledge explained that this history “includes not only Madison’s authorship and the proceedings before the First Congress, but also the long and intensive struggle for religious freedom in America.”¹⁷ Similarly, Justice Scalia has declared “that fortress which is our Constitution, cannot possibly rest upon the changeable philosophical predilections of the Justices of this Court, but must have deep foundations in the historic practices of our people.”¹⁸ Simply stated, to understand the First Amendment, it is important to consider the historical environment from which it emerged.¹⁹ The religious liberty, or lack thereof, of the American colonies and the changes the people of the colonies experienced tells us much about the context in which the First Amendment was framed

13. Smith, *Rise and Fall*, *supra* note 7, at 223.

14. Richard Albert, *American Separationism and Liberal Democracy: The Establishment Clause in Historical and Comparative Perspective*, 88 MARQ. L. REV. 867, 868 (2005). Thus, it is not surprising that it has been declared that “[t]here is a seemingly irresistible impulse . . . to appeal to history when analyzing issues under the religion clauses.” *Id.* (quoting JOHN E. NOWAK ET AL., CONSTITUTIONAL LAW 1031 (3d ed., 1986)).

15. *Reynolds v. United States*, 98 U.S. 145, 162 (1878).

16. *Everson v. Bd. of Educ.*, 330 U.S. 1, 33 (1947) (Rutledge, J., dissenting).

17. *Id.*

18. *Lee v. Weisman*, 505 U.S. 577, 632 (1992) (Scalia, J., dissenting).

19. Conor B. Dugan, Note, *Religious Liberty in Spain and the United States: A Comparative Study*, 78 NOTRE DAME L. REV. 1675, 1696 (2003).

and ratified, offering insight into “the long and intensive struggle for freedom in America.”²⁰ As stated by now Tenth Circuit Judge Michael McConnell, the religion clauses “cannot be understood or appreciated without knowing what happened before.”²¹

In the mother country during the seventeenth century while British colonization of America was beginning, religious intolerance and oppression was omni-present.²² With the Church of England as the official religion, the government acted to suppress dissent from both extreme Protestantism and Roman Catholicism.²³ After a civil war that resulted in Charles I being deposed and executed,²⁴ “[P]arliament took it upon itself to rewrite the prayer book and confession of faith, dissolve the episcopal structure of the Church, and confiscate the property of the bishoprics.”²⁵ Not only were Roman Catholics the target of suspicion and suppression, but “Baptist leaders were imprisoned, and ministers who insisted on frequent use of the prayer book were ejected from clerical office.”²⁶ With the restoration of the monarchy in 1660, the Church of England was reconstituted.²⁷ The Test Act of 1672 limited public and military office to Anglicans and “required officeholders to swear an oath in court denying transubstantiation[,] . . . acknowledging the King’s supremacy over the Church[,] and to present proof that they had taken communion within the preceding year in accordance with the rites of the Church of England.”²⁸ Under the Toleration Act of 1688, Anglicans retained a favored position and Catholics continued to be targeted with repressive measures, but official suppression of Protestant sects ceased.²⁹

20. *Everson*, 330 U.S. at 33.

21. Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1421 (1990).

22. *See id.*

23. *Id.*

24. *See generally* Kings and Queens of the United Kingdom, *Charles I*, <http://www.royal.gov.uk/OutPut/Page76.asp> (last visited Mar. 22, 2006) (providing background information on Charles I and the Civil War that led to his removal from power and execution).

25. McConnell, *supra* note 21, at 1421.

26. *Id.*

27. *Id.*

28. *Id.* at 1421-22.

29. *Id.* at 1422. *The Act for Further Preventing the Growth of Popery* is one example of the continuing suppression of Roman Catholicism in Britain. *See* CATHOLIC ENCYCLOPEDIA, *Penal Laws*, available at <http://www.newadvent.org/cathen/11611c.htm> (last visited Mar. 23, 2006).

The “Act for further preventing the growth of Popery” (11 & 12 Gul. III, 4), passed in 1699, introduced a fresh hardship into the lives of the clergy by offering a reward of 100 pounds for the apprehension of any priest, with the result that Catholics were placed at the mercy of common informers who harassed them for the sake of gain, even when the Government would have left them in peace. It was further enacted that any bishop or priest exercising episcopal or sacerdotal functions, or any Catholic

A variety of approaches to the relationship between religion and the government developed in the colonies, in part because “English religious policy did not automatically extend to the colonies.”³⁰ As a result, in the period before the proposal and ratification of the religion clauses, the colonies

experienced 150 years of a higher degree of religious diversity than had existed anywhere else in the world. They had . . . seen the results of religious conflict in England and of a variety of approaches to church-state relations in the colonies, ranging from near-theocracy to religious pluralism to state domination of the church.³¹

Experiences in the American colonies would serve “as laboratories for the exploration of different approaches to religion and government.”³²

When English settlers arrived in America, the idea of separation of church and state was largely without precedent and perhaps even beyond contemplation.³³ Founded largely for economic rather than religious motives,³⁴ the charter for Jamestown, the first permanent English colony in North America, nevertheless, demonstrated a deep concern for bringing Christianity to the native population.³⁵ Virginia, originally governed under a royal charter that was granted to a group of investors who held governing rights over the colony, became a royal colony in 1624, which placed it under the direct control of the English Crown.³⁶ In becoming a royal colony, the Anglican Church became the official church and would remain

keeping a school, should be imprisoned for life; that any Catholic over eighteen not taking the Oaths of Supremacy and Allegiance, or making the Declaration against Popery, should be incapable of inheriting or purchasing any lands; and any lands devised to a Catholic who refused to take the oaths should pass to the next of kin who happened to be a Protestant. A reward of 100 pounds was also offered for the conviction of any Catholic sending children to be educated abroad.

Id.

30. McConnell, *supra* note 21, at 1422.

31. *Id.* at 1421.

32. *Id.*

33. CONSTITUTIONAL DEBATES ON FREEDOM OF RELIGION: A DOCUMENTARY HISTORY 1 (John J. Patrick & Gerald P. Long eds., 1999) [hereinafter CONSTITUTIONAL DEBATES].

34. Although Jamestown was not founded for religious purposes, from the outset religious law was applied in the Jamestown colony. Arlin M. Adams & Charles J. Emmerich, *A Heritage of Religious Liberty*, 137 U. PA. L. REV. 1559, 1562-63 (1989) (“[T]he first English legal code in the New World, required daily church attendance and imposed harsh penalties for blasphemy, Sabbath-breaking, and speaking maliciously against the Trinity, God’s holy word, or Christian doctrine.”).

35. THE FIRST CHARTER OF VIRGINIA (Apr. 10, 1606), available at <http://www.yale.edu/lawweb/avalon/states/va01.htm>.

36. 13 ORIGINALS: FOUNDING THE AMERICAN COLONIES, available at <http://www.timepage.org/spl/13colony.html> (last visited Mar. 22, 2006).

so until the American Revolution.³⁷ The Anglican Church's position as the official church meant that taxes had to be paid through the colonial government to support the Anglican Church and its ministers; also, conformity with church laws was required, including mandatory church attendance, and the colonial government was enlisted to punish deviance or dissent from Anglican rules.³⁸ The Anglican Church itself, however, was not dominant; rather, the colonial government controlled the official Church in the colony and utilized it as a means of social control.³⁹ During the seventeenth century, few dissenters came to the colony of Virginia, which resulted in few, but significant, acts of overt religious coercion by the government.⁴⁰ By "the eighteenth century, Virginia was the most intolerant of the colonies."⁴¹ It developed this reputation when the eighteenth century brought increased immigration to Virginia including immigration by religious dissenters, especially by Presbyterians and Baptists, who were confronted by authorities that blocked their ability to preach as well as by acts of violence.⁴²

New England's settlers were Puritans, Congregationalist Calvinists, who had suffered persecution for their dissent against Anglican beliefs and practices.⁴³ They had tried, but had been unsuccessful in attempting to eliminate what they regarded as Roman Catholic elements from the Church of England.⁴⁴ Seeking to gain freedom for their Congregationalist faith and to establish what they believed would be truly a Christian Commonwealth,⁴⁵ the Puritans adhered to a religiously dictated governance of their

37. CONSTITUTIONAL DEBATES, *supra* note 33, at 1.

38. *Id.* at 1-2; see Adams & Emmerich, *supra* note 34, at 1563 ("This establishment was demonstrated by public support, glebe lands, compulsory church attendance, punishment of blasphemy, religious test oaths, and the suppression of dissenting views.")

39. McConnell, *supra* note 21, at 1423.

40. *Id.* Lord Baltimore, who was Catholic, and Puritan ministers attempting to serve a small Puritan community in Virginia were expelled. *Id.* The government also approved of laws allowing for the expulsion of Quakers, but there is little evidence to suggest that this was actually carried out. *Id.*

41. *Id.*

42. *Id.*

43. CONSTITUTIONAL DEBATES, *supra* note 33, at 2.

44. Adams & Emmerich, *supra* note 34, at 1562-63.

45. See Mark G. Valencia, *Take Care of Me When I Am Dead: A Examination of American Church-State Development and the Future of American Religious Liberty*, 49 SMU L. REV. 1579, 1585 (1996).

Puritans believed that God created society as a unified whole. Church and state, the individual and the public, are not unrelated spheres of life but are complementary, intimately connected by God's acts of creation and his continuing providence. This conviction lay behind the Puritan effort to reform all of English society. It also provided the stimulus for the Puritan effort to fashion colonies in the New World in which all parts of colonial life would reflect the glory of God. . . . [I]t led to the high-handedness and intolerance that Puritans sometimes displayed in both Britain and America when they were in control. Since they presumed to know the will of God so

churches and governmental institutions.⁴⁶ Each town constituted a congregation that would select its own minister and maintain its minister and his church through taxes.⁴⁷ Calvinist ministers “were accorded a high degree of autonomy from civil control, and indeed frequently lectured colonial authorities on their civic and spiritual derelictions.”⁴⁸

New England’s Puritans, “[h]aving carved their communities out of the rocky wilderness of a distant land[,] . . . saw no reason to allow ungodly individuals to spoil their vision of a Christian commonwealth.”⁴⁹ Having “fled England from fear of religious oppression, [the Puritans] replicated the very conditions of religious intolerance from which they sought safe harbor in America.”⁵⁰ The Puritans “who crossed the Atlantic did so not to found a civilization where all religions would be tolerated, but rather to live

clearly, they felt it was only right that they could force others to comply, even if those others did not understand God the same way they did.

Id.

46. McConnell, *supra* note 21, at 1422. Plymouth Bay’s separatist Puritans entirely rejected the Church of England and its teachings demonstrating

their commitment to higher law, a social compact based on covenantal theology, and government by consent in the Mayflower Compact of 1620. The nonseparatist Puritans who founded the Massachusetts Bay Colony still recognized the Anglican establishment and were less tolerant than their Pilgrim brethren, setting up a theocentric commonwealth premised on Old Testament law. Their magistrates and ministers cooperated in expelling dissenters, enforcing church attendance, limiting the electoral franchise to church members, and supporting the Congregational churches through taxation.

Adams & Emmerich, *supra* note 34, at 1563.

47. McConnell, *supra* note 21, at 1422.

48. *Id.*

49. *Id.* Nathaniel Ward, who was an attorney, minister, and compiler of the code of statutes for the colonial Massachusetts’ *The Body of Liberties*, strongly criticized any notion of toleration of incorrect religions. Answers.com, Nathaniel Ward, <http://www.answers.com/topic/ward-nathaniel> (last visited Mar. 25, 2006). Ward argued “[t]hat State is wise, that will improve all paines and patience rather to compose, then tolerate differences in Religion.” Nathaniel Ward, *The Simple Cobbler of Aggawamm in America* (London, 1647), reprinted in 1 AMERICAN HISTORY TOLD BY CONTEMPORARIES 393-96 (Hart ed., 1898), available at <http://www.swarthmore.edu/SocSci/bdorseyl/41docs/55-war.html>. See Valencia, *supra* note 45, at 1587 (citing THE AMERICAN PURITANS 98 (Perry Miller ed., 1956)).

John Cotton, a seventeenth century Puritan leader, explained that “toleration made the world anti-Christian.” He went on to exhort: “My heart has naturally detested . . . toleration of diverse religions, or of one religion in segregate shapes.” Cotton further stated that the only liberty the established sect owed to dissidents was “the liberty to keep away from us.”

Id.

50. Albert, *supra* note 14, at 882. “[A]s one scholar has commented with regard to the American experience, ‘persecuted groups, when they finally escape and gain an ascendancy of their own, have a tendency to persecute others with the same enthusiasm from which they had previously suffered.’” *Id.* at 895 (citing Wendy Dackson & Richard Hooker, *American Religious Liberty*, 41 J. CHURCH & ST. 117 (1999)); see Valencia, *supra* note 45, at 1585 (“Puritans, aside from a few exceptions, adopted a creed that turned out to be contrary to the interests of religious liberty and as oppressive as the Church of England.”).

according to their own religious beliefs free from oppression.”⁵¹ Thus, they created a framework in which religious freedom existed for Congregationalists, but not other faiths.⁵² As but one of many examples, for the first sixty years of the colony, only Puritans were allowed to vote; even Anglicans, members of the official religion of the mother country, were denied the franchise.⁵³ Initially, there was no room in the Puritans’ vision for religious pluralism or tolerance; dissenters were persecuted to such an extent that banishment and execution were not unknown.⁵⁴ Nevertheless, their rejection of ecclesiastical courts and distinguishing between civil and religious authority contributed to the future course of religious liberty in the colonies.⁵⁵

New England was not without dissent. Roger Williams, who had been banished from Massachusetts along with John Clarke,⁵⁶ gathered dissenters

51. Albert, *supra* note 14, at 882.

52. CONSTITUTIONAL DEBATES, *supra* note 33, at 2.

53. Ann M. Burkhart, *The Constitutional Underpinnings of Homelessness*, 40 HOUS. L. REV. 211, 235-36 (2003).

Decades of royal pressure were required to eliminate the religious voting restriction. The Crown was disturbed that an English colony denied political rights to Church of England members and that restrictions on religious practices were more stringent in Massachusetts than in England. In 1662, King Charles II ordered the Puritans to eliminate the religious restriction on the vote. After two years of royal pressure, the Puritans purported to eliminate the restriction but, in reality, did not do so. In lieu of an express religious requirement, the vote was limited to men who were (1) at least twenty-four years old, (2) admitted as an inhabitant by a town in the colony, (3) a householder, (4) a freeholder, (5) a property taxpayer, (6) religiously orthodox, (7) “not vicious,” (8) in possession of “a certificate from all the ministers of his town proving his religious and moral qualifications” and of a certificate from a majority of the local government officials confirming his status as a freeholder and taxpayer, and (9) accepted by a majority vote of the general court. Understandably, the King and his commissioners were not amused. The commissioners were particularly appalled that “those who came to America to establish liberty of conscience . . . later denied it to others, in order that their own enjoyments might not be disturbed.” In 1691, after sixty years of the Puritans’ monopolistic control of government and decades of royal pressure, the religious restriction on the franchise was eliminated in Massachusetts.

Id. (internal citations omitted).

54. McConnell, *supra* note 21, at 1423.

55. Adams & Emmerich, *supra* note 34, at 1563-64.

56. Two ministers Roger Williams, a Puritan, and John Clarke, a Baptist, founded Rhode Island. Williams devoted himself to setting forth in writing a theological condemnation of religious persecution and the separation of church and state. *Id.* at 1564-65. In his work *The Bloody Tenent, of Persecution, for Cause of Conscience*, in 1644, Williams argued:

[A]n enforced uniformity of religion throughout a nation or civil state, confounds the civil and religious, denies the principles of Christianity and civility, and that Jesus Christ is come in the flesh. [And that], the permission of other consciences and worships than a state professes, only can (according to God) procure a firm and lasting peace, (good assurance being taken according to the wisdom of the civil state for uniformity of civil obedience from all sorts.).

Id. at 1565.

together in creating Rhode Island.⁵⁷ Williams preached that a variety of paths existed to God, and that people should be free to select their own path.⁵⁸ The royal charter Williams obtained from King Charles II in 1663 contained a guarantee of the separation of religion and government and freedom of conscience.⁵⁹ Despite the broadness of its charter's guarantee, Rhode Island imposed restrictions on both Jews, who could not become citizens, and Catholics, who could not hold public office.⁶⁰ Nevertheless, Rhode Island became a haven for many religious dissenters.⁶¹

Rhode Island, however, was not the only new world haven for dissenters; rather, Maryland initially offered religious toleration to all sects of Christianity.⁶² George Calvert, also known as Lord Baltimore, and his son Cecilus Calvert founded Maryland in the hopes of providing a place for Catholics to escape the persecution that they endured in England and in other American colonies.⁶³ The Maryland Toleration Act of 1649 provided, in part:

no person . . . whatsoever within this Province . . . professing to believe in Jesus Christ, shall . . . be any ways troubled, Molested or discountenanced for or in respect of his or her religion nor in the free exercise thereof . . . nor any way compelled to the belief or exercise of any other Religion against his or her consent . . .⁶⁴

However, the Maryland Toleration Act did not survive long, and by 1689 “the proprietor was removed and the Protestant majority in Maryland established the Church of England and initiated a program of discrimination and intolerance toward dissenters, particularly Roman Catholics. In the eighteenth century, Maryland rivaled Virginia for the narrowness and intolerance of its laws.”⁶⁵

57. CONSTITUTIONAL DEBATES, *supra* note 33, at 3.

58. *Id.*

59. *Id.* The Rhode Island Charter of 1663 provides, in part, as follows:

No person, within said colony, at any time hereafter, shall be any wise molested, punished, disquieted, or called in question, for any differences in opinion in matters of religion, and do not actually disturb the civil peace of our said colony; but that all and every person and persons may . . . have and enjoy his and their own judgments and consciences, in matters of religious concerns; . . . they behaving themselves peaceable and quietly and not using this liberty to licentiousness and profaneness, nor to the civil injury or outward disturbance of others; any law . . .

Rhode Island Charter (1663), in CONSTITUTIONAL DEBATES, *supra* note 33, at 16.

60. McConnell, *supra* note 21, at 1425-26.

61. CONSTITUTIONAL DEBATES, *supra* note 33, at 3.

62. McConnell, *supra* note 21, at 1424.

63. CONSTITUTIONAL DEBATES, *supra* note 33, at 14.

64. *Maryland Toleration Act* (1649), in CONSTITUTIONAL DEBATES, *supra* note 33, at 15.

65. McConnell, *supra* note 21, at 1424.

A similar fate befell efforts at toleration in the Carolinas. Inspired by John Locke, who helped the influential Lord Ashley write the Fundamental Constitutions of the Carolinas in 1669, the Carolinas proprietors, though declaring the Church of England to be the true church, attempted to provide religious liberty to colonists of different faiths.⁶⁶ Other than atheists, “persons of ‘different opinions concerning matters of religion,’” were welcomed into the Carolinas.⁶⁷ The Fundamental Constitutions, which were never fully put into effect, included protection for “‘Jews, heathens, and other dissenters from the purity of Christian religion,’ as well as to the ‘natives of that place.’”⁶⁸ However, the protection for religious liberty did not extend to those who failed to embrace any religion, nor did it cover individualistic/non-institutionalized belief.⁶⁹ All residents had to be a member of a church and could not join multiple churches.⁷⁰ As to what could constitute a church, “any seven or more persons agreeing in any religion, shall constitute a church or profession.”⁷¹ However, to be a religion, three tenets had to be embraced: (1) the existence of God; (2) that God is to be publicly worshipped; and, (3) every church or profession of faith needed an outward manner in which their members were to publicly worship God.⁷² The system of the Fundamental Constitutions was never fully implemented or put into effect, but the Carolinas did serve for a period of time as a religious haven for dissenters in the seventeenth century before becoming more restrictive in the early eighteenth century.⁷³

Like the Carolinas and Virginia, Georgia eventually became a state in which the Church of England was the official established religion. The Trustees of Georgia supported the Church of England by financing and supervising ministers, building churches, and encouraging attendance and support for religion.⁷⁴ However, unlike in Virginia, “the Georgia Trustees demonstrated remarkable tolerance toward Protestant dissenters [and] Jews.

66. *Id.* at 1428.

67. *Id.*

68. *Id.* at 1429. The Fundamental Constitutions even extended protection for the religious liberty of slaves, who were to be “free to select ‘what church or profession any of them shall think best, and, therefore, be as fully members as any freeman.’” *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.* at 1425. Disagreement exists about the state of affairs in the Carolinas. Judge McConnell argues that by the early eighteenth century, North and South Carolina “instituted a rigid establishment of the Church of England along lines parallel to Virginia’s.” *Id.* Judge Adams insists that establishment in the Carolinas was not formidable, more akin to Georgia than Virginia. Adams & Emmerich, *supra* note 34, at 1567.

74. McConnell, *supra* note 21, at 1424.

(Savannah contained a substantial Jewish community, which was allowed to worship in peace and participate in public affairs.)”⁷⁵ Catholics, however, were excluded from the colony.⁷⁶ From its founding, Georgia was home to and welcomed adherents of a broad variety of faiths, including numerous Anglicans, Lutherans, Presbyterians, and Jews.⁷⁷ One of the more intriguing elements of Georgia’s government/religion relationship was that non-established religious groups also “received governmental funding and support for their own endeavors (including land grants, salaries for ministers, and some control over church and civil governance).”⁷⁸

Religious pluralism experienced its strongest adherence and greatest impact in the middle colonies “where no church was established (except in the four counties of metropolitan New York) and the widest range of religious persuasions lived in relative harmony.”⁷⁹ William Penn’s⁸⁰ colony of Pennsylvania was particularly associated with religious liberty, in part, because of Penn’s popular and widely read work *The Great Case of Liberty of Conscience*, which had been published in 1670.⁸¹ Under the 1701 Charters of Privileges, though limiting public office to Christians, Pennsylvania protected the religious practice of all theists.⁸² Pennsylvania’s assurances of toleration contributed to generating immigration levels higher than any other colony, resulting in great prosperity.⁸³ Pennsylvania’s approach to religious liberty was therefore noticed by citizens of neighboring colonies.⁸⁴ For example, Madison came to believe that “Pennsylvania’s ‘liberal, catholic, and equitable way of

75. *Id.*

76. *Id.*

77. Joel A. Nichols, *Religious Liberty in the Thirteenth Colony: Church-State Relations in Colonial and Early National Georgia*, 80 N.Y.U. L. REV. 1693, 1694 (2005).

78. *Id.*

79. McConnell, *supra* note 21, at 1429-30.

80. William Penn had been punished in England for his Quaker religious beliefs. CONSTITUTIONAL DEBATES, *supra* note 33, at 4. While Penn was in prison for his preaching, he wrote a defense of religious liberty entitled *The Great Case of Liberty of Conscience*. *Id.* He argued that religious liberty was critical because coerced religion was of little, or no value. *Id.* With the British Monarch in debt to Penn’s father, he was released and was awarded an area of America that would become Pennsylvania. *Id.* Penn moved forward with plans to make this area into a haven for Quakers and other dissenters, who had been persecuted by established faiths. *Id.*

81. McConnell, *supra* note 21, at 1430. “Combining the roles of religious leader and political statesman, Penn expounded his views on religious liberty in numerous tracts. In the most famous of these, *The Great Case of Liberty of Conscience* (1671), he stressed that coercion of conscience destroyed authentic religious experience and ‘directly invade[d] the Divine Prerogative.’” Adams & Emmerich, *supra* note 34, at 1566-67.

82. McConnell, *supra* note 21, at 1430.

83. *Id.*; Adams & Emmerich, *supra* note 34, at 1567 (“Penn’s holy experiment flourished, tending to prove that social stability could be enhanced by religious freedom.”).

84. McConnell, *supra* note 21, at 1430.

thinking as to the rights of conscience' . . . encouraged commerce, immigration, virtue, industry, the arts, and a productive love of fame and knowledge."⁸⁵ While these benefits accrued from religious liberty, its converse, "[r]eligious bondage," in Madison's view, "shackles and debilitates the mind and unfits it for every noble enterprise, every expanded project."⁸⁶ In a discourse with a fellow Princeton classmate who was from Pennsylvania, Madison, reflecting upon the lack of religious liberty in Virginia, conceded, "I have . . . nothing to brag of."⁸⁷ Although Pennsylvania was receiving more attention from Madison and others who would found the United States, religious liberty was also to a great extent being enjoyed in New York and New Jersey, though these colonies, unlike Pennsylvania, were not founded as havens for religious dissenters.⁸⁸ With extraordinary religious diversity existing in New York and New Jersey, for the most part an approach to government/religion relations emerged that afforded religious toleration for Protestants and Jews, though Catholics continued to be targeted.⁸⁹

The original colonists had "a curious idea of religious liberty, one that invited (or banished, as it were) dissenters to enjoy religious liberty elsewhere in the New World or stay, risking great persecution were they not to conform."⁹⁰ Nevertheless, by the eighteenth century, Pennsylvania started to become the leader in a trend towards increased religious liberty in the colonies.⁹¹ Catholics and Jews were generally outsiders, but variations between the colonies as to who were outsiders and insiders in the various colonies, and the greater degree of religious liberty than existed in Europe, created a rapidly growing diversity of sects and churches in the United States.⁹² Additionally, the Great Awakening, an evangelical movement that impacted a variety of sects beginning in the 1730s and 1740s,⁹³ also generated opposition to established religious orthodoxy and created organized

85. LANCE BANNING, *THE SACRED FIRE OF LIBERTY: JAMES MADISON & THE FOUNDING OF THE FEDERAL REPUBLIC* 81 (1995) (quoting James Madison to Bradford, April 1, 1774, in *1 THE PAPERS OF JAMES MADISON* 112-13 (William T Hutchinson et al. eds., 1962)).

86. *Id.*

87. *Id.*

88. McConnell, *supra* note 21, at 1424.

89. *Id.*

90. Albert, *supra* note 14, at 895.

91. CONSTITUTIONAL DEBATES, *supra* note 33, at 5.

92. *See id.* at 6.

93. CHRISTINE LEIGH HEYRMAN, *THE FIRST GREAT AWAKENING*, <http://www.nhc.rtp.nc.us:8080/tserve/eigheten/ekeyinfo/grawaken.htm> (last visited Mar. 26, 2006).

political power behind dissenters.⁹⁴ As the revolution approached, the adherence to a concept of enforcing religious belief was weakening, and the trend was towards religious liberty.⁹⁵ This trend would be accelerated by the ideology of the Revolution and severing of ties with England.⁹⁶

B. THE FOUNDERS' VIEW OF RELIGIOUS LIBERTY

It has been argued that “[f]or the founders, the substantive idea of religious liberty—whatever its precise boundaries—was rooted not in secular philosophy, but in theology.”⁹⁷ Disagreement exists though as to whether the desire to protect religious liberty was primarily a product of secular or religious thinking.⁹⁸ For a number of reasons, the dichotomy, however, is a false one in terms of eighteenth century thought on religious liberty.⁹⁹ One, the founding generation was deeply influenced by religious thought, and the distinction between civil and religious authority drawn upon by the Founders was itself related to the Protestant concept of two kingdoms, one an earthly, the other a heavenly realm.¹⁰⁰ Two, even

94. See CONSTITUTIONAL DEBATES, *supra* note 33, at 7; Adams & Emmerich, *supra* note 33, at 1567-68 (“[T]he establishments were eroded by the increased diversity arising during the Great Awakening.”).

95. See CONSTITUTIONAL DEBATES, *supra* note 33, at 7-8.

96. See *id.*

97. DANIEL O. CONKLE, CONSTITUTIONAL LAW: THE RELIGION CLAUSES 30 (2003).

98. Smith, *Rise and Fall*, *supra* note 7, at 156-66.

99. *Id.* at 158. Both the approach described sometimes as secular, and the religious approach “were centrally dependent upon religious, indeed theistic, assumptions.” *Id.* at 160. The more explicitly religious style was biblical and evangelical, while the more secular approach adhered more closely to natural religion being more philosophical in its approach to religion. *Id.* “[T]he critical point is that although the religious justification is not universally persuasive, that justification carried considerable weight with Americans of the founding generation. . . . Its influence is hardly surprising given the pervasively religious world view then prevailing.” *Id.* at 156-57.

100. *Id.* at 157; Adams & Emmerich, *supra* note 33, at 1561-62.

The American Founders were influenced profoundly by philosophers and theologians who reflected on the religious conflicts that occurred in the wake of the Reformation. From Martin Luther and John Calvin they inherited the view that God had instituted “two kingdoms”—a heavenly one where the church exercised its spiritual authority and an earthly one where the civil magistrates exercised temporal authority. A liberal Roman Catholic tradition represented by Erasmus and Thomas More also exerted significant influence in the colonies, inspiring the Lords Baltimore and the Carrolls of Maryland to rethink the proper relationship between church and state. The Puritan poet John Milton, confidant of Oliver Cromwell and friend of Roger Williams, shaped colonial thought by seeking to prove in 1659 that “for belief or practice in religion according to this conscientious persuasion no man ought be punished or molested by any outward force on earth whatsoever.” From Roger Williams and William Penn, the Founders learned that state control of religion corrupted faith and that coercion of conscience destroyed true piety. From theorists such as John Locke, they appropriated concepts such as inalienable rights and toleration for the religious beliefs of others. These diverse ideas, derived largely from the intellectual currents flowing from the

Founders like Jefferson, who deviated from Christian orthodoxy, viewed the world in strongly religious terms.¹⁰¹ Three, “in eighteenth-century America—in city, village, and countryside—the idiom of religion penetrated all discourse, underlay all thought, marked all observances, gave meaning to every public and private crisis.”¹⁰² The variance in approaches to religious liberty “is more accurately described as a difference in kinds or styles of religious thinking, not as a conflict between ‘religious’ and ‘secular’ thought in the contemporary sense of those terms.”¹⁰³

Although at the time of the framing of the Constitution there were a variety of arguments in favor of religious liberty, “the central justification [among the founding generation] for religious liberty was distinctly religious, resting on the combination of two theological principles: first, that religious duties are more important than secular duties, and second, that individuals must undertake their religious duties voluntarily, not under legal compulsion.”¹⁰⁴ These two principles have been described as the priority claim and the voluntariness claim.¹⁰⁵ The priority claim asserts that “‘religious goods’—that is, the distinctive goods, benefits, or blessings toward which religious beliefs and practices are directed—are more valuable or more important than most or perhaps all other human goods.”¹⁰⁶ This claim can also be stated as religious duties have a priority over nonreligious legal or social duties.¹⁰⁷ “The voluntariness claim asserts that religious goods or duties by their nature entail freedom of choice.”¹⁰⁸ Accordingly, consistent with the voluntariness view, “[i]t is futile, at least from a religious perspective, to force a person to profess a religious creed or conform to a religious practice because compulsory faith lacks religious efficacy. Compelled religion, the voluntariness claim insists, is a contradiction in terms”¹⁰⁹

Reformation, influenced the colonists in developing not only their religious, but also their political institutions.

Id.

101. Smith, *Rise and Fall*, *supra* note 7, at 158.

102. *Id.* at 157-58.

103. *Id.* at 160.

