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Defining Religion in the First Amendment: A Functional Approach

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DEFINING "RELIGION" IN THE FIRST AMENDMENT: A FUNCTIONAL APPROACH

> The essence of religion is belief in a relation to God involving duties superior to those arising from any human relation.
> Chief Justice Hughes, 1931.[1]

> Now is a great time for new religions to pop up. There are people who get religious about jogging, they get religious about sex. . . . Health foods have become the basis of a religion. ESP, of course, flying saucers, anything is fertile ground now. There's a new messiah born every day.
> Tom Wolfe, 1980.[2]

The First Amendment provides that "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof."[3] Although the Supreme Court has discussed the concept of "religion" in several cases,[4] it has not provided a specific definition to govern cases arising under the religion clauses. Most courts have approached the question with caution, recognizing that a very rigid judicial definition of religion would implicate the concerns underlying the religion causes.[5] Indeed, one commentator has argued that any judicial definition of religion would violate both the free exercise clause and the establishment clause.[6] Nonetheless, the constitutional command that the government neither promote religion, nor restrain religious liberty, requires an interpretation of the word "religion."

This Note attempts to provide a definition of religion that is generally consistent with Supreme Court precedent, as well as the Court's discussions of the religion clauses, and that will advance the purposes of the religion clauses in both free exercise cases and establishment clause cases. Part I establishes criteria for a constitutional definition of religion in light of the purposes of the religion

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1 United States v. McIntosh, 283 U.S. 605, 633-34 (1931).

2 TWENTY YEARS OF ROLLING STONE: WHAT A LONG STRANGE TRIP IT'S BEEN (J.S. Wenner ed. 1987).

3 U.S. CONST. amend. I.

4 *See infra* notes 24-44 and accompanying text.

5 *See, e.g.*, Thomas v. Review Board, 450 U.S. 707, 714 (1981) ("The determination of what is a 'religious' belief or practice is more often than not a difficult and delicate task . . . .").

6 *See* Weiss, *Privilege, Posture and Protection: "Religion" In the Law*, 73 YALE L.J. 593 (1964). The author argues that "any definition of religion would seem to violate religious freedom in that it would dictate to religions, present and future, what they must be. . . . Furthermore, an attempt to define religion . . . would run afoul of the 'establishment' clause . . . ." *Id.* at 604.

clauses and the Supreme Court's general approach to the religion clauses. Part II summarizes the Supreme Court's discussions of the meaning of religion. Part III surveys several approaches to the concept of religion and assesses them in light of the criteria outlined in Part I. Part IV sets forth a proposed definition of religion. Finally, Part V raises several possible objections to this proposal and seeks to defend the proposed definition.

I
THE NEED FOR A UNITARY, FLEXIBLE DEFINITION OF RELIGION

A. The Need For A Specific Definition

Although it has been argued that the courts should, and indeed must avoid defining religion,[7] the plain language of the religion clauses suggests the need for a definition that is specific enough to allow courts to distinguish religious belief or activity from nonreligious belief or activity.[8] Moreover, the Court's modern interpretation of the free exercise clause makes this task unavoidable. Under this interpretation, the free exercise clause, under certain circumstances, entitles persons to an exemption from secular government regulation, where the regulation interferes with a person's religious practices or beliefs.[9] Assessing such free exercise claims requires a definition that is specific enough to enable courts to distinguish between religious beliefs or practices and nonreligious beliefs or practices.[10]

B. A Definition Broad Enough to Account for the Growing Diversity of Religious Belief

The general function of the religion clauses of the First Amendment is to guarantee religious liberty. As Justice Goldberg has stated:

> These two proscriptions are to be read together and in light of the single end which they are designed to serve. [This] basic purpose . . . is to promote and assure the fullest possible scope of religious liberty and tolerance for all and to nurture the conditions which secure the best hope of attainment of that end.[11]

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7 *See supra* note 6.

8 As one commentator put it, "avoiding the task [of defining religion] would seem to violate the principles underlying the [free exercise] clause." L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 14-6, at 1179 (2d ed. 1988).

9 *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205 (1972); Sherbert v. Verner, 374 U.S. 398 (1963).

10 *See generally* Choper, *Defining "Religion" in the First Amendment*, 1982 U. ILL. L. REV. 579, 587.

11 Abington School Dist. v. Schempp, 374 U.S. 203, 305 (1963) (Goldberg, J., con-

This raises the difficult question of what the concept of "religious liberty" entails. Although the framers probably conceived of religion in a theistic manner,[12] it is not at all clear that they intended the religion clauses to apply only to theistic religions.[13] Moreover, the broad purpose of the religion clauses was not merely to assure the liberty of particular religious denominations, but rather to protect the religious impulses of man from government interference. This purpose is recognized in several Supreme Court opinions. For example, Justice Brennan has observed:

> The constitutional mandate expresses a deliberate and considered judgment that [religious] matters are to be left to the conscience of the citizen and declares as a basic postulate of the relation between the citizen and his government that "the rights of conscience are, in their nature, of peculiar delicacy, and will little bear the gentlest touch of governmental hand . . . ."[14]

Once we recognize that the concept of religious liberty entails protecting matters of conscience from government interference, it becomes clear that a constitutional definition of religion cannot be limited to the theistic religions recognized by the Framers, or even to a broader class of traditional religions. Such a rigid definition of

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curring). *See also* Merel, *The Protection of Individual Choice: A Consistent Understanding of Religion Under the First Amendment*, 45 U. CHI. L. REV. 805, 810 (1978) ("If there is any single unifying principle underlying the two religion clauses . . . it is that individual choice in matters of religion should be free.") (footnote omitted).

