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**DELIMITING RELIGION IN THE
CONSTITUTION: A CLASSIFICATION
PROBLEM**

ANITA BOWSER*

INTRODUCTION

The American system of church-state relations rests on very narrow constitutional grounds. The original Constitution provided simply that no religious test may be required for any office or public trust under the new central government, and the Bill of Rights added only that the national government may not establish religion or prohibit its free exercise. The latter restrictions were extended to state governments through the adoption of the fourteenth amendment.

These constitutional provisions have both the virtue of being compact and the vice of being so indefinite as to have limited value as guidelines. The operative word is religion; it is religion which may not be established or restricted in its exercise or made the content of a qualifying test for federal office. Its meaning, therefore, is central to all three provisions and so to the whole structure of American church-state relations. Yet, for all its importance as the pivotal element in our church-state arrangement, the term religion was left undefined. It is possible that here, as elsewhere in the deliberations of the Framers, ambiguity was the price of consensus, that the imprecision was intentional, and that the task of delimiting the term precisely was purposely left to later generations. Be that as it may, later generations were bequeathed no guidance by the authors concerning the exact meaning of the religion clauses.

Delimiting the term "religion" in the first amendment of the Constitution is an ongoing concern for the courts and one that is not easily within reach of a practical solution. Essentially a problem of statutory construction, the judicial burden is to determine how the concept "religion" is to be interpreted in areas where the viewpoints of government and citizens differ. What beliefs and practices shall be included under the term? What characteristics shall be regarded as legally significant and what values or what criteria of valid law

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shall be applied to identify the distinctions and differences? Further, what are the limitations placed on a legal definition of religion?

Of necessity, any delimiting process involves classification. In its review of equal protection cases, the Supreme Court of the United States has recognized that a state cannot function adequately unless it distinguishes its citizens for various purposes and treats some of them differently from others.¹ However, where such classifications are permitted and classes of citizens are not treated similarly, the Court has demanded that the statutory classification be rationally related to the purpose of the statute.² The difficult question then becomes how to formulate a legislative purpose against which the rationality of the statutory classification can be tested.³

Since classifying is necessarily a nondeductive procedure, the emphasis upon logic in the law can serve to focus attention only upon the subsidiary rather than central aspects of the legal decisional process. A judge cannot appeal to the canons of logic to decide whether a given classification is the necessary or the correct one.⁴ Because classification cannot be carried on deductively the task is an inherently arbitrary one. Value choices intrude, making any definitional effort a problem of normation.⁵ The judiciary must articulate a norm broad enough, one which fits the facts of the case before it and which can transcend the particular decision.⁶ However, the norm must be not so broad as to render the classification meaningless. Moreover, if a norm is articulated too narrowly, it could be discriminatory and be in violation of one or both of the religion clauses of the first amendment. Serious questions would arise, consequently, regarding the nature of the norm itself.

Given that a norm is an expression of a collective value, how is the value to be identified, selected and applied? Is the value a

1. In *George v. United States*, 196 F.2d 445, 452 (9th Cir. 1952), *cert. denied*, 344 U.S. 843 (1953), it was stated: "Courts do not look for perfect equality in legislative classifications. They will not condemn a classification so long as a reasonable ground exists for inclusion or exclusion." See also *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Reed v. Reed*, 404 U.S. 71 (1971); *Dandridge v. Williams*, 397 U.S. 471 (1970).

2. See, e.g., *Dandridge v. Williams*, 397 U.S. 471 (1970); *Shapiro v. Thompson*, 394 U.S. 618 (1969); *Rinaldi v. Yeager*, 384 U.S. 305 (1966); *McGowan v. Maryland*, 366 U.S. 420 (1961).

3. See *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1076-77 (1969) (other standards for review).

4. For an elaboration of this point see R. WASSERSTROM, *THE JUDICIAL DECISION: TOWARD A THEORY OF LEGAL JUSTIFICATION* 32-33 (1961).

5. "Normation" is a term once employed by Karl Llewellyn in *The Normative, The Legal, and the Law Jobs: The Problem of Juristic Method*. 27 U. CHI. L. REV. 661, 686 n.100 (1960).

6. See Miller & Howell, *The Myth of Neutrality in Constitutional Adjudication*. 27 U. CHI. L. REV. 610 (1960).

reflection of a common aim of what ought to be? Is it a societal expectation of what will be, or is it a reaction to some behavioral manifestation expressed in terms of sanctions?⁷ Common aims, it has been asserted, involve polycentric questions, that is, "questions not easily settled by the adjudicative process because of their unavoidable intersection with problems not primarily legal and constitutional."⁸ If the norm governs behavior, how much deviation is permitted before the standard is no longer considered a norm? Stated otherwise, can a distinction be made between attributes of norms that are true by definition and those that are contingent?⁹

Where religious beliefs overlap with secular interests, as in the conscientious objector disputes,¹⁰ and it is not known whether a belief is religious or secular, the Court might be forced to define religious or conscientious beliefs on the basis of some extra-legal consideration in the interests of effecting social justice. In *United States v. Seeger*,¹¹ for example, the Court attempted a psychological test to determine what role a professed belief played in the life of the possessor of the belief. The threshold question of sincerity also had to be resolved.¹² The content of the belief supposedly was not a criterion for judging, nor was the source of the belief, whether internally derived or externally compelled.¹³ This kind of functional deliberation requires a difficult and intuitive factual determination, one that is arbitrary in the sense that the decision could be predicated on any one of many varying psychological, extant concepts concerning the nature of man,¹⁴ even one that is not clearly justifiable. In earlier cases

7. This distinction of norms is made in Gibbs, *Norms: The Problem of Definition and Classification*, 70 AM. J. SOC. 568 (1965).

8. See Miller & Howell, *supra* note 6, at 687, where it is contended that "organization by common aims" also implies a national consensus which is not yet determined for most controversial issues.

9. See Gibbs, *supra* note 7, at 586. Gibbs explains that these are "attributes which vary from one norm to the next and, therefore, are not relevant for a generic definition of norms"

10. See, e.g., *Gillette v. United States*, 401 U.S. 437 (1971); *United States v. Sisson*, 399 U.S. 267 (1970); *Welsh v. United States*, 398 U.S. 333 (1970); *United States v. Seeger*, 380 U.S. 163 (1965).

11. 380 U.S. 163 (1965).

12. *Id.* at 176.

13. *Id.* In *Seeger*, the Court professed to reject a classification based on belief content, yet, paradoxically, it made an appeal to theology in its examination of various statements from theologians concerning the meaning of religion. *Id.* at 180, 183.

14. See Clark, *Guidelines for the Free Exercise Clause*, 83 HARV. L. REV. 327 (1969) ("no psychological analysis can provide the basis for a legal definition excluding any class of conscientious beliefs from protection"); cf. Goldstein, *Psychoanalysis and Jurisprudence*, 77 YALE L.J. 1053 (1968) (contending that the disciplines of psychoanalysis and jurisprudence are relevant).

involving the meaning of religion, the Court had indicated that it would concern itself exclusively with factors of externality in spite of the fact that the first amendment speaks in terms of protecting free exercise and not simply beliefs.¹⁵

If the Court should attempt a subject-matter definition of religion, citing as essential some fundamental quality for a belief or act, such as a moral or ethical principle, the definition would not be immune from attack as a possible establishment violation, for the problem of discrimination would arise against those not holding the particularly described religious tenet. In *Seeger*, the "parallel position" standard was employed: "whether a given belief that is sincere and meaningful occupies a place in the life of the possessor parallel to that filled by the orthodox belief in God of one who clearly qualifies for the exemption."¹⁶ Such a standard introduces into the definition of religion elements of discrimination in that the orthodox belief is used as a standard for reference. This arbitrarily gives the orthodox belief a favored position over that belief not similarly situated.

Finally, any attempt to distinguish religious beliefs and practices from secular ones by marking dividing lines among phenomena that are not clearly distinguishable introduces linguistic complexities which would render the resulting definition imprecise and ineffective as law. An establishment or free exercise claim could be made by anyone intentionally or inadvertently left out of the classification. A related problem would be a division of concepts into sharply distinct categories, placing labels on them such as "religious act" or "religious non-act" and confusing the labels for the thing itself.

This article considers some of the problems inherent in the legal definition of religion and seeks to determine whether the decisions of the Supreme Court in establishment and free exercise cases supply the ingredients of a legal definition of religion.

15. See, e.g., *Reynolds v. United States*, 98 U.S. 145 (1878). The Court in *Reynolds* stipulated that although laws "cannot interfere with mere religious belief and opinions, they may with practices." *Id.* at 166. In *United States v. Ballard*, 322 U.S. 78 (1944), the Court held that it was no concern of government to inquire into the truth or falsity of spiritual matters. This distinction, however, could not be maintained. See, e.g., *Sherbert v. Verner*, 374 U.S. 398 (1963).

16. 380 U.S. at 176. The Court in this instance was interpreting a statute pertaining to the conscientious objector status and not the first amendment. The statute reads: "Religious training and belief in this connection means an individual's belief in relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code." 50 U.S.C. § 459(j) (1964).

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I. EVOLUTION OF A LEGAL CATEGORY: THE CONSCIENTIOUS OBJECTOR CASES AND THE FREE EXERCISE CLAUSE

A valid legal classification is one which includes "all persons who are similarly situated with respect to the purpose of the law."¹⁷ Additional requirements imposed by the Supreme Court are that "[t]he classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation

17. F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920).

to the object of the legislation, so that all persons similarly circumstanced shall be treated alike."¹⁸ Classifications which are legally suspect have been described as those which exclude groups that are in special need of protection because they are "discrete and insular" minorities.¹⁹ This is best exemplified in the conscientious objector cases.

Initially, in the first congressional military exemption act, enacted in 1864, conscientious objector classification was limited to members of the historic peace churches²⁰ or to those "who shall be oath or affirmation declare that they are conscientiously opposed to the bearing of arms, and who are prohibited from doing so by the rules and articles of faith and practice of said religious denominations."²¹ Realizing the narrow scope of this statute in that it covered only a few churches, Congress in 1917 broadened the classification to include "any well-recognized religious sect or organization . . . whose existing creed or principles forbid its members to participate in war in any form and whose religious convictions are against war."²² The above exemption was broadened even further in the 1940 Selective Training and Service Act to include anyone "who, by reason of religious training and belief is conscientiously opposed to war in any form."²³

The ambiguity of the "religious training and belief" language provoked questions concerning the scope of the exemption under the Act; various interpretations were given in the circuit courts.²⁴ One

18. *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065 1076-1132 (1969); Note, *Legislative Purpose, Rationality, And Equal Protection*, 82 YALE L.J. 123 (1972).

19. *United States v. Carolene Prod. Co.*, 304 U.S. 144, 152-53 (1938). *See also Loving v. Virginia*, 388 U.S. 1 (1967).

20. Churches included in this classification were Mennonites, Brethren, Molakans, Christadelphians and Friends. *See Act of Mar. 3, 1863*, 12 Stat. 379; *Act of May 18, 1917*, Pub. L. No. 12, § 1, 40 Stat. 76. Virtually all the colonial military laws provided for conscientious objector status as did the Continental Congress.

21. *Act of Feb. 2, 1864*, ch. 13, § 17, 13 Stat. 9.

22. *Act of May 18, 1917*, ch. 15, 40 Stat. 76.

23. 54 Stat. 885, § 5(g).

24. *See, e.g., United States v. Kauten*, 133 F.2d 703 (2d Cir. 1943), where a liberal interpretation was read into the statute by Justice Augustus Hand who asserted:

Religious belief arises from a sense of the inadequacy of reason as a means of relating the individual to his fellow-men and to his universe . . . , a sense common to men in the most primitive and in the most highly civilized societies. It accepts the aid of logic but refuses to be limited by it. It is a belief finding expression in a conscience which categorically requires the believer to disregard elementary self-interest and to accept martyrdom in preference to transgressing its tenets.

opinion that momentarily prevailed came from the Ninth Circuit in *United States v. Berman*,²⁵ where an attempt was made at narrowing the classification. It was asserted in *Berman* that:

It is our opinion that the expression "by reason of religious training and belief" is plain language, and was written into the statute for the specific purpose of distinguishing between a conscientious social belief, or a sincere devotion to a high moralistic philosophy, and one based on an individual's belief in his responsibility to an authority higher and beyond any worldly one.²⁶

Quoting from Chief Justice Hughes's dissenting opinion in *United States v. Macintosh*²⁷ to the effect that "the essence of religion is belief in a relation to God involving duties superior to those arising from any human relation,"²⁸ the *Berman* court went on to say: "No matter how pure and admirable this 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 in the sense of that term as it is used in the statute."²⁹

Apparently seeking to avoid further difficulties of interpretation and seeking perhaps to preclude a broadened classification, Congress attempted by way of an amendment to the Selective Service Act to formulate a definition of its own.³⁰ By implicitly endorsing the *Berman* position, but substituting, without explanation, the term "Supreme Being" for "God," it defined "religious training and belief" as "an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political,

Id. at 708. In *United States ex rel. Phillips v. Downer*, 135 F.2d 521 (2d Cir. 1943), a petitioner who believed that "war is ethically and inevitably wrong" was considered to be within the religious category required by the Act. In *United States ex rel. Reel v. Badt*, 141 F.2d 845, 848 (2d Cir. 1944), it was held: "The relator can only secure exemption if it is found that the Director of Selective Service has held that he objected to participation in any war under any circumstances because of the compelling voice of his conscience."

25. 156 F.2d 377 (9th Cir.), *cert. denied*, 329 U.S. 795 (1946).

26. *Id.* at 380.

27. 283 U.S. 605 (1931). *Macintosh* involved a petition for naturalization. Respondent stated in his application form for citizenship that he would bear arms in defense of the United States only if he felt "morally justified" to do so. The Court held such a qualified commitment insufficient, contending that conscientious objectors enjoyed their status not as a constitutional necessity, but rather as "legislative grace."

28. 156 F.2d at 381.

29. *Id.*

30. Selective Service Act of 1948, 62 Stat. 604 (1948).

sociological or philosophical views or a merely personal moral code."³¹

The Court of Appeals for the Second Circuit subsequently faced a challenge to the validity of the Selective Service Act amendment on the basis of what it considered grave constitutional violations of first and fifth amendment rights.³² It was felt that those who adhered to no religion would be discriminated against and those who could not identify their beliefs with a deity would likewise be denied equal status under the law. Moreover, as had been affirmed in *Torcaso v. Watkins*,³³ neither the federal government nor a state government could constitutionally force a person "to profess a belief or disbelief in any religion. Neither can constitutionally pass laws or impose requirements which aid all religions as against non-believers, and neither can aid those religions based on a belief in the existence of God as against those religions founded on different beliefs."³⁴ On the basis of the *Torcaso* holding, therefore, conscientious objector exemptions seemingly should not be predicated on a religious standard, for to do so would give preferential status to believers over non-believers. This preference would result in a discriminatory classification violative not only of the first amendment, but of the due process clause of the fifth amendment as well.

The SEEGER Parallel Position Test

The circuits decided three related cases, *United States v. Jakobson*,³⁵ *Peter v. United States*,³⁶ and *United States v. Seeger*,³⁷ involving draft board denial of conscientious objector status to registrants who failed to base their objections to war on a belief in a Supreme Being. The Supreme Court of the United States, in response to the need for further clarification of the vague "religious training and belief" requirement, attempted to resolve the difficulty under the consolidated case of *United States v. Seeger*.³⁸ Petitioner Jakobson was a humanist who contended that his beliefs flowed not vertically but horizontally toward his fellow man. He believed in "an ultimate cause," or "creator of all existence" which he alluded to as "Godness."³⁹ For him "Godness" was a part of all humanity. His conclusion was that the "taking of human life is incompatible with

31. *Id.* at § 6(j).

32. *United States v. Jakobson*, 325 F.2d 409 (2d Cir. 1963).

33. 367 U.S. 488 (1961).

34. *Id.* at 495.

35. 325 F.2d 409 (2d Cir. 1963).

36. 324 F.2d 173 (9th Cir. 1963).

37. 326 F.2d 846 (2d Cir. 1964).

38. 380 U.S. 163 (1965).

39. 325 F.2d 409, 413 (2d Cir. 1963).

the order of the universe."⁴⁰ Holding that Jakobson's beliefs comported with the notion of theism that Congress intended, the Supreme Court affirmed the appellate court's decision and granted exemption.

Peter, also a humanist, felt that his actions were motivated by a feeling of relationship and love toward other human beings. "Since human life is for me a final value," Peter stated, "I consider it a violation of moral law to take human life."⁴¹ He added, "You could call that a belief in the Supreme Being or God. These just do not happen to be the words I use."⁴² His beliefs, nonetheless, were held to come under the statutory classification. Seeger, an agnostic, refused to assert a simple belief or disbelief in a deity. Claiming that "the existence of God cannot be proven or disproven, and the essence of His nature cannot be determined,"⁴³ he refused to seek protection under the statute, but chose, instead, to challenge its constitutionality.⁴⁴

Apparently looking for a way to avoid invalidating the statute, the Supreme Court chose not to rule on the constitutional issues posed by Seeger. Instead, it carefully designed a test to determine whether an objection to war was religious under the statute, a test that would be broad enough to bring the beliefs of all three men within the statutory exemption. The Court declared that: "[a] sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by the God of those admittedly qualifying for the exemption comes within the statutory definition."⁴⁵ Contending that the test avoids due process problems, Justice Clark, in speaking for the majority, explained: "This construction avoids imputing to Congress an intent to classify different religious beliefs, exempting some and excluding others, and is in accord with the well-established

40. *Id.* at 412.

41. 324 F.2d 173, 174 n.2 (9th Cir. 1963).

42. *Id.* at 176-77.

43. 326 F.2d 846, 854 (2d Cir. 1964). Seeger described his beliefs in the following way:

Personally, I do not believe that a person can give his life meaning by doing something worthwhile with it, i.e., by relating his existence in a constructive and compassionate way to the problems of his social environment. In this sense pacifism, among other things, is for me a transcendent concern and it is in this respect that I consider myself religious.

Id.