104. CONKLE, *supra* note 97, at 30.

105. Smith, *Rise and Fall*, *supra* note 7, at 154.

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.* at 154-55. There is a distinction to be drawn between a voluntariness claim and a view of salvation being achieved through the volitional acts of an individual. *Id.* While that view of salvation was accepted by Madison and Jefferson, it was not commonly embraced by many of their Calvinist allies, who were so critical in helping to promote and advance the cause of religious liberty. *Id.* at 155 n.19. “The impact of Puritanism on colonial thought can hardly be overstated, for as a prominent historian indicates, it ‘provided the moral and religious background of fully 75 percent of the people who declared their independence in 1776.’” Adams &

In combination, the priority and voluntariness claims support the constitutional commitment to religious liberty.¹¹⁰ “If religious goods or duties take precedence over other goods or duties, as the priority claim asserts, then the state should not interfere with religion in the interest of other matters that are necessarily less weighty.”¹¹¹ However, while this priority claim calls for government’s respect of religion, it does not necessarily lead to a conclusion that religious liberty or freedom should be the government’s approach to religion.¹¹² To “the contrary, if religion is the source of supremely important goods or duties, then it might seem that a government concerned for the welfare of its citizens should *require* them to accept such goods or to perform such duties.”¹¹³ Acting as a protector of their citizens, sometimes almost as a parental figure, “governments commonly oblige citizens with compulsory education laws, mandatory social security withholding, seat belt requirements, and substance abuse prohibitions, at least in part on the ground that such compulsion is good even for those citizens who

Emmerich, *supra* note 34, at 1564. An important link in the alliance connecting the two forces was the work of Calvinist Issac Backus:

Backus repudiated the social contractarian view that the individual surrenders some natural liberties by submitting to government. [He] maintained that fallen man in a “state of nature” is a slave and attains freedom only by entering into government. Backus divided this freedom-through-government into two types: Christian and civil. As to Christian freedom, unregenerate “natural” men are not free but slaves to Satan, ruled by sin. They will attain Christian freedom only by conversion, when they are brought under direct rule by God to obey the rule of love written in their hearts by the divine finger. True liberty is doing not as one chooses but as God chooses one to do. Divine government of the unruly heart is thus necessary for Christian freedom. Civil freedom, on the other hand, is possible only under a civil government, because without order sinners will naturally prey upon one another and upon those who have received grace. God therefore allows men to form governments so as to restrain the sinners and preserve civil peace. Human governments are formed primarily by unregenerate men for necessarily limited purposes. The unconverted can have no authority over true religion, and so they cannot transfer any such authority to merely civil governments. They exist only to keep the peace, not to promote salvation. God Himself has assumed complete rule over His own church, leaving no room for human ordinances

Thus, in diametric opposition to the argument of Jefferson and Madison, Backus’s rationale for religious freedom rests on the utter inefficacy of human choice. Backus believed that civil governments have no power over religion precisely because human governments are the products of human choice, from which no good can come. Only God can save man, and so man must be subject only to divine government in religion. The goal of religious liberty is thus not to leave man free to seek his salvation, but to leave the Spirit free to act within man without external constraint. The prerogative protected by the principle of religious freedom is not man’s but God’s.

David C. Williams & Susan H. Williams, *Volitionalism and Religious Liberty*, 76 CORNELL L. REV. 769, 872-73 (1991).

110. Smith, *Rise and Fall*, *supra* note 7, at 155.

111. *Id.*

112. *Id.*

113. *Id.* (emphasis in original).

fail to appreciate the wisdom in these measures.”¹¹⁴ With only the priority claim supporting religious liberty, the question arises, “[w]hy should government impose these mundane benefits on its citizens and at the same time neglect their incomparably greater interest in the salvation of their souls?”¹¹⁵ Such governmental action historically was considered one of, if not the primary duties of the state, and remains so in some countries to this day.¹¹⁶

It is by combining the priority claim and the “voluntariness claim with its insistence upon the futility of compulsory religion that justifies a public commitment not just to religion, but to religious freedom.”¹¹⁷ Like the priority claim, the voluntariness claim alone is insufficient to establish religious liberty or freedom.¹¹⁸ Because compulsory religion is, under the voluntariness approach, futile and even self-contradictory, the government should be discouraged “‘from interfering with citizens’ religious beliefs and practices in order to secure religious benefits for these citizens.”¹¹⁹ The voluntariness claim suggests little concern for the practice of religion, simply prohibiting forcing religion upon citizens.¹²⁰ If the “government has nonreligious reasons for regulating religious practices, the voluntariness claim gives no reason for restraint. Only the priority claim provides such a reason.”¹²¹ Taken together, the priority and voluntariness claims

form a cogent justification for extending special legal protection to religious freedom. The priority claim suggests that government should respect religion and avoid subordinating religious goods and duties in favor of secular concerns. The voluntariness claim suggests that the way in which government should respect religion is by securing religious freedom.¹²²

Examples of these two claims in the Founders’ justification and understanding of religious liberty are numerous among the writings, speeches, and letters of the founding generation. The Founders believed that “individuals had a duty to adhere to their religious beliefs—a duty they owed to a power higher than civil government—and for this reason, religious liberty

114. *Id.*

115. *Id.*

116. See Jeffrey Usman, Note, *The Evolution of Iranian Islamism from the Revolution through the Contemporary Reformers*, 35 VAND. J. TRANSNAT’L L. 1679, 1683-84 (2002) (discussing the Islamic goals included in the Iranian Constitution).

117. Smith, *Rise and Fall*, *supra* note 7, at 155 (emphasis omitted).

118. *Id.*

119. *Id.* (emphasis omitted).

120. *Id.* at 155-56.

121. *Id.* at 156.

122. *Id.*

seemed inalienable not only physically, but also morally. It neither could nor ought to be submitted to government.”¹²³ Prominent examples of Framers who had this view, Jefferson and Madison,¹²⁴ “based their defense of religious liberty on the assumption that religion is volitionalist: individuals reserve the right to religious freedom from the social contract so that they may be free to please God (or Providence) and win a reward for their conduct.”¹²⁵ The voluntariness claim is featured prominently in Jefferson’s *The Virginia Act For Establishing Religious Freedom*:

Well aware that Almighty God hath created the mind free; that all attempts to influence it by temporal punishments or burdens, or by civil incapacitations, tend only to beget habits of hypocrisy and meanness, and are a departure from the plan of the Holy Author of our religion, who being Lord both of body and mind, yet chose not to propagate it by coercions on either, as was in his Almighty power to do; that the impious presumption of legislators and rulers, civil as well as ecclesiastical, who, being themselves but fallible and uninspired men, have assumed dominion over the faith of others, setting up their own opinions and modes of thinking as the only true and infallible, and as such endeavoring to impose them on others, hath established and maintained false religions over the greatest part of the world, and through all time; that to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical.¹²⁶

Jefferson also made the priority claim; for example, he argued that “[t]he rights of conscience we never submitted, we could not submit. We are answerable for them to our God.”¹²⁷

James Madison’s *Memorial and Remonstrance Against Religious Assessments* stands as one of the finer examples of the synthesis of the priority and voluntariness arguments for religious liberty. Responding to a

123. Philip Hamburger, *More is Less*, 90 VA. L. REV. 835, 843 (2004).

124. Justice Rutledge suggested the history of religious liberty debates in Virginia is critical to the framing of religious liberty under the First Amendment. *Everson v. Bd. of Educ.*, 330 U.S. 1, 33-34 (Rutledge, J., dissenting); see Valencia, *supra* note 45, at 1587 n.46 (“Virginia is clearly the Constitutional genesis of the First Amendment’s Establishment and Free Exercise Clauses. Consequently, although other colonial developments (for example, Massachusetts and Plymouth) are relevant, they are not as material to the ideology behind American religious liberty development.”).

125. Williams & Williams, *supra* note 109, at 852.

126. THOMAS JEFFERSON, THE VIRGINIA ACT FOR ESTABLISHING RELIGIOUS FREEDOM (1786), available at <http://religiousfreedom.lib.virginia.edu/sacred/vaact.html> (last visited March 17, 2006).

127. Hamburger, *supra* note 123, at 844 (citing THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 159 (Query 17) (William Peden ed., Univ. of N.C. Press 1982) (1784)).

bill that would establish a provision for paying teachers of Christianity in Virginia, Madison stated his opposition in the Virginia General Assembly. He asserted:

Because we hold it for a fundamental and undeniable truth, “that Religion or the duty which we owe to our Creator and the Manner of discharging it, can be directed only by reason and conviction, not by force or violence.” The Religion then of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate. This right is in its nature an unalienable right. It is unalienable, because the opinions of men, depending only on the evidence contemplated by their own minds cannot follow the dictates of other men: It is unalienable also, because what is here a right towards men, is a duty towards the Creator. It is the duty of every man to render to the Creator such homage and such only as he believes to be acceptable to him. This duty is precedent, both in order of time and degree of obligation, to the claims of Civil Society. Before any man can be considered as a member of Civil Society, he must be considered as a subject of the Governor of the Universe: And if a member of Civil Society, do it with a saving of his allegiance to the Universal Sovereign. We maintain therefore that in matters of Religion, no man’s right is abridged by the institution of Civil Society and that Religion is wholly exempt from its cognizance.¹²⁸

In this argument, Madison “used the language of social contract and obligation to assert the priority of religious duties over other duties. If our obligation to the Creator precedes our assumption of the obligations imposed by civil society, then the latter obligations are subject or subordinate to our religious duties.”¹²⁹ Madison also addressed and asserted the voluntariness argument—arguing that religion is a matter for the conscience of every individual, as opposed to a matter for the enforcement of the state.¹³⁰

Although the priority and voluntariness claims are potent forces behind the Founders’ protection of religious liberty, it would be a mistake to analyze the First Amendment protection of religious liberty without considering federalism¹³¹ and the practical attendant element of merging a

128. James Madison, *Memorial and Remonstrance Against Religious Assessments* (1785), available at http://religiousfreedom.lib.virginia.edu/sacred/madison_m&r_1785.html (last visited Sept. 9, 2007).

129. Smith, *Rise and Fall*, *supra* note 7, at 161.

130. *Id.*

131. Adams & Emmerich, *supra* note 34, at 1605-12 (providing an excellent discussion of the federalism groundings of the First Amendment).

complicated patchwork of diverse church/state relations in the various states into a unified national whole. During the ratification debates in Virginia, Madison argued that “there is not a shadow of right in the general government to intermeddle with religion. Its least interference with it, would be a most flagrant usurpation.”¹³² It has been argued that the political situation was such “because of the multiplicity of sects existing at the founding, [that] any leaning or partiality toward one religion would have been politically unthinkable.”¹³³ Nevertheless, there was considerable concern that, absent express protection, federal interference would occur.¹³⁴ Thus, the drafters of the Constitution were required to assure, as Madison did in the Virginia ratification debates, that the federal government would promote a policy of neutrality towards the diverse faiths of the states.¹³⁵ The First Amendment was designed to assure concerned citizens that the federal government would not discriminate, persecute, or show financial prejudice on the basis of religion.¹³⁶ Through ratifying the First Amendment, action was taken not only to limit national power, but also “to preserve the power of the states to address religion and religious liberty as the states saw fit.”¹³⁷ As noted by Justice Story, “the whole power over the subject of religion is left exclusively to the state governments, to be acted upon according to their own sense of justice, and the State Constitutions.”¹³⁸ In the attempt to explore the definition of religion, the historical framework of the emergence of religious liberty, and the purposes of the First Amendment protection thereof, will regularly be considered and help frame the subsequent analysis.

III. OVERARCHING ISSUES IMPLICATED IN DEFINING RELIGION

A. SHOULD RELIGION BE DEFINED?

As noted by the United States Supreme Court, “[t]he word ‘religion’ is not defined in the Constitution.”¹³⁹ The Founders did not expressly define

132. James Madison, *Virginia Ratifying Convention* (June 12, 1788), in 5 THE FOUNDERS’ CONSTITUTION 88 (Philip B. Kurland & Ralph Lerner eds., 1987).

133. Albert, *supra* note 14, at 900; see WILLIAM LEE MILLER, *THE BUSINESS OF MAY NEXT: JAMES MADISON AND THE FOUNDING* 12-13 (1992); Valencia, *supra* note 45, at 1587 (asserting that religious diversity was extremely important in advancing religious liberty).

134. Albert, *supra* note 14, at 899-900.

135. *Id.* at 900.

136. *Id.* at 900-01.

137. CONKLE, *supra* note 97, at 19.

138. Douglas G. Smith, *The Establishment Clause: Corollary of Eighteenth-Century Corporate Law?*, 98 NW. U. L. REV. 239, 291 (2003) (quoting 3 JOSEPH STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* §1873 (1833)).

139. *Reynolds v. United States*, 98 U.S. 145, 162 (1878).

the term, and a number of commentators have argued that religion should not, or even cannot, be defined by the courts.¹⁴⁰ The arguments against defining religion can be largely classified into three categories: (1) religions vary significantly, and there is nothing about them at the core that is common or shared that would lend itself to a definition; (2) courts are not qualified to define religion, and in so doing pose a danger of bias; and, (3) defining religion would violate the Constitution by interfering with religious liberty and establishing religion.

The commentators and academics in the first category submit that a search for a definition of religion is misguided because “[t]here simply is no essence of religion, no single feature or set of features that all religions have in common and that distinguishes religion from everything else.”¹⁴¹ Because there is no *it*—no “religion”—somewhere out there, there is nothing to be deduced from, thus any definition of religion will be inherently arbitrary.¹⁴² Having seen the difficulties in reaching a satisfactory definition, some scholars have concluded that “[t]he fact is that no definition of religion for constitutional purposes exists, and no satisfactory definition is likely to be conceived.”¹⁴³ For these scholars, “[f]ashioning a general definition of religion seems virtually impossible.”¹⁴⁴

Even if a definition of religion could be reached, commentators in the second category argue the courts are not sufficiently competent or unbiased to generate a proper definition.¹⁴⁵ Some courts themselves have even questioned their own competence in making this determination. For example, a Delaware court noted that the state had argued that “Black Muslim beliefs and teachings are not a religion [and even indicated that] [s]ome plausible arguments are made in support of their contention;” however, the court did

140. Questions as to whether religion should be defined also arise in the context of international law. Robert Bejesky, *United States Obligations Under International Law and the Falun Gong v. Jiang Zemin Lawsuit: A Justified Reaction to a Threat to Public Security or Genocide? You Decide*, 11 U.C. DAVIS J. INT’L L. & POL’Y 295, 327-28 (2005). “One of the problems in protecting an international right to freedom of religion is establishing how that right should be defined. There is no international consensus on what constitutes a religion; some even claim that the term ‘religion’ should not be defined.” *Id.*

141. George C. Freeman, III, *The Misguided Search for the Constitutional Definition of “Religion,”* 71 GEO. L.J. 1519, 1565 (1983).

142. Gidon Sapir, *Religion and State—A Fresh Theoretical Start*, 75 NOTRE DAME L. REV. 579, 632-33 (1999) (citing Anita Bowser, *Delimiting Religion in the Constitution: A Classification Problem*, 11 VAL. U. L. REV. 163, 164 (1977)).

143. Philip E. Johnson, *Concepts and Compromise in First Amendment Religious Doctrine*, 72 CALIF. L. REV. 817, 832 (1984).

144. Steven D. Smith, *Symbols, Perceptions, and Doctrinal Illusions: Establishment Neutrality and the “No Endorsement” Test*, 86 MICH. L. REV. 266, 298 (1987) [hereinafter Smith, *Symbols*].

145. Sapir, *supra* note 142, at 633.

not consider this argument because it is “clear this court cannot-or should not-undertake to define or rule on what is or what is not a religion.”¹⁴⁶ Similarly, a New Jersey court concluded that “[t]here is no right in a state or an instrumentality thereof to determine that a cause is not a religious one.”¹⁴⁷

Still other commentators assert that defining religion is itself a violation of the religious liberty protected by the First Amendment. It has been submitted that any “attempt to define religion, even for purposes of increasing freedom for religions, would run afoul of the ‘establishment’ clause, as excluding some religions, or even as establishing a notion respecting religion.”¹⁴⁸ Under this interpretation, no definition of religion is possible, because by defining religion the court is establishing what religion is. Thus, defining religion would be contrary to the entire concept of religious liberty because “any definition of religion would seem to . . . dictate to religions, present and future, what they must be.”¹⁴⁹ Furthermore, any definition offered by the court would likely discriminate against unusual religions that the court was not familiar with or failed to account for, and by fixing the definition of religion, the court would create stagnancy by restricting the present and future growth of religion.¹⁵⁰ As a result, it has been argued that a problem will occur “[a]s soon as the Court says that religion is this, and only this, [because] someone will appear with a religion that does not fit the definition, and the Establishment Clause may be violated.”¹⁵¹

Nor is this viewpoint simply some academic wandering; quite to the contrary, the Internal Revenue Service (IRS) through its General Counsel has embraced this understanding.¹⁵² The IRS General Counsel stated:

146. *State ex rel. Tate v. Cabbage*, 210 A.2d 555, 562 (Del. Super. Ct. 1965); see Glen O. Robinson, *Communities*, 83 VA. L. REV. 269, 311 n.97 (1997).

147. *Kolbeck v. Kramer*, 202 A.2d 889, 892 (N.J. Super. Ct. Law Div. 1964).

148. Jonathan Weiss, *Privilege, Posture and Protection “Religion” in the Law*, 73 Yale L.J. 593, 604 (1964); see *Kolbeck*, 202 A.2d at 892 (“Such a censorship of religion as the means of determining its right to survive is a denial of liberty protected by the First Amendment and included in the liberty which is within the protection of the Fourteenth Amendment.”).

149. Weiss, *supra* note 148, at 604.

150. Mary Harter Mitchell, *Secularism in Public Education: The Constitutional Issues*, 67 B.U. L. REV. 603, 631 (1987) (citing M. KONVITZ, RELIGIOUS LIBERTY AND CONSCIENCE 51-72, 97 (1968)); see Timothy L. Hall, Note, *The Sacred and The Profane: A First Amendment Definition of Religion*, 61 TEX. L. REV. 139, 160 (1982) [hereinafter Hall, *Sacred*] (“The danger in defining religion lies in the possibility of violating the very purpose of the [F]ree [E]xercise [C]lause by proposing a definition that excludes nontraditional religious beliefs from the protective canopy of the first amendment.”).

151. Deborah K. Hepler, *The Constitutional Challenge to America Civil Religion*, 5 KAN. J.L. & PUB. POL’Y 93, 104 (1996).

152. Christine Roemhildt Moore, *Religious Tax Exemption and the “Charitable Scrutiny” Test*, 15 REGENT U. L. REV. 295, 306-07 (2003); see Reka Potgieter Hoff, *The Financial*

An analysis of the First Amendment to the Constitution of the United States indicates that it is logically impossible to define “religion.” It appears that the two religious clauses of the First Amendment define “religious freedom” but do not establish a definition of “religion” within recognized parameters. An attempt to define religion, even for purposes of statutory construction, violates the “establishment” clause since it necessarily delineates and, therefore, limits what can and cannot be a religion.¹⁵³

However, despite the view expressed in this memorandum, the IRS has, nevertheless, continued to apply a set of factors to determine if a group constitutes a church for purposes of tax benefits.¹⁵⁴

Despite the intriguing arguments presented by various academics and embraced by at least some courts, ultimately we should and in fact must give some meaning to the word religion. According to the Merriam-Webster Dictionary, to define something is “to determine or identify the essential qualities or meaning of; . . . to discover and set forth the meaning of; . . . to fix or mark the limits of; . . . to make distinct, clear, or detailed especially in outline, [or to] characterize[/]distinguish.”¹⁵⁵ This article moves forward with this understanding of what it means to define religion. While a short pithy statement is not likely to suffice, the term religion must be defined. Despite the third group of commentators fear that a definition is unconstitutional, courts have repeatedly concluded that there is no constitutional prohibition or restriction upon defining religion or assessing if particular practices or beliefs are religious.¹⁵⁶ Furthermore, by defining religion, discrimination between religions is less likely to be subtly hidden through court presumptions.¹⁵⁷

More fundamentally though, despite difficulties, the term must be defined because “the definition of ‘religion’ plays as integral a role in the articulation of any well-developed doctrine governing the constitutional separation of church and state as does the content to be assigned to the religion clauses’ two substantive terms—‘establishment’ and ‘free

Accountability of Churches for Federal Income Tax Purposes: Establishment or Free Exercise?, 11 VA. TAX REV. 71, 100 n.145 (1991).

153. Gen. Couns. Mem. 36,993 (Feb. 3, 1977).

154. Dmitry N. Feofanov, *Defining Religion: An Immodest Proposal*, 23 HOFSTRA L. REV. 309, 317 n.39 (1994).

155. MERRIAM-WEBSTER ONLINE DICTIONARY, <http://www.m-w.com/dictionary/define> (last visited June 21, 2007).

156. See, e.g., *Carpenter v. Wilkinson*, 946 F. Supp. 522, 525 (N.D. Ohio 1996) (citing *Jones v. Bradley*, 590 F.2d 294, 295 (9th Cir. 1979)).

157. See Stanley Ingber, *Religion or Ideology: A Needed Clarification of the Religion Clauses*, 41 STAN. L. REV. 233, 290-91 (1989).

exercise.”¹⁵⁸ Failure to define religion would not only be a problem in particular cases, it would be “a fundamental gap in [F]irst [A]mendment theory.”¹⁵⁹ Without a definition of religion, it would be difficult to say anything about the First Amendment’s protection of religious liberty.¹⁶⁰ Thus, “the Constitution itself requires that we provide a definition [by] . . . protect[ing] the free exercise and prohibit[ing] establishment of something called ‘religion.’”¹⁶¹ Accordingly, a definition is needed; even though the definition would not determine what constitutes free exercise or establishment, “it determines what is protected and what is not.”¹⁶² A definition is critical to determining “whether such diverse beliefs as Confucianism, political philosophy, Marxism, Communism, . . . being a millionaire, and even atheism, are, in fact, religions.”¹⁶³ Whether there is an unstated understanding or an express definition, “it is clear that the religion clauses cannot be applied without at least a working concept of religion. Because some such working definition is necessary, claims that definition is impossible, undesirable, or unconstitutional must be reduced to admonitions” suggesting caution in defining religion.¹⁶⁴ Succinctly stated, “[t]he Court can no more escape saying what is religion than it can escape saying what is speech or press or assembly under other provisions of the [F]irst [A]mendment.”¹⁶⁵

158. Jesse H. Choper, *Defining “Religion” in the First Amendment*, 1982 U. ILL. L. REV. 579, 580 (1982).

159. Johnson, *supra* note 143, at 839.

160. *Id.*; Ivan E. Bodensteiner, *The Demise of the First Amendment as a Guarantor of Religious Freedom*, 27 WHITTIER L. REV. 415, 426 (2005) (“[B]ecause the religion clauses protect ‘religion,’ it seems implausible that the clauses could be meaningful without a definition of ‘religion,’ or a definition that includes anything one asserts is a religion. Even if it is offensive to religions to have the courts decide the meaning of a term in the Constitution, it is less offensive than having the courts interpret the [F]ree [E]xercise [C]lause in a manner that provides no meaningful protection to religion.”).

161. Feofanov, *supra* note 154, at 315.

162. *Id.* at 313.

163. *Id.* at 313-15.

164. Mitchell, *supra* note 150, at 632-33. These admonitions would include “that the definition used should be flexible, should aim away from narrow parochialism, should not enmesh the courts too deeply in theology or in a believer’s mind, and might need to be adjusted from one context to another.” *Id.* at 633.

165. John H. Mansfield, Book Review, 52 CALIF. L. REV. 212, 215-16 (1964) (reviewing PHILIP B. KURLAND, *RELIGION AND THE LAW* (1962)); see T. Jeremy Gunn, *The Complexity of Religion and the Definition of “Religion” in International Law*, 16 HARV. HUM. RTS. J. 189, 191 (2003) (“While academics have the luxury of debating whether the term ‘religion’ is hopelessly ambiguous, judges and lawyers often do not.”).

B. THE FUNDAMENTAL DIFFICULTY IN DEFINING RELIGION

However, just because religion must be defined does not mean arriving at a definition will be without difficulty. When trying to define religion, the fundamental problem is that the definition arrived at generally is “either too narrow and excludes many belief systems which most agree are religions, or [it is] too vague and ambiguous, suggesting that just about anything and everything is a religion.”¹⁶⁶ An extremely broad definition of religious liberty may be difficult for courts to apply or essentially meaningless because it fails to exclude that which is not religion.¹⁶⁷ Thus, a broad definition may fail to separate religion from psychology, philosophy, or even economics.¹⁶⁸ Too narrow a definition of religion threatens to exclude non-traditional faiths, minority religions, and create stagnancy stifling the possibility of future growth and development in religion.¹⁶⁹ Furthermore, with an enormous variety of religious practice, a narrow definition is likely to be tied to the cultural and religious perspective of the judge performing the defining task and fail to recognize other cultural or religious perspectives.¹⁷⁰

C. TWO DEFINITIONS OF RELIGION

Another difficulty in defining religion stems from the two protections afforded by the First Amendment. The First Amendment guarantees, in part, “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.”¹⁷¹ Uncertainty exists as to whether there should be one or two definitions of the word religion; the Supreme

166. AUSTIN CLINE, WHAT IS RELIGION? DEFINING THE CHARACTERISTICS OF RELIGION, available at <http://atheism.about.com/od/religiondefinition/p/WhatReligion.htm> (last visited Mar. 20, 2006). A similar difficulty has been seen in the context of international law. Bejesky, *supra* note 140, at 328.

A very narrow definition may include solely the five religions that have an extended history and an overwhelming global membership—Buddhism, Christianity, Hinduism, Islam and Judaism. On the other hand, a narrow definition may screen other groups from attaining recognition as a legitimate religion. If the broadest definition were employed, arguably over six billion religions could exist in the world, as freedom of conscience preferences of each and every human being might be unique.

Id.

167. Jeffrey L. Oldham, Note, *Constitutional “Religion” A Survey of First Amendment Definitions of Religion*, 6 TEX. F. ON C.L. & C.R. 117, 154 (2001).

168. PAUL CONNELLY, DEFINITION OF RELIGION AND RELATED TERMS: WHAT IS RELIGION, available at <http://www.darc.org/connelly/religion1.html> (last visited Sept. 25, 2007).

169. Mitchell, *supra* note 150, at 631 (citing Konvitz, *supra* note 150, at 97).

170. Carl H. Esbeck, *A Restatement of the Supreme Court’s Law of Religious Freedom: Coherence, Conflict, or Chaos?*, 70 NOTRE DAME L. REV. 581, 624 n.189 (1995); Samuel J. Levine, *Toward a Religious Minority Voice: A Look at Free Exercise Law Through a Religious Minority Perspective*, 5 WM. & MARY BILL RTS. J. 153, 176 (1996).

171. U.S. CONST. amend. I.

Court has not decided the issue.¹⁷² Those who support a singular meaning point out that the word religion appears only once in the First Amendment.¹⁷³ This singular appearance led Justice Rutledge to conclude that “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.’”¹⁷⁴ Under his textual analysis, the unifying use of the term “‘thereof’ brings down ‘religion’ with its entire and exact content, no more and no less, from the first into the second guaranty, so that Congress and now the states are as broadly restricted concerning the one as they are regarding the other.”¹⁷⁵ From a natural reading of the First Amendment, it is difficult to conceive of the term religion as having two different meanings, one for purposes of free exercise and one for purposes of establishment.¹⁷⁶

Nevertheless, Professor Tribe has in the past argued that religion for free exercise purposes clearly “must be expanded beyond the closely bounded limits of theism to account for the multiplying forms of recognizably legitimate religious exercise.”¹⁷⁷ He found it “equally clear, however, that in the age of the affirmative and increasingly pervasive state, a less expansive notion of religion is required for [E]stablishment [C]ause purposes lest all ‘humane’ programs of government be deemed constitutionally suspect.”¹⁷⁸ Tribe’s Free Exercise Clause analysis emerged from the premise that a more limited definition of religion will hew too closely to orthodox religion excluding the unorthodox. His Establishment Clause analysis was alternatively pervaded by concern that “if everything can be religion, then anything the government does can be construed as favoring one religion over another, . . . [leaving] the government . . . paralyzed . . . by the Establishment Clause.”¹⁷⁹ To avoid this end, “Tribe argued that the [F]ree [E]xercise [C]ause should apply to any beliefs or practices that are

172. Francis J. Beckwith, *Public Education, Religious Establishment, and the Challenge of Intelligent Design*, 17 NOTRE DAME J.L. ETHICS & PUB. POL’Y 461, 486 (2003) (citing ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 973 (1997)).

173. *Id.*

174. *Everson v. Bd. of Educ.*, 330 U.S. 1, 32 (1946).

175. *Id.*

176. Knechtle, *supra* note 6, at 528.

177. Anand Agneshwar, Note, *Rediscovering God in the Constitution*, 67 N.Y.U. L. REV. 295, 311-12 (1992) (citing LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 827-28 (1978)).

178. *Id.*

179. James M. Donovan, *God is as God Does: Law, Anthropology, and the Definition of “Religion,”* 6 SETON HALL CONST. L.J. 23, 70 (1995).

‘arguably religious,’ whereas the Establishment Clause should not apply to beliefs or practices that are ‘arguably nonreligious.’”¹⁸⁰

Tribe was not alone in this view. Some courts and commentators confronting an increasingly diversified religious society, but concerned about overly restricting government action, have embraced Tribe’s argument for the definition of religion being broader for the purposes of free exercise analysis than for establishment purposes.¹⁸¹ Proponents of the dual definition approach argue four basic premises. First, like Tribe, they warn of the practical consequences, which include not protecting people’s religious beliefs under the Free Exercise Clause with too narrow a definition of religion and overly restricting the government with too broad a definition under the Establishment Clause.¹⁸² Second, they “argue that the two religion clauses should be interpreted in light of their distinct purposes.”¹⁸³ Critics offer a wide variety of interpretations of these purposes and divergent explanations for why these purposes suggest that a narrower definition of religion is appropriate for the Establishment Clause and a broader one for the Free Exercise Clause.¹⁸⁴ Three, they assert that utilizing a dual

180. Mitchell, *supra* note 150, at 653 n.236 (citing TRIBE, *supra* note 176, at 828-31).

181. *See, e.g.*, State v. Olsen, 315 N.W.2d 1, 8 (Iowa 1982) (explaining the court’s broad interpretation of the Free Exercise Clause); Grove v. Mead Sch. Dist. No. 354, 753 F.2d 1528, 1537 (9th Cir. 1985) (Canby, J., concurring); United States v. Allen, 760 F.2d 447, 450 (2d Cir. 1985).

182. Mitchell, *supra* note 150, at 652-53.

Accordingly, many advocate a broad free exercise definition of religion in order to fit that clause’s libertarian purposes to a wide variety of religious beliefs. They argue for a narrower definition of religion for the [E]stablishment [C]lause, however, partly because they conceive the purposes of that clause narrowly and partly because they fear that in these days of pervasive government activity too broad a definition would make that clause an “awful engine of destruction” and hobble many of the government’s “humane” programs. To these arguments proponents of a unitary definition respond that the aims of the [E]stablishment [C]lause are broader than supposed and that the dangers of unduly hampering government’s activities can be avoided by appropriately narrowing the concept of “establishment.”

Id.; *see* Donovan, *supra* note 179, at 32.