12 *See* Greenawalt, *Religion as a Concept in Constitutional Law*, 72 CAL. L. REV. 753, 757-58 (1984); Note, *Toward a Constitutional Definition of Religion*, 91 HARV. L. REV. 1056, 1060 n.26 (1978) [hereinafter *Definition of Religion*]. James Madison viewed religion as "the duty which we owe to our Creator and the Manner of discharging it." Walz v. Tax Comm'n, 397 U.S. 664, 719 (1970) (Douglas, J., dissenting) (quoting Madison, *Memorial and Remonstrance Against Religious Assessments* in 2 THE WRITINGS OF JAMES MADISON 183-91 (G. Hunt ed. 1901)).

13 *See Definition of Religion, supra* note 12, at 1060. Thomas Jefferson apparently envisioned religious liberty for various faiths. He stated that his Virginia Act for Establishing Religious Freedom "was meant to be universal . . . to comprehend within the mantle of its protection *the Jew and the Gentile, the Christian and Mohometan, the Hindu, and infidel of every denomination.*" *Id.* at 1060 n.27.

14 *Schempp*, 374 U.S. 203, 231 (Brennan, J., concurring) (quoting Representative Daniel Carroll of Maryland, speaking during debate upon the proposed Bill of Rights, August 15, 1789). *See also id.* at 217-18 ("Freedom of conscience and freedom to adhere to such religious organization or form of worship as the individual may choose cannot be restricted by law.") (quoting Cantwell v. Connecticut, 319 U.S. 296, 303-04 (1940)); Gillette v. United States, 401 U.S. 437, 445 (1971) (referring to "the general proposition that fundamental principles of conscience and religious duty may sometimes override the demands of the secular state."). Most commentators have also recognized this fundamental principle. *See, e.g.*, L. TRIBE, *supra* note 6, § 14-3, at 1160 ("The free exercise clause was at the very least designed to guarantee freedom of conscience by preventing any degree of compulsion in matters of belief.") (citations omitted); Clark, *Guidelines for the Free Exercise Clause*, 83 HARV. L. REV. 327, 340 (1969) (arguing "that the principal interest protected by the free exercise clause is the individual's interest in not being forced to violate the compelling requirements of conscience").

religion would be inconsistent with the very concept of religious liberty.[15] Accordingly, any proposed constitutional definition should be broad and flexible enough to include changing concepts of religion, thereby protecting new and unorthodox religious beliefs.

C. A Unitary Definition

Several commentators have argued that in order to provide broad protection under the free exercise clause for the growing diversity of faiths in the United States, without subjecting all government humanitarian programs and activities to establishment clause challenge, "religion" should be defined broadly for free exercise purposes, but narrowly for establishment purposes. For example, Professor Tribe advocated such a dual approach in the first edition of his constitutional law treatise. While arguing for an expansive free exercise definition, Tribe argued that "a less expansive notion of religion was required for establishment clause purposes lest all 'humane' programs of government be deemed constitutionally suspect."[16] In addition to this scholarly support, the dual approach has gained some judicial support.[17]

The dual approach presents two major difficulties. First, it is inconsistent with the language and structure of the First Amendment. Justice Rutledge's comments, in a dissenting opinion, illustrate this point:

> "Religion" appears only once in the Amendment. But the word governs two prohibitions and governs them alike. It does not have two meanings, one narrow to forbid "an establishment," and another, much broader, for securing "the free exercise thereof." "Thereof" brings down "religion" with its entire and exact content, no more and no less, from the first into the second guaranty so that Congress and now the states are as broadly restricted concerning the one as they are regarding the other.[18]

The second problem with a dual approach is that it may result

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15 *See* L. TRIBE, *supra* note 8, § 14-6, at 1180 ("The idea of religious liberty—combined with the special place of religion in the constitutional order—demands a definition of 'religion' that goes beyond the closely bounded limits of theism, and accounts for the multiplying forms of recognizably legitimate religious exercise.") (citation omitted).

16 L. TRIBE, AMERICAN CONSTITUTIONAL LAW 827-28 (1st ed. 1978). Tribe claimed that anything "arguably religious" should count as religious for free exercise purposes, and that anything "arguably nonreligious" should count as nonreligious for establishment purposes. *Id.* at 828. *See also Definition of Religion, supra* note 10, at 1084 (advocating use of a "bifurcated definition").

17 *See, e.g.*, United States v. Allen, 760 F.2d 447, 450-51 (2d Cir. 1985); Sheldon v. Fannin, 221 F. Supp. 766, 775 (D. Ariz. 1963) ("religion" in the establishment clause looks to majority's concept, while "religion" in the free exercise clause looks to the minority's concept).

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

in discriminatory treatment among religions. For example, a dual definition may provide more obscure religions and religious activities with special treatment, by protecting the free exercise of such religions, without placing any establishment clause limits on the government's ability to promote and aid such religions.[19]

A dual approach might be justified in spite of these problems, if it were necessary to reconcile the two religion clauses. However, the conflict does not appear as great as Tribe originally thought. Indeed, Tribe has now rejected the dual approach, stating that it "constitutes a dubious solution to a problem that, on closer inspection, may not exist at all."[20] The establishment clause prohibits government action taken for the sole purpose of advancing religion, or having primarily religious effects, or creating excessive entanglement with religion.[21] It does not, however, prevent the government from taking any action that is consistent with a particular religion or religious tenet.[22] Thus, just as a prohibition on murder is not an establishment of religion merely because it corresponds to one of the Ten Commandments, federal laws promoting equality of opportunity[23] are not establishments of religion, even though a commitment to equality may be a religious command for some.