44. Seeger challenged the statute on the basis of the due process clause of the fifth amendment, the free exercise clause of the first amendment, and article VI, § 3 of the Constitution barring a religious test for office holding.

45. 380 U.S. 163, 176 (1965).

congressional policy of equal treatment for those whose opposition to service is grounded in their religious tenets."⁴⁶

Moreover, Justice Clark felt that a conviction based upon religious training and belief would include "all sincere religious beliefs which are based upon a power or being, or upon a faith, to which all else is subordinate or upon which all else is ultimately dependent."⁴⁷ By including Seeger's beliefs within the scope of the statute that employed the term "Supreme Being," the Court thereby hoped to avoid a review of the statute's most obvious infirmity, the preference of theism over nontheism. In effect the test eliminated "religion" as a consideration for exemption. Although defining religion for the purposes of the statute by analogy to traditional beliefs in a Supreme Being, the *Seeger* test did not distinguish, or possibly it could not distinguish, religious beliefs from beliefs essentially political, sociological, or philosophical.⁴⁸

In the 1948 Selective Service Act, Congress had attempted to define religion by drawing a sharp line between beliefs founded upon an individual's relationship to a Supreme Being and beliefs founded on a philosophical or a personal moral code. Similarly, the *Seeger* Court attempted to draw a demarcation line between beliefs considered religious under the statute and those not so considered. Its approach sought to discover not the content of the belief, but rather the role the belief plays in the life of the possessor. This role thus becomes the significant element in deciding whether a belief is religious. By logical extension, however, its parallel belief test might even classify a personal moral code as religious if the belief is sincerely held and is based upon a power or being or upon a faith to which all else is subordinate.

Seemingly, it was not the intent of the *Seeger* Court to define religion, lest any presumption or arbitrariness evolve into problems of establishment.⁴⁹ Rather, it relied upon certain carefully selected religious treatises, the general thrust of which was to convey the idea

46. *Id.* at 177.

47. *Id.*

48. The Court indicated that: "these judgments have historically been reserved for the Government, and in matters which can be said to fall within these areas the conviction of the individual has never been permitted to override that of the state." *Id.* at 173.

49. The Court considered its problem a narrow one: "Does the term 'Supreme Being' as used in § 6(j) mean the orthodox God or the broader concept of a power or being, or a faith, 'to which all else is subordinate or upon which all else is ultimately dependent'?" In considering the question, the Court's intent was to "resolve it solely in relation to the language of § 6(j) and not otherwise." *Id.* at 174.

that the Court desired, primarily, that religion encompass something more than a mere belief in a Supreme Being. For example, the Court quoted with approval such an eminent theologian as Dr. Paul Tillich:

And if the 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 God. . . .⁵⁰

WELSH *Precludes Exemption for Political Belief*

Subsequent to the *Seeger* decision, Congress enacted the Military Selective Service Act of 1967 which eliminated the Supreme Being terminology from the statute's definition of religion.⁵¹ The reason for the deletion is uncertain. It was felt by some members of Congress, at least, that the *Seeger* Court had unduly broadened the exemption with its use of the term. There was a fear that the Court's employment of relativism and its concentration on manner rather than on content of belief would open wide the conscientious objector facet of the statute, permitting virtually anyone to come under its protection. One explanation of the confusion is provided by Senator Russell Long, who stated:

50. *Id.* at 187 (emphasis added by Court), quoting P. TILlich, *THE SHAKING OF THE FOUNDATIONS* 57 (1948). Other authorities consulted include: ROBINSON, *HONEST TO GOD* 181 (1963), in which the bishop stated: "In place of a God who is literally or physically 'up there,' we have accepted, as part of our mental furniture, a God who is spiritually or metaphysically 'out there'" Dr. David Saville Muzzey, a leader in the Ethical Culture Movement, states in *ETHICS AS A RELIGION* 183 (1951), "Instead of positing a personal God, whose existence man can neither prove nor disprove, the ethical concept is founded on human experience. It is anthropocentric, not theocentric." The Schema of the recent Ecumenical Council of the Catholic Church on the Church's relations with non-Christians was cited: "The Church regards with sincere reverence those ways of action and of life, precepts and teachings which, although they differ from the ones she sets forth, reflect nonetheless a ray of that Truth which enlightens all men." *Id.* at 182.

51. The section now reads:

Nothing contained in this title . . . shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participating in war in any form. As used in this subsection, the term "religious training and belief" does not include essentially political, sociological, or philosophical views, or a merely personal moral code.

50 U.S.C. § 456(j) (Supp. 1973).

Congress thought that we were tightening up this law in 1948, but the Supreme Court came to the conclusion that we were loosening it, were making it easier to secure an exemption. We thought we were making it harder, but sometimes the English language doesn't mean the same thing, apparently, to members of Congress and to the Supreme Court.⁵²

Justice Harlan, who had endorsed the majority opinion in *Seeger*, later was to express doubt concerning the Court's interpretation. In another conscientious objector case, *Welsh v. United States*,⁵³ he indicated that Congress had intended to exempt only those who adhered to theistic notions and not those adherents of nontheistic views.⁵⁴ Nor was it the intent of Congress, he claimed, to exempt those whose beliefs were not acquired through "religion" in the conventional way.⁵⁵ He did believe, however, that the statutory provision as properly construed violated the religion clauses of the first amendment.⁵⁶ But, he felt, when a statutory provision is unconstitutional because of underinclusion, nullification of the provision is not the only possible remedy. The Court may, if it deems it more appropriate, extend the statute's coverage to include others in the classification.⁵⁷ Arguing that the Court had gone far beyond the permissible bounds of avoidance, Justice Harlan nonetheless accepted the *Seeger* Court's conscientious objector test, "not as a reflection of congressional statutory intent but as [a] patchwork of judicial making that cures the defect of underinclusion" in the statute and which "can be administered by local boards in the usual course of business."⁵⁸

Welsh was opposed to participation in war in any form, characterizing his beliefs as non-religious in nature. In his application for conscientious objector status he wrote:

I believe that human life is valuable in and of itself; in its living; therefore, I will not injure or kill another human being. This belief (and the corresponding "duty" to abstain

52. See *Hearings on S.B. 1432 Before the Senate Comm. on Armed Services*, 90th Cong., 1st Sess. 35 (1967). For additional explanations and recommendations see *Hearings on the Review of the Administration and Operation of the Selective Service System Before the House Comm. on Armed Services*, 90th Cong., 1st Sess. (1967).

53. 398 U.S. 333 (1970).

54. *Id.* at 348-50 (concurring opinion).

55. *Id.* at 351-54.

56. *Id.* at 361-67.

57. *Id.* at 342-43.

58. *Id.*

from violence toward another person) is not "superior to those arising from any human relation." On the contrary: *it is essential to every human relation.* I cannot, therefore, conscientiously comply with the Government's insistence that I assume duties which I feel are immoral and totally repugnant.⁵⁹

The Court held that Welsh's beliefs "function as a religion in his life,"⁶⁰ thus clearly putting him within the exempted category. Justice Black stated for the majority:

If an individual deeply and sincerely holds beliefs which are purely ethical or moral in source and content but which nevertheless impose upon him a duty of conscience to refrain from participating in war . . . those beliefs certainly occupy in the life of that individual "a place parallel to that filled by . . . God" in traditionally religious persons . . . [S]uch an individual is as much entitled to a "religious" conscientious objector exemption . . . as is someone who derives his conscientious opposition to war from traditional religious convictions.⁶¹

While continuing to circumvent the issue of establishment, the *Welsh* Court, by its insistence that a secular belief should have equality of treatment with the religious belief, effectively rendered the "religious training and belief" requirement of the statute inoperative.

The majority acknowledged that once having decided that all religious conscientious objectors were entitled to the exemption, the more serious problem of determining which beliefs were "religious" within the meaning of the statute was presented.⁶² The Court interpreted its *Seeger* ruling to require of a conscientious objector to all war that, "[the] opposition to war stem from the registrant's moral, ethical, or religious beliefs about what is right and wrong and that these beliefs be held with the strength of traditional religious convictions."⁶³

The Court saw two groups of registrants which obviously did not fall within the exempted category: "those whose beliefs are not deeply held and those whose objection to war does not rest at all upon moral, ethical, or religious principle but instead rests solely upon

59. *Id.* at 343 (emphasis in original).

60. *Id.* at 340.

61. *Id.*

62. *Id.* at 338.

63. *Id.* at 342.

considerations of policy, pragmatism, or expediency.”⁶⁴ The Court went on to say that in applying the statute to those whose views are “essentially political, sociological, or philosophical” or to those who have a “merely personal moral code,” it should be remembered that: “these exclusions are definitional and do not therefore restrict the category of persons who are conscientious objectors by ‘religious training and belief.’ ”⁶⁵

The effect of the *Welsh* decision was to alter and greatly expand the legal notion of religion. Seemingly, the intent of Congress was not to include considerations of sociology, politics, and philosophy within its statutory class of objectors. However, Justice Black’s majority opinion embodied just such an inclusion. The statute unequivocally states that conscientious opposition predicated upon a merely personal moral or ethical code ought not be considered. In spite of this, a fusion of religion with morality was effected by Justice Black, who placed those moral and ethical beliefs, and possibly also those somewhat political,⁶⁶ regardless of source and content, within the *Seeger* norm. The Court thus created a new standard that permitted an exemption for “all those whose consciences, spurred by deeply held moral, ethical, or religious beliefs, would give them no rest or peace if they allowed themselves to become a part of an instrument of war.”⁶⁷ By restricting the objection criteria to sincerity and opposition to participation in war in any form, Justice Black was able to sidestep first amendment difficulties. Apparently all that *Welsh* placed outside the exempted category were those beliefs that are “purely” political.⁶⁸

The Court also subtly altered the *Seeger* requirement that a religious belief be one that occupies a place parallel to the belief held by those who believed in a Supreme Being and one that is sincere. In

64. *Id.*

65. *Id.* at 343.

66. *Id.* at 342. In *Welsh* the majority held that conscientious objection to war can be based in part on a “perception of world politics.” The Court maintained: “We certainly do not think that § 6(j)’s exclusion of those persons with “essentially political, sociological, or philosophical views or a merely personal moral code” should be read to exclude those who hold strong beliefs about our domestic and foreign affairs or even those whose conscientious objection to participation in all wars is founded to substantial extent upon considerations of public policy.

Id.

67. *Id.* at 342-44.

68. *Id.* Placed outside would be those beliefs that rest “solely upon considerations of policy, pragmatism, or expediency.” *Id.*

Welsh the demand is that the belief "function" as a religion and be held with the strength of traditional convictions.

In Justice Harlan's view the majority opinion played havoc with the statute.⁶⁹ He criticized the Court for its "wholly emasculated construction" merely to avoid facing the constitutional question,⁷⁰ and he attempted, therefore, to predicate his opinion on a constitutional base. He asked "whether a statute that defers to the individual's conscience only when his views emanate from adherence to theistic religious beliefs is within the power of Congress?"⁷¹ He perceived the Court's duty as one where it "must survey meticulously the circumstances of governmental categories to eliminate, as it were, religious gerrymanders."⁷²

Selective Objection and the Principle of Neutrality

Soon after the *Welsh* decision, two cases arose which attempted to force a consideration of the constitutional issue. *Gillette v. United States*⁷³ and *Negre v. Larsen*⁷⁴ involved conscientious objectors who distinguished between what were deemed just and unjust wars. Gillette, because of his humanistic beliefs, objected to becoming involved in what he considered an unjust war.⁷⁵ His local draft board, however, refused to classify him as a conscientious objector. Although he expressed a willingness to fight in some wars, Gillette's pacifism was selective. On the basis that the statutory provision required opposition to participation to war in *any* form, the exemption was denied. Negre, a devout Roman Catholic, likewise believed that he had a religious obligation to differentiate between just and unjust wars. After he was inducted into the army and ordered to Viet Nam,

69. *Id.* at 351 (concurring). In his words the Court "performed a lobotomy" on the statute.

70. *Id.* at 357.

71. *Id.* at 356.

72. *Id.* at 357. Mr. Justice Harlan argued: "In any particular case, the critical question is whether the scope of legislation encircles a class so broad that it can be fairly concluded that [all groups that] could be thought to fall within the natural perimeter [are included]." *Id.*, quoting *Walz v. Tax Comm'r*, 397 U.S. 664, 696 (1970) (Harlan, J., concurring).

73. 401 U.S. 437 (1971). See also *United States v. McFadden*, 309 F. Supp. 502 (N.D. Cal. 1970), *vacated and remanded*, 401 U.S. 1006 (1971) (in light of *Gillette v. United States*, 401 U.S. 437 (1971)); *United States v. Sisson*, 297 F. Supp. 902 (D. Mass. 1969), *appeal dismissed*, 399 U.S. 267 (1971).

74. 418 F.2d 908 (9th Cir. 1969), *aff'd sub nom.* *Gillette v. United States*, 401 U.S. 437 (1971).

75. 401 U.S. 437, 463 (1971). Gillette defined "humanism" as "respect and love for man, faith in his inherent goodness and perfectability, and confidence in his capability to improve some of the human condition."

he applied for discharge as a conscientious objector and sought habeas corpus relief when his application was rejected. His claim was also disallowed by the Supreme Court. Both Gillette and Negre argued that favoring the traditional pacifist sects over those faiths which distinguish between just and unjust wars violated their constitutional rights.

In these cases involving conscientious objection on a selective basis, two contradistinctive problems are seen. On the one hand, if no exemption were given to the conscientious objector who holds a sincere belief that a particular war is morally wrong, and that belief occupies in the objector's scale of values a place equal to that of the general objector, then, under the *Seeger* test, to grant exemption to the objector to all wars and not to the objector to one specific war shows a preference of one religion over the other. This is clearly a violation of the establishment clause. If, on the other hand, the selective objector's sincere belief is not viewed as religion, the granting of the exemption to the objector to all wars on religious grounds constitutes a preference for religion over non-religion and is also a violation of the establishment clause, being a breach of the principle of neutrality that the Court professes.⁷⁶ Also violated would be the objector's free exercise of religion in that he would be compelled to participate in a war that would violate his conscience.⁷⁷

Answering Gillette's and Negre's claim that the conscientious objector statute "impermissibly discriminates among types of religious belief and affiliation"⁷⁸ and thus prevents neutrality, the Court insisted that a congressional classification violates neutrality only if it shows bias on the face of the statute, or if the effect is discriminatory toward religions.⁷⁹ Implying that a selective objector

76. See *Walz v. Tax Comm'r*, 397 U.S. 664 (1970); *Abington School Dist. v. Schempp*, 374 U.S. 203, 222 (1963); *Everson v. Board of Education*, 330 U.S. 1, 15 (1947).

77. In *United States v. Macintosh*, 283 U.S. 605 (1931), it was suggested that the rationale behind Congress' recognition of conscientious objector status is "conscience." The Chief Justice declared that, "in the forum of conscience, duty to a moral power higher than the State has always been maintained." *Id.* at 633 (Hughes, C.J., dissenting).

78. 401 U.S. at 449.

79. *Id.* at 450. Compare Justice Marshall's statement: "[T]he Establishment Clause stands at least for the proposition that when government activities touch on the religious sphere, they must be secular in purpose, even-handed in operation, and neutral in primary impact," with one made by Justice Frankfurter in *McGowan v. Maryland*, 366 U.S. 420, 468 (1961), to the effect that a state action would lose its presumption of neutrality "only if the absence of any substantial legislative purpose other than a religious one is made to appear." Justice White, dissenting in *Welsh*, referred to this statement, 398 U.S. at 369, and Justice Marshall seemingly is following Justice White's position.

to war is political while the general objector is religious, Justice Marshall, for the majority, drew an arbitrary line between the two types and thereby sought to avoid the difficult problem of having to prove that the selective objector's beliefs were not religious. While formally it was the obligation of the courts to discover or declare the secular and neutral purpose of a statute, Justice Marshall transferred this burden to the selective objector; the petitioner would now be required to establish "the absence of a neutral, secular basis for the lines government has drawn."⁸⁰ With this unorthodox pronouncement, the Court inveighed upon the protections given "religion" under previous decisions.⁸¹

In justification of its stand, the Court contended that opposition to a particular war "could open the door to a general theory of selective disobedience to law."⁸² This same kind of reasoning could also be applied to the absolute objector who is already possessed of an exemption and who is, therefore, "outside the door." Presumably, according to Justice Marshall's logic, such an objector would be in a better position to disobey some other law in the name of his religion.⁸³ Undoubtedly, Justice Marshall's decision was based on a view once articulated by Justice Cardozo:

The conscientious objector, if his liberties were to be thus extended, might refuse to contribute taxes in furtherance of a war, whether for attack or for defense, or in furtherance of any other end condemned by his conscience as irreligious or immoral. The right of private judgment has never yet been so exalted above the powers and the compulsion of the agencies of government.⁸⁴

80. *Id.* at 352. Ordinarily the burden of proof has been with the courts to determine secular purpose. For a comprehensive treatment of statutory and procedural ways by which a claim of conscientious objection must be asserted, see Field, *Problems of Proof in Conscientious Objector Cases*, 120 U. PA. L. REV. 870 (1972).

81. See specifically *Sherbert v. Verner*, 374 U.S. 398 (1963), in which the burden was placed on the state "to carve out an exemption and to provide benefits for those whose unavailability is due to their religious convictions." *Id.* at 420.

82. 401 U.S. at 455.

83. The Court presumably thought that a wide variety of beliefs could be subsumed under the "objection to a particular war" statutory restriction, and concluded, therefore, that the selective objector might "more likely be political and nonconscientious than otherwise," and that "the difficulties sorting the two with a sure hand are considerable." *Id.* at 456.

84. *Hamilton v. Regents of the Univ. of Calif.*, 293 U.S. 245, 268 (1934) (conscientious objection to participation in a R.O.T.C. program). See also *Hanauer v. Elkins*, 217 Md. 213, 141 A.2d 903 (1958), *appeal dismissed*, 358 U.S. 643 (1959). Congress has not honored objection to payment of taxes and will find a means of extracting them. See Field, *supra* note 80, at 949 n.315.