If . . . religion is anything in the role of personal ultimate concern, which only the most compelling of state concerns can override, then almost any statute can be construed to affect religious beliefs and be subject to constitutional challenge. Thus, plaintiffs may make First Amendment challenges on the ground that such statutes infringe upon their personal beliefs and practices or encourage one set of beliefs at the expense of all others. Such litigation would present a formidable obstacle to the implementation of any new legislation.

Id.

183. Mitchell, *supra* note 150, at 652.

184. *Id.* at 652-53 (citing TRIBE, *supra* note 177, at 827; Paul Freund, *Public Aid to Parochial Schools*, 82 HARV. L. REV. 1680, 1686 n.14 (1969); Marc Galanter, *Religious Freedom in the United States: A Turning Point?*, 1966 WIS. L. REV. 217, 265-68 (1966); Gail Merel, *The Protection of Individual Choice: A Consistent Understanding of Religion Under the First Amendment*, 45 U. CHI. L. REV. 805, 830-36 (1978); William Van Alstyne, *Constitutional*

definition “reduces the analytic tension between those clauses and enables judges to decide in one context without concerns about how it might affect cases arising in the other context.”¹⁸⁵ Whatever the linguistic or semantic complexities, proponents argue that “the dual definition approach does have the virtue of potentially minimizing the conflict between competing constitutional interests” that are contained in the free exercise and establishment protections.¹⁸⁶ Fourth, some proponents have suggested that multiple definitions of religion are needed because the term should be interpreted in the context of the legal dispute in which it arises.¹⁸⁷ This, therefore, does not require two definitions—one for establishment and one for free exercise—but instead multiple definitions to fit the particular circumstances.¹⁸⁸ It has been asserted that:

Because different aspects of religions are relevant in different legal contexts, what qualifies for protection . . . depends upon the legal context. In other words, even if there were a uniquely correct definition of the term “religion” as it occurs in ordinary English, it should not fix the definition in the religion clauses because what qualifies as a religion should differ across differing legal contexts.¹⁸⁹

Thus, according to at least one opponent of a unitary definition, the definition of religion should be able to change and diversify in as many ways as there are contexts in which First Amendment religious liberty issues arise.

Some courts have embraced and utilized the dual definition approach. The Second Circuit Court of Appeals addressed the issue in a challenge to

Separation of Church & State: The Quest for a Coherent Position, 57 AM. POL. SCI. REV. 865, 874 (1963); Harvard Note, *supra* note 3, at 1083-86; Note, *Transcendental Meditation and the Meaning of Religion Under the Establishment Clause*, 62 MINN. L. REV. 887, 904 n.67 (1978).

185. Knechtle, *supra* note 6, at 528.

186. Donovan, *supra* note 179, at 33; see Troy L. Booher, *Finding Religion for the First Amendment*, 38 J. MARSHALL L. REV. 469, 472 (2004). Cf. Oldham, *supra* note 167, at 167.

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.

Id.

187. Booher, *supra* note 186, at 472.

188. *Id.*

189. *Id.*

convictions of anti-nuclear activists.¹⁹⁰ The activist argued the government was establishing the religion of “nuclearism.”¹⁹¹ The Second Circuit conceded “the concept of religion has certainly broadened [noting that] [n]ot long ago we defined an individual’s religion as his ‘ultimate concern’-whatever that concern be.”¹⁹² The court went on to state that “[t]his expansive definition of religion has been developed primarily to protect an individual’s free exercise of religion, recognizing that an individual’s most sincere beliefs do not necessarily fall within traditional religious categories.”¹⁹³ The court, however, concluded that for purposes of the Establishment Clause “nuclearism” did not constitute a religion.¹⁹⁴ The court expressly indicated that “[i]n so holding, we adopt for [E]stablishment [C]lause purposes the conventional, majority view, rather than appellants’ view, of what is religious and what is political. Consequently, we must acknowledge that ‘religion’ can have a different meaning depending on which religion clause of the First Amendment is at issue.”¹⁹⁵ The court then discussed and cited Professor Tribe’s dual definition analysis indicating that the judges found “his analysis helpful and provocative.”¹⁹⁶ The United States District Court for the District of Arizona also declared that the Establishment Clause “looks to the majority’s concept of the term religion” while the Free Exercise Clause looks to the minority’s concept.¹⁹⁷ In a concurring opinion, Judge Canby of the Ninth Circuit indicated “there is much to be said for the view that the definition of religion should vary with the clause under review.”¹⁹⁸ The Ninth Circuit moved forward with this conclusion in a subsequent Establishment Clause case, relying upon reasoning set forth by Professor Tribe and the Second Circuit, and determined that secular humanism for Establishment Clause purposes could not be a religion.¹⁹⁹ The District of Columbia Court of Appeals and the Georgia Court of Appeals have also concluded that the definition of

190. *United States v. Allen*, 760 F.2d 447, 450 (2d Cir. 1985).

191. *Id.*

192. *Id.* at 449-50 (quoting *Int’l Soc’y for Krishna Consciousness, Inc. v. Barber*, 650 F.2d 430, 440 (2d Cir. 1981)).

193. *Id.* at 450.

194. *Id.* at 450-51.

195. *Id.* at 450.

196. *Id.* at 450-51.

197. *Sheldon v. Fannin*, 221 F. Supp. 766, 774-75 (D. Ariz. 1963).

198. *Grove v. Mead Sch. Dist. No. 354*, 753 F.2d 1528, 1537 (9th Cir. 1985) (Canby, J., concurring).

199. *Peloza v. Capistrano Unified Sch. Dist.*, 37 F.3d 517, 521 n.5 (9th Cir. 1994). In dicta in a subsequent decision, the Ninth Circuit indicated that this apparent dual definition embrace in *Peloza* was merely dicta itself. *Alvarado v. City of San Jose*, 94 F.3d 1223, 1230 n.6 (9th Cir. 1996).

religion is narrower for purposes of Establishment Clause analysis and more expansive for free exercise purposes.²⁰⁰

Furthermore, even where courts do not explicitly embrace the dual definition approach, there is an apparent distinction that repeatedly emerges in many courts' analysis as to whether something is or is not a religion based upon whether the challenge is under the Establishment Clause or the Free Exercise Clause.²⁰¹ For example, the Eleventh Circuit indicated that "neither the Supreme Court nor [the Eleventh Circuit] has determined that 'secular humanism is a religion for purposes of the [E]stablishment [C]ause,'"²⁰² and the Ninth Circuit also ruled that secular humanism cannot be a religion for purposes of the Establishment Clause.²⁰³ But, the federal district court for the Western District of Wisconsin has noted that secular humanism is a religion for purposes of the Free Exercise Clause,²⁰⁴ as have the Ninth²⁰⁵ and Seventh Circuits.²⁰⁶

However, as critics of the dual definition approach point out (in addition to referencing the textual argument), "if the free exercise definition *is* broader than the establishment definition, the result might in some sense discriminate in favor of religions included in the former but not the

200. *Gay Rights Coal. of Georgetown Univ. Law Ctr. v. Georgetown Univ.*, 536 A.2d 1, 30 n.23 (D.C. 1987); *McDonnell v. Episcopal Diocese of Ga.*, 381 S.E.2d 126, 129 (Ga. Ct. App. 1989) ("[A] narrower definition of religion is employed in [E]stablishment [C]ause considerations, as compared to use of a broad definition when the [F]ree [E]xercise [C]ause is invoked.").

201. *See generally* Craig A. Mason, Case Comment, "Secular Humanism" and the Definition of Religion: Extending a Modified "Ultimate Concern" Test to *Mozart v. Hawk County Public Schools* and *Smith v. Board of School Commissioners*, 63 WASH. L. REV. 445, 445 (1988); Peter D. Schmid, Comment, *Religion, Secular Humanism and the First Amendment*, 13 S. ILL. U. L.J. 357, 359 (1989); Thomas Marvan Skousen, Case Comment, *The Lemon in Smith v. Mobile County: Protecting Pluralism and General Education*, 1997 BYU EDUC. & L.J. 69, 75-77 (1997); Theologos Verginis, Case Comment, *ACLU v. Capitol Square Review and Advisory Board: Is there Salvation for the Establishment Clause? "With God All Things are Possible,"* 34 AKRON L. REV. 741, 741 (2001); Andrew A. Cheng, *The Inherent Hostility of Secular Public Education Toward Religion: Why Parental Choice Best Serves the Core Values of the Religion Clauses*, 19 U. HAW. L. REV. 697, 703 (1997).

202. *McKinley v. Houston*, 361 F.3d 1328, 1332 (11th Cir. 2004); *cf. Newdow v. U.S. Congress*, 313 F.3d 500, 504 n.2 (9th Cir. 2002) ("As the Supreme Court has acknowledged, recognized religions exist that do not teach a belief in God, e.g., secular humanism.").

203. *See Alvarado v. City of San Jose*, 94 F.3d 1223, 1227 (9th Cir. 1996) (interpreting *Pelozo* as "holding that neither evolution nor secular humanism may be defined as religion" for purposes of the Establishment Clause).

204. *Kaufman v. McCaughtry*, 422 F. Supp. 2d 1016, 1022 (W.D. Wis. 2006) ("[C]ourts have recognized that pacifism, secular humanism and other non-theistic belief systems are entitled to the protection of the First Amendment's [F]ree [E]xercise [C]ause."); *Strayhorn v. Ethical Soc'y of Austin*, 110 S.W.3d 458, 466 n.8 (Tex. Ct. App. 2003); *but see Gibson v. Lee County Sch. Bd.*, 1 F. Supp. 2d 1426, 1431 (M.D. Fla. 1998) (expressing concern that insulation of public schools from the mention of God may establish religion of secular humanism).

205. *Newdow*, 313 F.3d at 504 n.2.

206. *Kaufman v. McCaughtry*, 419 F.3d 678, 682 (7th Cir. 2005).

latter.”²⁰⁷ For example, interpreting religion as having “a dual definition may provide more obscure religions and religious activities with special treatment, by protecting the free exercise of such religions, without placing any [E]stablishment [C]ause limits on the government’s ability to promote and aid such religions.”²⁰⁸ This is particularly problematic because equality between religions is the governing principle of the First Amendment, and accordingly should be a governing principle in First Amendment interpretation.²⁰⁹ The First Amendment simply cannot tolerate allowing advantageous treatment for one religious group over another. The Supreme Court has emphasized that it will apply strict scrutiny and reject as unconstitutional state and federal laws that discriminate between religions.²¹⁰ A dual definition approach fails even the most basic discrimination test.²¹¹ In adopting the dualist approach, the court would be violating a fundamental principle, which has been repeatedly emphasized in religious liberty cases, by discriminating between various religious groups and/or individuals based on their faith.²¹² There is no readily apparent reason why the court discriminating between religions would be of less constitutional concern than a state legislature or Congress engaging in the same discrimination.²¹³ In this vein, one critic has indicated that a dual definition approach would

207. Mitchell, *supra* note 150, at 652 (emphasis in original).

208. Ben Clements, *Defining “Religion” in the First Amendment: A Functional Approach*, 74 CORNELL L. REV. 532, 536 (1989) (citing Malnak v. Yogi, 592 F.2d 197, 212-13 (3d Cir. 1979) (Adams, J., concurring)); Kent Greenawalt, *Religion as a Concept in Constitutional Law*, 72 CALIF. L. REV. 753, 814 (1984).

209. Jay Alan Sekulow et. al, *Religious Freedom and the First Self-Evident Truth: Equality as a Guiding Principle in Interpreting the Religion Clauses*, 4 WM. & MARY BILL RTS. J. 351, 380-405 (1995) (arguing that equality should be/is the guiding principle for interpreting the religion clauses).

210. Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 339 (1987); Larson v. Valente, 456 U.S. 228, 246 (1982); Epperson v. Arkansas, 393 U.S. 97, 103-04 (1968).

Government in our democracy, state and national, must be neutral in matters of religious theory, doctrine, and practice. It may not be hostile to any religion or to the advocacy of no-religion; and it may not aid, foster, or promote one religion or religious theory against another or even against the militant opposite. The First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion.

Id.; Sch. Dist. of Abington Twp., Pa. v. Schempp, 374 U.S. 203, 305 (1963) (Goldberg, J., concurring) (“The fullest realization of true religious liberty requires that government neither engage in nor compel religious practices, that it effect no favoritism among sects or between religion and nonreligion, and that it work deterrence of no religious belief.”); Zorach v. Clauson, 343 U.S. 306, 314 (1952) (“The government must be neutral when it comes to competition between sects.”); Everson v. Bd. of Educ., 330 U.S. 1, 15 (1947) (“The ‘establishment of religion’ clause of the First Amendment means at least this: Neither a state nor the Federal Government . . . prefer one religion over another.”).

211. Knechtle, *supra* note 6, at 529.

212. *Id.*

213. *See id.*

be “perceived as fundamentally unfair” and noted that no persuasive constitutional explanation has been offered for discriminating against older traditional religions in favor of newer and less conventional faiths.²¹⁴ Accordingly, a minority religion cannot expect the two-fold benefit of the protection of free exercise and the additional advantage over traditional religious groups of not being restricted by the Establishment Clause: “The rose cannot be had without the thorn.”²¹⁵

Furthermore, although a dual definition is a sensible approach to preventing the problems of inhibiting the free exercise of unorthodox religions and restricting governmental action via the Establishment Clause, critics of the dual definition approach question whether these problems would arise under a unitary definition of religion.²¹⁶ Professor Tribe himself eventually accepted this very argument, and “now reject[s] the dual approach, stating that it ‘constitutes a dubious solution to a problem that, on closer inspection, may not exist at all.’”²¹⁷ The reason this problem “may not exist” is that the Court’s Establishment Clause jurisprudence, if not eliminating, at least reduces the concerns voiced by proponents of a dual definition.²¹⁸ The Establishment Clause “does not ban federal or state regulation of conduct whose reason or effect merely happens to coincide or harmonize with the tenets of some or all religions.”²¹⁹ In other words, the “[Establishment Clause] does not . . . prevent the government from taking any action that is consistent with a particular religion or religious tenet.”²²⁰ For example, simply because the State prohibits murder, which corresponds with the prohibition against killing in the Ten Commandments, it does not render that law an establishment of religion.²²¹ Similarly, because a State promotes through the force of law the value of equality, which may be religiously inspired, or adopts social programs advocated for by clerics to aid the

214. Ingber, *supra* note 157, at 289-90.

215. *Malnak v. Yogi*, 592 F.2d 197, 213 (3d Cir. 1979).

If a Roman Catholic is barred from receiving aid from the government, so too should be a Transcendental Mediator or a Scientologist if those two are to enjoy the preferred position guaranteed to them by the [F]ree [E]xercise [C]lause. It may be, of course, that they are not entitled to such a preferred position, but they are clearly not entitled to the advantages given by the [F]irst [A]mendment while avoiding the apparent disadvantages.

Id.

216. Clements, *supra* note 208, at 536.

217. *Id.* at 536 n.20 (citing LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 14-6, at 187 (2d ed. 1988) [hereinafter TRIBE, AMERICAN]).

218. *Id.*

219. *McGowan v. Maryland*, 366 U.S. 420, 442 (1961).

220. Clements, *supra* note 208, at 536.

221. *Id.*; *Malnak v. Yogi*, 592 F.2d 197, 212 (3d Cir. 1979).

financially poor and impoverished in spirit, such as the homeless or drug addicts, these actions do not mean that the State is establishing religion.²²² Quite to the contrary, State actions to prohibit religious leaders, who may continue acting from purely religious motivations, from attaining positions of power and authority in government, are unconstitutional.²²³

Additionally, a dual definition is simply not the best approach to resolving any potential conflict between the Free Exercise and Establishment Clause; rather, “the preferable perspective is to view religion as a unitary concept and to resolve any conflict between the clauses by refining each clause’s substantive mandate.”²²⁴ The question of what constitutes a religion should not be attached to the issue of whether “the constitutional mandate has been violated or, rather, whether the state interest has adequately overridden or circumvented the constitutional concern.”²²⁵

D. ONE PROBLEM WITH A BROAD DEFINITION OF RELIGION

Before a generous spirit leads one to embrace a broad unitary definition of religion, it should be noted that under the Supreme Court’s jurisprudence, the further the definition of religion reaches, the lesser the protections are that the Free Exercise Clause will afford. When considering whether to apply heightened scrutiny to generally applicable laws that impose upon religious activities, the Supreme Court warned that adoption of such a system of review would breed anarchy.²²⁶ This anarchy “increases in direct proportion to the society’s diversity of religious beliefs, and its determination to coerce or suppress none of them.”²²⁷ The Court noted this problem is particularly acute in the United States because there is extraordinary religious diversity: “[W]e are a cosmopolitan nation made up of people of almost every conceivable religious preference.”²²⁸ The Court

222. See *Clements*, *supra* note 208, at 536; *Malnak*, 592 F.2d at 212.

Moreover, the [E]stablishment [C]lause does not forbid government activity encouraged by the supporters of even the most orthodox of religions if that activity is itself not unconstitutional. The Biblical and clerical endorsement of laws against stealing and murder do not make such laws establishments of religion. Similarly, agitation for social welfare programs by progressive churchmen, even if motivated by the most orthodox of theological reasons, does not make those programs religious. The Constitution has not been interpreted to forbid those inspired by religious principle or conscience from participation in this nation’s political, social and economic life.

Id.

223. See *McDaniel v. Paty*, 435 U.S. 618, 641 (1978).

224. *Ingber*, *supra* note 157, at 290.

225. *Id.*

226. *Employment Div. v. Smith*, 494 U.S. 872, 888 (1990).

227. *Id.*

228. *Braunfeld v. Brown*, 366 U.S. 599, 606 (1961).

concluded that because the Constitution requires neutral treatment of religious groups, strict scrutiny could not be applied in a diverse religious society, because anarchy would result through the undermining of a broad variety of laws.²²⁹ This analysis leads to the conclusion that even if free exercise protection was bolstered, it “is unlikely that an extremely broad definition of religion will be permitted to coexist with an extremely generous protection of the claims that fall within that definition.”²³⁰

Seeking to increase the significance or scope of the right of free exercise, while balancing the court’s concerns about chaos, it has been suggested that a solution is “to define more narrowly what constitutes religion for First Amendment purposes.”²³¹ Critics have complained that an expansive definition of religion, such as the “ultimate concern” definition adopted by the Supreme Court in *Seeger* (discussed in Part IV), “inevitably blurs the distinction between religion and non-religion” making affording protections under the Free Exercise Clause and the Establishment Clause an almost unmanageable problem.²³² Accordingly, the use of “[t]oo broad a definition of religion tends to dilute protection for everyone.”²³³ Utilizing a definition of religion that defines it in accordance with only “the sincerity and the importance of a belief” to the individual, it becomes “difficult to understand why ‘religious’ beliefs deserve more protection than other sincere and important beliefs.”²³⁴ By narrowing the definition and more

229. *Employment Div.*, 494 U.S. at 888.

230. James M. Donovan, *Restoring Free Exercise Protections by Limiting Them: Preventing a Repeat of Smith*, 17 N. Ill. U. L. REV. 1, 12 (1996) (quoting JESSIE H. CHOPER, *SECURING RELIGIOUS LIBERTY: PRINCIPLES FOR JUDICIAL INTERPRETATION OF THE RELIGION CLAUSES* 63 (1995)).

231. Bodensteiner, *supra* note 160, at 425-26.

232. Daniel O. Conkle, *The Path of American Religious Liberty: From the Original Theology to Formal Neutrality and an Uncertain Future*, 75 IND. L.J. 1, 30 (2000). Emily Delacenseri & Marvin Hill, Jr., *Procrustean Beds and Draconian Choices: Lifestyle Regulations and Officious Intermeddlers—Bosses, Workers, Courts, and Labor Arbitrators*, 57 MO. L. REV. 51, 97 (1992) (discussing the difficulty of the *Seeger/Welsh* definition of religion being used in the workplace).

The EEOC has been liberal in its interpretation of what constitutes a religion, adopting the Court’s definition in *Seeger* and *Welsh*. What is particularly distressing for the practitioner is the absence of a workable definition of religion. After *Seeger* and *Welsh*, one might define religion to include *anything* that an individual decides is religious in his own scheme of things. Such a definition would avoid the courts in the constitutional problem of entanglement with religion, but would create havoc in the workplace and due process problems for employers who would have no way of implementing such a broad and vague scheme if charged with an affirmative duty to accommodate an employee’s religious observances.

Id. (emphasis in original).

233. Bodensteiner, *supra* note 160, at 426.

234. Rebecca Rains, *Can Religious Practice Be Given Meaningful Protection After Employment Division v. Smith?*, 62 U. COLO. L. REV. 687, 699 (1991).

clearly distinguishing religion from the secular, the result could be a greater protection of religious liberty.²³⁵ Proponents of narrowing the definition concede that this concept may offend some who regard their practices as religious, but argue that to allow religion to be anything one asserts it to be —i.e., any ultimate concern—will defeat any meaningful protection under the First Amendment.²³⁶ And, in weighing the level of offense, proponents argue that “[e]ven if it is offensive . . . it is less offensive than having the courts interpret the [F]ree [E]xercise [C]lause in a manner that provides no meaningful protection to religion.”²³⁷ Justice Goldberg asserted that “[t]he basic purpose of the religion clause of the First Amendment is to promote and assure the fullest possible scope of religious liberty and tolerance for all, and to nurture the conditions which secure the best hope of attainment of that end.”²³⁸ Although a broad definition may initially attract our default sympathy, Justice Goldberg’s goal may be better achieved by a narrower definition of religion that more clearly demarcates what is not religion than one that falls to distinguish that which is non-religious.

IV. HISTORICAL EVOLUTION OF THE CONCEPT OF RELIGION

The definition of religion has not been static. Quite to the contrary, how religion is understood and how it has been defined has changed in different eras. From the Founders’ understanding of what a religion is, state courts drew their initial inspiration in defining the term. In its first attempts, the Supreme Court provided a narrow, theistic definition in *Davis v. Beason*²³⁹ in the late 1800s. In the mid-twentieth century, the Supreme Court would broaden its understanding of religion in *United States v. Ballard*,²⁴⁰ *Torcaso v. Watkins*,²⁴¹ *United States v. Seeger*,²⁴² and *Welsh v. United States*,²⁴³ before narrowing the definition somewhat in *Wisconsin v. Yoder*.²⁴⁴ In the wake of these Supreme Court decisions, the circuit courts of appeals and state courts have offered various formulations of what constitutes religion.

235. Bodensteiner, *supra* note 160, at 426.

236. *Id.*

237. *Id.*

238. *Sch. Dist. of Abington Twp., Pa. v. Schempp*, 374 U.S. 203, 305 (1963) (Goldberg, J., concurring).

239. 133 U.S. 333 (1890).

240. 322 U.S. 78 (1944).

241. 367 U.S. 488 (1961).

242. 380 U.S. 163 (1965).

243. 398 U.S. 333 (1970).

244. 406 U.S. 205, 215 (1972).

A. THE FOUNDERS

Having explored why the Founders protected religious liberty, this article now turns to how they actually defined religion. Although the Founding Fathers themselves were uniformly theists,²⁴⁵ the historical evidence stands in conflict with regard to whether they viewed religious protections as applying only to theistic religions or towards a broader protection that includes non-theistic faiths.²⁴⁶ Most of the Founders appear to have considered theism and religion to be synonymous and coextensive.²⁴⁷ James Madison and George Mason utilized a theistic definition of religion: “[T]he duty which we owe to our creator, and the manner of discharging it.”²⁴⁸ Benjamin Franklin argued that the “essentials of every religion” are belief in “the Deity; [and] that he made the world, and govern’d [sic] it by his Providence.”²⁴⁹ Even Thomas Paine, the most radical of the founding generation, defined religion in theistic terms, describing it as “man bringing to his Maker the fruits of his heart.”²⁵⁰ While not displacing the connection between theism and religion, Paine’s writings on religion serve to undermine any notion of the necessity of organization for a belief or practice to be deemed religious.²⁵¹ Paine eloquently articulated his embrace of the individuality of religion: “I do not believe in the creed professed by the

245. “Theism” is “a belief in the existence of a god or gods.” MERRIAM-WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 2370 (3d ed. 2002).

246. Harvard Note, *supra* note 3, at 1060.

247. Freeman, *supra* note 141, at 1520-21.

248. Harvard Note, *supra* note 3, at 1060 n.26 (citing JAMES MADISON, A MEMORIAL AND REMONSTRANCE ON THE RELIGIOUS RIGHTS OF MAN, in CORNERSTONES OF RELIGIOUS FREEDOM IN AMERICA 84 (J. Blau ed., 1964)); Freeman, *supra* note 141, at 1520 (citing K. ROWLAND, THE LIFE OF GEORGE MASON 244 (1892)). Madison and Mason’s definition of religion should not be confused with religion meaning exclusively Christianity or various Christian sects. Quite to the contrary, Madison articulated a position that appears to indicate a strong opposition to the concept of establishing Christianity as a State religion. Madison poses the question in his *Memorial and Remonstrance on the Religious Rights of Man*, “[w]ho does not see that the same authority which can establish Christianity, in exclusion of all other Religions, may establish with the same ease any particular sect of Christians, in exclusion of all other Sects?” Madison continues, “the proposed establishment [of Christianity] is a departure from that generous policy, which, offering an asylum to the persecuted and oppressed of every Nation and Religion, promised a lustre to our country, and an accession to the number of its citizens.” David Reiss, *Jefferson and Madison as Icons in Judicial History: A Study of Religion Clause Jurisprudence*, 61 MD. L. REV. 94, 105 n.55 (2002).

249. Freeman, *supra* note 141, at 1520 (citing BENJAMIN FRANKLIN, BENJAMIN FRANKLIN ON RELIGION, in PROFILE OF GENIUS: POOR RICHARD PAMPHLETS 14 (N. Goodman ed., 1938) (pamphlet IX)).

250. Ingber, *supra* note 157, at 250-51 n.95 (citing Thomas Paine, *Rights of Man*, in 4 LIFE AND WRITINGS OF THOMAS PAINE 92 (D. Wheeler ed., 1908)).

251. R.P. NETTELHORST, NOTES ON THE FOUNDING FATHERS AND THE SEPARATION OF CHURCH AND STATE, <http://www.theology.edu/journal/volume2/ushistor.htm> (last visited Feb. 5, 2006) (quoting Richard Emery Roberts, *Excerpts from The Age of Reason*, in SELECTED WRITINGS OF THOMAS PAINE 362 (1945)).

Jewish Church, by the Roman Church, by the Greek Church, by the Turkish Church, by the Protestant Church, nor by any church that I know of. My own mind is my own church.”²⁵²

Some of the strongest historical support for a non-theistic understanding of religion appears in the writings of the nation’s third President, the pen of the Declaration of Independence. Thomas Jefferson questioned the ability of the courts to define religious orthodoxy.²⁵³ He stated, “I cannot give up my guidance to the magistrate; because he knows no more of the way to heaven than I do & [sic] is less concerned to direct me right than I am to go right.”²⁵⁴ Referring to the *Act for Establishing Religious Freedom in Virginia*,²⁵⁵ Jefferson indicated that it “was meant to be universal . . . to comprehend within the mantle of its protection *the Jew and the Gentile, the Christian and Mahometan*,²⁵⁶ *the Hindoo*,²⁵⁷ and the infidel of every denomination.”²⁵⁸ Jefferson, however, was inconsistent in his conceptualization of religion; on some occasions his writings provide a theistic definition of religion. For example, he wrote that religion is “a matter which lies solely between man and his God.”²⁵⁹ Furthermore,

252. *Id.*

253. *Africa v. Pennsylvania*, 662 F.2d 1025, 1030 n.7 (3d Cir. 1981) (citing Jefferson, *Notes and Proceedings on Discontinuing the Establishment of the Church of England* (1776), in 1 THE PAPERS OF THOMAS JEFFERSON 525, 547 (J. Boyd ed., 1950)).

254. *Id.*

255. See Bruce E. Lowry, Jr., *The New Discrimination in America: In Defense of the Religious Equality Amendment*, 16 ST. LOUIS U. PUB. L. REV. 205, 209 (1996) (indicating that the Virginia Act for Establishing Religious Freedom provides a guidepost for First Amendment analysis).

256. The author intends no offense to Muslims with this incorrect reference; rather, the author is merely trying to accurately preserve the historical material given the context of discussing the historical viewpoint.

257. The author intends no offense to Hindus with this incorrect reference; rather, the author is merely trying to accurately preserve the historical material given the context of discussing the historical viewpoint.

258. Harvard Note, *supra* note 3, at 1060 (citing AMERICAN STATE PAPERS BEARING ON SUNDAY LEGISLATION 133 n.1 (W. Blakely ed., 1911) (emphasis in original)); see Freeman, *supra* note 141, at 1520 (citing THE WRITINGS OF THOMAS JEFFERSON 66-67 (1903)). Roger Williams also embraced a broad collection of individuals within the ambit of religious liberty notably “Jews, Turks, Papists, Protestants, [and] pagans.” Edward J. Eberle, *Roger Williams on Liberty of Conscience*, 10 ROGER WILLIAMS U. L. REV. 289, 294-95, & n.20 (2005). The writings of Thomas Jefferson and Roger Williams, who wrote on religious liberty nearly a century before Jefferson, suggest that by the time of the founding the understanding of religion had evolved beyond the view of religion held by former Alabama Supreme Court Chief Justice Roy S. Moore. Former Chief Justice Moore suggested that the Supreme Court erred by embracing an understanding “that religion could include Buddhism, Hinduism, [and] Taoism.” The Honorable Roy S. Moore, *Religion in the Public Square*, 29 CUMB. L. REV. 347, 356-57 (1999). Both Thomas Jefferson and Roger Williams offered analysis that diverges from Moore’s understanding of religion.

259. Freeman, *supra* note 141, at 1521 (citing Letter from Thomas Jefferson to Nehemiah Doge, Ephraim Robins & Stephen Nelson, A Committee of the Danbury Baptist Association (Jan. 1, 1802), *reprinted in* 16 THE WRITINGS OF THOMAS JEFFERSON 281 (1903)).

although Jefferson's statement including Hinduism is generally interpreted as incorporating a broader view of religion than the theistic understanding of Madison,²⁶⁰ this conclusion does not necessarily follow from his statement. Christianity, Judaism, and Islam are theistic religions. Whether Hinduism is a theistic religion raises complicated theological questions,²⁶¹ but even if a resolution could be reached on whether Hinduism constitutes a theistic religion, it is almost impossible to assess Jefferson's understanding of Hinduism, complicating any analysis of what he meant by including Hinduism as a protected religion. While we know that Jefferson intended to protect Hindus within the ambit of religion, we are not sure what Jefferson knew of the beliefs and practices of Hindus.