D. Criteria for a Constitutional Definition of Religion

In light of the preceding discussion, a constitutional definition of religion should meet three main criteria, in addition to the criterion of general compatibility with approaches suggested by the Supreme Court. First, it should be specific enough to circumscribe the concept of religion, and allow courts to distinguish nonreligious from religious beliefs. Second, it should be flexible enough to embrace new and unorthodox forms of religion. Third, it should be applicable to both free exercise clause cases and establishment clause cases.

II
SUPREME COURT APPROACHES TO THE CONCEPT OF RELIGION

The early Supreme Court pronouncements on the meaning of religion generally defined religion very narrowly in terms of a God

19 *See generally* Malnak v. Yogi, 592 F.2d 197, 212-13 (3d Cir. 1979) (Adams, J., concurring); Greenawalt, *supra* note 12, at 814.

20 L. TRIBE, *supra* note 8, § 14-6, at 187.

21 Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971).

22 *See* McGowan v. Maryland, 366 U.S. 420, 442 (1961) ("[T]he Establishment Clause does not ban federal or state regulation of conduct whose reason or effect merely happens to coincide or harmonize with the tenets of some or all religions.").

23 *E.g.*, Title VII of Civil Rights Act of 1964, 42 U.S.C. § 2000e (1982).

or Creator. For example, in 1890 the Court stated that "[t]he term 'religion' has reference to one's views of his relations to his Creator, and to the obligations they impose of reverence for his being and character, and of obedience to his will."[24] In 1961, however, in *Torcaso v. Watkins*,[25] the Supreme Court abandoned the use of a belief in God as the touchstone for religious belief, when it invalidated a Maryland law which required all public office holders to declare a belief in the existence of God.[26] The Court stated that the government may not "aid those religions based on a belief in the existence of God as against those religions founded on different beliefs."[27]

The Court has provided its most extensive discussions of the meaning of religion in cases interpreting the conscientious objector exemption from the selective service. In *United States v. Seeger*,[28] the Court interpreted the Universal Military Training and Service Act which exempted from combat persons who objected to participation "by reason of religious training and belief."[29] The Act 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 [excluding] essentially political, sociological or philosophical views or a merely personal moral code."[30] Despite Congress' apparent intent to limit the exemption to objections based on traditional religious beliefs,[31] the Court held that this definition applied to Seeger who had stated that "he preferred to leave the question as to his belief in a Supreme Being open," and that his objection was based on a "belief in and devotion to goodness and virtue for their own sakes, and a religious faith in a purely ethical creed."[32] The Court ruled that "Congress, in using the expression

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24 Davis v. Beason, 133 U.S. 333, 342 (1890). *See also* United States v. MacIntosh, 283 U.S. 605, 633-34 (1931) (Hughes, C.J., dissenting) ("the essence of religion is belief in a relation to God involving duties superior to those arising from any human relation").

25 367 U.S. 488 (1961).

26 The Court previously had suggested a less rigid approach to the concept of religion, in United States v. Ballard, 322 U.S. 78 (1944), when it observed that "freedom of religious belief . . . embraces the right to maintain theories of life and of death and of the hereafter which are rank heresy to followers of the orthodox faiths." *Id.* at 86-87.

27 *Torcaso*, 367 U.S. at 495. The Court then noted that "among religions in this country which do not teach what would generally be considered a belief in the existence of God are Buddhism, Taoism, Ethical Culture, Secular Humanism and others." *Id.* at 495 n.11.

28 380 U.S. 163 (1965).

29 50 U.S.C. app. § 456(j) (1958).

30 *Id.*

31 *See* Greenawalt, *supra* note 12, at 759-60. Noting that "Congress had adopted this definition after a dispute in the courts of appeals over how broadly religion should be understood," Professor Greenawalt concludes that "the statutory language rather clearly represented endorsement of a traditional theistic conception of religion." *Id.*

32 *Seeger*, 380 U.S. at 166.

'Supreme Being' rather than the designation 'God,' was merely clarifying the meaning of religious training and belief so as to embrace all religions and to exclude essentially political, sociological, or philosophical views."[33] The Court then held that the test for "belief in a relation to a Supreme Being is whether a given belief that is sincere and meaningful occupies a place in the life of its pocessor parallel to that filled by the orthodox belief in God of one who clearly qualifies for the exemption."[34]

Although the Court in *Seeger* was attempting to define religious belief within the meaning of a statute, rather than within the meaning of the First Amendment, its decision was clearly influenced by constitutional considerations. These considerations are evident in the Court's statement that "[t]his construction avoids imputing to Congress an intent to classify different religious beliefs, exempting some and excluding others . . . ."[35] Since a conscientious objector statute distinguishing between different religious beliefs protected by the First Amendment would raise potential establishment clause problems,[36] as well as potential free exercise clause problems,[37] the *Seeger* Court may have viewed its broad interpretation as necessary to avoid finding the statute unconstitutional,[38] or at least as necessary to avoid a difficult constitutional question. Moreover, courts

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33 *Id.* at 165.

34 *Id.* at 165-66. In Welsh v. United States, 398 U.S. 333 (1970), a plurality of the Court extended *Seeger* and ruled that:

> if an individual deeply and sincerely holds beliefs which are purely ethical or moral in source and content but that nevertheless impose upon him a duty of conscience to refrain from participating in any war at any time, those beliefs certainly occupy in the life of that individual "a place parallel to that filled by God" in traditionally religious persons.