It might be argued, however, that forcing an individual to kill in violation of conscience is a demand separate and distinct from any other governmental requirement.⁸⁵ Moreover, compelling a person to act when his religion commands otherwise is seemingly a far greater infringement of individual religious liberty than prohibiting an act that is regarded as a religious expression by the individual.⁸⁶ If both the selective and the absolute objector were to seek avoidance from some other governmental obligation on the basis of religious beliefs, then the same *Seeger* standard with its sincerity requirement and its questioning whether a belief is central or peripheral to a person's hierarchy of values, or the *Welsh* test that construes conscience to include both sincerely held religious beliefs and sincerely held non-religious conscientious beliefs, should be equally available as a defense. The fact that the selective objectors in the instant cases were required to conform to a different standard from the total objector is discriminatory, especially since an identical belief—to kill is a violation of conscience—is at issue. Overlooking the possibility that a selective objection could be sincerely held and involve a more carefully thought-out moral judgment than that of a general objection,⁸⁷ the *Gillette* Court, in what it considered a secular and neutral justification for its decision, asserted dogmatically and without explanation that "sincerity" is a concept that can bear only so

85. In *United States v. Sisson*, 297 F. Supp. 902 (D. Mass. 1969), *appeal dismissed*, 399 U.S. 267 (1971), it was recognized that:

It would be a poor court indeed that could not discern the small constitutional magnitude of the interest that a person has in avoiding all helpful service whatsoever or in avoiding paying all general taxes whatsoever. His objections, or course, may be sincere. But some sincere objections have greater constitutional magnitude than others.

Id. at 910. See *In re Jenison*, 265 Minn. 96, 125 N.W.2d 588, *rev'd. per curiam*, 375 U.S. 14 (1963), wherein it was held that when a state attempts to compel an activity that is contrary to one's religious belief, the state is subject to greater limitations than when it passes a law forbidding the activity.

86. See Clark, *Guidelines for the Free Exercise Clause*, 83 HARV. L. REV. 327, 345-46 (1969).

87. In *United States v. Sisson*, 297 F. Supp. 902 (D. Mass. 1969), *appeal dismissed*, 399 U.S. 267 (1971), Judge Wyzanski commented that:

The sincerely conscientious man . . . always brings impressive credentials. When he honestly believes that he will act wrongly if he kills, his claim obviously has great magnitude. That magnitude is not appreciably lessened if his belief relates not to war in general, but to a particular war or to a particular type of war. Indeed a selective conscientious objector might reflect a more discriminating study of the problem, a more sensitive conscience, and a deeper spiritual understanding.

297 F. Supp. at 908.

much adjudicative weight.”⁸⁸ Was it the intent of the Court, therefore, to make the language of the statute limiting the opposition to “participation in war in any form” the objective test for sincerity?

II. THE CATEGORY OF SINCERITY: THE THRESHOLD QUESTION FOR RELIGIOUS EXEMPTION

The word “sincerity” is not mentioned in the statutes providing for conscientious objector status, nor is the word mentioned in the Constitution,⁸⁹ but Congress, by providing for such exemptions, has necessitated a determination of the meaning of the term.⁹⁰ To circumvent the issue by placing doubt on the weight that should be given “sincerity,” as was done by Justice Marshall in *Gillette*, is a form of question-begging that introduces new ambiguities into the test for religiosity. The fact that the term may be difficult to analyze does not obviate the necessity for doing so.⁹¹ Furthermore, as one judge on a lower court bench indicated: “The suggestion that courts cannot tell a sincere from an insincere conscientious objector underestimates what the judicial process performs every day.”⁹²

It was only after several decades of litigation over the issue of the precise role that conscience should play within the legal order that a decision was reached in *Seeger* to make sincerity “the threshold

88. 401 U.S. at 457.

89. *But see* Selective Service Systems, Local Board Memorandum No. 107 (July 6, 1970), which purports to establish guidelines that comply with the *Welsh* holding.

90. *See* Clancy & Weiss, *The Conscientious Objector Exemption: Problems In Conceptual Clarity And Constitutional Considerations*, 17 ME. L. REV. 143, 145 (1965).

91. *See* Clark, *supra* note 86, at 338 (“fairness to the conscientious individual is a major purpose of the free exercise clause”). *See also* Giannella, *Religious Liberty, Nonestablishment, and Doctrinal Development. Part I: The Religious Liberty Guarantee*, 80 HARV. L. REV. 1381, 1423 (1967).

92. *United States v. Sisson*, 297 F. Supp. 902, 909 (D. Mass. 1969), *appeal dismissed*, 399 U.S. 267 (1971); *see also* *United States v. Carruthers*, 152 F.2d 512 (7th Cir. 1945), *cert. denied*, 327 U.S. 787 (1946) (consideration was given to “sincerity” in a mail order fraud case). In *Dobkin v. District of Columbia*, 194 A.2d 657 (D.C. 1963), a Jewish claimant argued that his freedom of religion was violated because he was forced to be in court after sundown on Friday, his Sabbath. The court noted that he went to work regularly on his Sabbath and, therefore, there was no valid basis for his claim. *See also* *United States v. Coffey*, 429 F.2d 401 (9th Cir. 1970), in which the court suggested ways sincerity could be ascertained — one way being reliance upon prior statements or actions consistent or inconsistent with beliefs and depth of commitment to beliefs. Various state courts have made an evaluation of “sincerity.” *See, e.g., In re Grady*, 61 Cal. 2d 887, 394 P.2d 728, 39 Cal. Rptr. 912 (1964); *In re Jenison*, 267 Minn. 136, 125 N.W.2d 588 (1963).

question for religious exemption in every case."⁹³ "It is," Justice Clark proclaimed, "a question of fact—a prime consideration to the validity of every claim for exemption as a conscientious objector."⁹⁴ If this is so, how then might a factual basis for sincerity be ascertained?

Church Affiliation—A Departure from Neutrality?

One could assume that one way to such a determination would be through recognition of a claimant's affiliation and identification with a so-called peace church.⁹⁵ The Quakers who fought in some wars but who profess a total pacifist belief predicated in part on the teachings of William Penn have traditionally come under this classification.⁹⁶ The Jehovah's Witnesses, on the other hand, who maintain that all their workers are ordained ministers and rightfully entitled to exemption, have encountered challenges to their selective service claims.⁹⁷ According to the tenets of their religion, Witnesses may fight in their own defense and in defense of their families, their property and their religious faith, but they are not permitted to serve in the army of a mere political state. Consequently, they are not considered absolute pacifists.⁹⁸ In several cases courts have held that

93. 380 U.S. at 183-85.

94. *Id.*

95. Secretary of War Newton D. Baker assumed this to be so when he testified before the House Military Affairs Committee regarding the proposed 1917 Selective Service Act. He stated, in part:

In the National Defense Act you have an exclusion of any person who has conscientious beliefs against the bearing of arms That, of course, makes the question of exclusion purely a question of individual statement, and as lawyers might say, of a self-serving declaration made after the event. We recommend that the provision be modified so as to exclude or exempt those who are actually members of a recognized society which has, as one of its tenets, the disapproval of war.

Hearings on the Selective Service Act Before the House Comm. on Military Affairs, 65th Cong., 2d Sess. 9 (1917).

96. In *United States v. Sisson*, 297 F. Supp. 902 (D. Mass 1969), *appeal dismissed*, 399 U.S. 267 (1971), Judge Wyzanski noted that Quakers were automatically covered by statutes for exemption while Catholics were not. *See also* Act of Mar. 3, 1863, 12 Stat. 379; Act of May 18, 1917, Pub. L. No. 12 § 1, 40 Stat. 76. Chapter 15 of the 1917 Act specifies that conscientious objection status will be afforded only to those objectors who belong to a recognized religious sect whose creed would not allow participation in war.

97. *See* Donnici, *Governmental Encouragement Of Religious Ideology: A Study Of The Current Conscientious Objector Exemption From Military Service*, 13 J. PUB. L. 16 (1962). Donnici contends that the Jehovah's Witness more closely resembles the political objector for he challenges the purpose of each particular war. *Id.* at 40.

98. *Id.*, *citing* Tietz, *Jehovah's Witnesses: Conscientious Objectors*, 28 S. CALIF. L. REV. 123 (1955).

the Witnesses do not qualify for the statutory requirement of complete pacifism on the grounds that their objections do not conform to "war in any form."⁹⁹ In *Sicurella v. United States*,¹⁰⁰ however, a claim by a Witness that he could not fight in carnal wars, but would fight in defense of his brethren and in defense of his property, was allowed. Predicated on the assumption that there will be no divine commands given to wage war, the Court through Justice Clark asserted that:

The test is not whether the registrant is opposed to all war, but whether he is opposed, on religious grounds, to *participation* in war. As to theocratic war, a petitioner's willingness to fight on the orders of Jehovah is tempered by the fact . . . their history records no such command since Biblical times. . . .¹⁰¹

In dissent, Justice Minton argued that the majority opinion left *Sicurella* "the right to choose the wars in which he will fight."¹⁰²

The theological basis for Roman Catholic belief in the "just war" doctrine comes primarily from the teachings of St. Augustine¹⁰³ and St. Thomas Aquinas.¹⁰⁴ It finds modern expression in the words of Pope John XXIII, who declared:

Since the right to command is required by the moral order and has its source in God, it follows that if civil authorities

99. See, e.g., *Taffs v. United States*, 208 F.2d 329 (8th Cir. 1953), *cert. denied*, 347 U.S. 928 (1954); *United States v. Pekarski*, 207 F.2d 930 (2d Cir. 1953). In *Taffs* it was stated, however, that Congress, "intended by this section to exempt those persons from serving in the armed forces whose religious beliefs were opposed to any form of participation in a flesh and blood war between nations." 208 F.2d at 331. See also *United States v. Hartman*, 209 F.2d 366 (2d Cir. 1954) (the "in any form" language must modify "participation"). This was the court's justification for disposing of the government's claim that Congress meant to include theocratic wars within the meaning of the statute. *Id.* at 371.

100. 348 U.S. 385 (1955).

101. *Id.* at 390-91 (emphasis in original).

102. *Id.* at 395.

103. See AUGUSTINE, *THE CITY OF GOD* XIX, vii (M. Dodds trans. 1950). War, St. Augustine believed, was permissible to the Christian if it were for a just cause. The cause would be in defense of the state against external enemies or for punishment of wrongdoing. Moreover, war must be declared by a responsible authority.

104. AQUINAS, *SUMMA THEOLOGICA*, First Part of the Second Part, question 105(3). St. Thomas extended St. Augustine's argument to provide that the war must not only be waged for a just cause, but the intention of the ruler declaring the war must be a right intention.

pass laws or command anything opposed to the moral order and consequently contrary to the will of God, neither the laws made nor the authority granted can be binding on the consciences of citizens, since God has more right to be obeyed than men.¹⁰⁵

Thus, the "just war" concept permits the petitioner the privilege of determining, according to the dictates of his own conscience, whether a certain war is unjust.¹⁰⁶

In *United States v. McFadden*¹⁰⁷ a Catholic claimant argued the "just war" thesis before the lower courts. Recognizing that the doctrine was a legitimate tenet of the Catholic faith, the district court concluded that the objection was religious in nature rather than political and that:

The statute in question clearly discriminates between those who are opposed to all wars on religious grounds and those who are opposed to particular wars on religious grounds. In effect, this discriminates between the so-called "peace Churches" and other religions such as the Catholic Church.¹⁰⁸

As in *Negre v. Larsen*,¹⁰⁹ an exemption was denied. Various untenable reasons were given for the *McFadden* decision,¹¹⁰ among them: a substantial loss of manpower would result if the exemption were granted,¹¹¹ the morale of troops would be endangered,¹¹² and

105. JOHN XXIII, *PACEM IN TERRIS* pt. II (1963).

106. See Potter, *Conscientious Objection To Particular Wars*, in 4 RELIGION AND THE PUBLIC ORDER 44, 67-69 (1969). Potter lists the following mandates for the "just war" concept: "A complex process of reasoning, combining fundamental theological beliefs, theologically derived ethical norms, convictions concerning ultimate loyalties, and specific empirical input." *Id.* at 67.

107. 309 F. Supp. 502 (N.D. Cal. 1970), *vacated and remanded*, 401 U.S. 1006 (1971). See also notes 74-82 *supra* and accompanying text.

108. 309 F. Supp. at 506.

109. 418 F.2d 908 (9th Cir. 1969), *aff'd sub nom.* Gillette v. United States, 401 U.S. 437 (1971). *Negre's* sincerity was not in question, however.

110. 309 F. Supp. at 507-08.

111. The loss of manpower argument is now mooted by the introduction of a volunteer army. In the 1967 Marshall Commission Report little distinction was seen between an absolute and selective objector. See also Rabin, *When is a Religious Belief Religious: United States v. Seeger and the Scope of Free Exercise*, 51 CORNELL L.Q. 231, 242 (1966) (highly unlikely that the new *Seeger* standard will significantly raise the number of exemptions).

112. In *Conscience, The Constitution, And The Supreme Court: The Riddle of United States v. Seeger*, 1966 WIS. L. REV. 306, Abner Brodie and Harold P. Southerland contend: "There is no reason to suppose that the sincere nonreligious

any extension of the exemption to all selective religious objectors would open the floodgates to spurious claims.¹¹³ Justification for the decision was also given in the name of administrative efficiency.¹¹⁴

If it is recognized, as it was in *McFadden*, that established "peace churches" do exist and that the "just war" doctrine is an integral part of the beliefs of certain churches, then to grant exemptions only to those members of the churches who object to all wars and not to those who object selectively is a pronounced departure from neutrality and violative of the establishment clause of the first amendment. Certainly this is so in spite of the contrary assertions made by Justice Marshall in *Gillette* and *Negre*.

Another departure from neutrality was effected in *United States v. Yoder*,¹¹⁵ where Amish residents of Wisconsin sought exemption from a state statute requiring a public high school education. In *Yoder* Chief Justice Burger pointed to the fact that the Amish were "aided by a history of three centuries as an identifiable religious sect and a long history as a successful and self-sufficient segment of American society."¹¹⁶ He went on to say:

[T]he Amish in this case have convincingly demonstrated the sincerity of their religious beliefs, the interrelationship of belief with their mode of life, the vital role that belief and daily conduct play in the continued survival of Old Order Amish communities and their religious organization, and the hazards presented by the State's enforcement of a statute generally valid as to others.¹¹⁷

Seemingly, Chief Justice Burger's use of a historical reference is his way of testing the validity of a "sincere" belief, a belief that is associated with a well-established "peace" church.¹¹⁸ But unlike

pacifist would prove more amenable to military discipline or less likely to demoralize and infect his fellow soldiers than would his religious counterpart." *Id.* at 329.

113. John H. Mansfield in his comprehensive study of conscientious objectors would deny this assertion. See Mansfield *Conscientious Objection — 1964 Term*, in 1965 RELIGION AND THE PUBLIC ORDER (D. Giannella ed. 1966). He believes that spurious claims could be handled by a response from Congress which could establish a quota of objectors and then select a proper number by lot.

114. Clancy & Weiss, *supra* note 90, raise the question whether constitutional rights should be defined by administrative agencies. Apparently, the authors believe that if it is unconstitutional for the courts to do this, so it would be also for administrative agencies. *Id.* at 155.

115. 406 U.S. 205 (1972).

116. *Id.* at 235.

117. *Id.*

118. Philip B. Kurland, in *The Supreme Court, Compulsory Education, The First Amendment's Religion Clauses*, 75 W. VA. L. REV. 213 (1973), contends that the

Justice Marshall, who in *Gillette* and *Negre* disclaimed any violation of the neutrality principle, Chief Justice Burger admitted:

A regulation neutral on its face may, in its application, nonetheless offend the constitutional requirements for government neutrality if it unduly burdens the free exercise of religion. The Court must not ignore the danger that an exemption from a general obligation of citizenship on religious grounds may run afoul of the Establishment Clause, but that danger can not be allowed to prevent any exemption no matter how vital it may be to the protection of values promoted by the right of free exercise.¹¹⁹

What values promoted by the right of free exercise is the Chief Justice talking about? Since there is virtually an infinite number of value systems of beliefs, as varied as there are people who hold them, it is conceivable that the values to which Chief Justice Burger alludes are those that result in fairness to all individuals. How fair is it, then, to predicate a search for sincerity on a sectarian institutional base in one instance, as in *Yoder*, and disallow it in another, as in the cases of the selective objectors, *McFadden* and *Negre*? Moreover, if *Yoder* is to be treated as a seminal decision, then it is possible that the *Seeger* notion of parallelism or equivalence is in jeopardy, as it stipulates that the sincerity of a belief shall not be confined to parochial or traditional concepts.¹²⁰ Further, if the *Yoder* decision were to become the standard for future decisions, the concept of free exercise would be severely limited to those who can demonstrate sincerity through an established church membership.¹²¹ Under such an arrangement an insincere member of a church would be afforded privileges not granted to an intensely sincere ethical objector.

Chief Justice's narrow view that only long-established churches are to be beneficiaries of exemptions is also reflected in *Walz v. Tax Comm'r*, 397 U.S. 664 (1970), where the Court sustained the validity of property tax exemptions for churches.

119. 406 U.S. at 220-22.

120. In *Seeger*, it was held that "the validity of what he believes cannot be questioned . . . Local boards and courts in this sense are not free to reject beliefs because they consider them 'incomprehensible.' Their task is to decide whether they are, in his own scheme of things, religious." 380 U.S. at 184-85.

121. Joseph M. Dodge II, in *The Free Exercise Of Religion: A Sociological Approach*, 67 MICH. L. REV. 679, 714 (1969), argues that "at a minimum, a religion should have a social structure that extends beyond the individual and his kin." He believes also that any religious group and any practice it engages in should have a history of more than a generation before it receives such benefits as exemptions. See also Kurland, *supra* note 118, at 237-38. (*Yoder* might restrict the free exercise protection only to well-established church membership).