260. See Timothy L. Hall, *Religion, Equality, and Difference*, 65 TEMP. L. REV. 1, 14 (1992) [hereinafter Hall, *Religion*] ("But Jefferson's inclusive vision remained subordinate to a continued emphasis on the exclusive language of theism which ruled judicial rhetoric until well into the twentieth century."); Karen F.B. Gray, *An Establishment Clause Analysis of Webster v. Reproductive Health Services*, 24 GA. L. REV. 399, 409 n.52 (1990) ("The [F]ounding [F]athers took an expansive view of religious freedom, believing that it should protect non-theistic as well as traditional belief systems."); Clements, *supra* note 207, at 534; Bruce J. Casino, "I Know It When I See It": *Mail-Order Ministry Tax Fraud and the Problem of a Constitutionally Acceptable Definition of Religion*, 25 AM. CRIM. L. REV. 113, 130 (1987) (indicating that Jefferson embraced a broader view than theism); Norman Dorsen, *The Religion Clauses and Nonbelievers*, 27 WM. & MARY L. REV. 863, 867 n.18 (1987) ("Evidence of a desire to protect individuals other than theists through the [F]irst [A]mendment also exists."); Sherryl E. Michaelson, *Religion and Morality Legislation: A Reexamination of Establishment Clause Analysis*, 59 N.Y.U. L. REV. 301, 318 (1984) (Jefferson "suggests his intent to . . . transcend theistic boundaries in ensuring religious liberty."); Richard O. Frame, *Belief in a Nonmaterial Reality—A Proposed First Amendment Definition of Religion*, U. ILL. L. REV. 819, 822 (1992) ("[C]ertain remarks by Jefferson . . . indicate that he may have been willing to regard nontheistic belief systems as religious. . . . While this statement does not indicate clearly that Jefferson would have considered some nontheistic belief systems to be religious, it does at least enlarge the notion of religion beyond traditional Christianity.").

261. James P. Dawson, *Hinduism*, available at <http://www.jp dawson.com/modrelg/hinduism.html> (last visited July 2, 2007).

Hinduism is not one religion, but rather a family of religions . . . it is fluid and changing. Hinduism is a very complex set of beliefs and instructions that they have derived from ancient scriptures, the Vedas. Hindus have a very wide selection of beliefs and practices to choose from: they can be pantheists, polytheists, monotheists, agnostics and even atheists, but to reach the next level in their reincarnation they must choose and adhere to the teachings that they choose.

Id.; see Koppelman, *supra* note 3, at 124 ("Hinduism is theistic."); Alan E. Brownstein, *Harmonizing the Heavenly and Earthly Spheres: The Fragmentation and Synthesis of Religion, Equality, and Speech in the Constitution*, 51 OHIO ST. L.J. 89, 111 n.106 (1990) ("Hinduism is a polytheistic religion countenancing the worship of numerous Gods and Goddesses through rituals revering their images. Buddhism, by contrast, is in essence an atheistic faith."); Eduardo Peñalver, Note, *The Concept of Religion*, 107 YALE L.J. 791, 817 (1997) (indicating certain Hindu sects are theistic); Harold J. Berman, *Law and Logos*, 44 DEPAUL L. REV. 143, 148 n.24 (1994) (indicating that Hinduism is a non-theistic faith); see also Sri Siva Vishnu Temple, Frequently Asked Questions About Hinduism, <http://www.ssvt.org/Education/Hinduism%20FAQ.asp> (last visited Apr. 1, 2006) (discussing how complicated the questions and answers are as to whether Hinduism is monotheistic, polytheistic, or non-theistic).

What is clear, however, is that Jefferson did not stop protection for those whose beliefs were extremely different from his own or even heretical, for unlike John Locke,²⁶² from whom Jefferson otherwise took much inspiration,²⁶³ Jefferson concluded that atheists warranted protection.²⁶⁴ This protection of atheists is an extremely important departure from the writings of Locke and the prevailing ethos of colonies. As seen in the discussion of religious liberty in the colonies, even in Pennsylvania, the colony that provided the broadest protection of religious liberty, atheists were not protected. And, even under the Carolinas Fundamental Constitution, which recognized almost any group as being religious, belief in a deity was still required.

Nor was Jefferson alone among the Founders in his embracing of atheists as falling within the protection of religious liberty. Madison, like his fellow Virginian, afforded atheists the protections of religious liberty. Madison argued to his fellow Virginia legislators:

Whilst we assert for ourselves a freedom to embrace, to profess, and to observe the religion which we believe to be of divine origin, we cannot deny an equal freedom to those whose minds have not yet yielded to the evidence which has convinced us. If this freedom be abused, it is an offense against God, not against man: To God, therefore, not to man, must an account of it be rendered.²⁶⁵

Thus, any definition of religion that we arrive at, if it is to be true to the Founders' guarantee, must encompass a protection for the beliefs of atheists. However, if we think of atheism as only constituting a religious belief insofar as it takes a position on the existence of God, then we have not answered whether non-theistic faiths would fall within the Founders' understanding of religion.

262. In his *A Letter Concerning Toleration*, John Locke expressed no toleration for atheists. Locke stated:

[T]hose are not to be tolerated who deny the being of God. Promises, covenants, and oaths, which are the bonds of human society, can have no hold upon an atheist. The taking away of God, though but even in thought, dissolves all. Besides also, those that by their atheism undermine and destroy all religion, can have no pretense of religion whereupon to challenge the privilege of a Toleration.

John Locke, *A Letter Concerning Toleration* (1689), in CONSTITUTIONAL DEBATES, *supra* note 32, at 21-22.

263. Thomas "Jefferson carefully read and made notes on Locke's *The Reasonableness of Christianity* and his *Letters on Religious Toleration*. Major portions of Jefferson's Bill for Establishing Religious Freedom derived from passages in Locke's first *Letter Concerning Toleration*." McConnell, *supra* note 21, at 1430-31.

264. *Id.* at 1450-51 (citing THOMAS JEFFERSON, *Notes on Locke and Shaftesbury*, in 1 THE PAPERS OF THOMAS JEFFERSON 550 n.2 (J. Boyd ed., 1950)).

265. BANNING, *supra* note 85, at 93 (quoting JAMES MADISON, A MEMORIAL AND REMONSTRANCE (1785)).

Regardless, even if the Founders understood religion merely in theistic terms, the conclusion does not necessarily follow that they intended to exclude non-theistic religions. First, the founding fathers irrespective of their understanding of what constituted religion did not act to support any particular religion.²⁶⁶ Consequently, in defining religion, it can be argued that “the Founders sought simply to describe what religion itself is like, not to prescribe which religion or religions people should practice.”²⁶⁷ One argument in favor of non-theistic religions being included in the Founders’ original protection is essentially that the true intent of the Framers was to create a neutral definition of religion that did not discriminate against the unorthodox believer.²⁶⁸ During the Founders’ generation, unorthodox believers were, nevertheless, theists.²⁶⁹ However, “[h]ad there been nontheists among them, the Founders, in the interest of neutrality, might very well have conceived of religion in broader terms. This seems especially likely in view of the fact that most non-theistic religions resemble their theistic counterparts in emphasizing the importance of worship, rituals, deities, and the transcendent.”²⁷⁰ The Founders strongly emphasized neutrality in the treatment of religions; thus, it seems plausible to assume that neutrality is the most critical factor in constructing a definition of religion based upon original intent.²⁷¹ Furthermore, even though the evidence set forth in writings of the Founders primarily, if not exclusively, defines religion in theistic terms, no clear indication exists that the Founders denied the religious nature of non-theistic religions.²⁷² And, the Founders’ “views assist modern courts . . . insofar as they evidence an intent to construe liberally the scope of religious freedom.”²⁷³ As stated by the United States Supreme Court,

[t]he Fathers of the Constitution were not unaware of the varied and extreme views of religious sects, of the violence of disagreement among them, and of the lack of any one religious creed on which all men would agree. They fashioned a charter of

266. Reiss, *supra* note 248, at 105 n.55; see Freeman, *supra* note 140, at 1520 (citing Thomas Jefferson, *Autobiography*, in THE WRITINGS OF THOMAS JEFFERSON 66-67 (1903)).

267. Freeman, *supra* note 141, at 1521.

268. *Id.*; see Harvard Note, *supra* note 3, at 1068 n.71.

269. Freeman, *supra* note 141, at 1521.

270. *Id.*

271. *Id.*

272. Harvard Note, *supra* note 3, at 1060.

273. Adams & Emmerich, *supra* note 34, at 1666.

government which envisaged the widest possible toleration of conflicting views.²⁷⁴

The Founders' actions and beliefs are entirely consistent with the idea of embracing changes in the nature of religion, such as including non-theistic faiths within the family of protected beliefs. Considering the available historical information, an originalist could certainly argue that the Constitution restricts religious liberty to theists. But, one could also draw on this same information, still looking from an originalist perspective, and strongly argue that it is more consistent with the Founders' intent to protect non-theistic faiths as religions due to the Founders' desire for a neutral approach to religion, their expansive liberal approach, and their rejection of static restrictions on religion. Thus, although there are those who argue the Founders' understanding of religion must be rejected because it limits religion in manner that proves inadequate to modern America,²⁷⁵ this contention seems inaccurate. The Founders anticipated an America in which religion would grow and develop. Their emphasis on neutrality and liberality, in this regard, seems to create a structure that readily allows for cohesion and consistency between the Founders' theistic views and modern religious practice.

B. STATE COURTS DEFINING RELIGION IN THE MID-NINETEENTH CENTURY

The first judicial attempts at defining religion in the United States arose not in federal courts, but in state courts. These early forays into the subject of what constitutes religion provide a meaningful sense of early judicial interpretations of the term religion. In considering these decisions, there is certainly some cause for concern about whether religion means the same thing under a state constitution as it does under the Federal Constitution, especially given that states were not at this time obligated to adhere to the First Amendment. However, given the Supreme Court's interest in the debates and practices of states for purposes of free exercise and establishment jurisprudence, and that these state court decisions reveal no indication that the courts believed multiple meanings of the word religion existed, there is much to suggest that these opinions are an important first step in the attempt by the judiciary to define religion in the United States.

274. *United States v. Ballard*, 322 U.S. 78, 87 (1944).

275. *Adams & Emmerich*, *supra* note 34, at 1666.

In 1848, the South Carolina Court of Appeals relied upon a definition of religion provided by former New Jersey governor and founding father William Livingston. The court interpreted religion as “an habitual reverence for, and devotedness to the Deity, with such external homage, public or private, as the worshipper believes most acceptable to him.”²⁷⁶ The court noted that the South Carolina Constitution included “the free exercise and enjoyment of religious profession and worship, without discrimination or preference.”²⁷⁷ Furthermore, the court recognized the state constitution as guaranteeing

that a man might be of any order of religious worshippers, or of none at all; that he might worship God, or not, as he pleased; that his worship might be in any form, at any time or place, or none at all; and that for these differences in faith or practice, no difference in civil condition should ever be made by law.²⁷⁸

This abolition of disabilities on the basis of religion extended to the “the Christian, Israelite,²⁷⁹ Mahometan, Pagan and Infidel, [for] all stand alike, in the Government and people of S[outh] Carolina.”²⁸⁰

Similarly, in 1846, the General Court of Virginia explored the contours of religious liberty within the Commonwealth. The court described religion “as the duty which we owe to our Creator, and the manner of discharging it.”²⁸¹ By safeguarding religious liberty, the court indicated that the Virginia Constitution declared “to the Christian and the Mahometan, the Jew and the Gentile, the Epicurean and the Platonist, (if any such there be amongst us,) that . . . all are equally objects of its protection; securing safety to the people, safety to the government, safety to religion.”²⁸² In reaching this conclusion, the court was interpreting Virginia’s constitutional protection of religious liberty, which as previously noted has been extremely influential in shaping the United States Supreme Court’s interpretation of the First Amendment’s guarantees. By embracing both Epicureanism and Platonism as religions, depending on how this reference is understood, the

276. *City Council of Charleston v. Benjamin*, 33 S.C.L. 508, *12 (S.C.App. L. 1848) (quoting William Livingston) (emphasis in original).

277. *Id.*

278. *Id.*

279. As previously discussed with regard to incorrect historical references to Hindus and Muslims, the author intends no offense to members of the Jewish faith with this incorrect reference; rather, the author is merely trying to accurately preserve the historical material given the context of discussing the historical viewpoint.

280. *City Council of Charleston*, 33 S.C.L. at *12.

281. *Perry v. Commonwealth*, 44 Va. 632, 1846 WL 2406, at *5 (Va. Gen. Ct. 1846).

282. *Id.*

Virginia court may have offered one of the broadest definitions of religion set forth by any court.

C. ORTHODOXY IN THE LATE NINETEENTH CENTURY

While Pagans were protected in South Carolina and Platonists in Virginia, by the late 1800s, when the United States Supreme Court began to address what constituted religion under the First Amendment, its understanding and application of the definition of religion was narrow. In the late 1800s, the Supreme Court indicated that “[t]he ‘religion’ valued by the First Amendment . . . was the sort of theistic belief widely recognized and long revered by mainstream America—and nothing more.”²⁸³ The Supreme Court defined the term religion in purely theistic terms: “‘religion’ has reference to one’s views of his relations to his Creator, and to the obligations they impose of reverence for his being and character, and of obedience to his will.”²⁸⁴ However, as applied by the Court, the definition of religion proved to be even narrower than theism generally. For example, the Court concluded in *Davis v. Beason* that the beliefs of the Mormon Church, also known as the Church of Jesus Christ of Latter-Day Saints, did not constitute religious beliefs.²⁸⁵ Justice Field reasoned that because Mormonism advocated polygamy, which he viewed as conduct that all rational religious thinkers would view as immoral, it could not be considered a religion.²⁸⁶ If a belief was “against the enlightened sentiment of mankind,” then it was merely offered in the “pretense” of being derived from religious conviction.²⁸⁷ “In other words, any practice claimed to be religious, while arguably motivated by religious-type sentiments, must meet a certain level of enlightenment to be considered religious.”²⁸⁸ Essentially, the Court of this era excluded from the definition of religious beliefs and

283. David D. Meyer, *Self-Definition in the Constitution of Faith and Family*, 86 MINN. L. REV. 791, 811 (2002).

284. *Davis v. Beason*, 133 U.S. 333, 342 (1890).

285. *Id.* at 341-42; see *Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States*, 136 U.S. 1, 46 (1890) (upholding the repeal of the Mormon Church charter); see also Meyer, *supra* note 283, at 811 n.95 (“[T]he claims of religious minorities received little serious attention from the Supreme Court through the first part of this century.” (citing 4 RONALD D. ROTUNDA & JOHN E. NOWAK, *TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE* § 21.7, at 532 (1992)); TRIBE, *AMERICAN*, *supra* note 217, at 1179 (“In order to be considered legitimate, religions had to be viewed as ‘civilized’ by Western standards.”)).

286. See *Davis*, 133 U.S. at 341-42 (“[T]o call their advocacy a tenet of religion is to offend the common sense of mankind.”); see also Meyer, *supra* note 283, at 811 (“Thus, in a succession of cases toward the end of the Nineteenth Century, the Court placed Mormons effectively outside the scope of protected religion . . .”).

287. *Late Corp.*, 136 U.S. at 50.

288. Lee J. Strang, *The Meaning of “Religion” in the First Amendment*, 40 DUQ. L. REV. 181, 200 n.97 (2002).

practices those that did not fit neatly within a mainstream Christian perspective.

D. BROADENING THE DEFINITION OF RELIGION IN THE MIDDLE OF THE TWENTIETH CENTURY

However, this understanding of religion did not last because “[t]he Court’s narrow . . . conception of ‘religion’ began to give way . . . midway through the Twentieth Century, following a period of dramatic diversification of American religious life.”²⁸⁹ Courts began expanding the definition of religion in the 1940s. Discussing what constituted religious belief in the context of a conscientious objector statute, the Second Circuit stated:

[T]he 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.²⁹⁰

The Second Circuit’s more expansive approach to religion began to spread. For example, in a dissenting opinion, United States Supreme Court Justice Felix Frankfurter utilized the Second Circuit definition rather than the 1890 Supreme Court’s definition of religion.²⁹¹ However, the movement of the definition of religion away from theism was not immediate. For example, three years later, interpreting the same conscientious objector statute as the Second Circuit had, the Ninth Circuit declared:

There are those who have a philosophy of life, and who live up to it. There is evidence that this is so in regard to appellant. However, no matter how pure and admirable his standard may be, and no matter how devotedly he adheres to it, his philosophy and morals and social policy without the concept of deity cannot be said to be religion”²⁹²

The Supreme Court made a pronouncement in *United States v. Ballard* that is sometimes considered a break with its *Beason* jurisprudence which

289. Meyer, *supra* note 283, at 812.

290. *United States v. Kauten*, 133 F.2d 703, 708 (2d Cir. 1943).

291. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 658-59 (1943) (Frankfurter, J., dissenting).

292. *Berman v. United States*, 156 F.2d 377, 381 (9th Cir. 1946).

defined religion in terms of theism;²⁹³ however, this interpretation is an incorrect, or at least a not completely correct, view of the case.²⁹⁴ The Court did begin to widen its understanding of religion, but the theistic definition in *Beason* was not abandoned. However, the Court would not deem some religions as real religions that warranted protection, and some religions as untrue religions, which were not worthy of protection.²⁹⁵ There would be no inquiries allowed into the truth or falsity of religious beliefs or doctrines.²⁹⁶

The language that occasionally attracts commentators to state that *Ballard* rejected a theistic definition of religion is the Court's statement that "[f]reedom of thought, which includes freedom of religious belief, is basic in a society of free men. It embraces the right to maintain theories of life and of death and of the hereafter which are rank heresy to followers of the orthodox faiths."²⁹⁷ However, the Court further stated that the Founders, by protecting religious liberty, were ensuring that "[m]an's relation to his God was made no concern of the state. He was granted the right to worship as he pleased and to answer to no man for the verity of his religious views."²⁹⁸ The Court added:

[a]s stated in *Davis v. Beason* "[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, no interference can be permitted, provided always the laws of society, designed to secure its peace and prosperity, and the morals of its people, are not interfered with."²⁹⁹

293. See Strang, *supra* note 288, at 201 (stating that the Supreme Court in *Ballard* "implicitly expanded beyond theism the definition of religion"); Hall, *Sacred*, *supra* note 150, at 145 ("[T]he Supreme Court in *United States v. Ballard* emphasized the breadth of religious freedom in such a way as to call into question future attempts to define religion according to the measuring rod of theism."); Casino, *supra*, note 260, at 130-31 (regarding the Supreme Court's treatment of the *Beason* definition, the Court noted that "[t]his theistic notion of religion was dominant until the 1940's, when the Supreme Court, in a series of decisions, changed direction in regard to both the belief/action distinction and the theistic definition of religion").

294. See Eli A. Echols, Note, *Defining Religion for Constitutional Purposes: A New Approach Based on the Writings of Emanuel Swedenborg*, 13 B.U. PUB. INT. L.J. 117, 126-27 (2003) ("[*Ballard*] does not actually repudiate the theistic definition of religion. Rather, it implicitly embraces this definition by explaining that the First Amendment removed 'man's relation to his God' from the State's concerns.").

295. See Meyer, *supra* note 283, at 812 (indicating that in *Ballard* "the Court insisted that the First Amendment valued unorthodox faiths as well as conventional religion.").

296. *United States v. Ballard*, 322 U.S. 78, 88 (1944).

297. *Id.* at 86 (internal citations omitted).

298. *Id.* at 87.

299. *Id.* (internal citations omitted).

What the *Ballard* Court did change in the definition of religion was perspective. In looking at theories of life, death, and the hereafter, the Court was looking at what the faith was oriented towards: what types of questions it was asking and what answers it was providing. With regard to theism, the Court's understanding of religion in *Ballard* can best be described in terms of having "offered the possibility that nontheistic faiths would be entitled to [F]irst [A]mendment protection."³⁰⁰ Justice Rutledge in his *Everson* dissent would embrace this understanding, viewing religion as an expression of the practitioner's "feeling toward ultimate issues of existence."³⁰¹ What the *Ballard* Court and Justice Rutledge had emphasized were "generic areas of religious belief—life after death, for example—rather than specific beliefs—faith in a supreme being, for example—that must be held in order for the belief system to be considered religious."³⁰² Although *Ballard* has also been described as having stripped content from the definition of religion,³⁰³ "the language of *Ballard* [actually] remained content-oriented."³⁰⁴ But, it began moving that content analysis in an intriguing direction that presented an as yet unresolved issue insofar as the Court "left uncertain the extent to which the protected beliefs must embrace what have been termed 'extratemporal consequences' or 'transcendent realities.'"³⁰⁵

Whether *Ballard* embraced a non-theistic definition of religion or simply helped pave the way towards one being embraced, the Court clearly expanded its understanding of religion beyond theistic belief in a god or gods in the 1961 case of *Torcaso v. Watkins*.³⁰⁶ The Court included within its definition of religion Buddhism, Taoism, Ethical Culture, and Secular Humanism, which are faiths that do not embrace a traditional Western concept of God or Gods or, arguably, any concept of god whatsoever.³⁰⁷ While the Supreme Court concluded in *Torcaso* that the government could not discriminate to favor religions that embraced a concept of god against those that do not, and provided a list of religions not based on a belief in God, the Court did not explain why these particular beliefs constituted religions nor did it provide a definition that would allow for determining

300. Sherryl E. Michaelson, Note, *Religion and Morality Legislation: A Reexamination of Establishment Clause Analysis*, 59 N.Y.U. L. REV. 301, 322 (1984).

301. *Everson v. Bd. of Educ.*, 330 U.S. 1, 45 (1947) (Rutledge, J., dissenting).

302. Michaelson, *supra* note 300, at 322.

303. See Echols, *supra* note 294, at 127 n.64.

304. Michaelson, *supra* note 300, at 322.

305. *Id.* at 322-23.

306. *Torcaso v. Watkins*, 367 U.S. 488, 495 n.11 (1961).

307. *Id.*

what other beliefs constituted religions.³⁰⁸ Thus, although it was clear that religion was not limited to theism, it was not entirely clear what religion was.

In two conscientious objector cases, the Court provided a definition of religion. The Court in *Seeger* adopted the following understanding as the test of belief: “whether a given belief that is sincere and meaningful occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God of one who clearly qualifies.”³⁰⁹ In *Welsh*, the plurality indicated that to be religious, this sincerity must “stem from the registrant’s moral, ethical, or religious beliefs about what is right and wrong[,] and . . . these beliefs [must] be held with the strength of traditional religious convictions.”³¹⁰ The plurality determined,

[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, those beliefs certainly occupy in the life of that individual a place parallel to that filled by God in traditionally religious persons.³¹¹

Thus, purely moral and ethical beliefs, both in their source and content, were religious beliefs.³¹²

However, with Justice Blackmun not participating, four justices rejected this view.³¹³ Justice Harlan would have found the exemption for conscientious objectors who were opposed to the war because of their religious beliefs to be an Establishment Clause violation.³¹⁴ Such a violation occurred in his view because the conscientious objector legislation preferred theists to those who ascribed to a non-theistic religion, and as applied to the plaintiff, over those with strong, but secular, conscience based opposition.³¹⁵ Even defining religion so as to include non-theists would not resolve the problem, for the basic difficulty was a preference for religion over non-religion.³¹⁶ For Justice Harlan, the plaintiff’s beliefs were

308. *Id.* at 495.

309. *United States v. Seeger*, 380 U.S. 163, 166 (1965); *see Welsh v. United States*, 398 U.S. 333, 340 (1970) (plurality opinion).

310. *Welsh*, 398 U.S. at 340.

311. *Id.*

312. *Id.*; *see Seeger*, 380 U.S. at 166 (holding that meaningful and sincere beliefs are religious beliefs).

313. *Welsh*, 398 U.S. at 333.

314. *Id.* at 345.

315. *Id.* at 356-66 (Harlan, J., concurring).

316. *Id.*

clearly secular, not religious.³¹⁷ Justice White, writing for Justice Stewart and Chief Justice Burger, like Justice Harlan, similarly did not regard the plaintiff's beliefs as religious.³¹⁸ Justice White's dissenting opinion, however, rejected Justice Harlan's conclusion that an exemption for religious objectors without including those with passionate, but secular, non-religious, beliefs would be unconstitutional.³¹⁹

Although the Court in *Seeger* and the plurality in *Welsh* were construing the terms of a statute, the Court strongly suggested that this understanding of religion carried over to the First Amendment.³²⁰ There have, however, been questions raised as to whether the Court truly intended the *Seeger* and *Welsh* definitions of religion to be applied to the First Amendment as opposed to being limited to the conscientious objector statutory provision.³²¹ Regardless of the Court's original intent, *Seeger* and *Welsh* have had and continue to have a significant influence on how courts approach and understand what religion means for purposes of the First Amendment.³²²

Despite the continuing impact of these decisions, "[i]n subsequent cases, the Court appears to have retreated somewhat from the most expansive implications of *Seeger's* functional approach to defining religion and that of *Welsh*."³²³ In *Yoder*, the Court indicated that a "way of life" would not amount to religion, nor would philosophical beliefs.³²⁴ "Thus, if the Amish asserted their claims because of their subjective evaluation and rejection of the contemporary secular values accepted by the majority, much as Thoreau rejected the social values of his time and isolated himself

317. *Id.*

318. *Id.* at 367-74 (White, J., dissenting).

319. *Id.*

320. See *United States v. Seeger*, 380 U.S. 163, 176, 188 (1965) (Douglas, J., concurring); see also Jesse H. Choper, *Defining "Religion" in the First Amendment*, 1982 U. ILL. L. REV. 579, 589 (1982) (analyzing *Seeger* as "hav[ing] significant constitutional portents, particularly because the Court's straining of the language of the statute . . . was prompted by its desire to [avoid] imputing to Congress an intent to classify different religious beliefs, exempting some and excluding others"); Donald A. Giannella, *Religious Liberty, Nonestablishment, and Doctrinal Development Part I, The Religious Liberty Guarantee*, 80 HARV. L. REV. 1381, 1425 (1967) ("[*Seeger*] seems to suggest the Court's ultimate definition of religion for constitutional purposes.").

321. *Kalka v. Hawk*, 215 F.3d 90, 98 (D.C. Cir. 2000) ("Whether *Seeger* meant to define religion as used in the First Amendment is doubtful. Instead of discussing the history of the First Amendment, the Court there discussed the history of the draft.").

322. See, e.g., *Kaufman v. McCaughtry*, 419 F.3d 678, 681-82 (7th Cir. 2005) (citing and applying the definition of religion set forth in *Seeger* and by the plurality in *Welsh*); *Kong v. Scully*, 341 F.3d 1132, 1138 (9th Cir. 2003) (citing the *Seeger* definition of religion).

323. Meyer, *supra* note 283, at 813.

324. *Wisconsin v. Yoder*, 406 U.S. 205, 215, 216 (1972).

at Walden Pond, their claims would not rest on a religious basis.”³²⁵ Distinguishing between philosophy and religion, the Court indicated that “Thoreau’s choice was philosophical and personal rather than religious, and such belief does not rise to the demands of the Religion Clauses.”³²⁶ The Court’s discussion of how to treat views such as those of Thoreau, although merely dicta, embodies the change in the Supreme Court’s understanding of religion from *Seeger* to *Yoder*. Justice Douglas sounds this retreat, noting that the type of personal and philosophical choice made by Thoreau would have fallen within the definition of religion provided by *Seeger*.³²⁷ *Torcaso*, a 1961 decision, and *Yoder*, a 1972 decision, in both of which the Court’s discussion of defining religion is merely dicta, and *Seeger* and *Welsh*, two statutory interpretation cases from 1965 and 1970 respectively, stand as the last significant pronouncements from the Supreme Court on what constitutes a religion. None of these decisions offer a commanding pronouncement of what the law is, instead they serve only as loose guidance for the state courts and lower federal courts.³²⁸

E. RESPONSE OF THE FEDERAL CIRCUIT COURTS TO A BROADER DEFINITION OF RELIGION

Without definitive guidance from the Supreme Court, the various Circuit Courts of Appeals have responded to this vacuum by creating a variety of tests, which generally, but not completely, overlap. There are five primary approaches. In *Africa v. Pennsylvania*,³²⁹ the Third Circuit Court of Appeals offered a three part-test:

First, a religion addresses fundamental and ultimate questions having to do with deep and imponderable matters. Second, a religion is comprehensive in nature; it consists of a belief-system as opposed to an isolated teaching. Third, a religion often can be recognized by the presence of certain formal and external signs.³³⁰

325. *Id.* at 216.

326. *Id.*

327. *Id.* at 247-48 (Douglas, J., dissenting in part). William James also found Thoreau’s philosophy to be religious. See WILLIAM JAMES, THE VARIETIES OF RELIGIOUS EXPERIENCE 222 (1985) (providing Thoreau’s work as an illustration of personal spirituality).

328. See, e.g., Bodensteiner, *supra* note 160, at 421 n.31 (explaining the heterogeneous religious composition of the United States); Caroline L. Kraus, Note, *Religious Exemptions—Applicability to Vegetarian Beliefs*, 30 HOFSTRA L. REV. 197, 214 (2001); Val D. Ricks, *To God God’s, To Caesar Caesar’s, and to Both the Defining of Religion*, 26 CREIGHTON L. REV. 1053, 1065-66 (1993); William D. Palmer, *Time to Exorcise Another Ghost From the Vietnam War: Restructuring the In-Service Conscientious Objector Program*, 140 MIL. L. REV. 179, 220 (1993).

329. 662 F.2d 1025 (3d Cir. 1981).

330. *Africa*, 662 F.2d at 1032.

This Third Circuit definition, which grew out of a concurring opinion by Judge Arlin Adams in *Malnak v. Yogi*,³³¹ has been enormously influential with other circuit courts, federal district courts, and state courts.³³² The United States Court of Appeals for District of Columbia Circuit views religion as belief systems that address “underlying theories of man’s nature or his place in the Universe.”³³³ In *United States v. Meyers*, the Tenth Circuit Court of Appeals, navigating the unsettled waters surrounding what is and is not a religion, adopted a test composed of a variety of religious factors that various courts have identified.³³⁴ These factors include ultimate ideas, metaphysical beliefs, a moral or ethical system, comprehensiveness of beliefs; and the accoutrements of religion, which includes a founder, teacher or prophet, important writings, gathering places, keepers of knowledge, ceremonies and rituals, structure or organization, holidays, diets or fasting, prescribed appearance and clothing, and propagation.³³⁵ The

331. 592 F.2d 197, 207-10 (3d Cir. 1979).

332. See, e.g., *Udey v. Kastner*, 644 F. Supp. 1441, 1443 (E.D. Tex. 1986) (providing a two-part test for deciding whether a prisoner’s religious dietary demands could be denied); *Cutter v. Wilkinson*, 349 F.3d 257, 267-68 (6th Cir. 2003); see also Jane M. Ritter, *The Legal Definition of Religion: From Eating Cat Food to White Supremacy*, 20 *TOURO L. REV.* 751, 776-777 (2004).

333. *Founding Church of Scientology v. United States*, 409 F.2d 1146, 1160 (D.C. Cir. 1969).

334. *United States v. Meyers*, 95 F.3d 1475, 1482-84 (10th Cir. 1996).

335. *Id.* The Tenth Circuit explained these terms as follows:

1. *Ultimate Ideas*: Religious beliefs often address fundamental questions about life, purpose, and death. As one court has put it, “a religion addresses fundamental and ultimate questions having to do with deep and imponderable matters.” These matters may include existential matters, such as man’s sense of being; teleological matters, such as man’s purpose in life; and cosmological matters, such as man’s place in the universe.