Id. at 340.

35 *Seeger*, 380 U.S. at 176.

36 *See* Everson v. Board of Educ., 330 U.S. 1, 15 (1947) ("The [establishment clause] means at least this: Neither a state nor the Federal Government can . . . prefer one religion over another.").

37 *See Seeger*, 380 U.S. at 188 (Douglas, J., concurring) (stating that under a more narrow interpretation than the Court's "those who embraced one religious faith rather than another would be subject to penalties; and that kind of discrimination . . . would violate the Free Exercise Clause of the First Amendment"). *See also* Rabin, *When is a Religious Belief Religious: United States v. Seeger and the Scope of Free Exercise*, 51 CORNELL L.Q. 231, 241 (1966) (arguing that "constitutional considerations . . . led the [*Seeger*] Court to construe the statute in the chosen manner.").

38 *But cf.* Gillette v. United States, 401 U.S. 437 (1971), in which the Court held that the Congressional decision to protect religious objection to all wars, but not religious objection to a particular war, violated neither the establishment clause nor the free exercise clause. Regarding the establishment clause challenge, the Court found the distinction justified by secular pragmatic considerations, such as "the hopelessness of converting a sincere conscientious objector [apparently meaning an objector to all wars] into an effective fighting man." *Id.* at 453. As for the free exercise claim, the Court, stated that "[t]he incidental burdens felt by [the claimants] are strictly justified by substantial government interests that relate directly to the very impacts questioned." *Id.* at

and commentators have generally interpreted *Seeger* as signaling a broad concept of religion for First Amendment purposes.[39]

The Court's opinion in *Wisconsin v. Yoder*,[40] however, suggests a much more narrow conception of religion. In *Yoder*, the Court held that a group of Amish plaintiffs, who claimed that the state's requirement of compulsory education beyond the eighth grade violated their religion, were entitled to a religious exemption. After observing that "to have the protection of the Religion Clauses, the claims must be rooted in religious belief," the Court emphasized the religious nature of the Amish beliefs, by contrasting these beliefs with philosophical beliefs:

> [I]f the Amish asserted their claims because of their subjective evaluation and rejection of the contemporary secular values accepted by the majority, much as Thoreau rejected the social values of his time and isolated himself at Walden Pond, their claims would not rest on a religious basis. Thoreau's choice was philosophical and personal rather than religious, and such belief does not rise to the demands of the Religion Clauses.[41]

Although this passage seems to cast doubt on the viability of the *Seeger* approach as a constitutional test for religion,[42] it is unclear how much weight *Yoder* carries in determining the scope of "religion." Since the state did not dispute the religious nature of the Amish practices,[43] the definition of religion was not at issue, and the preceding statement was dicta. As a result, *Yoder* should not necessarily be read as a rejection of the *Seeger* approach in constitutional cases.[44]

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463. The Court left open the question of whether the free exercise clause "would require exemption of any class other than objectors to particular wars." *Id.* at 461 n.23.

39 *See, e.g.*, Malnak v. Yogi, 592 F.2d 197 (3d Cir. 1979) (Adams, J., concurring). Relying on *Seeger*, Judge Adams concludes that "the modern approach looks to the familiar religions as models in order to ascertain, by comparison, whether the new set of ideas or beliefs is confronting the same concerns, or serving the same purposes, as unquestioned and accepted 'religions.' " *Id.* at 207. *See also* Africa v. Pennsylvania, 662 F.2d 1025, 1030 (3d Cir. 1981); Greenawalt, *supra* note 12, at 760-61 ("the Supreme Court's broad statutory construction of religion [in *Seeger* and *Welsh*] . . . has led other courts and scholars to assume that the constitutional definition of religion is now much more extensive than it once appeared to be").

40 406 U.S. 205 (1972).

41 *Id.* at 216.

42 In his opinion, dissenting in part, Justice Douglas criticized this passage as a retreat from *Seeger*. *Id.* at 247-48 (Douglas, J., dissenting in part).

43 406 U.S. at 219.

44 *See* Greenawalt, *supra* note 12, at 759 ("[T]he Court did in [*Yoder*] distinguish religious belief from subjective rejection of secular values, but its opinion does not illuminate the lines between religions and nonreligions and is colored by the specific free exercise context of the case. I do not take the passage as representing any retreat from *Torcaso*."). *See also Definition of Religion, supra* note 12, at 1066 n.63, which states that "[t]here is no evidence that the Supreme Court has retreated from *Seeger-Welsh* in recent

III
SOME APPROACHES TO THE PROBLEM AND CRITICISMS

A. The Ultimate Concern Approach

In *Seeger*, the Court relied on the writings of the theologian, Paul Tillach, who argues that God is, for each individual, the source of that individual's "ultimate concern," and "what [one] take[s] seriously without any reservation."[45] One student commentator has argued that this concept of ultimate concern should be the sole criterion for religion under the free exercise clause.[46] The Note argues that ultimate concern represents "the essence of religion."[47] It then explains that " 'concern' denotes the affective or motivational aspect of human experience; the word 'ultimate' signifies that the concern must be of an unconditional, absolute, or unqualified character."[48] Under this view, whatever an individual regards as his ultimate concern, "[e]ven political and social beliefs,"[49] is his religion.