Sincerity Measured by Demeanor

It has been suggested by one court that the best evidence of a registrant's sincerity may well be his credibility and demeanor in a personal appearance before the fact-finding agency.¹²² Demeanor, however, can be fraudulently misrepresented.¹²³ It is, as Justice Jackson once indicated, an unsatisfactory criterion for testing sincerity, since any inquiry into what demeanor elicits raises profound psychological problems. Religious experiences, he asserted,

like some tones and colors have existence for one, but none at all for another. They cannot be verified to the minds of those whose field of consciousness does not include religious insight. When one comes to trial which turns on any aspect of religious belief or representation, unbelievers among his judges are likely not to understand and almost certain not to believe him.¹²⁴

One commentator questions whether constitutional rights should be defined by administrative agencies and feels that members of such agencies probably favor conventional religions and regard sincerity as related to plausibility.¹²⁵ Another critic believes that the intensity of a belief can only be evaluated as a factual matter in individual cases either by a jury or some agency and that this judgment will be "largely intuitive, and therefore more or less arbitrary, aided only in part by the science of psychology."¹²⁶ In *Seeger* the demand was that administrative officials be permitted limited discretion in the area of determining demeanor. It was there stated that, "in resolving these exemption problems one deals with beliefs of different individuals who will articulate them in a multitude of ways."¹²⁷

122. See *United States v. Simmons*, 213 F. Supp. 901, 904, (7th Cir. 1954), *rev'd on other grounds*, 348 U.S. 397 (1955); *Witmer v. United States*, 348 U.S. 375, 381 (1955) ("In those cases objective facts are relevant only insofar as they help determine the sincerity of the registrant in his claimed belief, purely a subjective question.").

123. See *United States v. Ballard*, 322 U.S. 78 (1944). Chief Justice Stone argued in dissent that "the state of one's mind is a fact as capable of fraudulent misrepresentation as is one's physical condition or the state of his bodily health." *Id.* at 90.

124. *Id.* at 92-93 (Jackson, J., dissenting).

125. See Clancy & Weiss, *supra* note 90, at 115; Weiss, Book Review, 72 YALE L.J. 1665, 1669-70 (1963).

126. See Clark, *supra* note 86, at 334.

127. 380 U.S. at 183-85.

The different ways by which an individual can express his beliefs poses special problems in the determination of sincerity. For example, if a claimant were able to use religious terminology to describe his nonreligious beliefs, he might be in a better position to secure conscientious exemption status. In *United States v. Shacter*,¹²⁸ an avowed atheist claimed that "the highest possible value must be placed on human life, that man's life is sacred, that mankind is a holy entity, and that the killing of one of its parts is a sin no man can endure, and that man has a mortal human soul."¹²⁹ Conceivably, had Shacter used nonreligious verbiage to characterize his beliefs, then under *Seeger* he might have been denied exemption on the basis that he was expressing essentially a personal, sociological or political philosophy.¹³⁰ Although it can be argued that the use of traditional religious language should be given some weight when determining sincerity, it does not follow that "a fortunate choice of words should be used objectively to classify beliefs as sincere religious beliefs."¹³¹ In *Gruca v. Secretary of the Army*¹³² a comparison was drawn between Gruca's rather simplistic expression of beliefs and Seeger's and Welsh's more sophisticated fluency. The District of Columbia Circuit Court of Appeals took note of the fact that Gruca had been denied exemption on the basis of his inability to verbalize properly.¹³³

One court has held that "an inference of insincerity could logically be drawn from the fact that an applicant for conscientious objector status expresses beliefs in a way which clearly indicates that he is not familiar with them."¹³⁴ That court maintained, however, that:

Many sincere young men use language derived from their reading and from their moral and spiritual advisers to

128. 293 F. Supp. 1057 (D. Md. 1969).

129. *Id.* at 1061.

130. The *Seeger* Court excluded those views "essentially political, sociological or a merely personal moral code" from its definition of religion. 380 U.S. at 176.

131. See Note, *Conscientious Objection*, 21 STAN. L. REV. 1734, 1742-44 (1969). See also Mansfield, *supra* note 113, at 11.

132. No. 23,849 (D.C. Cir., Oct. 23, 1970).

133. The *Gruca* case is reported in Comment, *Conscience and Religion*, 38 U. CHI. L. REV. 583 (1971). The case was up for review from a draft board's finding that the claimant was not entitled to be classified as a conscientious objector. The commentator stated that "the possibility of verbal manipulation makes some consideration of the purported objector's credibility necessary to distinguish articulate but fabricated opposition from sincere but naively expressed opposition." *Id.* at 611.

134. *Bortree v. Resor*, No. 24,607 (D.C. Cir. Mar. 2, 1971), reported in 38 U. CHI. L. REV. 583, 611 (1971).

express their beliefs, and in so doing may give the impression that their thoughts are not their own. Because of this phenomenon, Selective Service Boards and the Army must exercise great care if they attempt to draw conclusions from the manner in which an applicant phrases his beliefs.¹³⁵

In *Seeger*, the Court also recognized "that in such an intensely personal area, of course, the claim of the registrant that his belief is an essential part of a religious faith must be given great weight."¹³⁶ However, there is a strong possibility that a fact finder might not give any weight to that belief which he deems implausible.¹³⁷ This may be so in spite of admonitions in *United States v. Ballard*¹³⁸ that one's religious views cannot be subject to scrutiny or examination by any judge or tribunal.

The *Ballard* case involved leaders of the "I Am" movement who were charged with willfully and fraudulently using the mails to solicit contributions. The Ballards professed to be divine messengers and maintained that they were possessed with supernatural powers for healing those afflicted with so-called incurable diseases.¹³⁹ They also represented themselves as having ability to cure poverty and misery. Their claims prompted certain individuals to purchase items from them or make donations to them. Justice Douglas, concerned with the demands of the first amendment, held for the majority that the issues of truth or falsity of beliefs could not be submitted to a jury.¹⁴⁰ Echoing, seemingly, an oft-quoted comment made by Justice Miller that "the law knows no heresy, and is committed to the support of no dogma, the establishment of no sect,"¹⁴¹ Justice Douglas proclaimed that freedom of religion,

[e]mbraces the right to maintain theories of life and death of the thereafter which are rank heresy to followers of the orthodox faiths. . . . Men may believe what they cannot prove. They may not be put to the proof of their religious

135. *Id.*

136. 380 U.S. at 183-85.

137. See *United States v. Ballard*, 322 U.S. 78, 90 (1944) (Jackson, J., dissenting).

138. 322 U.S. 78 (1944). See also notes 123-24 *supra* and accompanying text.

139. The Ballards claimed, among other things, to have met Saint Germain and Jesus Christ. For an interesting discussion of the *Ballard* case and the implications that it holds for religious freedom, see Weiss, *Privilege, Posture and Protection: "Religion" in the Law*, 73 YALE L.J. 547 (1964).

140. 322 U.S. at 88.

141. *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 728 (1872).

doctrines or beliefs. . . . When the triers of fact undertake that task, they enter a forbidden domain. The First Amendment does not select any one group or any one type of religion for preferred treatment.¹⁴²

His decision, therefore, can be looked upon as a refusal to distinguish between men of sincere faith and those who deliberately set out to defraud.¹⁴³

In *Ballard*, an impressive argument was also made by Justice Jackson against using a religious claimant's sincerity as a basis for constitutional protection. In his dissenting opinion Jackson asserted that questions of verity of belief and sincerity are inter-related. Consequently, if an inquiry into one is not permissible, the other one must likewise be barred. He emphasized:

[A]s a matter of either practice or philosophy I do not see how we can separate an issue as to what is believed from considerations of what is believable. The most convincing proof that one believes his statements is to show that they have been true in his experience If we try religious sincerity severed from religious verity, we isolate the dispute from the very considerations which in common experience provide its most reliable answer.¹⁴⁴

If religion under law, according to the *Welsh* decision, involves nothing more than a "deeply and sincerely" held belief which may be "purely ethical or moral in source and content,"¹⁴⁵ and if under *Seeger* the inquiry must be limited to "whether the beliefs professed by a registrant are sincerely held and whether they are in his own scheme of things religious,"¹⁴⁶ and if *Ballard* mandates that "no inquiry can be made into the verity of beliefs,"¹⁴⁷ then under the combined

142. 322 U.S. at 86-87.

143. Jonathan Weiss, in his thoughtful analysis of the *Ballard* decision, asserts: "If we combine our notion of fraudulent representations with our conception of religious expression within a legal system predicated upon toleration of all forms of that expression, we obtain the result that there can be no fraud in matters of religious belief." Weiss, *supra* note 139, at 604.

144. 322 U.S. 78, 92-93 (1944) (dissenting opinion). Similarly, John H. Mansfield in his comprehensive analysis of the *Seeger* case feels that the character of truth of the religious beliefs must likewise be considered. He states: "Religion cannot be satisfactorily defined merely by reference to the role that a belief plays in the life of the believer." Mansfield, *supra* note 113 at 33-34.

145. 398 U.S. 333, 340 (1970).

146. 380 U.S. 163, 176 (1965).

147. 322 U.S. 78, 86 (1944). See also *Torcaso v. Watkins*, 367 U.S. 488 (1961), in which it was stated:

holdings, presumably, the mere assertion by an individual that his beliefs are religious is the only *prima facie* evidence needed to substantiate the validity of the professed beliefs. What is held out to be a religious claim, therefore, cannot be challenged.¹⁴⁸ This argument might be extended even further, as was done by several critics, to preclude a consideration of sincerity "since the degree and nature of sincerity are integral to the religious characterization and beyond dissection."¹⁴⁹ If this is true, then any legal attempt to distinguish religion from nonreligion becomes nothing more than a futile semantical gesture.

III. THE DOCTRINAL CONTENT CATEGORY

The stipulation in *Ballard* that no inquiry can be made into the truth of a religious assertion compels the notion that religious freedom can be achieved only if the content of a particular belief is eliminated as a criterion for a legal definition of religion.¹⁵⁰ Following this line of reasoning, it is easy to conclude that no requirement of a belief in a Deity should be demanded by the Court, as this would constitute "content" that would establish that belief over those beliefs rejecting the idea of a Supreme Being.

In 1961 in *Torcaso v. Watkins*,¹⁵¹ the Court recognized for the first time¹⁵² that there are certain religions that do not embrace a belief in a divine entity.¹⁵³ *Torcaso* was refused a commission as a

Neither a State nor the Federal Government can constitutionally force a person to profess a belief or disbelief in any religion. Neither can constitutionally pass laws nor impose requirements which aid all religions as against non-believers, and neither can aid those religions based on belief in the existence of God as against those religions founded on different beliefs.

Id. at 495.

148. See Weiss, *supra* note 139, at 605.

149. See Clancy & Weiss, *supra* note 90. Criticizing Justice Clark's assertion in *Seeger* that "the claim of the registrant that his belief is an essential part of a religious faith must be given great weight," the authors argue: "If he had specified what belief in what, the relevance of sincerity in his account might have been clarified. To look for (1) Supreme Being, and (2) Sincerity, is much too mechanical a test, for the recognition of religion prevents an analysis for sincerity." *Id.* at 153 n.56.

150. See generally Comment, *Defining Religion: Of God, The Constitution And the D.A.R.*, 32 U. CHI. L. REV. 533, 555 (1965).

151. 367 U.S. 488 (1961).

152. However, in *Everson v. Board of Education*, 330 U.S. 1, 15 (1947), the Court did say, "Neither can [a state] pass laws which aid one religion, aid all religions, or prefer one religion over another."

153. In a footnote, the Court conceded that "among religions in this country which do not teach what would generally be considered a belief in the existence of

notary public by the State of Maryland because of his refusal to declare a belief in God as was required by that state's constitution. By invalidating Maryland's statutory classification favoring theistic over non-theistic beliefs, the Court placed all non-theistic believers under the protection of the establishment clause. Although there is a suggestion in *Torcaso* that a definition of religion should not be based on the concept of a Deity, the opinion did not recite facts which showed whether the Court thought any other content requirement was necessary. Commenting on the case, Professor Conklin asserted:

Since any attempt by a court to define or interpret the word "religion" in the first amendment must, of necessity, imply the exclusion of some opinions which a small minority may choose to call religion, the plain implication in this opinion is that any such attempt is automatically unconstitutional. Because the term "religion" may not be so defined as to exclude "non-believers" it must, of necessity, include everyone regardless of their belief or non-belief. Therefore, any attempted legislative employment of the word "religion" would be fruitless since its meaning could never be usefully defined, either by Congress or by the courts. Any definition would have to include all who "believe," even if that be a "non-belief."¹⁵⁴

Judge Augustus Hand of the Second Circuit Court of Appeals also declared that "it is unnecessary to attempt a definition of religion," for the content of the term, he felt, is found in the history of the human race and is incapable of compression into a few words.¹⁵⁵ But what specifically is this content to which he alludes and that history discloses? Justice Jackson in *Ballard* attempted one answer by using a quotation from William James to the effect that "it is not theology or ceremonies which keep religion going. Its vitality is in the religious experiences of many people."¹⁵⁶ The rest of the quotation suggests what these experiences are: "[T]hey are conversations with

God are Buddhism, Taoism, Ethical Culture, Secular Humanism and others." 367 U.S. at 495 n.11.

154. Conklin, *Conscientious Objector Provisions: A View in the Light of Torcaso v. Watkins*, 51 GEO. L.J. 252, 277 (1963).

155. *United States v. Kauten*, 133 F.2d 703, 708 (2d Cir. 1943), *quoted with approval* in *West Virginia St. Bd. of Educ. v. Barnette*, 319 U.S. 624, 643 (1943) (Frankfurter, J., dissenting). Justice Frankfurter was concerned for the large number of people in the United States who held no membership in an organized church and wondered "what claims of conscience would the Court recognize and what would be rejected as satisfying the 'religion' which the Constitution protects."

156. W. JAMES, *THE VARIETIES OF RELIGIOUS EXPERIENCE* (1958).

the unseen, voices and vision, responses to prayer, changes of heart, deliverances from fear, inflowings of help, assurances of support, whenever certain persons set their own internal attitude in certain appropriate ways."¹⁵⁷

It is submitted that William James's view is a theological description of religion's content, but not necessarily the legal one. Currently in law it is debatable whether there is even a minimal content requirement; it was the *Ballard* case itself, if we accept Professor Conklin's stand, that was largely responsible for starting a trend which culminated in *Seeger*, effectively eliminating any Court-decreed content from the legal definition of religion.¹⁵⁸ In *Seeger* it is the place that "a sincere and meaningful belief" occupies in the life of the possessor parallel to that filled by the orthodox belief in God" that becomes the important element, a belief that is based upon "a power or being, or upon a faith, to which all else is subordinate or upon which all else is ultimately dependent."¹⁵⁹ External as well as internally derived beliefs comprise the permissible belief classification.¹⁶⁰

Critics have not agreed in interpreting the *Seeger* test. In one commentator's view the above quoted language may be said to be the "substance" of the Court's definition of a religious belief or belief in relation to a Supreme Being. "It assigns content," the commentator states, "to the merely formal 'place parallel to that filled by the [traditional] God' by telling what place."¹⁶¹ Another commentator contends that "since the test focuses on the position that belief occupies in the objector's life, it asks an ambiguous question."¹⁶² Ambiguity occurs because the belief may be both the source or the authority for the religious objection causing varying results in the handling of claims. If the Court treats the religious "source" of the opposition as dispositive, "then the class of exempted conscientious

157. *Id.*

158. Note, however, an earlier state court decision which eliminated content. Apparently the *Seeger* decision was patterned after the language of that case. *Fellowship of Humanity v. County of Alameda*, 153 Cal. App. 2d 673, 315 P.2d 394 (1957). It was there held: "Thus the only inquiry . . . is the objective one of whether a given group that claims the exemption conducts itself the way groups conceded to be religious conduct themselves. The content of the belief under such a test, is not a matter of governmental concern." *Id.* at 692, 315 P.2d at 406.

159. 380 U.S. at 176.

160. *Id.* at 186.

161. See Hollingsworth, *Constitutional Religious Protection: Antiquated Oddity or Vital Reality?*, 34 OHIO ST. L.J. 15, 19 n.20 (1972).

162. See Comment, *The Legal Relationship of Conscience to Religion: Refusals to Bear Arms*, 38 U. CHI. L. REV. 583, 593 (1971).

objectors will be more inclusive than if a religious authority for the objector's opposition must be established."¹⁶³

Still another commentator speculates that: "What the Court may mean is that the religious character of a belief is determined not by the place it occupies in the life of the believer, but by the place it ought to occupy in his life, considering the fundamental character of truths that are asserted."¹⁶⁴ Believing that there is some inadequacy in the *Seeger* test inquiring into the intensity with which a belief is held and that a distinction can be made between the quality of a belief and its functional aspects, the same critic contends that: "[I]t is the fundamental character of the truths asserted, and the fact that they address themselves to basic questions about the nature of reality and the meaning of human existence, that is the primary reason for characterizing a belief in these truths as religious."¹⁶⁵ Assuming that the Court means a religious belief to be an affirmation of some truth, reality or value, he argues:

If this is what the Court meant to say, the test does have a certain "objective" quality to it. In this respect it does not require an inquiry into the extent to which the belief has transformed the objector's life. It requires, instead, attention to whether the questions to which the belief addresses itself are of a certain character; it requires attention to the subject matter of the belief more than the condition of the believer.¹⁶⁶

In *Seeger*, while the Court professed to have eliminated the content requirement, it did in fact defer to certain theologians for their insights into what constitutes religion.¹⁶⁷ Moreover, it made the

163. *Id.* at 594-95. The author cites several examples. In *United States v. Shacter*, 293 F. Supp. 1057 (D. Md. 1968), the court focused on the source of, not the authority for, the opposition, and granted conscientious objector status to an atheist. The court viewed his belief as religious under *Seeger* without demonstrating an authority role in his life, which the commentator believes might be done under *Seeger*. In *re* Nomland, No. 264215 (C.D. Cal. Jan. 30, 1968), involved an avowed atheist with an undisputed religious background (Lutheran) who was granted relief. The court concluded that the beliefs from which opposition was derived were religious within the meaning of that term as set out in *Seeger*. In *In re Weitzman*, 284 F. Supp. 514 (D. Minn. 1968), where an authority inquiry was made, the court concluded that petitioner's objections were not religious because *Seeger* required "some external force greater than man's relationship to man which occupied a position in the [objector's] life tantamount to a God or a 'Supreme Being'."