2. *Metaphysical Beliefs*: Religious beliefs often are “metaphysical,” that is, they address a reality which transcends the physical and immediately apparent world. Adherents to many religions believe that there is another dimension, place, mode, or temporality, and they often believe that these places are inhabited by spirits, souls, forces, deities, and other sorts of inchoate or intangible entities.

3. *Moral or Ethical System*: Religious beliefs often prescribe a particular manner of acting, or way of life, that is “moral” or “ethical.” In other words, these beliefs often describe certain acts in normative terms, such as “right and wrong,” “good and evil,” or “just and unjust.” The beliefs then proscribe those acts that are “wrong,” “evil,” or “unjust.” A moral or ethical belief structure also may create duties—duties often imposed by some higher power, force, or spirit—that require the believer to abnegate elemental self-interest.

4. *Comprehensiveness of Beliefs*: Another hallmark of “religious” ideas is that they are comprehensive. More often than not, such beliefs provide a telos, an overreaching array of beliefs that coalesce to provide the believer with answers to many, if not most, of the problems and concerns that confront humans. In other words, religious beliefs generally are not confined to one question or a single teaching.

5. *Accoutrements of Religion*: By analogy to many of the established or recognized religions, the presence of the following external signs may indicate that a particular set of beliefs is “religious:”

Second Circuit Court of Appeals looked at religion not in a systematic or cultural manner, but instead psychologically, defining religion as “*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.*”³³⁶ Thus, expressly relying on *Seeger*, the Second Circuit held that for beliefs to be considered religious, “[a]n individual claiming violation of free exercise rights need only demonstrate that the beliefs professed are ‘sincerely held’ and in the individual’s ‘own scheme of things, religious.’”³³⁷

a. *Founder, Prophet, or Teacher*: Many religions have been wholly founded or significantly influenced by a deity, teacher, seer, or prophet who is considered to be divine, enlightened, gifted, or blessed.

b. *Important Writings*: Most religions embrace seminal, elemental, fundamental, or sacred writings. These [sic] writing often include creeds, tenets, precepts, parables, commandments, prayers, scriptures, catechisms, chants, rites, or mantras.

c. *Gathering Places*: Many religions designate particular structures or places as sacred, holy, or significant. These sites often serve as gathering places for believers. They include physical structures, such as churches, mosques, temples, pyramids, synagogues, or shrines; and natural places, such as springs, rivers, forests, plains, or mountains.

d. *Keepers of Knowledge*: Most religions have clergy, ministers, priests, reverends, monks, shamans, teachers, or sages. By virtue of their enlightenment, experience, education, or training, these people are keepers and purveyors of religious knowledge.

e. *Ceremonies and Rituals*: Most religions include some form of ceremony, ritual, liturgy, sacrament, or protocol. These acts, statements, and movements are prescribed by the religion and are imbued with transcendent significance.

f. *Structure or Organization*: Many religions have a congregation or group of believers who are led, supervised, or counseled by a hierarchy of teachers, clergy, sages, priests, etc.

g. *Holidays*: As is etymologically evident, many religions celebrate, observe, or mark “holy,” sacred, or important days, weeks, or months.

h. *Diet or Fasting*: Religions often prescribe or prohibit the eating of certain foods and the drinking of certain liquids on particular days or during particular times.

i. *Appearance and Clothing*: Some religions prescribe the manner in which believers should maintain their physical appearance, and other religions prescribe the type of clothing that believers should wear.

j. *Propagation*: Most religious groups, thinking that they have something worthwhile or essential to offer non-believers, attempt to propagate their views and persuade others of their correctness. This is sometimes called “mission work,” “witnessing,” “converting,” or proselytizing.

Id. (internal citations omitted).

336. *United States v. Sun Myung Moon*, 718 F.2d 1210, 1227 (2d Cir. 1983) (citing WILLIAM JAMES, *THE VARIETIES OF RELIGIOUS EXPERIENCE* 31 (1910)) (emphasis in original); see *Patrick v. LeFevre*, 745 F.2d 153, 157 (2d Cir. 1984) (citing WILLIAM JAMES, *THE VARIETIES OF RELIGIOUS EXPERIENCE* 31 (1910)).

337. *Ford v. McGinnis*, 352 F.3d 582, 588 (2d Cir. 2003) (quoting *Fifth Ave. Presbyterian Church v. City of New York*, 293 F.3d 570, 574 (2d Cir. 2002) (quoting *United States v. Seeger*, 380 U.S. 163, 185 (1965))).

Although also referencing *Seeger* and the plurality definition from *Welsh*, in framing its own definition of religion, the Seventh Circuit's approach to religion is somewhat different than the Second Circuit's approach. In the Seventh Circuit's definition, "when a person sincerely holds beliefs dealing with issues of 'ultimate concern' that for her occupy a 'place parallel to that filled by . . . God in traditionally religious persons,' those beliefs represent her religion"³³⁸ for purposes of free exercise.³³⁹ The court, however, also noted *Yoder* and indicated that "[t]he Supreme Court has said that a religion, for purposes of the First Amendment, is distinct from a 'way of life,' even if that way of life is inspired by philosophical beliefs or other secular concerns."³⁴⁰ For the Seventh Circuit the definition of religion that results from combining these two decisions appears to be more content-based than the Second Circuit's definition. In the Seventh Circuit, religion is something that is "taking a position on divinity"³⁴¹ and an issue of "ultimate concern,"³⁴² rather than simply sincere beliefs that are in the "individual's own scheme of things, religious" as the Second Circuit holds.³⁴³ These views represent the five primary approaches with other circuits generally deferring to and applying one of these respective viewpoints,³⁴⁴ although occasionally only using a test for purposes of the particular case—assuming *arguendo* the test properly defines religion.³⁴⁵

F. STATE COURTS' RESPONSE TO A BROADER DEFINITION OF RELIGION

State courts have addressed a variety of statutory provisions that relate to exemptions for religious activity and religious organizations.

If a state court is addressing an issue to which both the U.S. Constitution and the applicable state constitution have applicable

338. *Kaufman v. McCaughtry*, 419 F.3d 678, 681-82 (7th Cir. 2004) (citing *Fleischfresser v. Dirs. of Sch. Dist. 200*, 15 F.3d 680, 688 n.5 (7th Cir. 1994)) (internal citation and quotation omitted); see *Welsh v. United States*, 398 U.S. 333, 340 (1970) (plurality opinion); *United States v. Seeger*, 380 U.S. 163, 184-88 (1965).

339. *Fleischfresser*, 15 F.3d at 688 n.5.

340. *Kaufman*, 419 F.3d at 681-82; see *Wisconsin v. Yoder*, 406 U.S. 205, 215-16 (1972).

341. *Kaufman*, 419 F.3d at 682 ("If we think of religion as taking a position on divinity, then atheism is indeed a form of religion." (citing *Reed v. Great Lakes Cos.*, 330 F.3d 931, 934 (7th Cir. 2003))).

342. *Id.* at 681.

343. *Ford v. McGinnis*, 352 F.3d 582, 588 (2d Cir. 2003) (quoting *Fifth Ave. Presbyterian Church v. City of New York*, 293 F.3d 570, 574 (2d Cir. 2002) (quoting *United States v. Seeger*, 380 U.S. 163, 185 (1965))).

344. See, e.g., *Cutter v. Wilkinson*, 349 F.3d 257, 267-68 (6th Cir. 2003); *Doswell v. Smith*, 1998 U.S. App. LEXIS 4644, at *9-10 (4th Cir. Mar. 13, 1998).

345. See *Love v. Reed*, 216 F.3d 682, 687 (8th Cir. 2000); *Alvarado v. City of San Jose*, 94 F.3d 1223, 1229 (9th Cir. 1996).

clauses—such as free speech, free exercise and nonestablishment of religion, or equal protection—then the court has some obligation to use the federal authority to define the minimum applicable threshold concerning individual rights.³⁴⁶

Furthermore, the state courts have needed to define religion and to approach it in a manner that is consistent with the First Amendment.

Of the various definitions of religion set forth by state courts, the Supreme Court of Missouri has provided one of the more controversial formulations.³⁴⁷ The Missouri state tax commission had concluded that although the Missouri Church of Scientology

has some of the trappings and accouterments of an organized religion, it appears to be more an applied philosophy which has a certain religious connotation, but which falls short of *being devoted to the worship of the Supreme Being*, which [the] Commission [concluded was] necessary for the property owner to have its property considered exclusively for religious worship.³⁴⁸

The state tax commission determined that “‘an applied religious philosophy’ is not identical for purposes of exemption ‘with an organized religion devoted to religious worship.’”³⁴⁹ Thus, the Commission decided that the Church of Scientology’s use of land was not for religious purposes.³⁵⁰

Relying upon *Fellowship of Humanity v. County of Alameda*,³⁵¹ the Missouri Church of Scientology argued that the Missouri Supreme Court should have rejected the tax commission’s definition and instead adopt the understanding of religion and religious worship delineated by a California appellate court in the aforementioned case.³⁵² The California court in *Fellowship of Humanity*, indicated that “‘the proper interpretation of the terms ‘religion’ or ‘religious’ in tax exemption laws should not include any reference to whether the beliefs involved are theistic or nontheistic.”³⁵³ Thus, “[r]eligion simply includes: (1) a belief, not necessarily referring to supernatural powers; (2) a cult, involving a gregarious association openly

346. Jim Rossi, *Institutional Design and the Lingering Legacy of Antifederalist Separation of Powers Ideals in the States*, 52 VAND. L. REV. 1167, 1218 (1999).

347. See David Young, *The Meaning of “Religion” in the First Amendment: Lexicography and Constitutional Policy*, 56 UMKC L. REV. 313, 322 (1988).

348. *Mo. Church of Scientology v. State Tax Comm’n*, 560 S.W.2d 837, 840 (Mo. 1977) (en banc) (emphasis in original).

349. *Id.*

350. *Id.*

351. 315 P.2d 394 (Cal. Ct. App. 1957).

352. *Alameda*, 315 P.2d at 406.

353. *Id.*

expressing the belief; (3) a system of moral practice directly resulting from an adherence to the belief; and, (4) an organization within the cult designed to observe the tenets of belief.”³⁵⁴ For the California court, “[t]he content of the belief is of no moment. Assuming this definition of ‘religion’ is correct, then it necessarily follows that any lawful means of formally observing the tenets of the cult is ‘worship,’ within the meaning of the tax exemption provision.”³⁵⁵ The Missouri Supreme Court, however, did not find this argument persuasive, and instead affirmed the tax commission’s conclusion that the practices of the Missouri Church of Scientology did not constitute religious worship.³⁵⁶ The court concluded that to warrant an application of tax-exempt status accorded to property dedicated to religious worship, an organization as a “minimum requirement [must have] a belief in the Supreme Being.”³⁵⁷ The court reasoned that “[g]enerally religious worship is expressed by prayers, reverence, homage and adoration paid to a deity and include the seeking out by prayer and otherwise the will of the deity for divine guidance.”³⁵⁸ Although indicating that a religious organization did not need to use the term God or Supreme Being, the Missouri Supreme Court concluded that the United States Supreme Court in *Seeger* had not “excised the concept of a Supreme Being from ‘religion.’”³⁵⁹ Quite to the contrary, the court stated that “it can reasonably be said that when [the United States Supreme Court] spoke of ‘claimed belief’ as occupying ‘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*,’ . . . the term necessarily includes God or Supreme Being.”³⁶⁰ For the court, the United States Supreme Court’s decision in *Seeger* was more a matter of semantics: that the religious group or individual might not refer to their god or gods as God or a Supreme Being was of no import so long as they nevertheless had a God or a Supreme Being included in their beliefs.³⁶¹ Furthermore, the court noted that “[t]he *Seeger* definition is not one of constitutional construction but of statutory interpretation” of the Universal Military Training and Service Act.³⁶² Thus, according to the Missouri Supreme Court, to be

354. *Id.*

355. *Id.*

356. *Mo. Church of Scientology v. State Tax Comm’n*, 560 S.W.2d 837, 840 (Mo. 1977).

357. *Id.* at 842.

358. *Id.* at 840.

359. *Id.* at 842.

360. *Id.* (emphasis in original).

361. *Id.*

362. *Id.* at 841-42.

religious, belief in a Supreme Being or God, although not under that particular name, remains an essential component of religion.³⁶³

In a case presenting issues similar to those before the Missouri Supreme Court, the Rhode Island Supreme Court in *Church of Pan, Inc. v. Norberg* considered whether the Church of Pan (Pan) was a “church” or “other religious organization,” which would entitle it to a tax-exempt status under Rhode Island law. The trial court had determined Pan was operated for purely religious purposes and was therefore entitled to the tax exemption.³⁶⁴ In analyzing the trial court’s findings, the Rhode Island Supreme Court viewed the following facts as being important to its analysis: Pan had a founder, who served as the church’s senior minister,³⁶⁵ but none of the members of the group’s ministry were formally trained in theology.³⁶⁶ “The church’s doctrines include[d] belief in ‘the natural god’ [and] [c]entral to the organization’s teachings is a duty to serve this god through the study, care, and preservation of nature.”³⁶⁷ As part of this mission, Pan maintained 150 acres as a preserve for wildlife and the ecosystem, and its primary activities consisted of “forestry, wildlife care and recycling programs in which both members and nonmembers participate.”³⁶⁸ The organization also made “monetary contributions to such organizations as the Audubon Society and the Sierra Club.”³⁶⁹ Members of the twenty-five person congregation were free to adhere to other faiths, and many members were actually practicing members of other religions.³⁷⁰ Pan conducted monthly services, which consisted of a “general discussion, usually forty-five minutes to one hour in length, on a topic chosen by the senior minister.”³⁷¹ During these services, “[n]o hymns are sung, no prayers are recited, and there are no scripture readings.”³⁷² As for physical facilities, Pan “has no church building or other formal place of worship. Weather permitting, monthly services are conducted in a meadow or in woodlands on 200 acres

363. *Id.* at 842. Subsequent decisions and commentators have reiterated that Missouri law requires belief in a Supreme Being to qualify for a religious tax exemption. See, e.g., *Ozark Avalon v. Lachner*, 2001 WL 909165, at *8 (Mo. St. Tax. Comm’n 2001); *Sch. of Metaphysics v. McIntire*, 1992 WL 18304, at *6 (Mo. St. Tax. Comm’n 1992); GEORGE GLEASON BOGERT ET AL., *THE LAW OF TRUSTS AND TRUSTEES* § 401, n.20 (Rev. 2d ed. 2006).

364. *Church of Pan, Inc. v. Norberg*, 507 A.2d 1359, 1361 (R.I. 1986).

365. *Id.*

366. *Id.*

367. *Id.*

368. *Id.*

369. *Id.*

370. *Id.*

371. *Id.*

372. *Id.*

of leased property. . . . In inclement weather, services are held indoors wherever space is available.”³⁷³

The Rhode Island Supreme Court framed its analysis by noting that “[t]he mere fact that the claimant characterizes itself [as a religious organization] is not determinative.”³⁷⁴ The court indicated it “is permitted to inquire into the true purposes for which the organization was established and is conducted.”³⁷⁵ Nor will the stated purpose of the organization suffice to demonstrate that it is a religious organization; instead, the court will look to the organization’s actual activities.³⁷⁶ Citing the 1890s Supreme Court decision in *Beason*, the court noted that religion “has traditionally been defined as one’s views of one’s relationship with, and obligations to, a supreme being.”³⁷⁷ Since the Supreme Court’s *Torcaso*, *Seeger*, *Welsh*, and *Yoder* cases have failed to provide a binding First Amendment definition to the contrary, the court viewed religion for purposes of the First Amendment as having “reference to one’s views of his relations to his Creator, and to the obligations they impose of reverence for his being and character, and of obedience to his will.”³⁷⁸ For the court, it was essential that “[o]rganizations operated exclusively for religious purposes must be distinguished from those organizations dedicated primarily to the furtherance of philosophical, scientific, sociological, ecological, charitable, or political principles.”³⁷⁹

The Rhode Island Supreme Court concluded that even though the “plaintiff’s motives and the sincerity of its beliefs are not in question,” Pan simply was not a religion.³⁸⁰ The court found the following factors to undermine Pan’s claim that it was a religious organization: (1) “members are free to continue to practice other religions;” (2) the “congregation has neither any formally trained or ordained ministry nor any sacraments, rituals, or formal education courses;” (3) Pan’s “[m]onthly services consist simply of a general discussion rather than religious worship;” and, (4) “[d]uring the services no hymns are sung, no prayers are recited, and there are no scripture readings.”³⁸¹ Considering Pan’s tenets and activities, the court concluded that they were “primarily secular rather than religious.”³⁸²

373. *Id.*

374. *Id.*

375. *Id.*

376. *Id.* at 1362.

377. *Id.*

378. *Id.*

379. *Id.*

380. *Id.* at 1363.

381. *Id.*

382. *Id.*

The court indicated that “[t]he plaintiff’s activities, which include forestry, wildlife care, recycling programs and monetary support of environmental organizations, are best described as environmental and conservational programs.”³⁸³ The court determined that the “organization’s purpose is primarily the preservation of the environment, any religious connotation or purpose is merely incidental to this secular purpose.”³⁸⁴ These factors were critical to the court’s understanding of what constitutes a religion for purposes of its state tax laws, as interpreted in a manner consistent with the First Amendment.

The *Pan* court drew upon the analysis utilized in a similar Minnesota case, *Ideal Life Church of Lake Elmo v. County of Washington*.³⁸⁵ However, in a subsequent decision, *In re Collection of Delinquent Property Taxes*,³⁸⁶ the Minnesota Supreme Court, although not overruling *Ideal Life*, did further clarify the *Ideal Life* decision.³⁸⁷ The court indicated that the “test for determining whether an organization is properly considered [a religious entity] for tax purposes is a subjective one, focusing on the sincerity of belief and taking into account evidence on issues such as those articulated in *Ideal Life*.”³⁸⁸ For the issues similar to those articulated in *Ideal Life*, i.e., for the objective component of the test, the Minnesota courts have chosen to look to factors identified by the IRS in determining whether a legal entity is a church for tax purposes.³⁸⁹ These characteristics include: a distinct legal existence, a recognized creed and form of worship, a definite and distinct ecclesiastical government, a formal code of doctrine and discipline, a distinct religious history, a membership not associated with any other church or denomination, an organization of ordained ministers, a prescribed course of study for ordained ministers, a literature of its own, established places of worship, regular congregations, regular religious services, Sunday schools for religious instruction of the young, and schools for the preparation of its ministers.³⁹⁰ The *In re Collection of Delinquent Real Property Taxes* court continued to look to objective factors while tying these objective factors to its sincerity analysis. In concluding that the organization was not a religious entity, the court stated

383. *Id.*

384. *Id.*

385. 304 N.W.2d 308 (Minn. 1981).

386. 530 N.W.2d 200 (Minn. 1995).

387. *In re Collection of Delinquent Real Property Taxes*, 530 N.W.2d at 205.

388. *Id.* at 205.

389. *Id.*

390. *Id.* (citing INTERNAL REVENUE SERVICE, PUBL’N NO. 1828, TAX GUIDE FOR CHURCHES AND OTHER RELIGIOUS ORGANIZATIONS (Draft July 26, 1994)).

that while [the party seeking to be described as religious entity] meets several of the criteria articulated in *Ideal Life*, absence of certain other characteristics undermines an assertion of sincerity of belief In particular, we note the lack of association with other congregations, the lack of a prescribed course of study for ordained ministers and the dearth of sacrament, ritual, liturgy or recognized form of worship.³⁹¹

The Minnesota appellate courts have also wrestled with the convergence and distinctions between “conscience,” “creed,” and “religion.” The Minnesota Commission on Human Rights concluded that refusal to deliver food to an abortion clinic violated the state’s public accommodation laws by discriminating based on creed.³⁹² The Commission noted that the refusal to deliver to the clinic was “because of [the clinic’s] commitment to pro-choice beliefs” and that such action, failing to deliver food, constituted “discrimination based upon ‘creed.’”³⁹³ The Commission defined “‘creed’ as a ‘formulation or epitome of principles, rules, opinions, and precepts formally expressed and seriously adhered to and maintained.’”³⁹⁴ The Commission reasoned that because the head of the clinic and the organization itself “are ‘adamantly pro-choice for women’ and are committed to providing abortion services, and their pro-choice position ‘demonstrates a seriously maintained set of principles and opinions,’”³⁹⁵ their “pro-choice position constituted a ‘creed.’”³⁹⁶ Reversing, the Minnesota Court of Appeals determined the term creed included only religion and religious beliefs and that “the Commission erred in defining ‘creed’ to include political, sociological and philosophical beliefs.”³⁹⁷ The appeals court concluded that “[b]oth the ‘common meaning rule’ of statutory construction and the existing case law supports this court’s holding that the definition of ‘creed’ extends only to religion and religious beliefs and not, as the Commission held, to *any* beliefs on *any* subject.”³⁹⁸

In *Roberts v. Ravenwood Church of Wicca*,³⁹⁹ the Georgia Supreme Court considered whether the Ravenwood Church of Wicca, a nonprofit corporation dedicated to the practice of Wicca, was a religious entity and

391. *Id.* at 206.

392. *Rasmussen v. Glass*, 498 N.W.2d 508, 510 (Minn. Ct. App. 1993).

393. *Id.*

394. *Id.* at 511.

395. *Id.*

396. *Id.*

397. *Id.*

398. *Id.* at 514.

399. 292 S.E.2d 657 (Ga. 1982).

whether its practices constituted religious worship, which would qualify the organization for a tax exemption.⁴⁰⁰ *Ravenwood* is a particularly interesting case because of the distinctions drawn by the majority and the differing conclusions reached by the majority and the dissent, despite both applying the same definition of religion. The court indicated that “in order to constitute a religion, there is the requirement that there be a belief in a deity occupying a place parallel to that occupied by God in traditional religions.”⁴⁰¹ These beliefs must be sincerely held, and there must be a dedication on the part of the adherent to the practice of those beliefs.⁴⁰²

In applying this definition and determining that Wicca constituted a religion, the majority looked to the Wicca doctrine, training of ministers, and its ceremonial or cultural aspects. With regard to doctrine, the court relied on the deposition testimony of Lady Sintana, the head of the Ravenwood Church, wherein she stated that in Wicca “there is a belief in a deity, but not in the sense of an anthropomorphic God. Rather, the Wiccan belief is that there is a primordial, supernatural force which is the creator of the world and universe and which permeates everything therein.”⁴⁰³ She further indicated that in Wicca “there is a deification of this force, and all individuals are seen as divine sparks from this divinity with a concomitant moral and ethical responsibility to themselves and to everything in nature.”⁴⁰⁴ The duty owed “arises from the fact that each individual is connected to all things in the universe in what is known as the ‘karmic circle,’ and each individual both causes the events occurring within the circle and is affected thereby.”⁴⁰⁵ The court also found it important that Lady Sintana was trained for ten years before being ordained as a Wiccan minister.⁴⁰⁶ In looking to the ceremonial and cultural aspects of the religion, the court noted that Wicca has eight Sabbaths that mark festivals for various seasonal changes.⁴⁰⁷ The court also noted the existence of sacraments and ceremonies “of the Wiccan doctrinal theology [which] include: honoring the deity through reverence and homage, communion, marriages (referred to as ‘hand fastings’), funeral ceremonies, and

400. *Roberts*, 292 S.E.2d at 657-58.

401. *Id.* at 661. See, e.g., *Lamad Ministries, Inc. v. Dougherty County Bd. of Tax Assessors*, 602 S.E.2d 845, 852 (Ga. Ct. App. 2004) (providing an illustration of the continuing influence of *Ravenwood* in Georgia courts).

402. *Roberts*, 292 S.E.2d at 661.

403. *Id.* at 658.

404. *Id.*

405. *Id.*

406. *Id.*

407. *Id.*

ceremonies for naming babies.”⁴⁰⁸ Moreover, last but certainly not least, the court considered that the State of Georgia permitted Lady Sintana to perform marriages recognized by the State.⁴⁰⁹

The Georgia Supreme Court determined that “[a]dherents to the Wiccan faith do not practice the stereotypical ‘bubble, bubble, toil and trouble’ witchcraft, and Voodoo-like curses and hexes play no part in the Wiccan philosophy.”⁴¹⁰ To be considered a religious organization, it was important that the Wiccans differed from such groups because the majority concluded that “demonology and stereotypical witchcraft most emphatically do not constitute religion.”⁴¹¹ Justices Jordan and Clarke, the dissenting justices, agreed with the majority’s definition of religion that the “essence of religion is belief in a relation to God involving duties superior to those arising from any human relation.”⁴¹² The dissenting justices, however, concluded that Wicca “does not meet this test;” they believed that Wicca did not escape the majority’s distinction.⁴¹³ The dissenters noted that,

Lady Sintana, the founder of Ravenwood, refers to herself as “a pagan and a witch.” Male followers are called “warlocks.” Each individual is connected to everything in the universe by what is known as the “karmic circle.” There is no belief in a deity in the sense of an anthropomorphic God, only a belief in some strange supernatural force which permeates the world.⁴¹⁴

For the dissenters, the majority’s approach raised a clear concern that, under what the dissent considered a “nebulous” understanding of religion, “there could be as many ‘places of religious worship’ as there are homes or tents where humans meditate on the mysteries of life. It would certainly include places in which Satanic cults worship a supernatural evil force which dominates the world.”⁴¹⁵ The dissenters did not believe that “such cults or beliefs” were religious.⁴¹⁶

Although the majority and dissent differed in their conclusion on whether Wicca is a religion, they both agreed on a general understanding of what constitutes religion, including that a belief in some form of deity is an

408. *Id.*

409. *Id.*

410. *Id.*

411. *Id.* at 661.

412. *Id.* at 660 (Jordan, C.J., dissenting).

413. *Id.*

414. *Id.*

415. *Id.*

416. *Id.*

essential component. This view is largely reflective of the states' general approach to this issue. Although there is certainly variance between states as to what they consider to be a religion, in general, states have been reluctant and resistant to embracing the potentially radical implications of the Supreme Court's definition of religion in *Seeger*. They often note that *Seeger* and *Welsh* are merely statutory interpretations and sometimes look to *Yoder* as modifying the United States Supreme Court's understanding of religion.

The Texas Court of Appeals, however, is an exception, embracing *Seeger* and *Welsh*.⁴¹⁷ In *Strayhorn v. Ethical Society of Austin*,⁴¹⁸ the Ethical Society of Austin sought tax-exempt status as a religious organization under the Texas state tax code.⁴¹⁹ The Texas Comptroller denied the Ethical Society's application "on the ground that the Ethical Society must demonstrate that it requires belief in a 'God, Gods, or higher power' . . . in order to qualify."⁴²⁰ The question before the court was "whether a state government may, consistent with the First Amendment to the United States Constitution, require a group to demonstrate its belief in a 'Supreme Being' in order to be considered a religion for statutory purposes."⁴²¹ The court concluded that "[b]ecause the Comptroller's test fails to include the whole range of belief systems that may, in our diverse and pluralistic society, merit the First Amendment's protection, we will affirm the trial court's judgment."⁴²²

Members of the Ethical Society view themselves as being ethical humanists, who place ethics at the center of human relations.⁴²³ The Texas Comptroller argued that its test—requiring belief in god, gods, or a higher power—created "a necessary bright-line rule protecting the state from being required to award tax exemption to any group that calls itself 'religious.'"⁴²⁴ Relying on *Yoder*, the state argued that its rule adheres to the principle that religious beliefs and personal or philosophical beliefs are not synonymous.⁴²⁵ In reaching this conclusion, "[t]he Comptroller relies on the [S]upreme [C]ourt's declaration in . . . *Yoder* that a way of life, however virtuous and admirable, will not have First Amendment protection

417. *Strayhorn v. Ethical Soc'y of Austin*, 110 S.W.3d 458, 461 (Tex. Ct. App. 2003).

418. 110 S.W.3d 458 (Tex. Ct. App. 2003).

419. *Strayhorn*, 110 S.W.3d at 461.

420. *Id.*

421. *Id.*

422. *Id.*

423. *Id.* at 462

424. *Id.*

425. *Id.* at 463.

unless it is rooted in ‘religious belief.’”⁴²⁶ The state argued that *Yoder* “counteracts any expansive reading of religion undertaken in the conscientious objector cases, because it focuses the First Amendment analysis squarely, and exclusively, on the distinction between religious and personal or philosophical beliefs.”⁴²⁷ The Comptroller believed its test to be the only adequate means of distinguishing between personal/philosophical beliefs and religious beliefs.⁴²⁸ The Ethical Society, however, argued that this definition presents too narrow an understanding of religion.⁴²⁹ Relying on *Torcaso*, *Seeger*, and *Welsh*, the Ethical Society asserted that the state’s definition of religion “does not adequately account for the range of belief systems which comprise the broad spectrum of religious faith in contemporary society.”⁴³⁰ However, “because the test encompasses the generic concept of a supernatural reality, the Comptroller assert[ed] that it is sufficiently broad to account for the various diverse religious views existing in contemporary society.”⁴³¹

In analyzing these arguments, the court began with an indication “that the State has a compelling interest in insuring that only qualified religious organizations receive the tax exemption—it cannot be sufficient for a group simply to label itself as a religion in order to enjoy tax-exempt status.”⁴³² It noted that Ethical Culture Societies “have no creed of theology or metaphysics, no set doctrines concerning the unknown mysteries of life. There is no claim to a belief in a supernatural universe or Supreme Being.”⁴³³ However, the court also referenced a book setting forth Ethical Society thought:

What ultimate reality is we do not know; but we have the faith that it expresses itself in the human world as the power which inspires in men moral purpose. Thus the ‘God’ that we love is not the figure on the great white throne, but the perfect pattern, envisaged by faith, of humanity as it should be, purged of the evil elements which retard its progress toward “the knowledge, love, and practice of the right.”⁴³⁴

426. *Id.* at 464.

427. *Id.* at 465.

428. *Id.* at 464-65.

429. *Id.* at 463.

430. *Id.*

431. *Id.* at 465.

432. *Id.* at 464 (citing *Church of the Chosen People v. United States*, 548 F. Supp. 1247, 1252-53 (D. Minn. 1982)).

433. *Id.* at 466.

434. *Id.* at 467 n.9.

Although stating that only religion, not personal belief, is protected under *Yoder*, the Texas Court of Appeals indicated that the *Yoder* decision fails “[to] articulate a workable test for distinguishing personal from religious beliefs.”⁴³⁵ The Texas court agreed with Justice Clark’s statement in *Seeger* that “the distinction between personal and religious beliefs is inherently difficult because ‘in no field of human endeavor has the tool of language proved so inadequate.’”⁴³⁶ The court also expressed concern that “[a]ny inquiry that delves . . . closely into the textual references made by a religion to the existence of God puts the courts in danger of making determinations based on dimly understood, and perhaps misconceived, characterizations of unfamiliar religions.”⁴³⁷ To protect “the full range of religious belief, as expressed in *Seeger*,” the court concluded that it had to reject the Comptroller’s test.⁴³⁸ The court reasoned that “[a]lthough the Ethical Society’s tenets and beliefs may not explicitly reference a divinity, they evidence enough of a sense of *spiritual feeling* that the Society’s claim to religious status should be carefully assessed.”⁴³⁹ Citing the Third Circuit decision in *Malnak*, the Texas Court of Appeals found the test therein to be an appropriate measure of whether an entity constituted a religion:

The test requires that a set of beliefs: (1) address fundamental and ultimate questions having to do with deep and imponderable matters such as the meaning of life and death or man’s role in the universe; (2) be broad in scope and comprehensive in nature; and (3) be accompanied by the presence of certain formal and external signs.⁴⁴⁰

Under this test, the court concluded that the Ethical Society constituted a religion.⁴⁴¹ Thus, while the presence of a deity has been critical to many state courts in assessing whether an organization constituted a religious entity, the Texas Court of Appeals rejected this conclusion. In reaching its definition of religion, the Texas Court of Appeals, like the United States Supreme Court in *Seeger*, looked to the understanding of religion provided by academics outside the legal profession, raising the question of why the views of non-legal experts are of such importance.