At least in theory, the ultimate concern approach has a number of advantages. By not specifying the content of religious belief, either in terms of the types of questions that religion must address, or the types of answers it must produce, the approach avoids any risk of "religious chauvinism" and ensures tolerance for changing concepts of religion.[50] Moreover, as the Note observes, "what concerns could be more deserving of preferred status than those deemed by the individual to be ultimate?"[51] Finally, since ultimate concerns involve beliefs that "cannot be superseded,"[52] protecting such concerns from government interference would seem to advance the free exercise goal of not subjecting persons to the "hard

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years." The author argues that the Court's discussion in *Yoder* was simply intended to emphasize that the Amish were "at the core of even a narrow understanding of religion." *Id. But see* L. TRIBE, *supra* note 8, § 14-6, at 1183 ("Although . . . a broad [functional] definition is arguably consistent with the Court's statutory interpretation in the conscientious objector cases, it clashes directly with the constitutional holding in *Wisconsin v. Yoder*.") (citation omitted); Choper, *supra* note 10, at 589 ("the *Seeger* definition's promise for attaining constitutional status has been measurably diminished by the Court's subsequent treatment of the problem in *Sherbert* and *Yoder*").

45 *Seeger*, 380 U.S. at 187 (quoting, P. TILLICH, THE SHAKING OF THE FOUNDATIONS 57 (1948)).

46 *See Definition of Religion, supra* note 12. The author would not apply the ultimate concern definition to establishment clause cases, because such an approach "might lead some to conclude that numerous humanitarian government programs should be regarded as unconstitutional." *Id.* at 1084. Accordingly, the author offers a separate definition for purposes of the establishment clause. *See id.* 1086-89. For criticism of such a dual approach to the definition of religion, see *supra* notes 18-23 and accompanying text.

47 *Definition of Religion, supra* 12, at 1066.

48 *Id.*

49 *Id.* at 1071.

50 *See id.* at 1070, 1076-77.

51 *Id.* at 1075.

52 *Id.* at 1075 n.108.

choice between contravening imperatives of religion and conscience or suffering penalties."[53]

Despite these apparent advantages, it is not clear that the concept of ultimate concern would, in practice, perform the function that the Note envisions it performing. First, the ultimate concern approach assumes that "the concerns of any individual can be ranked" and each individual has a single highest concern that "gives meaning and orientation to a person's whole life."[54] However, individuals may have several ultimate concerns, none of which is superior to the rest. As Professor Greenawalt has noted, "[m]any people care a great deal about a number of things—their own happiness, the welfare of their family, their country, perhaps their religion—without any clear ordering among these . . . ."[55] Since the Note assumes that each person has a personal-concern ranking system, it does not explain how we are to determine the ultimate concern of a person having several deep concerns.

A second practical difficulty with the ultimate concern approach is that the concept of ultimate concern may not always coincide with the types of concerns that the religion clauses are intended to protect. The Court has generally recognized that the religion clauses protect persons from government interference with matters of conscience.[56] The Harvard Note does not state that ultimate concern always involves matters of conscience, but it does identify ultimate concern as that which "happens 'in the center of the personal life and includes all its elements.' "[57] And since the Note recognizes the "mandate of inviolability of conscience"[58] as central to the free exercise clause,[59] it apparently assumes that ultimate concerns are always matters of conscience. However, Professor Greenawalt has persuasively argued that what a person views as his ultimate concern, he does not always view as a matter of conscience. For example, "the lives of people addicted to drugs may center around using and obtaining the drug, and they may be willing to do almost anything rather than be deprived of the drug. Yet they may not regard their obsession as one concerning conscience."[60]

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53 Gillette v. United States, 400 U.S. 437, 445 (1971).

54 *Definition of Religion, supra* note 12, at 1067.

55 Greenawalt, *supra* note 12, at 808.

56 *See supra* note 14 and accompanying text.

57 *Definition of Religion, supra* note 12, at 1076.

58 *Id.* at 1058.

59 *See id.* at 1058, 1074.

60 Greenawalt, *supra* note 12, at 808. This problem might be avoided by claiming that implicit in the ultimate concern approach is that ultimate concerns are equivalent to matters of conscience. Assuming this to be so, Greenawalt's criticism still suggests that "ultimate concern" may be a poor choice of terminology and that a definition in terms

B. A Non-Rational, Transcendent Reality Approach

The concept of religion is often associated with questions facing mankind that are not subject to rational or scientific proof.[61] This view of religion has led some commentators to suggest a definition of religious belief as "faith in something beyond the mundane observable world—faith that some higher or deeper reality exists than that which can be established by ordinary existence or scientific observation."[62] A recent Washington Law Review Note advocates this definition as a modified ultimate concern approach.[63] Under this approach, religion is defined in terms of ultimate concern, which is defined in terms of "questions which science cannot objectively answer."[64] More specifically, the Note states that " '[u]ltimate' refers to all values and 'knowledge' which cannot be proven true, or even tested, by empirical evidence."[65]

This approach presents two related difficulties. First, it seems highly unlikely that an acceptable line could ever be drawn between the realm of scientific demonstrability and the realm of faith. Indeed, it may be persuasively argued that the validity of all claims to scientific truth depend on a leap of faith in accepting the validity of inductive reasoning.[66] Moreover, even if we assume the validity of inductive reasoning, "[n]ot every view is easily classifiable as one that does or does not invoke higher reality since the edges of natural social science, and of rational philosophy, are hardly sharp."[67]

The second problem with the transcendent reality approach is that even if courts could articulate a workable distinction between those beliefs held on faith and those based on scientific proof, the

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of duties of conscience would be more appropriate. *See infra* notes 134-37 and accompanying text.