164. Mansfield, *supra* note 113, at 10.

165. *Id.*

166. *Id.*

167. See notes 49-50 *supra* and accompanying text.

place that traditional religion holds in the life of a believer the standard of reference for comparison. This not only is paradoxical, as one writer was quick to point out,¹⁶⁸ but also indicates that there might be some vestigial content test remaining in that belief designated religious by the Court. Paradoxically, also, in granting standing to someone seeking equal protection under the law against an alleged discriminatory practice, the Court must first recognize the religious character of the asserted claim even if it later were to declare the claim to be not a religious one.¹⁶⁹ Where a doubt exists regarding a group's religious character and where the Court assumes without justification that a certain group is in fact religious, the assumption of the religious nature of that group becomes normative in that the Court is injecting its own perception of religion's content into its decision.¹⁷⁰

Emphasizing that normative definitions of what is true religion are not proper for actualizing the first amendment, one commentator suggests the necessity of an "external referent" for religious belief on the basis that "intensity of commitment would not be enough."¹⁷¹ Alluding to definitions of religion that include a relational idea, the author contends that no "theological or philosophical assertion is intended."¹⁷² Rather, he claims, "it is merely a tentative attempt to

168. Dodge, *The Free Exercise of Religion: A Sociological Approach*, 67 MICH. L. REV. 679, 713 (1969). Dodge also points out that the theologians offered disparate statements of what the core of religion is.

169. See, e.g., *State v. Cubbage*, 58 Del. 430, 210 A.2d 555 (1965) (involving Black Muslims), noted in Killilea, *Standards for Expanding Freedom of Conscience*, 34 U. PITT. L. REV. 531, 540 (1973).

170. See, e.g., *Pierce v. La Vallee*, 293 F.2d 233 (2d Cir. 1961); *In re Ferguson*, 55 Cal. 2d 667, 361 P.2d 417, 12 Cal. Rptr. 753, cert. denied, 368 U.S. 864 (1961). Both of these cases involved Black Muslims. The court assumed in *Ferguson*, for purposes of litigation, that Islam is in fact a religion even though there are aspects of its practices that are not. For a discussion of these cases see Comment, 75 HARV. L. REV. 837 (1962).

171. See Hollingsworth, *supra* note 61, at 28. Hollingsworth suggests the danger "in positing the minimal requirement that the religion's object be perceived as external is that even here one may be confusing an aspect of one's own normative definition of religion with a purely descriptive one."

172. *Id.* at 26-27. Hollingsworth quotes several authorities: C.G. JUNG, *Psychology And Religion: West And East*, in 11 THE COLLECTED WORKS OF C.G. JUNG 7 (1958) ("religious teaching as well as the consensus gentium always and everywhere explain this experience as being due to a cause external to the individual"); W. JAMES, *THE VARIETIES OF RELIGIOUS EXPERIENCE*, Lecture 3 (1958) (defining religion as: "the feelings, acts, and experience of individual men in their solitude, so far as they apprehend themselves to stand in relation to whatever they may consider the divine"); E.S. BRIGHTMAN, *A PHILOSOPHY OF RELIGION* 415 (1940) ("Religious experience is any experience of any person taken in its relation to his God.").

posit a phenomenological, generic description of religion.¹⁷³ He feels, therefore, that "an essential (or the essential) characteristic of religion is commitment to something that is subjectively understood by the believer to be other than his own self."¹⁷⁴ He indicates, however, that the "locus" of this required objective content may remain in the perception of subject-believer.¹⁷⁵ He argues that his suggestion would circumvent the problem of having to include that objector whose only concern is to save his own skin, within the religious classification.¹⁷⁶ It would seem that even as a description this requirement would convey the notion that the Court was approving or disapproving the content of the religious expression. The end result could be injection of normative elements into religion's legal definition.

This same author asserts also that the requirements of the first amendment's religion clauses "do not preclude a rational, theologically neutral delineation between what is religion and what is not."¹⁷⁷ He feels, moreover, that "in a practical sense these clauses require it, lest by allowing religion to include everything it seems to have little or no constitutional significance."¹⁷⁸ There are others who would concur in this viewpoint, emphasizing, in fact, that the necessity arises out of the constitutional language itself, which sets down religion as a separate category for special consideration.¹⁷⁹

173. Hollingsworth, *supra* note 161, at 27.

174. *Id.* at 28.

175. *Id.*

176. John H. Mansfield convincingly argues:

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.

Mansfield, *supra* note 113, at 10.

177. Hollingsworth, *supra* note 161, at 41.

178. *Id.*

179. *See, e.g.,* Mansfield, Book Review, 52 CALIF. L. REV. 212 (1964) (P. KURLAND, RELIGION AND THE LAW). Mansfield maintains:

If public funds may not be used to support religious activities, the Court will have to decide whether an activity receiving support is religious or not. The Court must have a definition of religion. This necessity arises out of the constitutional provisions of the first amendment. Indeed, even a doctrine that says the Court has only to determine whether there is a legislative classification on the basis of religion, itself requires a decision as to whether a given classification is on such a basis or not.

IV. THE NORMATIVE ELEMENT IN THE ESTABLISHMENT CLAUSE

Even if it can be argued that the elimination of any content requirement is desirable for defining religion in free exercise disputes, it cannot logically be maintained that content similarly must be or can be eliminated in establishment cases. Any attempt at an equivalency would result in gross inconsistencies. Justice Douglas pointed to one of these when he said: "The first amendment commands government to have no interest in theology or ritual; it admonishes government to be interested in allowing religious freedom to flourish."¹⁸⁰ It would be difficult indeed to sustain an interest in religious freedom or, for that matter, to permit it to flourish adequately, without retaining some interest in theology or ritual, even if the interest is nothing more than a sociological recognition. In *Walz v. Tax Commissioner*,¹⁸¹ for example, wherein the Court upheld the validity of tax exemptions accorded ecclesiastical property in the State of New York, it was observed by Justice Brennan that:

The means churches use to carry on their public services activities are not "essentially religious" in nature. They are the same means used by any purely secular organization—money, human time and skills, physical facilities. It is true that each contributes to the pluralism of our society through its purely religious activities, but the state encourages these activities not because it champions religion *per se* but because it values religion among a variety of private, nonprofit enterprises that contribute to the diversity of the Nation. Viewed in this light, there is no non-religious mosaic, just as there is no nonliterary substitute for literary groups.¹⁸²

If Justice Brennan's "no substitute" contention is correct and if, according to *Seeger*, religion under the free exercise clause is defined as "any sincere belief that is of ultimate concern to an individual," then "is government barred from adopting and endorsing policies that express paramount convictions or ultimate concerns?"¹⁸³ Pre-

Id. at 216. See Comment, *Defining Religion: Of God, The Constitution and the D.A.R.*, 32 U. CHI. L. REV. 533, 555-56 (1965) ("governmental classifications in terms of religion are constitutionally permissible, and . . . a definition is therefore necessary to delineate the scope of such legislation").

180. *McGowan v. Maryland*, 366 U.S. 420, 564 (1961) (dissenting opinion).

181. 397 U.S. 664 (1970).

182. *Id.* at 693.

183. Or is government merely barred from sanctioning beliefs that occupy a parallel position to conventional religion? Marc Galanter poses these and the following

sumably, this cannot be, lest government lose all means of social control. Government and the courts must at least be free to determine what religion is for the purpose of deciding whether legislation serves a secular or a religious purpose in order to avoid favoring a religion or religion in general.¹⁸⁴

Articulating a Secular Norm

Theoretically, then, the mandate of allowing religious freedom to flourish is an ultimately secular concern and not a religious one that moves the Court into the policy-making field. There a process of normation or a social ordering takes place, whereby the Court, acting as a national conscience, articulates a norm that is broad enough to fit the facts of the case before it and capable of transcending the particular dispute. This articulation becomes the Court's rationalized characterization of what religion is in the secular sense or that which cannot be established. Religion, then, for establishment purposes, is supposedly an expression of a majority view.¹⁸⁵ The broad permissible individualized definition of religion that has evolved under free exercise disputes is, therefore, not applicable in establishment disputes. The paradox exposed here is that any national consensus or majority opinion impinging upon religion's legal meaning is a contradiction of the democratic principle held out for a pluralistic society—a principle that suggests privacy, independence, and competition as ultimate values.¹⁸⁶

provocative questions in *Religious Freedoms in the United States: A Turning Point?*, 1966 WIS. L. REV. 217:

If religion embraces a whole class of beliefs when they are claimed to be such by their adherents, does it include all the beliefs of that class when no such claim is made for them? Or when the religious characterization is attached by someone other than the adherent himself? Is the teaching of secular subjects in religious schools a secular matter because opponents of aid to schools deem it religious? If government is constitutionally disabled from saying that it is nonreligious when its practitioners say that it is religious, is it similarly disabled from saying that something is religious when its practitioners say that it is not?

Id. at 265.

184. *Abington School Dist. v. Schempp*, 374 U.S. 203 (1963), held that the "purpose" of any contested law and its "primary effect" must be secular in character.

185. One court has held that the establishment clause "looks to the majority concept" of the term religion while the free exercise clause refers to the "minority view." *Sheldon v. Fannin*, 221 F. Supp. 766 (D. Ariz. 1963).

186. See Lowi, *The Public Philosophy: Interest Group Liberalism*, 61 AM. POL. SCI. REV. 5, 22 (1967), in which the author alludes to an artificial pluralism and suggests: "It is wrong to assume that social pluralism (which is an undeniable fact about America) produced political pluralism." See also R. DAHL, *PLURALIST DEMOCRACY IN THE UNITED STATES: CONFLICT AND CONSENT* 3-4 (1967).

The first attempt to provide content to the religion clauses was in 1890 in *Davis v. Beason*,¹⁸⁷ a case involving members of the Mormon religious sect. In *Davis*, majority will and conventional notions of religion were clearly articulated by Justice Field, who explained:

The term "religion" has reference to one's views of his relations to his Creator, and to the obligations they impose of reverence for his being and characters, and of obedience to his will. It is often confounded with the cultus or forms of worship of a particular sect, but is distinguishable from the latter. The First Amendment to the Constitution, in declaring that Congress shall make no law respecting the establishment of religion, or forbidding the free exercise thereof, was intended to allow everyone under the jurisdiction of the United States to entertain such notions respecting his relations to his Maker and the duties they impose as may be by his judgment and conscience, and to exhibit his sentiments in such form of worship as he may think proper, not injurious to the equal rights of others, and to prohibit legislation for the support of any religious tenets, or the modes or worship of any sect It was never intended or supposed that the Amendment could be invoked as a protection against legislation for the punishment of acts inimical to the peace, good order and morals of society¹⁸⁸

The Court went on to say that "however free the exercise of religion may be, it must be subordinate to the criminal laws of the country."¹⁸⁹

From the secular vantage point of 1890, religion is viewed as theistic in that there is deference to a Deity, involving obligations and obedience. "Cultus" is also mentioned, which would be recognition of "beliefs" and "ritual." There is also a standard of public morality expressed that reflects prevalent social norms, abhorring bigamy and polygamy and viewing them as "crimes by the laws of all

187. 133 U.S. 333 (1890). In *Beason* the constitutionality of an Idaho statute which compelled oaths against bigamy and polygamy was upheld. In *Reynolds v. United States*, 98 U.S. 145 (1878), an earlier case involving Mormons, the polygamy issue was also presented. Although the *Reynolds* Court arrived at the action-belief distinction that "laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices," the Court never found it necessary to define "religion." See also *The Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States*, 136 U.S. 1 (1890).

188. 133 U.S. at 342-43.

189. *Id.* at 344.

civilized and Christian countries."¹⁹⁰ The secular will in other contexts and in other times is not as easily discernible as in *Beason*. Thus the locus of the objective content under establishment vests in the perceptions of the individual court members as well as members of legislatures and constitutes an arbitrary value choice that expresses what religion is or ought to be in the legal sense.¹⁹¹

Neutrality and Excessive Entanglements

The choice on which the Court predicated its decision in *Walz v. Tax Commissioner*¹⁹² was the concept of "neutrality," formulated in *Abington School District v. Schempp*¹⁹³ and requiring a value judgment on a question involving the religion clauses to turn on whether particular acts of government are intended to establish or interfere with religious exercise or have the primary effect of doing so. It has been recognized by various critics¹⁹⁴ and the Court itself¹⁹⁵ that most of the laws reviewed by the Court under the first amendment are capable of producing not only one effect but a multiplicity of effects. Since there is always the possibility that a primary religious effect may be wrapped "in the verbal cellophane of a secular purpose," as Justice Frankfurter once picturesquely explained,¹⁹⁶ it is incumbent upon the Court to differentiate carefully between that which is secular and that which is religious, so that there is no violation of the first amendment mandate.

Further, the *Schempp* test, which requires that an effect be primary and one that neither advances nor inhibits religion,¹⁹⁷ raises

190. *Id.*

191. Sometimes the courts engage in what they call a "balancing of interests" technique. Since opposed values are involved and are qualitatively different, there is no actual balancing. Rather, there is merely a judicial determination of the greater and the lesser. In this regard see the arguments presented in Wormuth & Mirkin, *The Doctrine of the Reasonable Alternative*, 9 UTAH L. REV. 254, 255 (1964).

192. 397 U.S. 664 (1970). See notes 181-82 *supra* and accompanying text. See also notes 207-10 *infra*.

193. 374 U.S. 203, 222 (1963).

194. See, e.g., Van Alstyne, *Constitutional Separation of Church and State: The Quest for a Coherent Position*, 57 AM. POL. SCI. REV. 865 (1963); Choper, *The Establishment Clause and Aid to Parochial Schools*, 56 CALIF. L. REV. 260, 277-78 (1968).

195. *Committee for Pub. Educ. and Religious Liberty v. Nyquist*, 413 U.S. 756, 783 n.39 (1973).

196. *United States v. Kahrigher*, 345 U.S. 22, 38 (1953) (dissenting opinion). A religious effect has been defined as "[s]tate action abridging the individual's freedom to adopt, observe, or propagate his religion (or irreligion) through programs of assistance, or systems of regulation." Note, *Toward a Uniform Valuation of Religion Guarantees*, 80 YALE L.J. 77, 98 (1970).

197. 374 U.S. 203, 222 (1963).

linguistic problems. Must the effect be direct, indirect, or ultimate? The semantical distinction could be crucial to parochial schools, for instance, that might be on the verge of closing if some state funding is not available.¹⁹⁸ Moreover, the value consequences following any differentiation could alter the secular-religious distinction and thereby alter the meaning of religion. In *Walz*, for example, Justice Brennan assumed that since religious institutions contribute to the pluralistic nature of American society, they must be defended and fostered. This conscious patronizing could change a religious institution's role, affect its autonomy and independence, and make it "public for more purposes than the Church would wish."¹⁹⁹ It would seem, therefore, that there is inherent in the establishment clause a certain amount of coercion, in that religious organizations would feel the need to conform lest they lose the benefits of continued governmental support.²⁰⁰

There are things that have traditionally been recognized and universally accepted as being associated with religion, some of which are indicated in the *Beason* opinion. These include places of worship, the act of worship, and the rituals associated with worship such as prayers, sermons, reading from sacred books, meditations, proselytizing, and sacraments.²⁰¹ In addition, an identification with some charismatic leader might be included in the generally accepted

198. See Choper, *supra* note 194, in which the writer contends that if an effect is to serve a religious end, "the action's purpose should not be characterized as secular even though an ultimate or derivative public benefit may be produced." *Id.* at 278.

199. Justice Brennan himself recognized this discrepancy in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), which held unconstitutional a Pennsylvania statute providing funds for the purchase of secular educational services from non-public schools. It has also been recognized that "exemption policy affects the behavior of taxpayers as well as the activities of organizations seeking to obtain or retain an exemption. It creates competitive imbalances between exempt and non-exempt groups providing similar services, and it may create political controversies." Note, *Religion in Politics and the Income Tax Exemption*, 42 *FORDHAM L. REV.* 387, 397 n.6 (1973) [hereinafter cited as *Income Tax Exemption*].

200. In *Board of Education v. Allen*, 392 U.S. 236, 248-49 (1968), the Court held that "[c]oercion against individuals in the practice of their religion" was essential to a free exercise action, but it found no such requirement for establishment cases. See also *Engle v. Vitali*, 370 U.S. 421, 431 (1962), stating: "When the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain."

201. Recent court decisions, however, reflect a change in the commonality view. See, e.g., *Brown v. Reaves*, 294 F. Supp. 808 (D. La. 1966) (church attendance not necessary in the classification); *United States v. Washington*, 392 F.2d 37 (6th Cir. 1968), (biblical citations for beliefs not necessary to an objective classification).

category.²⁰² Built into this commonality of understanding are two notions of religion: religion in an organizational sense that looks at form, and religion in an operational or functional sense that looks at substance.

This commonality view is manifested in the current Internal Revenue Code and Treasury Regulations that classify certain organizations, including religious ones, for property tax exemption purposes.²⁰³ One of the conditions for tax exemption is that the benefiting organization abstain from certain forms of political activity.²⁰⁴ This operational standard creates two classes of religion: the politically active non-exempt religion and the non-active exempt one.²⁰⁵ Under this differentiation it can be seen that one religion is favored over the other and an advancement or inhibition of religion is possible.²⁰⁶

In two establishment disputes, *Waltz v. Tax Commissioner*²⁰⁷ and *Lemon v. Kurtzman*,²⁰⁸ the Court attempted a classification of

202. Joseph M. Dodge II argues for a sociological definition of religion that reflects traditional notions:

A religion should have a social structure that extends beyond the individual and his kin. Moreover, the religious group (and also the particular practice involved) should either have a history of, let us say, more than a generation, or it should be characterized by a significant, persisting, and organized following of a charismatic leader.

Dodge, *supra* note 121, at 714.

203. Treasury Reg. § 1.1511-2(a) (3) (ii) (1958) states: "[W]hat constitutes the conduct of religious worship . . . depends on the tenets and practices of a particular religious body constituting a church." An organization is included within the term church if it: "a) is an integral part of a church, and b) is engaged in carrying out the functions of a church." Although this is undeniably a circular definition of church and not of religion, it does reflect a societal view of religion in both organizational and operational ways. See *Income Tax Exemption*, *supra* note 199, at 400.