435. *Id.* at 467.

436. *Id.* at 467 (citing *United States v. Seeger*, 380 U.S. 163, 175 (1965)).

437. *Id.* at 467-68.

438. *Id.* at 468.

439. *Id.*

440. *Id.* at 469.

441. *Id.* at 469-73.

V. THE SIGNIFICANCE OF OTHER DISCIPLINES' DEFINITIONS OF RELIGION

Justice Oliver Wendell Holmes stated:

[T]he provisions of the Constitution are not mathematical formulas having their essence in their form; they are organic, living institutions transplanted from English soil. Their significance is vital, not formal; it is to be gathered not simply by taking the words and a dictionary, but by considering their origin and the line of their growth.⁴⁴²

In endeavoring to find or present a legal definition of religion, while looking beyond a dictionary is necessary, why should the legal community care or consider what other disciplines have to say regarding what constitutes a religion, especially since there are a number of reasonable concerns associated with doing so? For example, it has been argued that “[r]eligion is one thing to the anthropologist, another to the sociologist, another to the psychologist, another to the theologian, and another to the philosopher.”⁴⁴³ These variations between academics in their respective fields, specifically the differences in their understanding of what constitutes a religion, is at least in part attributable to the type of inquiry being conducted.⁴⁴⁴ “[P]ost-modern . . . theory contends that ‘[e]very field is defined by its own special devices . . . by existence theorems, arguments from invisible hands, and appeals to textual probabilities or archives. . . .’”⁴⁴⁵ Thus, for example, because a sociologist is looking more to the cultural dynamic, her vision will be limited by tools of her discipline, and because a theologian is focused more upon doctrine, her understanding will be confined by the lenses of her analysis. Thus, we may expect that in any discipline we are getting only part of the picture of what constitutes a religion, and that picture will be taken standing from a particular vantage point. While this concern cautions restraint in simply embracing the wholesale theological, philosophical, or sociological definition of religion, it does not counsel

442. *Gompers v. United States*, 233 U.S. 604, 610 (1914).

443. Mark C. Modak-Truran, *Reenchanting the Law: The Religious Dimension of Judicial Decision Making*, 53 CATH. U. L. REV. 709, 721-23 (2004) (citing JOHN HICK, PHILOSOPHY OF RELIGION 3 (2d ed. 1973)) [hereinafter Modak-Truran, *Reenchanting*].

444. Mark Modak-Truran, *The Religious Dimension of Judicial Decision Making and the De Facto Disestablishment*, 81 MARQ. L. REV. 255, 257 n.5 (1998) [hereinafter Modak-Truran, *Religious Dimension*].

445. David M. Zlotnick, *The Buddha's Parable and Legal Rhetoric*, 58 WASH. & LEE L. REV. 957, 1006 (2001).

against trying to utilize the insights of these fields in framing a legal definition of religion.

Although as a general matter, originalists may be opposed to consulting commentators outside the legal profession, there are reasons why they would not necessarily be opposed to doing so in this instance. Originalists normally “eschew an approach that would consider the values of a modern interpreter.”⁴⁴⁶ Approaching the Constitution using “[o]riginalism requires that we give effect to the Framers’ values, as expressed in the language of the document itself.”⁴⁴⁷ Thus, “[i]n determining whether an interpretation would conform with the purposes of a provision, one may consider the normative effects of that interpretation, but only if they are of the kind that the framers’ generation would have embraced.”⁴⁴⁸ In contrast, “normative effects reflecting modern sensibilities that would be alien to the Framers are not relevant to an originalist interpretation.”⁴⁴⁹ But as previously discussed the Founders had concern for the emergence of new religious groups and included them within the ambit of the protections of religious liberty, rather than merely imposing a stagnant, preservative protection of the contemporary religious faiths. Moreover, theology and philosophy inspired the Founders’ creation of religious liberty, and a pre-formal variant of sociology inspired an awareness on the part of the Founders of some of the religious diversity in their colonies, states, and the emerging nation. If it is helpful to look to those disciplines that study religion to understand the contemporaneous practice of religion in the United States, and that assists in fulfilling the Founders’ values of preserving religious liberty by safeguarding growth and changes in religious belief and practice, then considering the insights of other disciplines should not necessarily be deemed an improper project from an originalist perspective.

There are at least five reasons for looking at other fields’ understanding of religion in the quest for a legal definition of religion. One, the United States Supreme Court and various federal and state courts have already looked to other fields in defining religion. In endeavoring to understand the definitions of religion used by the courts, it can be advantageous to understand the definition provided by the particular theorist relied upon by the court. Thus, there already has been a move by courts to consider these other disciplines and their insight into what constitutes religion. In order to apprehend what these courts are doing, it would be wise to consider the

446. John O. McGinnis & Michael B. Rappaport, *Symmetric Entrenchment: A Constitutional and Normative Theory*, 89 VA. L. REV. 385, 391 (2003).

447. *Id.* at 391-92.

448. *Id.* at 392.

449. *Id.*

sources they are utilizing. The influence of theorists and scholars in various fields on the courts will be discussed more fully in the next section of this article. Two, knowledge is not limited to any particular discipline. To develop a more complete picture or understanding of religion, it would be prudent to draw upon knowledge, regardless of whether its source is across an academic discipline border. Three, many of the questions that courts are struggling with in defining religion have also been challenges and questions that other disciplines dedicated to studying religion have confronted and explored. By looking to these other disciplines, it becomes easier to avoid pitfalls experienced by theorists in these various fields and to draw upon their considerable research and analysis. Fourth, the United States is an incredibly complicated and diverse pluralistic religious country. Judges are not experts in religion. To avoid concerns about judges failing to appreciate the full scope of religious diversity in the United States, it is prudent to draw upon experts in the field. Fifth, drawing on advice and insights of religious experts in endeavoring to understand what constitutes religion is not unlike the influence of experts with regard to various other legal issues, for example psychologists' influence in shaping the legal debate regarding the law's understanding of mental defect issues.

It has been claimed that "a profession, like an individual, has come of age when it has developed capacity for interdependent relationships, notable qualities of which are readiness to give and take without anxiety and without need to dominate or to suffer loss of identity."⁴⁵⁰ By taking insights and understanding from various disciplines, that is, by employing interdisciplinary study and analysis, a better understanding may be reached.⁴⁵¹ For example, it has been argued that interdisciplinary education can lead to "the development of the level of human cognition that stimulates thought about an issue from all viewpoints, taking into account varied and, as yet, unthought possibilities."⁴⁵² Advocates of an interdisciplinary approach contend that it offers an opportunity at what can be described as "wisdom."⁴⁵³ For these interdisciplinary proponents, "[w]isdom cannot be confined to a specialized field, nor is it an academic discipline; it is the consciousness of wholeness and integrity that transcends both. Wisdom is

450. Janet Weinstein, *Coming of Age: Recognizing the Importance of Interdisciplinary Education in Law Practice*, 74 WASH. L. REV. 319, 319 (1999) (quoting CHARLOTTE TOWLE, *THE LEARNER IN EDUCATION FOR THE PROFESSIONS* 19 (1954)).

451. See Anita Weinberg & Carol Harding, *Interdisciplinary Teaching and Collaboration in Higher Education: A Concept Whose Time Has Come*, 14 WASH. U. J.L. & POL'Y 15, 22-23 (2004).

452. *Id.*

453. *Id.* at 23.

complexity understood and relationships accepted.”⁴⁵⁴ As an illustration, a family law practitioner and professor has noted that in family law “interdisciplinary studies are not a distraction from, but a critical part of, modern lawyering. It would be futile to isolate legal doctrine and practice from psychology, economics, sociology, religion, and history.”⁴⁵⁵ Similarly, determinations on what constitutes due process and free speech in the public school setting are also linked to an interdisciplinary, rather than purely legal, discourse.⁴⁵⁶ Theologians, psychologists, and sociologists can provide understandings of religion that are worthy of consideration.⁴⁵⁷ Although there are certainly reasons to be cautious in transferring insights and observations from one discipline to another, academic institution divisions “should not be allowed to stand in the way of the transfer or joint production of information and modes of knowledge.”⁴⁵⁸

The Supreme Court, in defining religion in *Seeger*, looked beyond dictionaries to an understanding of religion produced by a prominent liberal Protestant theologian, Paul Tillich. In exploring the discoveries and understanding of other disciplines, the Supreme Court should have analyzed the definition of religion “more deeply. Had it done so, the Court would have found that while it has been grappling with the religion clauses with increasing sophistication, an academic discipline called ‘religious studies’ has been developing rapidly.”⁴⁵⁹ Religious studies scholars have been studying religion using the tools of theology, sociology, psychology, anthropology, and history to create a methodology for understanding religion.⁴⁶⁰ “Much of the academic work has focused on defining, explaining, and describing religion in order to make sense of the place of religion in contemporary society.”⁴⁶¹ But why should the legal community care what these scholars have to say regarding religion? In part, because “[m]any of the questions addressed by these scholars are . . . identical to the questions with which the Supreme Court has had to grapple in construing the [F]irst

454. Joseph W. Meeker, *Wisdom and Wilderness*, LANDSCAPE, Jan. 1981, available at <http://www.cop.com/info/meekart.html> (last visited Mar. 8, 2006).

455. Barbara Bennett Woodhouse, *Mad Midwifery: Bringing Theory, Doctrine, and Practice to Life*, 91 MICH. L. REV. 1977, 1991 (1993).

456. Sarah E. Redfield, *The Convergence of Education and Law: A New Class of Educators and Lawyers*, 36 IND. L. REV. 609, 620-21 (2003).

457. See Knechtle, *supra* note 6, at 523-24.

458. Manuel A. Utset, *Back to School with Coase: The Production of Information and Modes of Knowledge Within and Across Academic Disciplines*, 75 B.U. L. REV. 1063, 1096 (1995).

459. Agneshwar, *supra* note 177, at 320.

460. *Id.*

461. *Id.*

[A]mendment.”⁴⁶² Where problems are analogous, the legal community should look to other disciplines for advice, techniques, data, and new insights.⁴⁶³

Unlike theologians and philosophers, judges, who must perform the difficult and delicate task of defining religion, have no special competence with regard to religion.⁴⁶⁴ By not being experts in religion, an extraordinarily complicated subject matter, the judges’ “actions in defining religion run the risk of establishing the Justices’ own views of religion,” thereby posing a threat to the free exercise rights of religious practitioners of unfamiliar faiths.⁴⁶⁵ However, it has been argued that by drawing on the work of “academics—[including] anthropologists, sociologists, historians, philosophers, psychologists—who have a sub-specialty in studying religious behavior,” judges may be able to avoid this danger.⁴⁶⁶ Thus “religious studies can help lawyers and judges to acknowledge the religiousness of Americans without establishing it.”⁴⁶⁷ Furthermore, even assuming one does not hold a view of judges’ ability that limits their approach in such manner, the religious environment is so complicated and pluralistic that in defining religion “a meaningful discussion requires references to other disciplines such as philosophy.”⁴⁶⁸ By deriving their understanding from the experiences of individuals, a common tool in these disciplines, the possibility is also presented of arriving at a more phenomenological definition—learning what religion is from the ground up, rather than imposing a top-down definition.⁴⁶⁹

Additionally, the incorporation of religious studies into the examination of what constitutes religion is consistent with practices in a wide variety of legal fields, which provide for including the insights and observations of experts outside the legal field to add a more scientific element to the analysis. United States Supreme Court Justice Robert H. Jackson, in referencing a religious studies scholar, noted that the individual offered a scientific approach to the study of religion.⁴⁷⁰ It has been argued that “[u]se of a generalized scientific concept as part of a legal rule or standard

462. *Id.*

463. Utset, *supra* note 458, at 1094.

464. Mitchell, *supra* 150, at 632 n.117 (citing P. KAUPER, RELIGION AND THE CONSTITUTION 24-25 (1964)).

465. C. John Sommerville, *Defining Religion and the Present Supreme Court*, 6 U. FLA. J.L. & PUB. POL’Y 167, 169 (1994).

466. *Id.* at 168.

467. Winnifred Fallers Sullivan, *Judging Religion*, 81 MARQ. L. REV. 441, 442 (1998).

468. Feofanov, *supra* note 154, at 315-16.

469. Sommerville, *supra* note 465, at 169.

470. *United States v. Ballard*, 322 U.S. 78, 93 (1944) (Jackson, J., dissenting).

presumptively fosters correct and consistent adjudication.”⁴⁷¹ However, we should expect these advantages to be lesser where the legal term is skewed by or attached closely with policy considerations and where the science is of lesser sophistication in classifying the term or phenomena.⁴⁷² In making a legal concept scientific, difficulties are particularly likely to occur where the science is “concerned with mental and emotional conditions.”⁴⁷³ Nevertheless, consulting scientific practitioners is still warranted. For example, “whether the test of criminal responsibility is framed in terms of ‘mental disease or defect’ or in terms of capacity to know ‘right from wrong,’ adjudication would proceed foolishly if it failed to seek guidance from the discipline that makes abnormal mental condition its special province of study.”⁴⁷⁴

VI. CONTRIBUTIONS TO THE DEFINITION OF RELIGION FROM PAUL TILLICH, A THEOLOGIAN, WILLIAM JAMES, A PSYCHOLOGIST, AND EMILE DURKHEIM, A SOCIOLOGIST

Whatever their reasons for drawing on insights into what constitutes religion from other disciplines, courts have certainly embraced the views of a number of different significant figures in other disciplines. The views of theologian Paul Tillich, psychologist William James, and sociologist Emile Durkheim have been particularly influential. Courts have used aspects of their theories to define religion for purposes of the First Amendment.

A. PAUL TILLICH’S INFLUENCE ON THE COURTS

The writings of theologian Paul Tillich profoundly influenced various courts’ interpretations of what constitutes a religion.⁴⁷⁵ The Third Circuit noted Tillich’s “thoughts have been influential both with courts and commentators.”⁴⁷⁶ The definition of religion adopted by the United States Supreme Court in *Seeger* and *Welsh* was “derived largely from Tillich.”⁴⁷⁷ In *Seeger*, the United States Supreme Court sought to embrace the increasingly broad understanding of religion that was becoming manifest in

471. Harold L. Korn, *Law, Fact, and Science in the Courts*, 66 COLUM. L. REV. 1080, 1096 (1966), in JACK B. WEINSTEIN ET AL., EVIDENCE: CASES AND MATERIALS 1011 (9th ed. 1997).

472. *Id.*

473. *Id.* at 1097.

474. *Id.* at 1096.

475. Gianella, *supra* note 320, at 1424-26; Harvard Note, *supra* note 3, at 1066-68.

476. *Malnak v. Yogi*, 592 F.2d 197, 208 (3d Cir. 1979).

477. *Grove v. Mead School Dist. No. 354*, 753 F.2d 1528, 1537 n.10 (9th Cir. 1985) (Canby, J., concurring).

the religious community.⁴⁷⁸ To this end, on more than one occasion in *Seeger*, the Court referenced and quoted approvingly theologian Paul Tillich, who it described as an eminent Protestant theologian.⁴⁷⁹ The Court noted that Tillich “identifies God not as a projection ‘out there’ or beyond the skies but as the ground of our very being.”⁴⁸⁰ In trying to identify non-traditional religions that would qualify for protection under the First Amendment, the Court looked to Tillich’s ultimate concern:

And if that word [God] has not much meaning for you, translate it, and speak of the depths of your life, of the source of your being, [of] your ultimate concern, *of what you take seriously without any reservation*. Perhaps, in order to do so, you must forget everything traditional that you have learned about God⁴⁸¹

With religion no longer requiring a god or gods, the *Seeger*/Tillichian functional phenomenological⁴⁸² approach “treats an individual’s ‘ultimate concern’—whatever that concern be—as his ‘religion.’”⁴⁸³ It is not “difficult to see why this philosophy would prove attractive in the American constitutional framework.”⁴⁸⁴ For, as noted by the Third Circuit, “[o]ne’s views, be they orthodox or novel, on the deeper and more imponderable questions—the meaning of life and death, man’s role in the Universe, the proper moral code of right and wrong—are those likely to be the most ‘intensely personal’ and important to the believer. They are . . . ultimate concerns.”⁴⁸⁵ Courts shifting their analysis from traditional definitions of religion towards an “ultimate concern” approach is indicative of the significant impact of Tillich.

478. *United States v. Seeger*, 380 U.S. 163, 180 (1965); Harvard Note, *supra* note 3, at 1066 (“In *Seeger*, the majority explicitly relied on the views of several progressive theologians, notably Paul Tillich, and in so doing, tapped into one of the most respected, yet most expansive, traditions in the phenomenological approach to religion.”).

479. *Seeger*, 380 U.S. at 180. *Cf.* *Lewis v. Sobol*, 710 F. Supp. 506, 514 (S.D.N.Y. 1989) (describing Tillich without the accolades, simply as a liberal theologian).

480. *Seeger*, 380 U.S. at 180.

481. *Id.* at 187 (citing PAUL TILlich, *THE SHAKING OF THE FOUNDATIONS* 57 (1948)).

482. “Phenomenology” is “the typological classification of a class of phenomena.” MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 869 (10th ed. 1993).

483. *Lewis v. Sobol*, 710 F. Supp. 506, 514 (S.D.N.Y. 1989); *Int’l Soc. for Krishna Consciousness, Inc. v. Barber*, 650 F.2d 430, 440 (2d Cir. 1981); *see United States v. Levy*, 419 F.2d 360, 362 (8th Cir. 1969) (“[Religion] in the largest and most basic sense of the word, is ultimate concern.” (citing PAUL TILlich, *THEOLOGY OF CULTURE* 7-8 (1959))).

484. *Malnak v. Yogi*, 592 F.2d 197, 208 (3d Cir. 1979).

485. *Id.*

B. WILLIAM JAMES'S INFLUENCE ON THE COURTS

The writings of philosopher, psychologist, theologian, and sociologist William James have also profoundly affected the Courts. Justice Jackson's conclusion in *Ballard* "that religious faith is more a matter of emotional experience than of rational inquiry was heavily influenced by the psychological and phenomenological studies of religious conversions by William James."⁴⁸⁶ Jackson stated that "William James, who wrote on these matters [religion] as a scientist, reminds us that it is not theology and ceremonies which keep religion going. Its vitality is in the religious experiences of many people."⁴⁸⁷ Jackson's embrace of an internal, psychological, and individualistic definition of religion incorporates James's understanding of religion.⁴⁸⁸ Similarly, the Second Circuit Court of Appeals borrowed from James its definition of religion: "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."⁴⁸⁹ According to the Second Circuit, James conceives of the divine with god or gods being unnecessary, instead it is used "in its broadest sense as denoting any object that is godlike, whether it is or is not a specific deity."⁴⁹⁰ Consequently, the Second Circuit broadly construes divinity, while looking for an intense psychological reaction to the divine. As noted by the United States District Court for the Northern District of New York, application of the Jamesian definition requires "the factfinder to delve into the internal operations of the claimant's mind" in determining whether a belief is religious in nature.⁴⁹¹

C. EMILE DURKHEIM'S INFLUENCE ON THE COURTS

Sociologist Emile Durkheim contributed his social and behavioral⁴⁹² definition of religion. The Third Circuit's test for determining if something is a religion developed out of the philosophical and sociological works of

486. Michaelson, *supra* note 300, at 339 n.162.

487. *United States v. Ballard*, 322 U.S. 78, 93 (1944) (Jackson, J., dissenting).

488. Michaelson, *supra* note 300, at 339 n.162 (1984); see Garrett Epps, *What We Talk About When We Talk About Free Exercise*, 30 ARIZ. ST. L.J. 563, 564 (1998).

489. *United States v. Sun Myung Moon*, 718 F.2d 1210, 1227 (2d Cir. 1983) (citing WILLIAM JAMES, *THE VARIETIES OF RELIGION* 31 (1910)); see *Patrick v. LeFevre*, 745 F.2d 153, 157 (2d Cir. 1984) (citing WILLIAM JAMES, *THE VARIETIES OF RELIGION* 32 (1910)); *Selah v. Goord*, 255 F.2d 42, 44 (N.D.N.Y. 2003).

490. *Sun Myung Moon*, 718 F.2d at 1227 (citing James, *supra* note 326, at 34).

491. *Keesh v. Smith*, No. 9:04CU0779NAMGJD, 2006 WL 516793, at *4 (N.D.N.Y. Mar. 2, 2006).

492. Epps, *supra* note 488, at 564.

Emile Durkheim.⁴⁹³ The Third Circuit indicated that external/formal ritualistic elements are “helpful in supporting a conclusion of religious status given the important role such ceremonies play in religious life.”⁴⁹⁴ The court specifically referenced Durkheim’s finding that these external/formal ritualistic elements “are always common to a determined group which makes profession of adhering to them and to practicing rites connected with them[.]”⁴⁹⁵ A point Durkheim summarized by stating that “[i]n all history, we do not find a single religion without a Church.”⁴⁹⁶ Courts utilizing Durkheim’s definition find “that religion implies community.”⁴⁹⁷ Consequently, these courts look for an external and formal nature, rather than an internal one. This is the inverse of the approach of the Second Circuit, which is modeled on James’s view of religion.

VII. REACHING DEEPER INTO OTHER DISCIPLINES FOR INSIGHTS INTO DEFINING RELIGION FOR FIRST AMENDMENT PURPOSES

By reaching deeper into other disciplines than the courts have so far, it becomes easier to see problems with the definitions of religion that have been adopted by courts, particularly the aforementioned definitions based on the views of Tillich, James and Durkheim. Furthermore, other disciplines have already confronted many of the same questions and difficulties in defining religion with which courts are currently struggling. In doing so, they have achieved insights that can be helpful in formulating a better definition of religion for First Amendment purposes.

A. ONE ULTIMATE CONCERN FOR EVERYONE

A deep yearning and restlessness within the human soul forces it to struggle and strive for fulfillment, as it endeavors to reach beyond itself into the infinite.⁴⁹⁸ Paul Tillich recognizes this internal need to seek fulfillment:

493. *Malnak v. Yogi*, 592 F.2d 197, 209 n.44 (3d Cir. 1979); *see Africa v. Pennsylvania*, 662 F.2d 1025, 1032 n.12 (3d Cir. 1981) (adopting Judge Adams’s concurrence as the Third Circuit’s definition of religion).

494. *Malnak*, 592 F.2d at 209.

495. *Id.* at 209 n.44 (citing EMILE DURKHEIM, *THE ELEMENTARY FORMS OF THE RELIGIOUS LIFE* 43-44 (1915)); *see Way Int’l v. Limbach*, 552 N.E.2d 908, 911 (Ohio 1990) (citing EMILE DURKHEIM, *THE ELEMENTARY FORMS OF THE RELIGIOUS LIFE* 43-44 (Joseph W. Swain trans., 1915)).

496. *Malnak*, 592 F.2d at 209 n.44.

497. *Wilson v. Beame*, 380 F. Supp. 1232, 1239 (N.Y.E.D. 1974) (citing DURKHEIM, *supra* note 495, at 42-47).

498. *See* PAUL TILlich, *DYNAMICS OF FAITH* 13 (1957) (explaining that humans seek fulfillment in the infinite).

“the human heart seeks the infinite because that is where the finite wants to rest.”⁴⁹⁹ However, if, as Søren Kierkegaard theorized, an infinite gulf exists between the infinite and finite, a problem develops when people attempt to bridge the gap between humanity’s finite constraints and the infinite itself.⁵⁰⁰ Although people may desire to rest in the infinite, their finite constraints prevent this happy slumber and leave them with a conditioned understanding of the infinite, which is itself unconditional.⁵⁰¹ One result of this conditioned understanding is that certain concepts of religion become difficult to accept after the separation between the two spheres is shattered. Consequently, humans seek to reconcile and to justify certain facets of religion into a comprehensible, accessible form, an act which perhaps does not demonstrate weakness as Freud or Marx⁵⁰² would argue, but which is instead a manifestation of an inherent and reasonable human response. According to Tillich, the need to be oriented by something beyond the finite realm is a necessity that is inherent within human existence; without it, people have a gap in their existence.⁵⁰³ An ultimate concern fills this gap⁵⁰⁴—religion expressed through an ultimate concern cannot be avoided even by the most antagonistic opponents of god or gods. For Tillich, everyone has a religion because everyone possesses and is possessed by an ultimate concern.⁵⁰⁵

B. LACK OF UNITY OF SELF/MORE THAN ONE ULTIMATE CONCERN

A significant problem in Tillich’s analysis is the objection that people do not in this era, or perhaps any era, possess a unified sense of self. Consequently, they do not have a single ultimate concern, but rather a broad array of transitory and sometimes conflicting, important, though not ultimate, concerns. With the classical image of God being fractured under the potent force of materialistic progress, cultural relativism, and alternative scientific paradigms for defining the world, the conceptualization of self is being deconstructed in a corresponding manner with every fracture in the model of God deepening the cracks in our imaginings of the deficient

499. *Id.*

500. See, e.g., Lynn Poland, *The New Criticism, Neoorthodoxy, and the New Testament*, 65 J. Religion 459, 474 (1985); STEPHEN TOMKINS, A SHORT HISTORY OF CHRISTIANITY 223 (2005); ARLAND USSHER, JOURNEY THROUGH DREAD 123 (1968).

501. See TILLICH, *supra* note 498, at 14.

502. Doug Padgett, *Anthropology of Religion*, May 1998, <http://www.indiana.edu/~wanthro/religion.htm> (explaining Freud and Marx’s view of origins of religion).

503. TILLICH, *supra* note 498, at 1-2.

504. *Id.*

505. Harvard Note, *supra* note 3, at 1076 (citing TILLICH, *supra* note 498, at 63-64).

reproduction: the self.⁵⁰⁶ Although Western civilization is still pervaded by an abundance of the assumed truths of its philosophical parents and ancestors, including notably Augustine's sense of self as existing in imperfect reflection of God, the rise of postmodernist thought and relativistic understandings of the world have substantially effaced for the contemporary world the Augustinian model of the self as derived from God.⁵⁰⁷ Without a seemingly infinite singular locus of orientation for the self in the medium of God, individuals, it can be argued, have been transformed into the Platonic concept of the democratic soul.⁵⁰⁸ Plato conceived of the democratic soul as being the kaleidoscopic person with his or her orientation being directed towards a myriad of finite elements, which both cooperate and compete to define the concept of self.⁵⁰⁹ Thus, people are not unified toward one object God, nor toward one ultimate concern.

506. See Augustine, *supra* note 2, at 19.

507. See generally Augustine, *supra* note 2, at 19.

For even then I was; I lived: I felt: even so early I had an instinct for the care of my own being, a trace in me of that most profound Unity whence my being was derived; in my interior sense I kept guard over the integrity of my outward sense perception, and in my small thoughts upon small matters I had come to delight in the truth. I hated to be wrong, had a vigorous memory, was well trained in speech, delighted in friendship, shunned pain, meanness and ignorance. In so small a creature was not all this admirable and reason for praise? Yet all these were the gifts of my God, for I did not give them to myself. All these were good and all these were I. Therefore He Who made me is good and He is my Good: and in Him I shall exult for all the good qualities that even as a boy I had. But in this lay my sin: that I sought pleasure, nobility, and truth not in God but in the beings He had created, myself and others. Thus I fell into sorrow and confusion and error. Thanks be to Thee, my Joy and my Glory and my Hope and my God: thanks be to Thee for Thy gifts: but do Thou preserve them in me. Thus Thou wilt preserve me, and the things Thou hast given me will increase and be made perfect, and I shall be with Thee: because even that I exist is Thy gift.

Id.

508. See PLATO, THE REPUBLIC 252-53 (Richard W. Sterling & William C. Scott trans., 1985) (describing the "democratic man" as analyzing everything with "the rule of equality").

509. *Id.* at 253. Plato contends that the rise of a democratic age destroys the unity of people's orientation towards any particular value. *Id.* at 252. They no longer have one goal, honor in the timocratic age, or wealth in the oligarchic age, but instead people have a multitude of orientations that reflect the unleashed confusion of a democratic state that fails to orient its people towards a single objective. *Id.* at 253-54. A democratic soul

divides his expenditures of time, money, and effort equally between the necessary and unnecessary pleasures. . . . He yields to each appetite as it makes its presence felt so that it appears to be a matter of random choice. Then gives himself over to it until he is satisfied. After that, he turns to some other pleasure, rejecting none and treating all as equally enjoyable. . . . So he lives his life day by day, indulging each appetite as it makes itself felt. One day he is drinking heavily and listening to the flute; on the next he is dieting and drinks only water. Then he tries some exercise, only to lapse into idleness and lethargy. Sometimes he seems to want to be the philosopher. More frequently, he goes in for politics, rising to say or do whatever comes into his head. If he develops an enthusiasm for military men, he rushes to join them; if for businessmen, then he is off in that direction. His life lacks all discipline and order, yet

Tom Wolfe, a prominent American writer and cultural critic, illustrates Plato's point about the democratic soul. Wolfe writes, "[n]ow is a great time for new religions to pop up. There are people who get religious about jogging, they get religious about sex. . . . Health foods have become the basis of a religion. ESP, of course, flying saucers, anything is fertile ground now. There's a new messiah born every day."⁵¹⁰ Depending upon the analyst's perspective, either people have been freed from the monolithic orientation of self as an inaccurate replica of God and released into a world with a nearly limitless multitude of potentialities that create numerous ephemeral conceptualizations of self, or the self has been imprisoned within a relativistic funhouse with swiftly tilting mirrors that briefly reflect distorted images that keep people enslaved by their constantly changing nature. Regardless, there is an embrace in society of the surface and the swiftly changing as opposed to the deeper and the unchanging.⁵¹¹ Consequently, it becomes difficult to have only one ultimate concern.

As an illustration, the deconstruction of the unity of self seems to culminate in the almost absolute annihilation of the unitary self as portrayed by Cindy Sherman in her photographic self-portraits.⁵¹² Sherman created a picture gallery of "self-portraits" which cannot be identified from an objective viewpoint as containing the same subject, namely the artist herself. Although she seems to endeavor to present a visual poetry with every moment possessing enormous reality, truth, emotion, meaning, and significance, Sherman does not present the complete image of herself in any of her photographs. In addition to the literal aspect of removing at least some part of her physical body from each photograph, Sherman does not present any progression between the photographs, thus leaving the audience with a controlled glimpse of an incomplete moment, rather than an extended portrayal of the self. Her work, which does not provide enough information to complete any story, invites the audience to define and to explain, what they see in that moment. The varying presentations of self provided by Sherman in her photographic self-portraits unveil an understanding of the self that exists in a myriad of diverse moments and forms, which are completely disconnected. In her self-portraits, Sherman

he calls it a life of pleasure, freedom, and happiness and is resolved to stay the course. . . . He is a kaleidoscopic man, a man of many different humors, fair and colorful as the city itself. Many men and women would count him fortunate as the one who displays the greatest diversity in personal qualities and life styles.