61 *See, e.g.*, United States v. Kauten, 133 F.2d 703, 708 (2d Cir. 1943) ("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 . . . .").

62 Greenawalt, *supra* note 12, at 805. Although Greenawalt rejects the transcendent reality approach, along with all other definitional approaches, (*see infra* notes 94-95 and accompanying text) he claims that "of all the positions that assert some essential core to the constitutional concept of religion, the claim that belief in higher reality constitutes that core is by far the most tenable." *Id.* at 806.

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

64 *Id.* at 457.

65 *Id.* at 456.

66 *See* D. HUME, AN ENQUIRY CONCERNING HUMAN UNDERSTANDING 25-39 (L.A. Silby-Bigge ed. 1893).

67 Greenawalt, *supra* note 12, at 805. *See also* Choper, *supra* note 10, at 603 ("When justifying competing government policies on such varied matters as social welfare, the economy, and military and foreign affairs, there is at bedrock only a gossamer line between 'rational' and 'supernatural' causation—the former really being little more capable of 'scientific proof' than the latter.").

result would almost certainly be an unacceptably overbroad definition of religion. The ability of the government to take action pursuant to particular values would be seriously threatened by an approach that classified as inherently religious all views not subject to scientific proof. For example, the teaching of shared societal values in schools would presumably violate the establishment clause.[68] Furthermore, this approach, at least if strictly construed, would seem to bring into question criminal prohibitions on murder and other violent crimes, which are similarly based on shared societal values.[69]

The Note claims that while the teaching of values would be prohibited, teaching of science, such as evolution, would be permissible.[70] However, even this is not clear under the transcendent reality. For example, in *Crowley v. Smithsonian Institution*,[71] the plaintiffs claimed that a Smithsonian exhibit, which allegedly "explain[ed] and advocat[ed] the theory of evolution," inhibited their free exercise rights, and unconstitutionally established the religion of Secular Humanism.[72] The plaintiffs argued that evolution is "a nonobservable and alleged phenomenon which can neither be proven nor verified by the scientific method" and, therefore, "is not a true science, but is a *faith* position."[73] The court rejected the challenge, stating: "The fact that religions involve acceptance of some tenets on faith without scientific proof obviously does not mean that all beliefs and all theories which rest in whole or in part on faith are therefore elements of religion as that term is used in the first amendment."[74] Under the transcendent reality approach, the evolution exhibit would be an establishment of religion, unless it could be shown that evolution was subject to scientific proof. Moreover, even if such a showing could be made, the *decision* to advocate, or even to research, a particular science, arguably reflects non-scientific value judgments, and therefore, might still violate the establishment clause, under this view.[75]

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68 *See Modified "Ultimate Concern"*, *supra* note 63, at 459 (Schools may not teach "untestable 'ultimate meanings' "), 455 ("Ethical and other value judgments do not have rational grounds").

69 The Note seeks to avoid this difficulty by arguing that legislation designed to advance the majority's non-rational, value-based ends is permissible, so long as the state is not presenting the "majority values as morally superior to minority values." *Id.* at 461.

70 *See id.* at 459.

71 636 F.2d 738 (D.C. Cir. 1980).

72 *Id.* at 740.

73 *Id.* at 742.

74 *Id.*

75 *See* Choper, *supra* note 10, at 603 ("[A]t the level of final decision, even the most frankly utilitarian goals depend ultimately on values—such as good or evil, or even the desirability of human survival—that represent normative preferences rather than ration-

C. An Extratemporal Consequences Approach

In his article, *Defining "Religion" in the First Amendment*,[76] Dean Choper offers a definition of religion that focuses on whether the allegedly religious belief involves "a belief in the phenomenon of 'extratemporal consequences.' "[77] Under this view, a person's beliefs are religious, for First Amendment purposes, if "the effects of action taken pursuant or contrary to the dictates of a person's beliefs extend in some meaningful way beyond his lifetime."[78] Accordingly, the free exercise clause provides protection from government activity that forces a person to face the "cruel choice" between "suffering meaningful temporal disabilities" for violating the government's commands and suffering meaningful extratemporal consequences (or disabilities) for violating commands of one's religion.[79] Choper acknowledges that his definition, like other content-based definitions of religion, "presents the danger of parochialism and intolerance—that judges will include conventional orthodoxy in the definition and exclude new, unfamiliar, or 'dangerous' beliefs." He claims, however, that a definition which focuses on "ultimate supposed effects of beliefs" rather than the substance of the beliefs "is sufficiently flexible and capable of growth to include newly perceived and unconventional values."[80]

A definition that focuses on extratemporal effects has more orthodoxy built into it than Choper seems to recognize. The problem is not so much that it will favor older religions and exclude newer beliefs, but rather that it excludes all religions, new or old, that do not involve an afterlife.[81] As a result, the free exercise clause would provide no protection for religions that do not espouse belief in an afterlife.[82] For example, the beliefs expressed by the persons seeking conscientious objector status in *Seeger* would not be deemed reli-

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ally compelled choices."). In criticizing the transcendent reality approach, I have focused on the establishment clause difficulties, because they are the most blatant. However, similar overbreadth objections could be made in the free exercise area. Indeed, almost any objection to a legal restriction or obligation could be characterized so as to rest on a nonscientific value judgment.

76 *Id.*

77 *Id.* at 599.

78 *Id.*

79 *Id.* at 597-601.

80 *Id.* at 599.