204. The Treasury Code, discussed in *Income Tax Exemption*, *supra* note 199, at 399 n.15, stipulates that an organization will not be exempt "if the organization (a) contacts or urges the public to contact, members of a legislative body for the purpose of proposing, supporting, or opposing legislation; or (b) advocates the adoption or rejection of legislation . . ." Further, in part (iii), an action organization is defined as one that "participates or intervenes directly or indirectly, in any political campaign." Section 1.501(c)(3)(iv) defines an action organization as one whose characteristics are that "(a) its main or primary objective or objectives (as distinguished from its incidental or secondary objectives) may be attained only by legislation or a defeat of proposed legislation; and (b) it advocates . . . the attainment of such main or primary objective . . ."

205. The distinction is valid since the Court still recognizes the beliefs of the organization and does not penalize in that respect. Furthermore, the church is permitted to continue its activities but only on a non-exempt basis.

206. See note 152 *supra*.

207. 397 U.S. 664 (1970).

208. 403 U.S. 602 (1971).

religion that excludes the idea of the political. It must be remembered that this was also the aim in the free exercise disputes involving the conscientious objectors.²⁰⁹ In *Walz* the Court focused on eliminating religious strife as a divisive political force and formulated its "excessive entanglement" standard.²¹⁰ In *Lemon* the Court was concerned with "religion's intruding into the political arena or [in] political power intruding into the legitimate and free exercise of religion."²¹¹

"Excessive entanglement" is a sufficiently vague concept; while it can be read very restrictively, it also can be read with great latitude for aid to religion depending on the societal mood and the Court's interpretation of that mood.²¹² In *Lemon*, however, the broad implication of its standard is that any act of government which arouses or tends to arouse citizens politically because of the tenets of their religion is constitutionally suspect. This standard would appear to reflect more specifically the values of the Court members rather than societal values and is seemingly more unyielding than is the "excessive entanglement" standard.²¹³

The argument that the *Lemon* Court presents in justification of its new standard is that "political division along religious lines was one of the principal evils against which the First Amendment was intended to protect . . . [Indeed] [t]he potential divisiveness of such conflict is a threat to the normal political process."²¹⁴ By way of explanation, Chief Justice Burger maintained that political division "would tend to confuse and obscure other issues of great urgency."²¹⁵ Presumably, the value Chief Justice Burger places on these other secular interests is of greater import than those values reportedly

209. *Welsh v. United States*, 398 U.S. 333 (1970); *United States v. Seeger*, 380 U.S. 163 (1965); *Negre v. Larsen*, 418 F.2d 908 (9th Cir. 1969), *aff'd sub nom. Gillette v. United States*, 401 U.S. 437 (1971).

210. An argument is made that this was probably designed to replace the unsatisfactory "purpose and effect" verbal formulations "which had left the earlier cases with no lasting guidelines other than the court's judgment of affirmation or reversal." Lewin, *Disentangling Myth From Reality*, 3 J. LAW- EDUC. 107, 112 (1974).

211. 403 U.S. 602, 622 (1971).

212. It has been claimed that the "impact of the *Walz* case will depend on the content that the Supreme Court gives to the concept 'excessive entanglement'." *The Supreme Court, 1969 Term*, 84 HARV. L. REV. 1, 133 (1970).

213. The fact that state legislatures are vainly seeking means whereby they can aid private educational programs through such schemes as voucher plans would substantiate the argument that the mood of society is changing toward some support for private schools. See generally Note, *Education Vouchers: The Fruit of the Lemon Tree*, 24 STAN. L. REV. 687 (1972).

214. 403 U.S. at 622.

215. *Id.* at 623.

afforded religious minorities. What then happens to the free exercise value? The quality of treatment value? The freedom of expression value? And the value that attaches to the right of self-perpetuation?²¹⁶ Moreover, what happens to the secular value that is held out as the basis for the establishment principle—that of preserving a neutrality towards religion?²¹⁷

Apolitical View of Religion: Possible Chilling Effects

Where fundamental interests or suspect classifications are involved in statutory interpretations, courts have been inclined to interpret legislative purpose narrowly.²¹⁸ Their recent disposition to view religion as apolitical, in the light of *Lemon*, however, has prompted at least one court to interpret a statute so broadly that a possible "chilling effect"²¹⁹ on other constitutional rights deemed privileged is evident.

In *Christian Echoes National Ministry, Inc. v. United States*,²²⁰ for example, a case involving a revocation of a tax exemption for a religious organization under the Internal Revenue Code's political limitation,²²¹ the Court stipulated that indirect political activity or

216. See *United States v. Yoder*, 406 U.S. 205 (1972). The basis of the *Yoder* decision was the preservation of the Amish religion. It could be argued that the efforts made by religious groups to seek financial aid for their schools, as in the *Lemon* decision, are also efforts towards "self preservation." See notes 115-21 *supra* and accompanying text.

217. See *Everson v. Board of Education*, 330 U.S. 1, 18 (1947). The Court stipulated that the state must remain "neutral in its relations with groups of believers and nonbelievers."

218. Several types of classifications have been viewed as fundamental: those based on race, national lineage and alienage, and those affecting lower economic groups. See, e.g., *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966); *McLaughlin v. Florida*, 379 U.S. 184 (1964); *Korematsu v. United States*, 323 U.S. 214 (1944). See also *McGowan v. Maryland*, 366 U.S. 420, 425-26 (1961), in which Chief Justice Warren formulated a minimal rationality requirement permitting "the states a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective." Although the Supreme Court has used the term "suspect classification" mainly in racial discrimination cases and has placed a rigid burden on states to justify their classifications, the Court has also found use for a complementary "compelling state interest" requirement as an equal protection test to seek state justification for infringement of religious liberty.

219. The term "chilling effect" which appeared in *Walker v. City of Birmingham*, 388 U.S. 307, 344-45 (1967) (Brennan, J., dissenting), depicts a concern for those affected by consequences of some state action. See generally Note, *The Chilling Effect in Constitutional Law*, 69 COLUM. L. REV. 808 (1969).

220. 470 F.2d 849 (10th Cir. 1972), cert. denied, 414 U.S. 864 (1973).

221. I.R.C. § 501(c)(3).

lobbying at the "grass roots level" was included in the statutory restriction. It was charged that the Christian Echoes organization "engaged in a year-round mass media effort, often in connection with specific campaigns, to oppose all 'liberal' candidates and place in their stead candidates with a 'conservative' outlook. In practical effect, a petitioner's opposition to 'liberals' amounted to support for their 'conservative' adversaries."²²²

The various privileged rights "chilled"²²³ by the decision could include the right to observe religious beliefs without government interference or coercion,²²⁴ the right to dissent,²²⁵ the right to freedom of assembly,²²⁶ and the right to the equal protection of the laws. In

222. See Brief for Appellant at 36, 470 F.2d 849 (10th Cir. 1972), quoted in *Income Tax Exemption*, supra note 199, at 400.

223. The chilling effect principle has been applied almost exclusively in first amendment cases. Justice Brennan characterized the doctrine:

To give these freedoms the necessary "breathing space to survive" . . . the Court has modified traditional rules . . . We have molded both substantive rights and procedural remedies in the face of varied conflicting interests to conform to our overriding duty to insulate all individuals from the "chilling effect" upon exercise of First Amendment freedoms generated by vagueness, overbreadth and unbridled discretion to limit their exercise.

Walker v. City of Birmingham, 388 U.S. 397, 344-45 (1967) (dissenting opinion).

224. See *West Virginia St. Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943), overruling *Minersville School Dist. v. Gobitis*, 310 U.S. 586 (1940). In *Barnette* Justice Jackson decreed: "If official power exists to coerce acceptance of any patriotic creed what it shall contain cannot be decided by courts, but must be largely discretionary with the ordaining authority." He further stated: "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." 319 U.S. at 642.

225. See *Speiser v. Randall*, 357 U.S. 513, 518 (1958):

To deny an exemption to claimants who engage in certain forms of speech is in effect to penalize them for such speech. Its deterrent effect is the same as if the state were to fine them for this speech. The appellees are plainly mistaken in their argument that, because a tax exemption is a "privilege" or a "bounty", its denial may not infringe speech.

Id. at 518. See also *Cantwell v. Connecticut*, 310 U.S. 296 (1940), wherein the Court stated:

In the realm of religious faith as in that of political belief sharp differences arise . . . But the people of this nation have ordained in light of history, that in spite of the probability of excesses and abuses, these liberties are in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy.

Id. at 310.

226. See *NAACP v. Button*, 371 U.S. 415 (1963). The concern in *Button* centered around publicity given certain membership lists and the effect this might

addition, any application of the *Lemon* restriction of "potential divisiveness" could constitute a prior restraint²²⁷ of the right of freedom of expression.²²⁸ Since all of the rights mentioned are variations and amplifications of the individual's right to the free exercise of his religion, are these rights lost when implemented through associational or institutional religious activity?

In a number of cases in the labor relations field which question whether collective bargaining agreements infringe individual religious liberty, the courts in their efforts to maintain labor harmony have tended to uphold the interests of groups over individual interests.²²⁹ In *Stimple v. State Personal Board*,²³⁰ for instance, a Sabbatarian, who was a public service employee, was fired for his refusal to work on Saturdays. Although Title VII of the 1964 Civil Rights Act protects individuals who seek employment from private employers against religious discrimination, no such protection is extended under the Act to public employees.²³¹ No effort was made by the state to reinstate Stimple, and no alternative means were suggested for solving the labor dispute, such as shifting the individual to a work schedule that was more compatible with his religious beliefs. Instead the Court argued:

The proliferation of religions with an infinite variety of tenets would, if the state is required as an employer to accommodate each employee's particular scruples, place an intolerable burden upon the state. We conclude that if a

have on the freedom of association. There the Court stated: "These freedoms are delicate and vulnerable as well as supremely precious in our society. The threat of sanctions may deter their exercise almost as potently as the actual application of sanctions." *Id.* at 433. See also *DeJonge v. Oregon*, 299 U.S. 353 (1937).

227. See *United States v. Seeger*, 380 U.S. 163 (1965). The Court there stated: There is no right in a state or an instrumentality thereof to determine that a cause is not a religious one. 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.

Id. at 179.

228. See *id.*; see also *Shuttlesworth v. City of Birmingham*, 394 U.S. 147 (1969). In *Shuttlesworth*, certain civil rights marchers had attempted to obtain parade permits but were unsuccessful. They marched and were charged with violation of a city ordinance. The Court held the city ordinance void on its face for the reason that the first amendment freedoms were subject to a prior restraint.

229. See *Edwards & Kaplan, Religious Discrimination and the Role of Arbitration under Title VII*, 69 MICH. L. REV. 599, 632 n.158 (1971).

230. 6 Cal. App. 2d 206, 85 Cal. Rptr. 797 (1970), *cert. denied*, 397 U.S. 952 (1970).

231. Civil Rights Act of 1964, 42 U.S.C. § 2000e-(b) (1964).

person has religious scruples which conflict with the requirements of a particular job with the state, he should not accept employment, or, having accepted, he should not be heard to complain if he is discharged for failing to fulfill his duties.²³²

It is difficult to reconcile the *Stimple* decision with *Sherbert v. Verner*,²³³ wherein the state was similarly accused of depriving a claimant of economic benefits. The cases were distinguished on the basis that in *Sherbert* the claimant could receive unemployment benefits only from the state, whereas in *Stimple* the petitioner could find other means of employment.²³⁴ By upholding the state interest or by giving great latitude to the state in its hiring and firing procedures, the Court is implying that governmental agencies shall have wide discretion in their employment practices. Therefore, a Sabbatarian's religious requirements need not be "accommodated"²³⁵ nor an alternate means to an equitable solution be found, as this would constitute an "intolerable burden" for the state.

The Court sometimes makes reference to a "less drastic" or an "alternative means" test and indicates that when it has available a variety of equally effective ways to a given end, it chooses the measure that least interferes with individual liberties.²³⁶ It is argued that less repressive means are always available provided the government is willing to sacrifice effectiveness.²³⁷ Should "less drastic" or "alternative" become the instrument for judicial determination, it would imply that the first amendment right questioned would be entitled to absolute protection and although gains for such rights would be assured by this method, it would be done, perhaps, at

232. 6 Cal. App. 2d at 209-10, 85 Cal. Rptr. at 799.

233. 374 U.S. 398 (1963). The case questioned whether appellant should receive unemployment compensation because of her refusal to work on Saturdays, her Sabbath.

234. 6 Cal. App. 2d at 210, 85 Cal. Rptr. at 799. Cf. *Dewey v. Reynolds Metal Co.*, 429 F.2d 324 (6th Cir. 1970), *aff'd.*, 402 U.S. 689 (1971) (equally divided Court (mem.)); *Dawson v. Mizell*, 325 F. Supp. 511 (E.D. Va. 1971).

235. See note 254 *infra*.

236. See, e.g., *Schneider v. Smith*, 390 U.S. 17 (1968); *United States v. Robel*, 389 U.S. 258 (1967); *NAACP v. Button*, 371 U.S. 415 (1963); *Braunfeld v. Brown*, 366 U.S. 599 (1961). It has been suggested that terms such as "less drastic" or "alternative means" offer no explanation of how a decision is reached; rather, the language is used by the Court as a device for announcing results.

237. See, *Wormuth & Mirkin, The Doctrine of the Reasonable Alternative*, 9 UTAH L. REV. 254 (1964); Note, *Less Drastic Means and the First Amendment*, 78 YALE L.J. 464 (1969).

the expense of other social or personal values.²³⁸ A justification for this choice of methods can be found in Mr. Justice Black's doctrine of absolutes and his contention that the Constitution provides an underlying balance and is the authoritative guide for choices between conflicting interests and values.²³⁹

Justice Frankfurter contended that the "the Constitution does not give us greater veto power in dealing with one phase of 'liberty' than with another."²⁴⁰ Because of this view he denounced the "preferred position" doctrine²⁴¹ because it expressed, according to him, "a complicated process of constitutional adjudication by a deceptive formula."²⁴² In defining the applicability of the doctrine, Justice Rutledge, a proponent thereof, argued that "it is the character of the right, not the limitation" that is determinative.²⁴³ But Justice Frankfurter would have the character of the limitation

238. A case in point is *Martin v. City of Struthers*, 319 U.S. 141 (1941). A ban on door-to-door solicitation would keep out the unwanted but would also keep away those solicitors that the homemaker might want to see. Paul G. Kauper suggests that the alternate means approach has important implications as a limitation on the secular purpose doctrine, "but it remains to be determined whether this test has assumed a definitive significance in the interpretation of the Establishment Clause." Kauper, *The Warren Court: Religious Liberty and Church-State Relations*, 67 MICH. L. REV. 269, 281 (1968).

239. Justice Black's balancing position can be found in Black, *The Bill Of Rights*, 35 N.Y.U.L. REV. 865, 879 (1960): "Where conflicting values exist in the field of individual liberties protected by the Constitution, that document settles the conflict and policy should not be changed without constitutional amendments by the people in the manner provided by the people."

240. *West Virginia St. Bd. of Educ. v. Barnette*, 319 U.S. 624, 648 (1943) (dissenting opinion).

241. The doctrine developed from a speculative footnote written by Justice Stone in *United States v. Carolene Prod. Co.*, 307 U.S. 144 (1938), and has been interpreted to mean that those laws restricting the freedoms enumerated in the first amendment are presumed invalid on their face because those rights are held to be more important than the other ones mentioned in the Bill of Rights. The Stone footnote reads in part:

There may be a narrower scope for the operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are equally specific when held to be embraced with the Fourteenth

Id. at 152 n.4.

242. See *Kovacs v. Cooper*, 336 U.S. 77, 91-92 (1949) (concurring opinion). In *Dennis v. United States*, 341 U.S. 494, 526 (1951), Justice Frankfurter pointed out that the doctrine was announced with the "casualness of a footnote." But see an earlier opinion of his in *Minersville School Dist. v. Gobitis*, 310 U.S. 586 (1940), where he agreed with the distinction and regarded it as "basic."

243. *Thomas v. Collins*, 323 U.S. 516, 529-30 (1945) (quoting the Stone footnote, *supra* note 241).

rather than the right the decisive factor,²⁴⁴ and would leave the settlement of conflict between two "preferred" rights to the political branches of government. Justice Rutledge, on the other hand, and all like-minded activists on the bench with him, recognizing that democratic values may conflict with the institutionalized value attributed to a legislature, would support Justice Stone's formula and on behalf of minority interests weigh the government restriction in light of some alternative means to a proper and equitable solution.²⁴⁵

In accord with Justice Frankfurter's stand that the legislature rather than the courts should be the prime policy maker in the field of social policy is *Griggs v. Duke Power Company*.²⁴⁶ The case, which arose under the Civil Rights Act of 1964, "redefines discrimination in terms of consequence rather than motive, effect rather than purpose."²⁴⁷ The assumption underlying *Griggs*, according to one commentator, "is that the Civil Rights Act protects the interests of minority groups and their members in securing and improving employment opportunities."²⁴⁸ It is pointed out that *Griggs* views discrimination not only "as an isolated act by an aberrant individual wrongdoer that affects only an individual complainant, but also as the operation of industrial-relations systems that adversely affect minority group members."²⁴⁹ It is argued, therefore, that Title VII under the Civil Rights Act "focuses on the harm to both the group and the individual."²⁵⁰

If the *Stimple* and *Griggs* decisions portend the Court's changing view of discrimination and if values under this view are predicated on consequences or, conceivably, on that which affords the greatest good for the greatest number, then individual rights, accordingly, emerge as manifestations of secondary import.²⁵¹

244. See *Kovacs v. Cooper*, 336 U.S. 77 (1949).

245. In *United States v. Carolene Prod. Co.*, 304 U.S. 144 (1943), the correlate, alternative means, was used. Justice Frankfurter concurred in the decision, but on other grounds. See also *Follett v. McCormick*, 321 U.S. 573 (1944); *West Virginia St. of Educ. v. Barnette*, 319 U.S. 624 (1943); *Murdock v. Pennsylvania*, 319 U.S. 105 (1943); *Cantwell v. Connecticut*, 319 U.S. 296 (1940).