Id. at 252-53.

510. TOM WOLFE, *TWENTY YEARS OF ROLLING STONE: WHAT A LONG STRANGE TRIP IT'S BEEN* 340 (J.S. Wenner ed. 1987).

511. See Pamela McCorduck, *Sex, Lies, and Avatars*, *WIRED*, Apr. 1996, at 108.

512. See CINDY SHERMAN, *CINDY SHERMAN* (1987).

appears as animals, pieces of plastic, grass, curtains, monsters, men, and women; she is dead, alive, elegant, tawdry, young, and old. Her concept of self is imparted as a completely diverse array of unconnected elements that cannot be classified as different parts of the same self; rather, they are different notions of self, which exist independently. Each photograph reveals a different self in her multiplicity of beings. Unlike Augustine, whose sense of self was organized around God, Sherman destroys the concept of a singular orientation; thereby, she prevents the formation of a unitary order. She presents a postmodern self with no clear center of orientation for defining the world. Her concept is of a diverse multitude of selves such as would be presented by looking through a constantly changing kaleidoscope. The problem raised by this concept of self for Tillich's paradigm is that there is no singular ultimate concern, because the individual lacks the consistency necessary to have a single ultimate concern.

C. DIVINE AND DEMONIC

In his text *Dynamics of Faith*, Tillich imparts his view that humanity endeavored to create within the realm of finite understanding a clear, distinct dichotomy between good and evil, rather than accepting the complication that one God of both good and evil would present to a unified image of self.⁵¹³ Therefore, humans have discovered a compartmentalized separation between the divine and demonic in various forms, for example, Christianity's revelation of a God of love and Satan, a manifestation of evil. Consequently, people's orientation toward God, who permeates the finite and relativistic world, is transformed from "both divine and demonic" into a quest for the "morally good and the logically true."⁵¹⁴ Humanity desires to alleviate the confusion and pain that is suffered as a result of the ambiguity and contradictions, which people's finite minds perceive when attempting to understand a demonic and divine God.⁵¹⁵ This causes a fight to be "waged against the demonic-destructive element in the holy."⁵¹⁶ Tillich describes this fight as having been "so successful that the concept of the holy was changed."⁵¹⁷ He believes, however, that this new finite conceptualization of God does not provide "genuine meaning."⁵¹⁸ Because

513. See TILlich, *supra* note 498, at 15 (describing the ambiguity of "the holy" as "divine-demonic").

514. *Id.*

515. *Id.*

516. *Id.*

517. *Id.*

518. *Id.*

humanity endeavors to rest in its true home, a home which its finite constraints prevent it from reaching, people create a false image of God and religion.⁵¹⁹ This religion lacks, according to Tillich, the intimations of God, as “the ‘separated,’ the ‘transcending,’ the ‘fascinating and terrifying,’ the ‘entirely other.’”⁵²⁰ For Tillich, this provides an indication of the lack of “genuine meaning” derived from such a finite conception of God.⁵²¹ He contends that a dichotomy between good and evil results from humanity’s attempt to create a constrained and conditioned finite understanding of the infinite.

Although Tillich understands the desire of the human soul to extend beyond itself into what is “true and good,” he, nevertheless, calls for the death of humanity’s creation of a true God, who is constrained and conditioned by the finite shackles imposed by our limitations.⁵²² This, in his view, is necessary in order to transcend toward the infinite. Because Tillich recognizes “the infinite distance of the finite from the infinite,” he decries any attempt to reach the infinite via finite means.⁵²³ For Tillich, every attempt to get deeper into a religion by eliminating the ambiguity and conflicts perceived by people’s finite minds in a search for the truth of God does not in fact bring people closer to God.⁵²⁴ Quite to the contrary, Tillich believes that the more a person understands about God, the farther away that person moves from the infinite.⁵²⁵ Every attempt to explain God produced via people’s finite minds, hearts, and souls leads to a more erroneous understanding of God.⁵²⁶ Therefore, once subjugated by the conditional, God is removed from a position of being and misplaced into a position of existence as a being, which mutates God into an “object.”⁵²⁷ Once finite limitations are placed upon God, the infinite does not exist within humanity’s finite realm as the All; rather, God is transformed into the all-powerful, all-knowing, all-loving God. This destroys the infinite separation between God and humanity.

Consequently, Tillich disagrees with the view of God as divine; rather, for Tillich, God is “both divine and demonic.”⁵²⁸ He indicates that humanity has witnessed and endured some horrible atrocities due to orientation

519. *Id.* at 12-17.

520. *Id.* at 15.

521. *Id.*

522. *Id.*

523. *Id.* at 13.

524. *Id.* at 30-35.

525. *Id.* at 30-35.

526. *Id.* at 30-40.

527. *Id.* at 14.

528. *Id.* at 15.

towards a God. More controversially, he disagrees with the dismissal of these actions as completely disassociated from true faith.⁵²⁹

The holy which is demonic, or ultimately destructive, is identical with the content of idolatrous faith. *Idolatrous faith is still faith.* The holy which is demonic is still holy. This is the point where the ambiguous character of religion is most visible and the dangers of faith are most obvious: the danger of faith is idolatry and the ambiguity of the holy is its demonic possibility. Our ultimate concern can destroy us as it can heal us.⁵³⁰

While humanity endeavored to create a compartmentalized or clear dichotomy between good and evil with God only manifesting within the good sphere, Tillich disagrees with this separation by arguing that God is “both divine and demonic” and “both creative and destructive.”⁵³¹ For example, the nation for the Nazis is an idolatrous faith, but even though idolatrous, the nation is an ultimate concern and Nazism a religion.⁵³² Furthermore, perhaps revealing some of his Protestant religious background, Tillich states, “the holy originally lies below the alternative of the good and the evil,” which correlates in some aspects extremely well with the Old Testament representation of God as a Creator and Destroyer.⁵³³ Within the Old Testament, God creates the world and destroys Sodom and Gomorrah.⁵³⁴ While both of these actions could be explained as a synthesis of creation and destruction, the story of the flood perhaps provides a better explanation of the intertwining of creation and destruction.⁵³⁵ For God with one act, both destroys the current state of existence of humanity via the flood and creates, via Noah and the Ark, a new order and a new orientation for humanity.⁵³⁶

For Tillich, God is “both divine and demonic,” yet God is in some respects neither good nor evil.⁵³⁷ God exists beyond these finite constraints; God transcends our finite perceptions of what is justice, truth, real,

529. *Id.* at 16.

530. *Id.* (emphasis added).

531. *Id.* at 14-15.

532. *Id.* at 44 (“If the nation is someone’s ultimate concern, the name of the nation becomes a sacred name and the nation receives divine qualities which far surpass the reality of the being and functioning of the nation.”).

533. *Id.* at 15.

534. See *Genesis* 1:1-1:3 (“In the beginning God created the heavens and the earth. And the earth was without form and void; and darkness was upon the face of the deep. And the Spirit of God moved upon the face of the waters. And God said, ‘Let there be light’; and there was light.”); *Genesis* 18:16-19:29.

535. See *Genesis* 6:1-11:31.

536. See *id.*

537. TILLICH, *supra* note 498, at 15.

love, compassion, etc. For Tillich, God remains inexplicable; the closest humanity can get to know God is to say that God is qualitatively beyond the limits of people's finite understanding. God does not embody the qualities of goodness or even complete goodness. God exists in an unconditioned state, which is fundamentally indescribable. Therefore, when Tillich argues that God is "both divine and demonic," he does not simply present the Old Testament God, which performs acts of creation and destruction.⁵³⁸ God transcends these finite constraints. For Tillich, God stands at a point where chaos and the void merge to become one unitary, absolute, infinite being: God is contradiction—everything yet nothing.

William James, Emile Durkheim, and Mircea Eliade, a Romanian religious studies scholar, among others, would vigorously disagree with Tillich's understanding of religion as being an approach to the divine and the demonic, the sacred and the profane. James defined religion as "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."⁵³⁹ The Second Circuit Court of Appeals adopted this Jamesian definition of religion.⁵⁴⁰ To be divine, the belief in a god or gods is deemed unnecessary. For James and the Second Circuit employ the word divine "in its broadest sense as denoting any object that is godlike, whether it is or is not a specific deity."⁵⁴¹ The Second Circuit, believing that "[i]n every religion there is an awareness of what is called divine and a response to that divinity," accepted James's understanding of religion as an individual's relation to what they consider divine.⁵⁴² Helping to provide an indication if something is divine or not, James noted that "the individual feels impelled to respond to [the divine] solemnly and gravely, and neither by curse nor jest."⁵⁴³ The key component of religion is that a person stands in apprehension of that which they consider to be divine or sacred, not as Tillich would suggest standing in apprehension of the demonic and divine.

538. *Id.* at 16.

539. *Patrick v. LeFevre*, 745 F.2d 153, 158 (2d Cir. 1984) (citing WILLIAM JAMES, *THE VARIETIES OF EXPERIENCE* 31 (1910)).

540. *United States v. Sun Myung Moon*, 718 F.2d 1210, 1227 (2d Cir. 1983) (citing JAMES, *supra* note 539, at 31); *see Patrick*, 745 F.2d at 157 (citing JAMES, *supra* note 539, at 31); *Selah v. Goord*, 255 F. Supp. 2d 42, 44 (N.D.N.Y. 2003).

541. *Sun Myung Moon*, 718 F.2d at 1227; *see* WILLIAM JAMES, *THE VARIETIES OF RELIGIOUS EXPERIENCE* 48 (1958) ("[W]e must interpret the term 'divine' very broadly, as denoting any object that is *godlike*, whether it be a concrete deity or not.") (emphasis in original).

542. *Sun Myung Moon*, 718 F.2d at 1227 (citing 7 *THE ENCYCLOPEDIA OF PHILOSOPHY* 143 (1972)).

543. *Donovan*, *supra* note 178, at 80 (citing WILLIAM JAMES, *THE VARIETIES OF RELIGIOUS EXPERIENCE* 31, 38 (1916)).

Similarly, Emile Durkheim defined religion as “a unified system of beliefs and practices relative to sacred things, that is to say, things set apart and forbidden—beliefs and practices which unite into one single moral community called a Church, all those who adhere to them.”⁵⁴⁴ This “classic definition of religion includes the fundamental dichotomy of sacred/profane as universal absolute.”⁵⁴⁵ Though nothing is inherently or intrinsically sacred or profane, for Durkheim the distinction between the sacred and the profane is essential to religiosity.⁵⁴⁶ Mircea Eliade also focused on this distinction between the sacred and the profane. For Eliade, the sacred “is identified as the source of significance, meaning, power and being, and its manifestations as hierophanies, cratophanies, or ontophanies accordingly (appearances of the holy, of power, or of being).”⁵⁴⁷ For Durkheim and Eliade, the distinction between the sacred and the profane was the foundational cornerstone of all religion; without it, a religion does not exist.

Tillich’s more expansive definition of religion would include within its ambit all that James, Durkheim, or Eliade would find to be religion, but they would exclude some views that Tillich would not. Implicit within their more constrained view of religion as approaching the divine or the sacred, not the demonic or profane, rests an assumption that religion is in pursuit of good as opposed to evil. Though James argued that a healthy religion tries to understand “pessimistic elements” and “evil facts,”⁵⁴⁸ he would not accept religion as pursuing the purely demonic.⁵⁴⁹ If the divine is not the absolute whole of things, divine and demonic, religion must be in pursuit of “the most ideal part.”⁵⁵⁰ This viewpoint is not a denial of status as religion on the basis of the fact that a religious group promotes or engages in immoral or improper conduct. Rather, the group that is pursuing the demonic and not the divine, the profane and not the sacred, would simply not be religious, regardless of their good morals or ethics. Alternatively, Tillich’s view allows for greater inclusion of groups that expressly embrace the demonic or the profane. The distinction between

544. Epps, *supra* note 487, at 569 (citing DURKHEIM, *supra* note 494, at 47).

545. JOEL ELLIOTT, ÉMILE DURKHEIM AND RELIGION: AN ANNOTATED BIBLIOGRAPHY n.41 (1999), at <http://www.unc.edu/~elliott/durkheim.html> (citing Edmund Leach, *Anthropology of Religion: British and French Schools*, in II NINETEENTH CENTURY RELIGIOUS THOUGHT IN THE WEST 215-62 (Ninian Smart et al. eds., 1985).

546. LEWIS A. COSER, MASTERS OF SOCIOLOGICAL THOUGHT: IDEAS IN HISTORICAL AND SOCIAL CONTEXT 137 (2d ed., 1977).

547. Bryan Rennie, *Mircea Eliade*, in ROUTLEDGE ENCYCLOPEDIA OF PHILOSOPHY (1998), available at <http://www.westminster.edu/staff/brennie/eliade/mebio.htm>.

548. JAMES, *supra* note 541, at 151.

549. *Id.* at 83-151.

550. *Id.* at 126 n.4.

Tillich's view of the demonic as opposed to James, Durkheim and Eliade's views, leads to the question whether Satanism is a religion.

Courts approach this issue with timidity; they have not reached a determination of which of the aforementioned approaches to adopt in addressing Satanism. Frequently, courts will indicate that they are assuming for purposes of analysis that Satanism is a religion,⁵⁵¹ but then afford extremely little protection⁵⁵² to its adherents or exercise little concern about its establishment.⁵⁵³ These cases generally arise in the prison context. Courts assume that the prisoner is a devout religious believer in Satanism for purposes of analysis, then find that the department of corrections or bureau of prisons acted for legitimate penological reasons in restricting access to Satanist materials, such as the *Satanic Bible*.⁵⁵⁴ Legitimate penological interests are implicated, according to some courts, because "large portions of *The Satanic Bible* have great potential for fomenting trouble of all kinds in a prison setting, leading to difficulty in maintaining security and order and in delivering rehabilitative services in the prisons."⁵⁵⁵ Similarly, in at least one case, the court has assumed that

551. See, e.g., *Kunselman v. W. Reserve Local Sch. Dist., Bd. of Educ.*, 70 F.3d 931, 931 (6th Cir. 1995) (assuming that Satanism was a religion).

552. See *Carpenter v. Wilkinson*, 946 F. Supp. 522, 528, 530 (1996) (holding that a prison inmate's *Satanic Bible* could be prohibited).

553. *Kunselman*, 70 F.3d at 531.

554. *Carpenter*, 946 F. Supp. at 528, 530.

[T]his case is about a very narrow issue: whether there are legitimate penological reasons for prohibiting the plaintiff from possessing *The Satanic Bible*. The Court concludes that there are. The Court draws no conclusion regarding whether the prison ever can or should completely prohibit the practice of Satanism, since that has not been made an issue in this case. Here, all that is concluded is that prohibiting the possession of *The Satanic Bible* does not substantially burden the plaintiff's ability to practice his "religion" and is validated by legitimate penological concerns for safety and security.

Id.; see *McCorkle v. Johnson*, 881 F.2d 993, 995-96 (11th Cir. 1989); *Doty v. Lewis*, 995 F. Supp. 1081, 1086-87 (D. Ariz. 1998); *Howard v. United States*, 864 F. Supp. 1019, 1030 (D. Colo. 1994).

555. *Carpenter*, 946 F. Supp. at 529.

In addition, much of the publication advocates preying on the weak in any way possible for one's own gratification—clearly an extremely dangerous "teaching" in any setting, but especially in a prison where the weak have fewer avoidance strategies at their disposal. A few examples of isolated quotations will suffice to illustrate the point. The *Satanic Bible* states:

Hate your enemies with a whole heart, and if a man smite you on one cheek, SMASH him on the other!; smite him hip and thigh, for self-preservation is the highest law!

Give blow for blow, scorn for scorn, doom for doom—with compound interest liberally added thereunto! Eye for eye, tooth for tooth, aye four-fold, a hundred-fold! Make yourself a Terror to your adversary, and when he goeth his way, he will possess much additional wisdom to ruminate over. Thus shall you make yourself respected in all the walks of life, and your spirit—your *immortal* spirit—shall live, not in an

Satanism is a religion and that the plaintiff was a sincere practitioner thereof, but allowed prison officials to restrict access to cloth and incense for Satanists, while at the same time the prison officials allowed Native American tribal religious groups in the prison to keep and use similar items.⁵⁵⁶ A plaintiff was also denied access to a copy of the *The Necronomicon*, a Satanic book of magic, because of fears that he would use it to try to cast spells on other inmates, thereby allowing him to pray on other prisoners by instilling fear in them.⁵⁵⁷ The same inmate was denied access to a Satanic Bible because of its approval of brutality, masochism, and racism, among other things, which could be disruptive to the penal institution environment.⁵⁵⁸

The Nevada Supreme Court addressed this issue in another context, a death penalty case.⁵⁵⁹ In a plurality opinion, the court determined that the prosecutor improperly utilized the defendant's religious beliefs in Satanism to demonstrate bad character in violation of the defendant's First Amendment free exercise rights as incorporated against the states through the Fourteenth Amendment.⁵⁶⁰ In dissent, Justice Steffen did not deny that Satanists have First Amendment protections to the right to free speech, but

intangible paradise, but in the brains and sinews of those whose respect you have gained.

The seven deadly sins of the Christian Church are: greed, pride, envy, anger, gluttony, lust, and sloth. Satanism advocates indulging in each of these "sins" as they all lead to physical, mental, or emotional gratification.

Satanism encourages its followers to indulge in their natural desires. Only by so doing can you be a completely satisfied person with no frustrations which can be harmful to yourself and others around you. Therefore, the most simplified description of the Satanic belief is: INDULGENCE INSTEAD OF ABSTINENCE[.]

The only time a Satanist would perform a human sacrifice would be if it were to serve a two-fold purpose; that being to release the magician's wrath in the throwing of a curse, and more important, to dispose of a totally obnoxious and deserving individual. . . . The question arises, "Who, then, would be considered a fit and proper human sacrifice, and how is one qualified to pass judgment on such a person?" The answer is brutally simple. Anyone who has unjustly wronged you—one who has "gone out of his way" to hurt you—to deliberately cause trouble and hardship for you or those dear to you. In short, a person asking to be cursed by their very actions.

Intense sexual feeling should accompany this step of the [sexual] ritual, and after sufficient imagery is obtained, as strong an orgasm as is possible should serve as climax to this step. This climax should be attained using any masturbatory or auto-erotic means necessary.

Intense, calculated hatred and disdain should accompany this step of the [destruction] ceremony, and no attempt should be made to stop this step until the expended energy results in a state of relative exhaustion on the part of the magician.

Id. at 529-30 (citing *THE SATANIC BIBLE*, 33, 46, 81, 88-89, 132, 134 (1969)).

556. *Doty v. Lewis*, 995 F. Supp. 1081, 1085-86 (D. Ariz. 1998).

557. *Id.* at 1087.

558. *Id.* at 1086-87.

559. *Flanagan v. State*, 846 P.2d 1053 (Nev. 1993).

560. *Id.* at 1058-59 (plurality opinion).

denied that Satanism constituted a religion.⁵⁶¹ He stated that generally accepted or popular connotations of the word religion do not include Satanism.⁵⁶² In his dissenting opinion, Justice Steffen incorporated James, Durkheim, and Eliade's rationale for excluding demonic adherences from being classified as religious: "The point to be made is that Satanists have tattooed themselves with character impressions of an unambiguous nature. They have embraced evil, including amorality and lawlessness, as desirable objectives."⁵⁶³ Such considerations were certainly not far from the minds of the dissenting Georgia Supreme Court justices in *Ravenwood* when they accused the majority of having framed an approach to determining what constitutes a religion that would errantly allow "places in which Satanic cults worship a supernatural evil force which dominates the world" to be considered places of religious worship.⁵⁶⁴ Nor were such considerations far from the view of the Georgia Supreme Court majority when it responded to the dissenters by attesting that "demonology and stereotypical witchcraft most emphatically do not constitute religion."⁵⁶⁵ The unambiguous pursuit of evil would exclude Satanism from being considered a religion in the Jamesian vision and under the Georgia Supreme Court and Justice Steffen's viewpoints, but not in Tillich's understanding of religiosity.⁵⁶⁶

D. INDIVIDUALIZED OR COMMUNAL, INTERNAL OR EXTERNAL

Another complexity in defining religion is whether religion should be understood as being individual or communal, and internal or external. Tillich's phenomenological definition of religion stresses the importance that belief plays within the individual's life both externally through symbols and internally through orientation.⁵⁶⁷ Religious studies scholar Lynda Sexson rejects the external component of this definition; she argues against viewing religion through the cultural dynamic or communal understanding. Sexson asserts that even "[i]f there is no political body to verify occurrences or images as religious or sacred, . . . these particularized images still have . . . connotations . . . sacred or . . . religious."⁵⁶⁸ Similarly, James's

561. *Id.* at 1060 (Steffen, J., dissenting).

562. *Id.*

563. *Id.*

564. *Roberts v. Ravenwood Church of Wicca*, 292 S.E.2d 657, 660 (1982).

565. *Id.* at 661.

566. JAMES, *supra* note 540, at 126; TILlich, *supra* note 498, at 15.

567. Harvard Note, *supra* note 3, at 1067.

568. LYnda SEXSON, *ORDINARILY SACRED* 3 (1992).

definition of religion provides a cognitive definition that is purely internal and individualized.⁵⁶⁹

It is this distinctive focus on the internal attitude of religious believers that has made James' psychological understanding of religion . . . appealing to courts and commentators who have been reluctant to interpret freedom of religion by reference to the external features of religious belief, lest by doing so they enshrine religious orthodoxy.⁵⁷⁰

However, as a consequence of these definitions, which are dependent on the inner state of mind of the individual, "the courts [are] in the position of measuring the sincerity of professions of belief rather than the consistency of religious practices."⁵⁷¹

Alternatively, Durkheim defined religion as "a unified system of beliefs and practices relative to sacred things, that is to say, things set apart and forbidden—beliefs and practices which unite into one single moral community called a Church, all those who adhere to them."⁵⁷² This definition provides a "purely social and behavioral definition" of religion.⁵⁷³ Durkheim's "definition casts religion as . . . a question of behavior and relationships, something that happens outside the individual consciousness and thus is capable of objective measurement."⁵⁷⁴ For Durkheim, religion existed not as a private or individual phenomenon, but instead was "eminently social."⁵⁷⁵ He asserted that "[r]eligious representations are collective representations which express collective realities. . . . [T]hey are rich in social elements."⁵⁷⁶ Within this scheme, religion provides a collective attempt to overcome a sense of meaninglessness in order to bring meaning to the world.⁵⁷⁷

It is not necessary that these collective expressions actually be a literal church. Rather, a "cultural system that 'function[s] to synthesize a people's ethos—the tone, character, and quality of their life, its moral and aesthetic style and mood—and their world view—the picture they have of the way things in sheer actuality are,' is religious."⁵⁷⁸ Durkheim, however, would

569. Epps, *supra* note 488, at 564.

570. Timothy Macklem, *Faith as a Secular Value*, 45 MCGILL L.J. 1, 23 (2000).

571. Epps, *supra* note 488, at 570.

572. *Id.* at 569 (citing DURKHEIM, *supra* note 495, at 47).

573. *Id.* at 564.

574. *Id.* at 569.

575. Michael M. Maddigan, *The Establishment Clause, Civil Religion, and the Public Church*, 81 CALIF. L. REV. 293, 318 (1993) (citing DURKHEIM, *supra* note 495, at 22).

576. *Id.*

577. *Id.* at 319.

578. *Id.* (citing CLIFFORD GEERTZ, *THE INTERPRETATION OF CULTURES* 89 (1973)).

not accept the proposition that the appropriate explanation for this search is in the form of psychology; rather, he embraced sociology and studied social phenomena.⁵⁷⁹ In exploring religion, he focused not on individual believers; quite to the contrary, believing religion exists outside of and independently of the individual, he focused on social interaction.⁵⁸⁰ Durkheim's "principal objective [was] . . . to extend scientific rationalism to human behavior."⁵⁸¹ By focusing on social interactions and external features as opposed to internal ones, Durkheim intended to provide a rationale means of approaching religion.⁵⁸² Anything else, he concluded, ignored what religion is, a communal force or associational approach to divinity.

"Durkheim argued that religious phenomena emerge in any society when a separation is made between the sphere of the profane—the realm of everyday utilitarian activities—and the sphere of the sacred—the area that pertains to the numinous, the transcendental, the extraordinary."⁵⁸³ This distinction between the sacred and the profane cannot be made by an individual, but can only be created by a group or cult through social interactions.⁵⁸⁴ Something becomes sacred or profane depending on valuation assigned by the group not by any individual.⁵⁸⁵ "Sacred activities are valued by the community of believers not as means to ends, but because the religious community has bestowed their meaning on them as part of its worship."⁵⁸⁶ For example, wine in a Catholic Mass places sacred ritualistic significance upon communal wine as the blood of Christ.⁵⁸⁷

Noted anthropologist Clifford Geertz continued the development of Durkheim's approach to religion.⁵⁸⁸ He argued for defining religion as a cultural system.⁵⁸⁹ He also vigorously challenged the predominant view in the academic anthropology community that "saw in religion an archaic mode of thought and action" standing behind the modern programs of

579. COSER, *supra* note 546, at 137-38.

580. *Id.*

581. *Id.* at 142 (quoting EMILE DURKHEIM, *SUICIDE* xxxix (The Free Press ed., 1951)).

582. *Id.* at 136-38, 142.

583. *Id.* at 137.

584. *Id.* at 137-38.

585. *Id.*

586. *Id.* at 138.

587. *Id.* at 137-38.

588. See ELLIOTT, *supra* note 546, at n.60, available at <http://www.unc.edu/~elliott/durkheim.html> (citing Talcott Parsons, "Durkheim on Religion Revisited: Another Look at *The Elementary Forms of the Religious Life*," in *BEYOND THE CLASSICS? ESSAYS IN THE SCIENTIFIC STUDY OF RELIGION* (1973)).

589. PADGETT, *supra* note 502.

science, law, politics, and education that would one day drop away.⁵⁹⁰ Geertz defined religion as dynamic entity that is “(1) a system of symbols which acts to (2) establish powerful, pervasive, and long-lasting moods and motivations in men by (3) formulating conceptions of a general order of existence and (4) clothing these conceptions with such an aura of factuality that (5) the moods and motivations seem uniquely realistic.”⁵⁹¹ Like Durkheim, Geertz shifted the analysis to the external; a person’s “design for living” or way of life becomes the criteria for determining religiosity.⁵⁹² His definition of religion does not exclude general ideas of order or affirmation of something beyond the self. However, instead of analyzing internally, Geertz looked to see “the empirical differentia of religious activity [and] religious experience.”⁵⁹³

Geertz was prepared to accept a broad array of religions including seemingly frivolous ones such as golf. For golf (or anything else) to be a religion, there must be external manifestations that denote not merely playing with passion or every Sunday at 10 a.m., but which are instead sufficient to demonstrate visibly to the observer that the would-be religion is “symbolic of some transcendent truth” for the person.⁵⁹⁴ Religion synthesizes “what is known about the way the world is, the quality of the emotional life it supports, and the way one ought to behave while in it.”⁵⁹⁵ Geertz noted that “[t]hrough in theory we might think that a people could construct a wholly autonomous value system independent of any metaphysical referent, an ethics without ontology, we do not in fact seem to have found such a people.”⁵⁹⁶ Such a view strongly argues that moral ethical systems of belief to which there is practicing adherence and some form of communion, like the Ethical Society of Austin or a practicing society of Neo-Platonists or Epicureans, would necessarily be religious because their value structure would have a metaphysical core. According to Geertz,

590. *Id.*

591. CLIFFORD GEERTZ, *THE INTERPRETATION OF CULTURES* 90 (1973); see Donovan, *supra* note 179, at 88-89 (citing Talal Asad, *ANTHROPOLOGICAL CONCEPTIONS OF RELIGION: REFLECTIONS ON GEERTZ*, 18 *MAN* 237 (1983)) (Asad asserts that Geertz’s essay “[is] perhaps the most influential, certainly the most accomplished, anthropological definition of religion to have appeared in the last two decades.”).

592. Donovan, *supra* note 179, at 88 (citing Clifford Geertz, *Religion: Anthropological Study*, in 13 *INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL SCIENCES* 398, 406 (David L. Sills ed., 1968)).

593. GEERTZ, *supra* note 591, at 98.

594. *Id.*

595. Andrew Rotstein, *Good Faith? Religious-Secular Parallelism and the Establishment Clause*, 93 *COLUM. L. REV.* 1763, 1775 n.73 (1993) (citing Arlin M. Adams & Charles J. Emmerich, *A NATION DEDICATED TO RELIGIOUS LIBERTY* 82-83 (1990)).

596. *Id.*

communities share these qualities externally, though they are deeply felt internally. Geertz's focus was on the communal and external nature of religion, not the internal view of James and the Second Circuit.

The general response of courts to this on-going discussion of the existence of religion as internal or external, individualistic or communal has five basic components. First, a broad declaration is made that religion may exist without any formal external or communal signs of traditional religions such as formal services, ceremony, presence of clergy, structure or organization, propagation efforts, holidays being observed, and other similar activities.⁵⁹⁷ Second, courts refuse to allow religion to become a limitless self-defining category or classification.⁵⁹⁸ Third, courts consider the sincerity of the religious belief of the party,⁵⁹⁹ which is sometimes termed the devotional component of the definition of religion.⁶⁰⁰ Fourth, the courts look to communal and external elements as proof of the sincerity of the person's belief.⁶⁰¹ Fifth, even if this belief is sincerely held, many courts include these external and communal elements as factors in determining whether the belief is religious.⁶⁰² Thus, although courts assert that these external or formal elements are not essential for beliefs or practices to be religious, courts are, nevertheless, skeptical of the sincerity of beliefs when the individual's practice of their faith does not include these external or communal elements, and they are uncertain that the belief is even religious if it does not include such public communal expressions.

Nevertheless, Judge Arlin Adams, who has been extremely influential in defining religion,⁶⁰³ concedes that the worldviews of *Seeger* and *Welsh*,

597. See, e.g., *Malnak v. Yogi*, 592 F.2d 197, 209 (3d Cir. 1979); *Africa v. Pennsylvania*, 662 F.2d 1025, 1036 n.21 (3d Cir. 1981); *Stevens v. Berger*, 428 F. Supp. 896, 900 (E.D.N.Y. 1977) (“[N]either the trappings of robes, nor temples of stone, nor a fixed liturgy, nor an extensive literature or history is required to meet the test of beliefs cognizable under the Constitution as religious.”).

598. *Malnak*, 592 F.2d at 209; *Africa*, 662 F.2d at 1035; *Johnson v. Pa. Bur. of Corr.*, 661 F. Supp. 425, 437 (W.D. Pa. 1987).

599. *Welsh v. United States*, 398 U.S. 333, 337, 340 (1970) (plurality opinion); *United States v. Seeger*, 380 U.S. 163, 185 (1965) (“[T]here remains the significant question whether it is ‘truly held.’ This is the threshold question of sincerity which must be resolved in every case.”); see *Vetter v. Farmland Indus.*, 120 F.3d 749, 751 (8th Cir. 1997); *United States v. Meyers*, 95 F.3d 1475, 1482 (10th Cir. 1996).