81 In addition to excluding these religions altogether, the extratemporal consequences approach would recognize the religious beliefs and practices of a religionist who believes in an afterlife, only where the beliefs and practices directly related to the afterlife. Thus, as Professor Greenawalt has observed, the "use of wine for communion" would not be considered a religious practice. *See* Greenawalt, *supra* note 12, at 803.

82 Choper acknowledges that beliefs "associated with the Universalist, Secular Humanism, Deism and Ethical Culture movements" would fall outside his definition. Choper, *supra* note 10, at 600.

gious for First Amendment purposes because none of the claimants in *Seeger* expressed a belief that participation in the war would subject them to eternal damnation or any other extratemporal consequences.[83] Under the extratemporal consequences approach, an objection to military service that "is rooted in a deep-seated faith that [to] voluntarily kill[] another human being [may determine one's] destiny after death" would qualify as a religious objection.[84] But this approach would not recognize the religious nature of objections based on a deep-seated faith in man's spiritual nature and a belief that the "most important religious law [is] that no man ought ever to wilfully sacrifice another man's life as a means to any other end,"[85] or based on "beliefs that taking another's life is a fundamental violation of 'God's law' but causes no afterlife effects."[86]

Choper defends this result by claiming that "the degree of internal trauma on earth for those who have put their souls in jeopardy for eternity can be expected to be markedly greater" than for those who have violated a religious command that does not affect prospects for an after-life.[87] However, the person forced to violate deeply-held convictions of conscience may suffer severe trauma in terms of gnilt. It is hardly self-evident that the trauma of one fearing extratemporal consequences is any more severe. Courts and commentators generally recognize the severity of psychological trauma associated with violating one's conscience without considering the effects of the violation.[88] Distinguishing the trauma suffered by one who violates a duty thought to have extratemporal consequences, and that suffered by one who violates some other religious duty, becomes even more difficult when we consider the wide variety of views held by believers in an extratemporal world.[89]

Even if we assume that the religionist who believes his violation will lead to extratemporal consequences will suffer greater trauma

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83 *See* United States v. Seeger, 380 U.S. 163, 166-69, 186-88 (1965).

84 Choper, *supra* note 10, at 598.

85 *Seeger*, 380 U.S. at 168.

86 *See* Choper, *supra* note 10, at 598 n.109.

87 *Id.* at 598. Choper refers to those who have violated dictates unrelated to an afterlife, as "those who have only violated a moral scruple." *Id.* This description, however, begs the question by assuming that such dictates are *only* "moral scruples."

88 *See, e.g.*, Clark, *supra* note 14, at 337 ("the cost to a principled individual of failing to do his moral duty is generally severe, in terms of supernatural sanction or the loss of moral self respect."). *See also* Gillette v. United States, 401 U.S. 437, 445 (1971) (referring to the "hard choice between contravening imperatives of religion and conscience or suffering penalties"). *See also supra* note 14 and accompanying text.

89 *See generally* Greenawalt, *supra* note 12, at 804. Greenawalt concludes that "[w]hen we recognize the wide range of views among persons whose beliefs include faith in some life beyond this one, we will be hesitant to conclude that persons with such faith will generally suffer more torment from violating conscience than will persons who think they have done some terrible wrong in the only life they have to live." *Id.* at 804.

for violating a religious duty than will one who violates his duty of religion, but anticipates no such consequences, Choper's argument remains unpersuasive. The problem is that the argument assumes that the religionist will violate his religious beliefs, rather than the government's command. If, instead, the religionist chooses to disobey the government, then the nonextratemporal believer would appear to face the greater trauma. As Choper notes, "at a psychological level, the identical cost may be more comfortably borne by those religionists who can balance [the punishment suffered for violation of the government's command] against eternal rather than temporal benefits. Indeed, some may believe that martyrdom has independent value in affecting their destiny."[90] Thus, in some cases, the government may be doing the afterlife believer a favor by punishing him.

In response to this, Choper argues that "because the burden of *obeying* the law is so severe for the religious objector [whose objection is based on extratemporal effects], our traditions hold that his noncompliance is not as morally culpable as one [sic] who disobeys for other reasons."[91] This explanation fails for two reasons. First, Choper does not explain why we should focus on the burden of obeying the law, rather than on the burden of disobeying the law, or some combination of these two factors. Second, and perhaps more important, it is not at all clear that the person who disobeys for fear of eternal damnation is less morally culpable than the person who disobeys because of his devotion to God's law, or his deep-seated faith and "devotion to goodness and virtue for their own sake," or his commitment to the "most important religious law . . . that no man ought ever to wilfully sacrifice another man's life as a means to any other end."[92] Indeed, just the opposite would seem true. A person who violates the law in the name of altruistic principles is generally thought of as morally defensible, if not morally commendable. In contrast, a person who violates the law in pursuit of his own self-interest, is generally thought of as the most condemnable violator.[93]

D. A Non-Definitional Analogical Approach

In his article, *Religion as a Concept in Constitutional Law*,[94] Professor Greenawalt rejects both the "ultimate concern" approach,[95] and

90 Choper, *supra* note 10, at 598.

91 *Id.*

92 *Seeger*, 380 U.S. at 168.

93 The extratemporal consequences approach also creates difficulties as applied to the establishment clause. *See* Greenawalt, *supra* note 12, at 804.