246. 401 U.S. 424 (1971). The case arose on the basis of racial discrimination but is applicable to cases involving religion also since it defined "discrimination" under the 1964 Civil Rights Act.

247. See Blumrosen, *Strangers in Paradise: Griggs v. Duke Power Co. and the Concept of Employment Discrimination*, 71 MICH. L. REV. 59, 62 (1972).

248. *Id.*

249. *Id.*

250. *Id.*

251. Other cases affecting Sabbatarians substantiate this position. See *Kings Garden, Inc. v. FCC*, 498 F.2d 51 (D.C. Cir.), *cert. denied*, 419 U.S. 996 (1974); *Dewey v. Reynolds Metal Co.*, 428 F.2d 324 (6th Cir. 1970), *aff'd*, 402 U.S. 689 (1971)

V. THE SPECIAL BENEFIT CATEGORY FOR RELIGIOUS ORGANIZATIONS: A DEVIATION

The 1964 Civil Rights Act, which prohibits employment discrimination because of race, color, sex, national origin or religion, was amended in 1972 to allow religious organizations to discriminate in employment in all activities, not only religious activities.²⁵² Congress, by broadening the exception, has created a special benefit category favoring religious organizations in their hiring practices over secular organizations. By implication, Congress has denied that any "compelling" state interest exists to override the religious interest.²⁵³ Since the 1972 amendment to the Civil Rights Act also provides for a "reasonable accommodation" to religion in "all aspects of religious observance and practices,"²⁵⁴ an additional benefit to religion accrues at the expense of secular organizations. By the accommodation standard, employees of secular organizations are permitted time off from a regularly scheduled workweek to celebrate religious holidays or sabbath observances that do not fall on regular time-off days. In effect, this standard creates two classes based on religion: the specially benefited five-day eligibility class composed of Sabbatarians and the six-day eligibility class made up of non-Sabbatarians. Presumably, the purpose of the Civil Rights Act and its 1972 amendment was to give the broadest possible latitude to the free exercise of religion and to guarantee that religious expression not be "chilled" by governmental intrusion into internal religious

(equally divided Court) (mem.); *Dawson v. Mizell*, 325 F. Supp. 511 (E.D. Va. 1971). See also *Parker Seal Co. v. Cummins*, 516 F.2d 544 (6th Cir. 1975); *Jackson v. Veri Fresh Poultry, Inc.*, 304 F. Supp. 1276 (E.D. La. 1969).

252. See Equal Employment Opportunity Act of 1972, 42 U.S.C. § 2000c-1 (Supp. II, 1972), amending 42 U.S.C. § 2000e-1 (1970), stating:

This title shall not apply . . . to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with carrying on by such corporation, association, educational institution, or society of its activities.

253. The "compelling" state interest was elucidated in *Sherbert v. Verner*, 374 U.S. 398 (1963), and in *Wisconsin v. Yoder*, 406 U.S. 205, 215-16 (1972). For a less liberal interpretation of the concept see *Johnson v. Robinson*, 415 U.S. 361, 384 (1974).

254. See Act of Mar. 24, 1972, Pub. L. No. 92-261, § 2, 86 Stat. 103 (codified at 42 U.S.C. § 2000-2(j)(Supp. II, 1972)(amending 42 U.S.C. § 2000-2 (1970)). A "reasonable accommodation" pertains to "all aspects of religious observance and practices, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business." *Id.*

affairs.²⁵⁵ However, this conscious patronizing does permit religious organizations to discriminate and has, possibly, the primary non-neutral effect of advancing religion.²⁵⁶

The constitutionality of the broadened exemption was challenged when a complaint was filed against the King's Garden Corporation, a licensee of two radio stations, for violation of a Federal Communications Commission rule barring discrimination on the basis of religion in choosing employees.²⁵⁷ The licensee argued that the Civil Rights Act and the free exercise clause of the first amendment compelled an exemption from the Commission's requirement.²⁵⁸ The Commission maintained that only "those persons hired to espouse a particular religious philosophy over the air should be exempt from its nondiscrimination rule." Further, it stated, an exemption would be a violation of the establishment clause of the first amendment.²⁵⁹

Reasoning that no religious organization has a constitutional right to hold a broadcast license or to convert a franchise into a "church," the Court found that the 1972 Civil Rights Act amendment could not apply. The Court maintained that the free exercise clause was not intended to permit religious organizations to discriminate in staffing "a trucking firm, a chain of motels, a race track," or any

255. Senator Sam J. Erwin, Jr., in his introduction of the amendment before the Senate subcommittee, indicated that the amendment would exempt religious corporations, associations and societies from the applications of this Act insofar as the right to employ people of any religion they see fit is concerned. "In other words, this Amendment is to take the hands of Caesar off the institutions of God, where they have no place to be." See SUBCOMM. ON LABOR AND PUBLIC WELFARE, LEGISLATIVE HISTORY OF THE EQUAL EMPLOYMENT OPPORTUNITY ACT OF 1972, 92d Cong., 2d Sess. 1645 (1972).

256. The author of *The Constitutionality of the 1972 Amendment to Title VII's Exemption for Religious Organizations*, believes that this possibility is exaggerated and claims: "It can be argued that the effect of the exemption is to neutralize the impact of Title VII on religious exercise rather than to advance religion." Note, 73 MICH. L. REV. 538, 547 (1975).

257. *King's Garden, Inc. v. FCC*, 498 F.2d 51 (D.C. Cir.), cert. denied, 419 U.S. 996 (1974). The challenged rule provides:

Equal opportunity in employment shall be afforded all licensees or permittees of commercially or noncommercially operated standard (AM) or (FM) television or international broadcast stations (as defined in this part) to all qualified persons, and no person shall be discriminated against in employment because of race, color, religion, national origin or sex.

47 U.S.C. §§ 73.125, 73.301 (1970).

258. 498 F.2d at 53.

259. *Id.* at 60.

260. *Id.* at 53-54. It was held that the 1964 Civil Rights Act did not supercede

similar endeavor,²⁶¹ and felt that under the 1972 amendment such activity would be condoned. Moreover, it was felt that the exemption placed religious organizations in a privileged position in relation to other employers and that the exemption constituted a "sponsorship" which is barred as being establishment.²⁶²

The delimiting problem posed by the *King's Garden* case centers on the meaning given the term "activities" as used in the 1972 amendment and whether such amendment preempts the Commission rule against discrimination. The Court predicated its decision on the basis that no constitutional right attaches to a religious organization granted a license, and that a duty to conform to FCC rules follows voluntary acceptance of the license.

The Court, by way of dicta, did recognize the constitutional right of proselytizing and acknowledged that under the free exercise clause some religious discrimination in employment is permissible.²⁶³ For example, a particular religious sect should have the prerogative of choosing a member of the sect to act as religious leader,²⁶⁴ and of determining what qualifications are required of the leadership.²⁶⁵ However, it is not clear if any other person can be a part of this special benefit category. Conceivably, if "free exercise" permits dissemination of a religious belief, then the category should cover employees who facilitate in some way the actual proselytization.

The right-privilege distinction relied upon by the Court to uphold the constitutionality of the Commission's standard has been rendered suspect in a number of cases. For example, in *Sherbert v. Verner*,²⁶⁶ it was claimed: "it is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial or

the F.C.C.'s regulations regarding non-discrimination and adequate constitutional protection was afforded religious broadcasters.

261. *Id.* at 54.

262. For a earlier case considering "sponsorship," see *Committee for Pub. Educ. and Religious Liberty v. Nyquist*, 413 U.S. 756, 771 (1973).

263. 498 F.2d at 56. The constitutional right of proselytizing was recognized in *Fowler v. Rhode Island*, 345 U.S. 67 (1953); *Follett v. Town of McCormick*, 321 U.S. 573 (1944); *Martin v. City of Struthers*, 319 U.S. 141 (1943); *Murdock v. Pennsylvania*, 319 U.S. 105 (1943).

264. *Kedroff v. Saint Nicholas Cathedral*, 344 U.S. 94, 107 (1952) (appointment of clergy recognized as integral to "free exercise").

265. See *Kreshnik v. Saint Nicholas Cathedral*, 363 U.S. 190 (1963); *Gonzalez v. Roman Catholic Archbishop*, 280 U.S. 1 (1920); *McClure v. Salvation Army*, 460 F.2d 553 (5th Cir.), *cert. denied*, 409 U.S. 896 (1972) (female Salvation Army officer charging sex discrimination).

266. 374 U.S. 398 (1963).

placing of conditions upon a benefit or privilege."²⁶⁷ In *Cantwell v. Connecticut*²⁶⁸ it was specifically stated:

[T]o condition the solicitation of aid for the perpetuation of religious views or systems upon a license, the grant of which rests in the determination of state authority as to what is a religious cause, is to lay a forbidden burden upon the exercise of liberty protected by the Constitution.²⁶⁹

To require a religious organization to hire personnel who would contravene proselytizing efforts of the hiring body or who could conceivably inveigh upon a desired religious atmosphere would be a violation of the religious freedom guarantee of the Constitution. Further, to permit the Commission to determine which employees are not crucial to the actual proselytizing is an "entanglement" with religion.²⁷⁰

The *King's Garden* Court, by predicating its decision on the right-privilege standard, left in doubt the constitutional issue of whether the 1972 Civil Rights amendment creates an establishment of religion. Since the narrow Federal Communications Commission rule was upheld, the decision seemingly encroaches on religion in the associational sense. Moreover, since the decision leaves in doubt the scope of the term "religious" when applied to "corporation," "association," or "society" in the text of the amendment, a further invasion of the field of religion in the associational sense is possible.

The classification problems discussed above depict the present state of confusion surrounding the meaning of religion, especially in the establishment sense, and the place which religion occupies in the Court's hierarchy of values. Confusion also surrounds the importance that the Court attaches to individual rights versus secular interests. Nor is the confusion mitigated by the permissible deviations from the norm that the Court has granted in several instances—a deviation

267. *Id.* at 404. See also *Banzhaf v. FCC*, 405 F.2d 1082 (D.C. Cir. 1968), *cert. denied*, 396 U.S. 842 (1969), where it is suggested that FCC policies "cannot withstand constitutional scrutiny in the light of contemporary understanding of the First Amendment." 405 F.2d at 1100.

268. 310 U.S. 296 (1940).

269. *Id.* at 307. *Cantwell* involved a licensing requirement for solicitation of money for religious purposes. See also *Fowler v. Rhode Island*, 345 U.S. 67, 70 (1953): "[I]t is no business of courts to say that what is a religious practice or activity for one group is not religion under the protection of the First Amendment."

270. For a consideration of the "entanglement" standard, see *Committee for Pub. Educ. and Religious Liberty v. Nyquist*, 413 U.S. 756 (1973); *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

that requires a state to make distinct religious concessions in contradiction to what seemingly is a paramount state interest.²⁷¹ Furthermore, the confusion is compounded when it is seen that the Court is capable of making different value judgments and of reaching different end results from the same secular base point.²⁷²

Apparently, there is a lack of a coherent system of values in establishment disputes that accounts for most of the confusion. Various suggestions given as a paramount principle or value have been offered as guides both by judges and by commentators and have received some consideration by the courts.²⁷³ Even though there is merit and some legitimacy in all of the guides offered, there is, as Herbert Wechsler once indicated, "no simple basis for determining priorities of values having constitutional dimension."²⁷⁴ Also, since no single constitutional test of meaning has yet appeared to command

271. See, e.g., *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (state's interest in providing a high school education for all its children eroded by exception granted Amish children); *People v. Woody*, 61 Cal. 2d 716, 394 P.2d 813, 40 Cal. Rptr. 69 (1964) (Navajo Indians practicing peyote cultism as part of their belief spared the incident of local narcotics restrictions imposed by a state whose concern was for the health and welfare of its citizenry). *But see* *Leary v. United States*, 383 F.2d 851 (5th Cir. 1967), *rev'd. on other grounds*, 395 U.S. 6 (1969) (Leary claimed narcotics to be crucial to his religion, but was denied relief); *Native American Church of Navajoland v. Arizona Corp.*, 329 F. Supp. 907 (D. Ariz. 1971), *aff'd*, 405 U.S. 901 (1972). See also *People v. Marquis*, 291 Ill. 121, 125 N.E. 757 (1919) (exemption for sacramental wine during Prohibition upheld); *In re Jenison*, 267 Minn. 136, 125 N.W.2d 588 (1964) (Seventh Day Adventist committed to universal forgiveness and opposed to judging her fellow man exempted from jury service).

272. See, e.g., *Braunfeld v. Brown*, 366 U.S. 599 (1961); *McGowan v. Maryland*, 366 U.S. 420 (1961). Both cases involved identical laws pertaining to a required Sunday closing of business establishments. *Braunfeld* was reviewed as a free exercise violation and *McGowan* as a possible establishment implementation. Cf. *Shuttlesworth v. City of Birmingham*, 394 U.S. 147 (1969); *Walker v. City of Birmingham*, 388 U.S. 307 (1967) (both cases arising out of the same set of facts resulting in different treatment for petitioners).

273. Value guides that have been suggested include: "neutrality," "no religious classification," "complete church-state separation," "freedom of mind," "no imposition," "open society," and "voluntarism." V. BLUM, *FREEDOM IN EDUCATION: FEDERAL AID FOR ALL CHILDREN* (1965); P. KURLAND, *RELIGION AND THE LAW OF CHURCH AND STATE* (1962); L. PFEFFER, *CHURCH, STATE AND FREEDOM* (rev. ed. 1967); Dixon, *Religion, Schools and the Open Society: A Socio-Constitutional Issue*, 13 J. PUB. L. 67 (1964); Gianella, *Religious Liberty, Nonestablishment, And Doctrinal Development: Part II: The Nonestablishment Principle*, 81 HARV. L. REV. 513 (1968); Schwarz, *No Imposition of Religion: The Establishment Clause Value*, 77 YALE L.J. 692 (1968); Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959); Note, *Toward Uniform Valuation of the Religion Guarantees*, 80 YALE L.J. 77 (1970).

274. *Toward Neutral Principles Of Constitutional Law*, 73 HARV. L. REV. 1, 25 (1959).

majority support in the Supreme Court, doctrinal development and substantive interpretation remain confused. Some meaning of religion, however, has surfaced in the Court's opinions. What follows is a delineation of these definitional elements.

VI. RELIGION DELIMITED

Although the Court in *United States v. Seeger* was, strictly speaking, interpreting an act of Congress,²⁷⁵ there is agreement among commentators on *Seeger* that the Court's reading of "religion" under the act can go beyond mere statutory interpretation.²⁷⁶

The SEEGER-WELSH Formula: Broadening the Meaning of Religion

Seeger recognized that some beliefs which the holders may characterize as moral and "which are based upon a power or being, or upon a faith, to which all else is subordinate" are religious beliefs withing the meaning of the statute, "no matter what they are to the holders or are in fact."²⁷⁷ The *Seeger* Court also interpreted belief in a "Supreme Being" to mean theism, and theism to mean a belief that refers to an ultimate concern. Conceivably, it does not matter whether the belief is capable or incapable of being articulated, nor does it matter whether the belief is internally derived or externally compelled. Since the subjective notion of "ultimateness" must vary with individuals, the Court's use of the term was employed apparently to bring all religious beliefs within the scope of the military service exemption.²⁷⁸ But what constitutes an ultimate concern in the context of *Seeger*?

Because the Court found difficulty in articulating precisely what it meant by "ultimateness," critics were quick to point out that virtually anything could be classified as an ultimate concern in

275. The Universal Military Training and Service Act, § 6(j), 62 Stat. 612 (June 24, 1948), states:

Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation but does not include essentially political, sociological, or philosophical views or a merely personal moral code.

276. See, e.g., Mansfield, *supra* note 113; Giannella, *supra* note 91, at 1425.

277. 380 U.S. 163, 183 (1965).

278. The Court admitted that its construction "avoids imputing to Congress an intent to classify different religious beliefs, exempting some and excluding others, and is in accord with the well-established congressional policy of equal treatment for those whose opposition to service is grounded in their religious tenets." 380 U.S. at 176.

someone's subjective view—even, perhaps, a man's bank account.²⁷⁹ Obviously, the Court did not intend such a result and a careful reading of the *Seeger* decision refutes such criticism. "Ultimateness" must be read in light of what beliefs were excluded from the Court's classification—those which are not sincerely held and beliefs that are "essentially political, sociological or economic," or a "merely personal moral code."²⁸⁰

The favorable reading of a statement by a leader of the Ethical Culture Movement to characterize Seeger's nontheistic views provides some indication of what the Court had in mind when it spoke in terms of an ultimate concern:

Instead of positing a personal God, whose existence man can neither prove nor disprove, the ethical concept is founded on human experience. It is anthropocentric, not theocentric. . . Religion, for all the various definitions that have been given it, must surely mean the devotion of man to the highest ideal that he can conceive. And that ideal is a community of spirits in which the latent moral potentialities of men shall have been elicited by their reciprocal endeavors to cultivate the best in their fellow men.²⁸¹

Here then is a suggestion that religion is a devotion to some abstract concept similar to Seeger's self-identification with a "belief and devotion to goodness and virtue for their own sakes."²⁸² "Ultimateness," apparently, is linked to some ethical concept of "good." It is a subjective notion capable of having variant meanings, but since the definition alludes to an external component or a reciprocal relationship to "community," which seeks to "cultivate" the "best" in men, the ultimate belief cannot be merely personal.

Seeger, with its test asking whether a given belief that is sincere and meaningful occupies a place in the life of the possessor parallel to that filled by the orthodox belief in God, left unanswered several questions concerning proper standards for measuring "sincerity," "ultimateness," and "parallel position." Would a sincere belief in hedonism, demonism, or use of hallucigenic drugs qualify? Further, from what source must religious beliefs be derived? Does one who adheres sincerely to some moral principle outside his own self-centered existence come under the first amendment's free exercise protection?

279. See Mansfield, *supra* note 113, at 34.

280. 380 U.S. at 165.

281. *Id.* at 183, quoting D. MUZZY, ETHICS AS A RELIGION 95 (1951).

282. 380 U.S. 163, 166 (1965).