600. *United States v. Ward*, 989 F.2d 1015, 1018 (9th Cir. 1993).

601. *Malnak*, 592 F.2d at 209; *Int’l Soc. for Krishna Consciousness, Inc. v. Barber*, 650 F.2d 430, 441 (2d Cir. 1981); *Founding Church of Scientology v. United States*, 409 F.2d 1146, 1156 (D.C. Cir. 1969); *Washington Ethical Society v. District of Columbia*, 249 F.2d 127, 128 (D.C. Cir. 1957); *Marria v. Broadus*, 200 F. Supp. 2d 280, 292-93 (S.D.N.Y. 2002).

602. *Malnak*, 592 F.2d at 209; *Meyers*, 95 F.3d at 1482-84.

603. Peñalver, *supra* note 261, at 799; Jeffrey L. Oldham, Note, *Constitutional “Religion” A Survey of First Amendment Definitions of Religion*, 6 TEX. F. ON C.L. & C.R. 117, 139-44 (2001); Feofanov, *supra* note 154, at 375-77; see *Friedman v. S. Cal. Permanente Medical Group*, 125 Cal. Rptr. 2d 663, 678 (Cal. App. 2002). An analysis conducted by a California State Appellate

which were determined by the Supreme Court to be religious, are not supported by any external or communal ceremonial, ritualistic, or organizational elements.⁶⁰⁴ He admits that it is possible to be religious without these external or communal elements: “Of course, a religion may exist without any of these signs, so they are not determinative, at least by their absence, in resolving a question of definition.”⁶⁰⁵ However, Judge Adams notes that these elements “can be helpful in supporting a conclusion of religious status given the important role such ceremonies play in religious life. . . . Thus, even if it is true that a religion can exist without rituals and structure, they may nonetheless be useful signs that a group or belief system is religious.”⁶⁰⁶ As applied by circuit and district courts, these external and communal elements are more important to determining if something is a religion or not, or if a particular person is religious, than the conscientious objector cases would seem to suggest.⁶⁰⁷

Court found that “[a]lthough Judge Adams’s analysis only appeared in a concurring opinion, his discussion immediately began to find direct as well as indirect acceptance with other federal appellate court decisions.” *See, e.g.,* DeHart v. Horn, 227 F.3d 47, 52, n.3 (3d Cir. 2000); Love v. Reed, 216 F.3d 682, 687 (8th Cir. 2000) (providing an analysis based on a Third Circuit ruling premised on Judge Adams’s concurring opinion in *Malnak*); United States v. Meyers, 95 F.3d 1475, 1483 (10th Cir. 1996) (analyzing a religion issue using in part a Third Circuit ruling premised on Judge Adams’s *Malnak* concurring opinion); Alvarado v. City of San Jose, 94 F.3d 1223, 1227 (9th Cir. 1994); Dettmer v. Landon, 799 F.2d 929, 931 (4th Cir. 1986); Grove v. Mead School Dist. No. 344, 753 F.2d 1528, 1534 (9th Cir. 1985); Wiggins v. Sargent, 753 F.2d 663, 666 (8th Cir. 1985) (adopting Third Circuit test); Africa v. Pennsylvania, 662 F.2d 1025, 1033-34 (3d Cir. 1981). Similarly, district court judges have relied upon Judge Adams’ concurring opinion in whole or in part. *See, e.g.,* Mitchell v. Angelone, 82 F. Supp. 2d 485, 492 (E.D. Va. 1999); Altman v. Bedford Cent. Sch. Dist., 45 F. Supp. 2d 368, 378 (S.D.N.Y. 1999), *aff’d in part, vacated in part, & rev’d in part on other grounds*, 245 F.3d 49 (2d Cir. 2001); United States v. Meyers, 906 F. Supp. 1494, 1503 (D. Wyo. 1995), *aff’d*, 95 F.3d 1475 (10th Cir. 1996); Church of Scientology Flag Services v. City of Clearwater, 756 F. Supp. 1498, 1509-1510 (M.D. Fla. 1991), *aff’d in part, vacated in part, & rev’d in part on other grounds*, 2 F.3d 1514 (11th Cir. 1993); May v. Cooperman, 572 F. Supp. 1561, 1568-69 (D.N.J. 1983), *aff’d*, 780 F.2d 240 (3d Cir. 1985); Jacques v. Hilton, 569 F. Supp. 730, 733 (D.N.J. 1983), *aff’d*, 738 F.2d 422 (3d Cir. 1984); Church of the Chosen People v. United States, 548 F. Supp. 1247, 1252-53 (D. Minn. 1982); Van Schaick v. Church of Scientology, 535 F. Supp. 1125, 1144 (D. Mass. 1982); Africa v. Pennsylvania, 520 F. Supp. 967, 970 (E.D. Pa. 1981), *aff’d*, 662 F.2d 1025 (3d Cir. 1981). Similarly, state courts have utilized directly or indirectly the analysis in *Malnak*. *See, e.g.,* Needham Pastoral Counseling Ctr. v. Bd. of Appeals of Needham, 557 N.E.2d 43, 45 (Mass. App. 1990); Christofferson v. Church of Scientology, 644 P.2d 577, 601 (Or. App. 1982).

604. *Malnak v. Yogi*, 592 F.2d 197, 209 n.43 (3d Cir. 1979).

605. *Id.* at 209.

606. *Malnak*, 592 F.2d at 209-10 (citing DURKHEIM, *supra* note 495, at 43-44) (“[T]he really religious beliefs are always common to a determined group which makes profession of adhering to them and to practicing rites connected with them In all history, we do not find a single religion without a Church.”); *see* K. DUNLAP, RELIGION: ITS FUNCTIONS IN HUMAN LIFE 255-70 (1946); E. UNDERHILL, WORSHIP 20-41 (1937); *see generally* Note, *Transcendental Meditation and the Meaning of Religion Under the Establishment Clause*, 62 MINN. L. REV. 887, 906-08 (1978).

607. *Malnak*, 592 F.2d at 209 n.43.

However, given that Tillich, whose view of religion formed the basis for *Seeger* and the *Welsh* pluralities' approach to defining religion,⁶⁰⁸ conceives of the ultimate concern as fully permeating a person's being, external signs can be reasonably expected.⁶⁰⁹ In employing Tillich's understanding—the ultimate concern test—such considerations are entirely appropriate. Through this understanding of Tillich's definition, external manifestations can be reintegrated into the courts' ultimate concern analysis. Thus, in considering the external component, Judge Adams actually had no reason for concern in having departed from *Seeger*. While the Third Circuit traveled the route of incorporating Durkheim's view of religion to embrace external elements, a court following *Seeger* can arrive at the same point by continuing to follow Tillich's insights. Where the break occurs is in the Second Circuit's utilization of James's definition and allowing religion to dwell exclusively internally within the mind and psyche. A Tillichian ultimate concern will necessarily surrender itself to public manifestation, but the Jamesian understanding can remain purely an internal light, not shown or revealed to the world. That is not to say that James did not believe that there will be some external effects of religion, of standing before the divine, but unlike Tillich's or Durkheim's understanding of religious experience, in James's view we are not necessarily going to fill our world with symbols. We are not necessarily going to build churches, attend meetings, wear particular clothing, eat certain foods, etc. Thus, Tillich, Durkheim, and Geertz would suggest that we look for the symbols, the churches, the gatherings, how we spend our time, but James would argue that only by looking at the mind and psyche can we know if beliefs or practices are religious.

E. HOW ULTIMATE AN ULTIMATE CONCERN?

Regardless of whether religion is viewed as being communal or individualized, or external or internal, the question of how intense or important the belief must be in order to be deemed religious cannot be ignored. As applied to Tillich's definition of an ultimate concern, the word ultimate “signifies that the concern must be of an unconditional, absolute,

608. *United States v. Seeger*, 380 U.S. 163, 180 (1965); *Grove v. Mead School Dist.* No. 354, 753 F.2d 1528, 1537 n.10 (9th Cir. 1985) (Canby, J. concurring); Harvard Note, *supra* note 3, at 1066; Peter D. Schmid, *Religion, Secular Humanism and the First Amendment*, 13 S. Ill. U. L.J. 357, 364-65 (1989).

609. See The Honorable Wendell L. Griffen, *The Case for Religious Values in Judicial Decision-Making*, 81 MARQ. L. REV. 513, 515-16 (1998); Harvard Note, *supra* note 3, at 1067; Ingber, *supra* note 157, at 268; Richard H. Jones, *Concerning Secularists' Proposed Restrictions on the Role of Religion in American Politics*, 8 BYU J. PUB. L. 343, 345 (1994).

or unqualified character;" the word "concern" indicates an affective or motivational component of a person's experience.⁶¹⁰ Unlike Tillich, who believed that religion was composed of a single essence,⁶¹¹ James emphasized a flexible understanding of religion.⁶¹² He argued that religion did not have one essence, but many characteristics that were of equal importance to the experience of religion or divinity.⁶¹³ However, divinity for James was not unlimited. He indicated that "[t]he individual feels impelled to respond to [the divine] solemnly and gravely, and neither by curse nor jest."⁶¹⁴

Regarding the sacred or divine, Eliade indicated that sacred space or time makes it possible "to acquire orientation in the chaos of homogeneity, to 'found the world' and to live in a real sense."⁶¹⁵ Profane space and time, however, "maintains the homogeneity and hence the relativity of space [and time]."⁶¹⁶ Eliade maintained an affinity for religious peoples that embrace a world of absolute dichotomous spheres separating the sacred and the profane, Gods and nothingness. He recognized and abhorred the problem of lessened religiosity, of non-singular orientation, of multiple concerns as opposed to an ultimate concern.⁶¹⁷ But, Eliade did not think that religion is dead. "To whatever degree he may have desacralized the world, a man who has made his choice in favor of a profane life never succeeds in completely doing away with religious behavior."⁶¹⁸ In the modern world, according to Eliade, even the experience of the profane contains religiosity, that is, breaks from the homogeneity:

There are for example, privileged places qualitatively different from all others—a man's birthplace, or the scenes of his first love Even for the most frankly nonreligious man, all of these places retain an exceptional, a unique quality; they are the "holy places" of his private universe, as if it were in such spots that he

610. Harvard Note, *supra* note 3, at 1067.

611. Freeman, *supra* note 141, at 1553 (citing PAUL TILlich, WHAT IS RELIGION? 56-86 (J.L. Adams trans., 1969)) ("[T]he concept of essence . . . is the first and basic task of philosophy and religion."); see Harvard Note, *supra* note 3, at 1066-83.

612. Macklem, *supra* note 570, at 23.

613. Freeman, *supra* note 141, at 1553 (citing WILLIAM JAMES, THE VARIETIES OF RELIGIOUS EXPERIENCE 26 (1920)).

614. Donovan, *supra* note 179, at 80 (citing WILLIAM JAMES, THE VARIETIES OF RELIGIOUS EXPERIENCE 31, 38 (1916)).

615. MIRCEA ELIADE, THE SACRED & THE PROFANE: THE NATURE OF RELIGION 23 (Willard R. Trask trans., 1959).

616. *Id.* at 17-18, 23.

617. *Id.* at 1-28.

618. *Id.* at 23.

had received the revelation of a reality *other* than that in which he participates through his ordinary daily life.⁶¹⁹

Eliade, however, termed this behavior crypto-religious; it stands lesser than real religion.⁶²⁰ It is a “sort of degradation and desacralization of religious values and forms of behavior.”⁶²¹

Sexson further explored the deeper significance of these breaks in profane time and space. She argued that toppling the barrier between the sacred and the profane “brings one into the sphere in which ordinary reality is saturated with the sacred.”⁶²² For Sexson, the individual may even be unaware of her own religiosity or what is sacred to her.⁶²³ She asserts that in our society the ordinary becomes religious: “if religion or the sacred is to be discovered or reaffirmed in this culture, it will have to be found under the bed, in the box, like a string of dogwood berries upon which the rosary of life can be sung.”⁶²⁴ For her, “[i]t is the weaving of imagination and discovery, of the divine and the human, of the past and the present, that creates the fabric of our existence. We all have bits and scraps of experience, dream, and thought out of which we weave the texture, the story, of our lives.”⁶²⁵ For Sexson, the flotsam of life that is preserved is sacred, which means that old tickets saved from concerts, an old tattered baseball glove, family stories that are told and not forgotten, rocks collected from the roadside, or even lint from the dryer can all be sacred.⁶²⁶ Sexson, however, recognizes the problem with this definition: “If everything is sacred, nothing is. Or, how can we decide that one kid’s pocket is filled with divine objects and another is just trouble for the washer?”⁶²⁷

Although we likely do not want to embrace Sexson’s radical breaking of the barriers of objectivity, destroying a notion that there is an objective sacred and profane, this is an almost unavoidable implication of Tillichian approach. For Tillich, religion was an ultimate concern, everyone has an ultimate concern, and ultimate concerns are otherwise unconstrained. An ultimate concern can be anything from collecting baseball cards, to being an obsessive Star Trek fan, a Christian, a business executive, a Neo-Platonist,

619. *Id.* at 24.

620. *Id.*

621. *Id.*

622. SEXSON, *supra* note 568, at 10.

623. *Id.* at 13. “Some of the boxes that will draw our attention have already been perceived as containers of the sacred; others are the boxes that anyone except the owner, and perhaps even the owner, would say contain junk.” *Id.*

624. *Id.* at 6-7.

625. *Id.* at 34.

626. *Id.* at 16.

627. *Id.*

and beyond. The field of ultimate concerns is limitless. This major problem with using the ultimate concern definition for religion will be discussed further below. However, first there is another problem, which the Sexson/Tillich approach needs to address: since the apparently ordinary can be sacred, how can we distinguish the two? Which set of rocks are religious icons and which are simply ordinary objects? After all, not all rocks should qualify for First Amendment protection under Tillich's approach; only those gathered as part of an ultimate concern deserve such protection.

In drawing upon Tillich, the Supreme Court alludes to the issue of the intensity of an ultimate concern. "The word 'ultimate' signifies that the concern must be of an unconditional, absolute, or unqualified character."⁶²⁸ However, a test that is this demanding "probably forecloses constitutional protection for a large number of ordinary church—or synagogue-goers."⁶²⁹ Also, the entire concept of ultimate concerns is based upon the premise that individuals concerns are capable of being ranked with one being clearly more important than all the others,⁶³⁰ which is a questionable proposition.

"Many people care a great deal about a number of things—their own happiness, the welfare of their family, their country, perhaps their religion—without any clear ordering among these and without any single ordering principle for clashes between them."⁶³¹ Either these people lack ultimate concerns or their ultimate concerns could be understood as some sort of amalgamation of this multitude of important concerns.⁶³² However, under the Tillichian definition, an ultimate concern cannot be compromised; it excludes all other concerns from being ultimate.⁶³³ No amalgamation is possible. This viewpoint seems strikingly excessive given the fact that human weaknesses in the Tillichian paradigm are unanticipated, unacceptable, and unexplainable except as being non-religious. Thus, the person who misses church most Sundays for football games in the fall and winter and baseball games in the spring and summer is religious about sports, not church.

628. Harvard Note, *supra* note 3, at 1067.

629. Steven D. Collier, *Beyond Seeger/Welsh: Redefining Religion Under The Constitution*, 31 EMORY L.J. 973, 995 (1982).

630. Harvard Note, *supra* note 3, at 1067.

631. Greenawalt, *supra* note 208, at 808.

632. *Id.*

633. Mark B. Greenlee, *Faith on the Bench: The Role of Religious Belief in the Criminal Sentencing Decisions of Judges*, 26 DAYTON L. REV. 1, 12 (2000) ("[R]eligious concern is ultimate; it excludes all other concerns from ultimate significance; it makes them preliminary. The ultimate concern is unconditional, independent of any conditions of character, desire, or circumstance." (citing PAUL TILlich, SYSTEMATIC THEOLOGY 11-12 (1967))).

For purposes of this discussion though, there are two fundamental problems with Tillich's demanding form of an ultimate concern being applied in courts of law. First, if the Tillichian approach is truly applied, then the courts raise the stakes exponentially for the level of commitment that someone must manifest to be considered religious. The level of commitment demanded by Tillich is not reasonable in this or any other era. Tillich's definition of religion requires that a person hold to Abraham's level of sacrifice and commitment;⁶³⁴ to be religious, one must be prepared to sacrifice all to one's ultimate concern.⁶³⁵ Although Tillich argued that everyone has an ultimate concern, the level of commitment to one's ultimate concern demanded by Tillich has led at least one critic to suggest that perhaps almost no one has an ultimate concern.⁶³⁶ A second complicating problem, if courts require this level of commitment for a non-traditional religion to be given religious status, whereas a nominal Christian, Jew, Muslim, Buddhist, or Hindu is considered protected under the First Amendment, then the courts essentially establish a preference for traditional over non-traditional religions. However, without this demanding standard of recognition, the distinction between a rock picked up along side the road and a sacred rock becomes an infinitely more complicated question.

Having received a glimpse of the slope down which the ultimate concern definition of religion, which lacks much of a harness, can easily slide, it would, perhaps, be wise to remind ourselves why this definition is often so attractive to courts: "There is a common perception that religion is defined not so much by particular doctrines (like the existence of a god) or in particular functions (like providing a structure for morals) but instead by attitude."⁶³⁷ One the foremost ways of expressing this sense of religion is Tillich's contention that religion is not these doctrines or functions, but is instead "the focus of our 'ultimate concern.'"⁶³⁸ And, it should not discount that "[t]here seems to be a certain validity to this position because so much about religion appears to revolve around a person's attitude towards life, the universe, and what is most important to them."⁶³⁹

634. See *Genesis* 22:1-14 (relating the story of Abraham being asked to sacrifice his son Isaac, who God spared).

635. Ingber, *supra* note 157, at 269.

636. *Id.*; see Steven G. Gey, *Why Is Religion Special?: Reconsidering the Accommodation of Religion Under the Religion Clauses of the First Amendment*, 52 U. PITT. L. REV. 75, 160 n.402 (1990) (discussing Ingber's views).

637. Austin Cline, Religion as Faith and Ultimate Concern, <http://atheism.about.com/od/aboutreligion/a/UltimateConcern.htm> (last visited Mar. 20, 2006).

638. *Id.*

639. *Id.*

F. IS EVERYTHING REALLY SACRED?

However, deficiencies in the ultimate concern test cannot be ignored. For example, a problem identified by a sociological view of the ultimate concern definition of religion is that “[i]t seems to include so much under the umbrella of religion that little is left over—and if everything qualifies as a religion, then the term itself stops being very useful anymore.”⁶⁴⁰ Sexson, although she is untroubled by it, showed us the slippery slope and just how easy it is to slide down. Tillich’s definition of religion provides little ability to stop religion from moving from belief in God or Gods and devotion of one’s life to pursuing his, her, or their will, to pursuing money and devoting one’s life to its pursuit. Professor John Mansfield described this failing of the *Seeger* definition as follows:

Is it not also true that a belief that no one would dignify as religious may occupy an important if not dominant place in a man’s life, profoundly affecting his conduct, thoughts, and feelings? A person may make his pocketbook his master or his stomach a god, or consider that the highest virtue is the preservation of his own life and the advancement of his own interests, but no one would say, except ironically, that because of his devotion to these ends his belief in them is religious.⁶⁴¹

The problem is that “an honest application of Tillich’s theory would not in any way limit the field of constitutionally protected conduct.”⁶⁴² A faithful application of *Seeger* in its broad form would include within the category of religion “*anything* that has the same importance to an individual that a belief in God has to a traditional believer, no matter how secular that belief might appear.”⁶⁴³ Accordingly, “[n]ot only does it include philosophies that are specifically anti-religious such as atheism, Marxism, and secular humanism, but by making it subjective, it opens the doors to virtually anything someone wishes to assert as ultimate. By making it so relative and universal, it robs the word of virtually any meaning.”⁶⁴⁴ Additionally, “there is nothing about most strongly held beliefs that necessarily lies outside of the competence of legislatures or courts, unlike

640. *Id.*

641. Mitchell, *supra* note 150, at 661 n.263 (quoting John H. Mansfield, *Conscientious Objection—1964 Term*, 2 RELIGION AND PUB. ORD. 9-10 (1964)).

642. Gey, *supra* note 634, at 160.

643. Collier, *supra* note 627, at 983 (emphasis in original).

644. Knechtle, *supra* note 6, at 527.

those qualities peculiar to religion, such as their non-rational and faith-driven nature, that are not easily evaluated by government.”⁶⁴⁵

VIII. CONCLUSION

In defining religion, “[f]lexibility and careful consideration . . . are needed. Still, it is important to have some objective guidelines in order to avoid *ad hoc* justice.”⁶⁴⁶ Some have argued that there cannot be an acceptable definition of religion.⁶⁴⁷ Nevertheless, regardless of the difficulties, courts must develop an understanding of religion to be applied in cases before them.⁶⁴⁸ With regard to the non-legal theorists reviewed in the course of this discussion, one point, the plurality of their understandings of religion, is apparent. This diversity of views leads some to the conclusion that what religion is depends upon who is looking and what her vantage point happens to be.⁶⁴⁹

645. Paul Horwitz, *Scientology in Court: A Comparative Analysis and Some Thoughts on Selected Issues in Law and Religion*, 47 DEPAUL L. REV. 85, 131 (1997).

646. *Malnak v. Yogi*, 592 F.2d 197, 210 (3d Cir. 1979).

647. Freeman, *supra* note 141; Modak-Truran, *Religious Dimension*, *supra* note 444, at 257 n.5.

648. Mansfield, *supra* note 165, at 215-16; *see* Sullivan, *supra* note 459, at 454.

649. Modak-Truran, *Religious Dimension*, *supra* 444, at 257 n.5 (citing JOHN HICK, PHILOSOPHY OF RELIGION 3 (2d ed. 1973)).

However, this results in part from the different purposes of the many types of inquiries that analyze the nature of religion including the anthropology of religion (*e.g.*, Clifford Geertz), sociology of religion (*e.g.*, Emile Durkheim, Peter L. Berger), psychology of religion (*e.g.*, William James), history of religions (*e.g.*, Mircea Eliade), theology (*e.g.*, Paul Tillich), and philosophy of religion (*e.g.*, Charles Hartshorne).

Id. “For example, sociology of religion views religion ‘in terms of social interaction’ and studies religion ‘with reference to the general concepts of sociology, including leadership, stratification, and socialization.’” *Id.* (quoting GEORGE A. THEODORSON & ACHILLES G. THEODORSON, A MODERN DICTIONARY OF SOCIOLOGY 406 (1969)). In his text *Beyond Good and Evil*, Nietzsche advances a related point:

Little by little I came to understand what every great philosophy to date has been: the personal confession of its author, a kind of unintended and unwitting memoir; and similarly, that the moral (or immoral) aims in every philosophy constituted the actual seed from which the whole plant invariably grew. Whenever explaining how a philosopher’s most far-fetched metaphysical propositions have come about, in fact, one always does well (and wisely) to ask first: “What morality is it (is *he*) aiming at?” Thus I do not believe that an “instinct for knowledge” is the father of philosophy, but rather that here as elsewhere a different instinct has merely made use of knowledge (and knowledge [sic]) as its tool. For anyone who scrutinizes the basic human instincts to determine how influential they have been as *inspiring* spirits (or demons and goblins) will find that all the instincts have practiced philosophy, and that each one of them would like only too well to represent *itself* as the ultimate aim of existence and as the legitimate *master* of all other instincts. For every instinct is tyrannical; and as *such* seeks to philosophize.

FRIEDRICH NIETZSCHE, *BEYOND GOOD AND EVIL: PRELUDE TO A PHILOSOPHY OF THE FUTURE* 8 (Marion Faber trans., Oxford Univ. Press 1998).

Further complicating matters, the word religion possesses a seemingly limitless array of potential meanings and possible interpretations. Much of the uncertainty that fills the text of various courts' struggles to define religion is deeply imbued with post-modern thought, the deconstructionism advanced by Nietzsche. In a post-modern world, what is a religion becomes to some extent a question without an answer. An objective reality in defining religion becomes an almost laughable matter and qualifications become necessary before a discussion is even begun. The thoughts and objections that are raised by postmodernist thought are not mere "childish philosophical skepticism and linguistic nihilism."⁶⁵⁰ However, post-modernists' view of "a world of many competing and equal ideas"⁶⁵¹ is only half right when it comes to the law. Within the law, not all ideas are equal, nor are all understandings of religion of the same value, worth, or legitimacy in terms of striving for a definition of religion for purposes of constitutional analysis. In part, the problem with postmodernist thought in general becomes actualized in the law. In the ethereal world of aesthetics and the arts, there is freedom for words to be fully undefined, for conversations to not communicate. In that world, language can be powerful and boundless:

What most characterizes deconstruction is its notion of textuality, a view of language as it exists not only in books, but in speech, in history, and in culture. For the deconstructionist, language is everything. The world itself is "text." Language directs humanity and creates human reality. (A reality that cannot be named or described is illusory, at best.) Yet, upon close examination, words seem to have no connection with reality or with concepts or ideas.⁶⁵²

When the courts embrace postmodernism, as they deconstruct the concept of religion, it is not for its radicalism that postmodernism gains adherence in the law. Rather, it is because of its capacity to embrace diversity and to be inclusive, which is of particular concern in dealing with religion.

The problem generally with regard to the limitations of postmodernist thought in the field of law, and with the area of religion in particular, is that

650. RadicalAcademy.com, *Cultural theory, Structuralism, Postmodernism & Deconstructionism*, <http://www.radicalacademy.com/adiphipostmodernism.htm> (last visited Sept. 13, 2007). Cf. VINCENT B. LEITCH, *AMERICAN LITERARY CRITICISM FROM THE THIRTIES TO THE EIGHTIES* 305 (1988) (noting that W. Jackson Bate derided deconstructionism as "a childish philosophical skepticism and nihilism").

651. *Id.*

652. *Id.*

the courts cannot abandon a working definition, but courts also cannot abandon the limitations imposed by their perceptual lenses. For example, courts make implicit assumptions about religion that render creation science religion, but physical science not religion. From the post-modern viewpoint, it is difficult to see why science should not be deemed to be a religion. The French philosopher Michel Foucault would argue that it is exactly those things that seem true and that we do not question that are our religion. It is the unquestioned that is held with the deepest faith. Philosophers from George Berkeley to David Hume to Jacques Derrida could question the postulate that scientific knowledge is distinct from religious belief. Berkeley, Hindu mystics, and Buddhist scholars could offer an explanation of reality and truth that is plausible, but which denies science. Nevertheless, the reason that science is not religion and creation science is religion stands as the same reason that a definition of religion must exclude those rocks picked from the side of road, and the same reason that law may use postmodernism as a tool, but may never embrace it fully. Because in the final analysis, beyond all theory and beyond all thought and debate, questions and problems, shortcomings and failures, the law must function. It must work; it must resolve disputes and reach conclusions. Schools must be able to teach, and judges must be able to decide cases. The definition of religion will never be perfect. Its growing expanse or its contracting limits will ebb and flow as courts struggle to find the right balance. But, courts must continue to do so, for in an era, where God is dead, religion is very much alive.

So how should courts approach the task of defining religion? I will discuss seven principles that I have come to believe, in the course of researching for this article, provide helpful governing parameters regarding defining religion under the First Amendment. First, the courts cannot avoid defining religion. Courts are necessarily operating under some understanding of what religion is in applying the First Amendment. That understanding should be express, rather than assumed and hidden from public view. Second, there should be a singular definition of religion. Courts should desist in explicitly or implicitly giving religion two different meanings, one for purposes of establishment and one for purposes of free exercise. The core of the First Amendment protection of religious liberty is government not preferring one religion over another; the dual-definition approach inherently creates such a preference for non-traditional over traditional faiths. If, for example, the court determines that secular humanism is a religion for purposes of free exercise, then it should be a religion for Establishment Clause purposes. If the court is unconcerned about the establishment of

secular humanism, it is the substantive determination of what constitutes establishment, rather than what is a religion, that should be applied.

Third, the broad *Seeger* ultimate concern test should be rejected or many reasons; two will be discussed. First, people do not have one ultimate concern; they experience life with a variety of competing and conflicting concerns. We are not all Abrahams prepared to sacrifice Isaac. And without this clarity and dedication, we cannot give true meaning in a legal context to Tillich's understanding of religion. Second, there is no limiting principle in the *Seeger* test; Tillich would allow anything, any concern, however, secular to be deemed religious. As noted by Professor Mansfield, "a religious belief is first of all a belief, that is to say the affirmation of some truth, reality or value. In addition it addresses itself to basic questions' about 'the meaning of suffering and death and the existence of spiritual reality.'"⁶⁵³ Pursuing ultimate concerns, such as wealth or Star Trek memorabilia no matter how fanatical, simply is not a religion under the First Amendment.

Fourth, the court should not return to the definition of religion that was utilized in the 1890s in cases like *Beason*. Moral judgment regarding the validity of religion and its value simply has no place in the First Amendment context. Tillich is correct in indicating that God can encompass both the divine and demonic, the creative and the destructive. There are enough varieties of religious beliefs, including arguably those set forth in the Old Testament, that present an understanding of God that is beyond our limited human comprehension of good and evil. Thus, if Satanism or demonology, etc., otherwise satisfies the test for what constitutes a religion, it should be regarded as such and afforded First Amendment protection.

Fifth, as stated by the Supreme Court:

If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.⁶⁵⁴

This is a bedrock First Amendment principle, but the conclusion does not follow that all of these beliefs are protected by the guarantee of free exercise and the prohibition on the establishment of religion. In designing a definition of religion, we should be cognizant of the extremely important

653. Mitchell, *supra* note 150, at 661 (quoting John H. Mansfield, Conscientious Objection—1964 Term, 2 RELIGION AND PUB. ORD. 10, 33-34 (1964)).

654. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

protections afforded by the free speech provision and not merely look to use the religion clauses as a repository for all areas of thought and conscience that we seek to protect from governmental intervention. Many of the questions and beliefs that we hold which are secular in nature should find protection in rights of free speech, rather than religion.

Sixth, to constitute a religious belief or practice under the First Amendment, the belief or practice should be an approach toward or duty imposed by an authority that is part of some reality or understanding that is beyond the ordinary. While extra-temporal consequences are unnecessary, the authority must be sacred, that is not profane, and addressed to fundamental questions of existence. A distinction should also be drawn between the philosophical/personal beliefs and religious beliefs. Returning to our earlier discussion of why the Founders entrenched religious liberty in the Constitution, they understood religion as part of a duty owed to some sacred authority that existed beyond the State. If there is no separate authority, then there is no conflicting duty that can be considered religious. Philosophical and personal commitments can be strongly held, but insofar as they are not duties originating from an authority beyond the individual; they are not religious.

Seventh and most importantly, whatever definition of religion is applied, it should be applied in a consistent manner, and though courts should act with caution in defining religion, they should do so without fear. It is readily apparent that religion is incredibly difficult to define; scholars and courts have stumbled and will continue to do so in approaching this extraordinarily complicated subject. In endeavoring to formulate the best possible definition, the most important elements of the continuing effort by judges and academics to define religion are: (1) adherence to equality as a guiding interpretative principle; (2) employing the definition in a consistent manor; and (3) being cautious but not so frightened that the courts retreat to so vague a definition that the term religion loses its meaning.