Since *Seeger* eliminated any requirement of affirmation of belief in a Deity, it could conceivably be argued that *Seeger* made it logically impossible for even an atheistic or a nonreligious objector to fall outside the exempted class. As one commentator points out, every sincere disbeliever either,

adheres to one of the variations of the theme of universal humanistic Goodness or else his views are such that he cannot qualify . . . for the statutory exemption afforded those who are conscientiously opposed to the taking of life, and if he does adhere to such a system of belief, he, *ipso facto*, is not an "atheist".²⁸³

That *Seeger* did not hold that all moral opposition to war is religious within the meaning of the statute is seen from the Court's refusal to extend the exemption to objectors whose conscientious opposition was based on purely personal moral codes.

*Welsh v. United States*²⁸⁴ meant the foreclosing of some of the residual problems of *Seeger* and a further broadening of the meaning of religion. *Welsh* excluded from the religious category all those whose beliefs are not deeply held and all those "whose objection to war does not rest at all upon moral, ethical, or religious principles but instead rest solely upon considerations of policy, pragmatism, or expedience."²⁸⁵ Speaking for the majority, Justice Black in *Welsh* made clear that any deeply held moral belief now would come within the definition of religion if the belief is not a "merely personal moral code."²⁸⁶ Since the Court holds as religious all those whose consciences are spurred by deeply held moral beliefs, it seems improbable that any sincerely held moral beliefs could be characterized as a "merely personal moral code." Moreover, since the *Welsh* ruling omits any substantive requirement from its definition of "religious belief," it could be stated that there is no longer a need to balance the religious and the secular content of such beliefs in order to determine whether either is substantially religious or essentially political, sociological, or philosophical. Religious beliefs and moral and ethical beliefs are one and the same.

283. Rabin, *When is a Religious Belief Religious: United States v. Seeger and the Scope of Free Exercise*, 51 CORNELL L.Q. 231, 244 (1966); see *United States v. Shacter*, 393 F. Supp. 1057 (D. Md. 1968), where the court granted an avowed atheist conscientious objector status under the Act as interpreted by *Seeger*.

284. 398 U.S. 333 (1970). See notes 53-72 *supra* and accompanying text.

285. 398 U.S. at 339-40.

286. *Id.* at 343-44.

It is the elimination of all substantive content in the *Seeger-Welsh* definitions of religion that has given commentators their broadest base for criticism. Those who object to the standard that has evolved maintain that religion cannot be satisfactorily defined merely by reference to the role that the belief plays in the life of the believer and that substantive considerations must also be had.²⁸⁷ If the *Seeger-Welsh* norm relates only to claims of conscience, including both sincerely held religious beliefs and non-religious conscience-based beliefs, then those claims of exemption prompted by opportunism, expedience, or convenience will not qualify. This is true not because the Court is precluded by the *Ballard*²⁸⁸ and *Torcaso*²⁸⁹ holdings from inquiring into the truth or verity of a belief, but because such self-serving beliefs impose no affirmative moral or ethical duty related to an ultimate concern.

Compelling State Interest—The Need to Determine Content

Contributing also to the development of the concept of religion in the religious liberty area is *Sherbert v. Verner*.²⁹⁰ *Sherbert* moved the protection of conscience from an almost nonexistent right under the *Schempp* "secular regulation" rule²⁹¹ to a formidable defense position requiring the "compelling state interest" test.²⁹² The standard which it established is open to criticism because of the difficulty of its application. Aside from the desirable effect of protecting conscience against a discriminatory law or the unintended effect of a purely secular law, the *Sherbert* rule, again because of *Ballard* and *Torcaso*, encounters difficulty in distinguishing religion from non-religion and in providing a proper standard for weighing the sincerity factor.²⁹³ It thus leaves open the possibility of a never-ending number of spurious claims and deprives the rule of all but limited utility.

287. See Mansfield, *supra* note 113; Rabin, *supra* note 283.

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

289. *Torcaso v. Watkins*, 367 U.S. 488 (1961).

290. 374 U.S. 398 (1963).

291. 374 U.S. 203, 223 (1963).

292. Under the *Sherbert* test, the claimant must demonstrate that there is a burden on free exercise of religion caused by a state regulation. Once this has been done, the state must show its "compelling" interest in maintaining a secular rule. Further, even if there is a sufficient secular reason for a rule, the state has the additional burden of showing that "no alternative forms of regulation would combat such abuses." 374 U.S. at 407.

293. See Weiss, *Privilege, Posture and Protection: "Religion" in the Law*, 73 YALE L.J. 593 (1963).

However, if the *Seeger* test were given general application in constitutional interpretation, it could "provide for much of the selectivity among free exercise claims needed to implement *Sherbert*."²⁹⁴ The *Seeger* test and the *Sherbert* rule can "mutually reinforce each other when religion is interpreted as in *Seeger*," but first it must be recognized that "arguments against the constitutionality of inquiring into a claimant's sincerity are appropriate only in specific instances and do not pertain in the typical free exercise claims that *Sherbert* would sanction."²⁹⁵

For this reason two formulations of religion appear to be needed in the free exercise area: one which, because "the law knows no heresy,"²⁹⁶ ignores the content of a belief, and the other which considers content to determine what to weigh when religious and secular interests are opposed, particularly when a strong state interest is at stake.

The Amish case, *Wisconsin v. Yoder*,²⁹⁷ illustrates the use of the latter formulation and provides an example of how the *Seeger-Sherbert* rule broadens the meaning of religion under law. In cases where claimants assert a free exercise right, the threshold question is whether the claim is truly religious. In *Yoder*, the Court held that the Amish claim, that a compulsory education statute infringed their religious freedom, was religious because it was, "not merely a matter of personal preference, but one of deep religious conviction, shared by an organized group, and intimately related to daily living."²⁹⁸ These words of the Court provide a description of religion in an organizational sense, a formulation in contrast to the functional definition adopted in the *Seeger* case. While *Seeger's* requirement of "a sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by the God of [others]"²⁹⁹ is appropriate in individual conscientious objection cases, more is needed in cases where overwhelming state interests must also be accommodated. If it were otherwise, a court once stated, "the fabric of society might be pierced and fatally rent by a religious belief

294. One author discusses this point in relation to the hedonist who may sincerely claim that he has an obligation to pursue pleasure and avoid pain but who cannot maintain "that he has an obligation to do so." Killilea, *Standards for Expanding Freedom of Conscience*, 34 U. PITT. L. REV. 531, 546-47 (1973).

295. *Id.* at 533.

296. *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 728 (1872).

297. 406 U.S. 203 (1972).

298. *Id.* at 216.

299. 380 U.S. at 176.

sincerely held by an individual in action or in non-action damaging to the continuing existence of peace and order in the community."³⁰⁰

In *Yoder*, the "compelling state interest" test of *Sherbert* was applied. The state was required to show with particularity how its admittedly strong interest in education would be adversely affected by an exemption for Amish children. The Amish community had to show that its religion was burdened by the secular rule. The case illustrates the principle that as the degree of state interest in a secular regulation increases, the religious burden which must be shown to outweigh it also increases. The *Yoder* ruling confirms the *Sherbert* formula and supplements *Seeger-Welsh* by adding the organizational dimension to the evolving constitutional teaching on religion in the free exercise area.

An Expanded View of Religion in Establishment Cases?

The establishment clause of the first amendment is popularly rendered as "separation of church and state," a formula which converts the word "religion" into "church" and tends to limit its meaning to institutional religion and what institutionalized religion does. By "separating" religion from government in this sense, the Constitution provides a setting in which each society is free to use its own powers to seek its own goals. This popular conception has been fortified by rulings of the Supreme Court since World War II.

On various occasions, notably in the *Everson*,³⁰¹ *Schempp*,³⁰² and *Walz*³⁰³ cases, the Court has stated that the government may not establish, sponsor, support financially, or become actively involved or entangled with religion. The use of such verbs suggest that it is the activities more than the beliefs of persons or groups which are the amendment's concern. The doctrines publicly professed and propagated, the moral and ethical practices, and the modes of worship which religious bodies adopt may not be "established." The government may not favor or disfavor religion, advance or inhibit it, encourage or discourage its acceptance or practice, or become actively involved in either supporting or impeding its efforts.

The judgment of governmental acts challenged as "establishing religion" has turned on the meaning assigned to the expressions "aid

300. *People v. Woodruff*, 26 App. Div. 2d 236, 239 (1966), *aff'd*, 21 N.Y.2d 848 (1968).

301. *Everson v. Board of Education*, 330 U.S. 1 (1947).

302. *Abington School Dist. v. Schempp*, 374 U.S. 203 (1963).

303. *Walz v. Tax Comm'r*, 397 U.S. 664 (1970).

to religion” and “inhibition of religion.” While support and opposition can usually be discerned without difficulty, establishment cases present a special problem, in that the matter supported or inhibited is not entirely clear. The uncertainty of the Court itself is seen in the words of Justice Black, who, speaking for the majority in *Everson*, said that the establishment clause means “at least” the following activities:

Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institution, whatever they may be called or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organization or groups and *vice versa*. In the words of Jefferson, the clause against establishment was intended to erect “a wall of separation between church and state.”³⁰⁴

Whether and if additions might be made to his list Justice Black left to a future day. His is an open-ended approach which has not always been helpful in the analysis of religion in the Constitution.

Some matters, however, were settled in the *Everson* statement. A church—that is, an organized body of believers, worshipers or practitioners of certain ethical standards—is religious. Profession (and non-profession) of a church’s creed, attendance (and non-attendance) at church come under the religious heading. Whatever they are called, religious institutions and their activities are excluded from the scope of supportive and inhibitory action by the government. Government participation, open or secret, in the activities of “religious organization and groups” is forbidden under the clause. These statements make clear that the area of life associated with church activity—creeds, moral codes, ritual—is a religious field in the establishment sense, as are its counterparts, non-membership in a church and non-participation in any ecclesiastical activities.

304. 330 U.S. at 15-16 (1947).

This is a natural and obvious meaning of the term—uncontested in the free exercise field—but, according to Justice Black, it is not offered as comprehensive or exhaustive. What else might religion mean in the establishment area? In particular, is there any development in the establishment sense comparable to the *Seeger-Welsh* result in the free exercise field?

Additional elements of the Court's understanding of religion for establishment purposes are gathered from a wide variety of cases. The "law knows no heresy" principle of *Watson v. Jones*³⁰⁵ is an exclusionary rule calling for self-restraint by the Court in the theological field. Whatever the merits of conflicting parties in religious or theological disputes, their solution by judicial action is banned by establishment considerations. In *Watson* the Court declined to determine which of two competing groups of members was the rightful owner and occupant of a Presbyterian church. This decision tells what the Court's position must be in relation to religion rather than what religion itself is, but it does identify family disputes by church groups as religious matters outside the Court's jurisdiction.

In other cases the Court has specified areas which the establishment clause forbids the government to enter. *Torcaso*³⁰⁶ ruled that the State of Maryland could not validly require a profession of a belief in God as a qualification for public office. The *Epperson*³⁰⁷ decision denied to the State of Arkansas the authority to bar from the public school curriculum the teaching of evolution on the grounds that it was contrary to Scripture. In *Murray v. Curlett*³⁰⁸ and *Engle v. Vitale*³⁰⁹ the Court invalidated as violative of the establishment clause legally prescribed prayers in public schools. The *Schempp*³¹⁰ case excluded from the legitimate scope of the police power the compulsory reading of Scripture in public schools. In the line of cases beginning with *McCullum v. Board of Education*³¹¹ and continuing through *Committee for Public Education and Religious Liberty v. Nyquist*,³¹² the Court has forbidden financial aid to church-related schools.

305. 80 U.S. (13 Wall.) 679, 728 (1872).

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

307. *Epperson v. Arkansas*, 393 U.S. 97 (1968).

308. 374 U.S. 203 (1963).

309. 370 U.S. 421 (1962).

310. *Abington School Dist. v. Schempp*, 374 U.S. 203 (1963).

311. 333 U.S. 203 (1948).

312. 413 U.S. 756 (1973).

In each of these cases the simple fact of aid to religion was the constitutional flaw. The form or amount of the aid was of no import, nor was popular support and endorsement of the aid. In *Torcaso* only one religious doctrine, God's existence, was contained in the prescribed oath. The prayer in *Engle* was brief and intentionally non-denominational; in *Murray* it was the Lord's Prayer, revered by most and recited by many Americans, that was the single issue. It was a sacred book, commonly called Holy Scripture, whose content was aided by the compulsory education law in *Schempp*. In *Nyquist* and the other school cases, the invalidated policies entailed some amount of aid to the churches operating the private schools involved.

Through the application of the *Everson* aid-to-religion standard to these cases, the Court has developed an expansive notion of religion which requires an element associated with doctrines, practices, or ritual observances related to the Supreme Being. Whether it be a theistic oath, a publicly prescribed prayer, a recitation from a revered book, a school curriculum policy, or financial assistance to churches in their educational efforts, the governmental policy involved, if supportive or inhibitory, is violative of the establishment clause. By thus expanding the field of religion, the Court has reduced the scope of government's jurisdiction.

Does the *Seeger-Welsh* definition have any application to establishment cases? It can in certain instances. If a government policy provides constitutionally valid benefits to religiously oriented groups, such as property tax exemption for churches, programs of released time for religious instruction in public schools, or draft exemptions for ministerial students, it may not discriminate against serious religious claimants. The question of what is religion in such cases can be answered by the *Seeger-Welsh* formula.

In *Everson*, the New Jersey bus case,³¹³ the Court used an expression which has in the main passed unnoticed, but which raises a very serious question which may have a dire effect on the very religious liberty that the establishment clause purportedly is designed to protect. In attempting to describe the meaning of the establishment clause, the court noted: "Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organization or groups and *vice versa*."³¹⁴

It is the *vice versa* formulation that is questionable, particularly in light of the presumption that the establishment clause was

313. *Everson v. Board of Education*, 330 U.S. 1 (1947).

314. *Id.* at 15-16.

designed to operate solely as a restriction on government. *Vice versa* suggests that the clause can be applied directly as a restraint on religious institutions. That this application was made in the 1973 *Christian Echoes*³¹⁵ case is evidence of the more restrictive view held out for religion under recent establishment interpretation.

Penalizing religious organizations whose members engage in religiously motivated expressions that may touch upon some current political issue produces a chilling effect not only on the free exercise of religion, but also on other constitutional rights. Moreover, the penalizing negates the concept of political pluralism that is held out as integral to our democratic system of government. Negated also is the concept of neutrality advanced as the proper standard to be applied in establishment disputes. This negation results from the Court's failure to take into consideration the basic nature of the American religious society. That this error did not affect a lower court's discernment can be seen from its characterization of religion:

Religion includes a way of life as well as beliefs upon the nature of the world and the admonitions to be "Doers of the word and not hearers only" (James 1:22) and "Go ye therefore, and teach all nations" (Matthew 28:19) are as old as the Christian Church. The step from acceptance by the believer to his seeking to influence others in the same direction is a perfectly natural one, and it is found in countless religious groups. The next step, equally natural, is to secure the sanction of organized society for or against certain outward practices thought to be essential. Thus we had Sunday observance laws The advocacy of such regulation (prohibition) before party committees and legislative bodies is a part of the achievement of the desired result in a democracy. The safeguards against its undue extension lie in counter-pressures by groups who think differently and the constitutional protection, applied by courts, to check that which interferes with freedom of religion for any.³¹⁶

Furthermore, the entanglement standard formulated in the *Walz* decision³¹⁷ that bars excessive involvement of government with

315. *Christian Echoes Nat'l Ministry, Inc. v. United States*, 470 F.2d 849 (10th Cir. 1972), *cert. denied*, 414 U.S. 864 (1973).

316. *Girard Trust Co. v. Commissioner*, 122 F.2d 108, 110 (3d Cir. 1941), *quoted in Income Tax Exemption*, *supra* note 199, at 408-09.

317. *Walz v. Tax Comm'r*, 397 U.S. 664 (1970).

religion can be read in light of *Christian Echoes* in two ways. If interpreted as in *Walz*, government is restricted from scrutinizing the activities of religious groups to determine whether their activities are either political or religious. If the "excessive entanglement" standard is hinged to the *vice versa* formulation of *Everson*, then it could mean a substantiation of the apolitical view of religion that *Christian Echoes* has generated.

CONCLUSION

The current teaching of the Supreme Court on the meaning of religion in the Constitution is a mixture of tradition and change. The conventional concept of religion—a systematic body of doctrinal, ethical, and ceremonial elements related to the place of the Supreme Being in the life of man—has continued to be central. This combination of dogma, ritual, and moral rules is commonly referred to as a faith, and a group of person sharing a faith is usually called a church. There has not been nor is there today any question that a faith or a church is religious in the constitutional sense. Individual persons professing a faith or claiming membership in such a church enjoy the protection of both religion clauses. Corresponding to the protection of churches and individual believers is that of persons or groups who choose not to join a church or accept any religious guidelines. The freedom not to embrace a religion is itself a religious stand protected by the first amendment.

On the other hand, cases involving the free exercise and establishment clauses have combined to produce an expanded meaning of religion, especially since World War II. Suits seeking to enlarge the area of constitutionally protected religious freedom have resulted in the *Seeger-Welsh* formula, which regards religion as related to the ultimate concern in the person's hierarchy of values and looks for "a sincere and meaningful belief occupying a place in the life of the possessor parallel to that filled by the orthodox belief in God." Likewise, suits designed to obtain or retain state benefits for religious interests, or to eliminate state support of religion, have also expanded the meaning of religion in the establishment sense. The area of American life to which government aid must be denied because it has been judged religious has been considerably enlarged.

These traditional and recent teachings of the Supreme Court combine to provide the following descriptive definition of religion for constitutional purposes; that is religious which is related by doctrinal, ethical or ritualistic consideration to the Ultimate Concern (identified as God, Nature, Humanity, or other) in the life of an

individual or group, the belief or faith to which all else is subordinate and which occupies in the life of its possessor a place parallel to that filled by the orthodox belief in God, giving fundamental meaning to life and dictating standards of belief, conduct or worship. Whatever satisfies the terms of the description is entitled to protection under the free exercise clause and, by the same token, is disqualified from governmental assistance by the establishment clause.

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