94 *Id.*

95 *See id.* at 806-11.

the "extratemporal consequences" approach,[96] claiming that these and other "dictionary approach[s] are wholly inadequate to produce acceptable results in a wide range of religion clause cases."[97] Arguing that "any dictionary approach oversimplifies the concept of religion,"[98] Greenawalt proposes that "religion should be determined by the closeness of analogy in the relevant respects between the disputed instance and what is indisputably religion."[99]

Analogizing to other religions is by no means a unique approach. Any approach to religion must begin with a focus on what are the usual features of recognized religions.[100] For example, a focus on ultimate concern reflects the fact that religions traditionally have dealt with questions of ultimate concern.[101] Similarly, a focus on extratemporal consequences reflects the fact that most traditional religions include strong beliefs regarding extratemporal consequences.[102] Indeed, Greenawalt recognizes that the distinctive feature about his approach is not its use of analogical reasoning, but that "it denies that a search for essential conditions is a profitable method for applying the concept of religion."[103]

This denial results in an approach that provides little guidance in determining what qualifies as a religion. While Greenawalt suggests several "indubitably religious" attributes,[104] he does not indicate how many of, or what combination of, these attributes must be present to satisfy the constitutional concept of religion. As a result, the approach presents problems of potential overinclusiveness and underinclusiveness.

By failing to identify any necessary condition for religion, the

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96 *See id.* at 803-04.

97 *Id.* at 765.

98 *Id.* at 763.

99 *Id.* at 764.

100 In this sense my proposal also represents an analogical approach. *See infra* notes 130-34 and accompanying text. It differs from Greenawalt's approach, however, in that it seeks to identify the essential features of commonly recognized religions.

101 *See Definition of Religion*, *supra* note 12, at 1067 n.68 (suggesting the concept of "God" for traditional religions is equivalent to ultimate concern).

102 *See* Choper, *supra* note 10, at 600 (claiming that Christianity, Islam, most branches of Judaism, Hinduism, and Buddhism all teach a belief in some form of afterlife).

103 Greenawalt, *supra* note 12, at 766.

104 These include:

> a belief in God; a comprehensive view of the world and human purposes; a belief in some form of afterlife; communication with God through ritual acts of worship and through corporate and individual prayer; a particular perspective on moral obligations derived from a moral code or from a conception of God's nature; practices involving repentance and forgiveness of sins; "religious" feelings of awe, guilt, and adoration; the use of sacred texts; and organization to facilitate the corporate aspects of religious practice and to promote and perpetuate beliefs and practices.

Id. at 767-68.

analogical approach, if interpreted broadly, presents the risk that organizations or belief systems, which are loosely analogous to previously identified religions, but generally not considered to be religious (even by their followers), will be defined as religion under the First Amendment. The approach does not explain, for example, whether a political philosophy such as Marxism, which has some of the religious attributes set forth by Greenawalt, would qualify as a religion.[105] Greenawalt indicates that Marxism "is usually not considered religious,"[106] but he does not explain how one would reach this conclusion relying solely on his analogical approach.

Conversely, by failing to identify any sufficient condition for religion, the analogical approach is subject to a narrow interpretation that might exclude new and different religions. For example, any emphasis on the structural features of organized religion[107] would result in the exclusion of very personal approaches to religion that do not conform to any particular group or organization.[108] Such a result would be inconsistent with the concept of religious liberty.[109]

One might argue that to criticize the analogical approach for failing to provide necessary or sufficient conditions for whether something is religion misses the point of the approach. After all, Greenawalt's position is that any test based on essential conditions or on a set definition, even if desirable, is unworkable for purposes of the religion clauses.[110] Greenawalt, however, is incorrect in his perception that a definition providing essential features of religion will necessarily oversimplify the concept of religion. I will argue that the definition outlined below, which provides the necessary and sufficient conditions for religion, does provide a workable approach to the religion clauses.[111]

E. An Analogical Approach Based on External Manifestations of Traditional Religions

Another possible method of definition by analogy would be to

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105 Marxism does present "a comprehensive view of the world and human purposes," it has "a particular perspective on moral obligations derived from a moral code . . .," it arguably makes "use of sacred texts," and at least in some modern manifestations, it has an "organization to facilitate the corporate aspects of [its] practices and to promote and perpetuate beliefs and practices."

106 Greenawalt, *supra* note 21, at 768.

107 In terms of Greenawalt's suggested attributes of religion, structural features would include those features related to "corporate aspects of religious practice," and in some cases "the use of sacred texts." *See supra* note 104.

108 *See infra* notes 116-21 and accompanying text.

109 *See infra* note 122 and accompanying text.

110 *See supra* notes 97-98, 103 and accompanying text.

111 *See infra* notes 131-56 and accompanying text.

focus on the external manifestations that are generally associated with traditional religions. For example, Judge Adams of the Third Circuit has proposed a test for religion consisting of three indicia, the third of which is the presence of "any formal, external, or surface signs that may be analogized to accepted religions."[112] Among the external signs that might be considered in determining whether a belief or practice is part of a religion are, "formal services, ceremonial functions, the existence of clergy, structure and organization, efforts at propagation, observation of holidays and other similar manifestations associated with the traditional religions."[113] The primary advantage of such an approach is that it provides more objective and tangible elements for courts to focus on in assessing whether a belief or practice is religious.

However, any approach that focuses on such external indicia favors organized religion over individualized personal approaches to religion. Thus, it would threaten to exclude religious beliefs that are not held by any group or sect. For example, the religious beliefs asserted in *Seeger* did not involve any organizational or formal trappings.[114] *Bowen v. Roy*[115] presents another example. In that case, Roy asserted a religious belief that the use of a Social Security number for his daughter would "rob [her] spirit . . . and prevent her from attaining greater spiritual power."[116] Although the belief was based on conversations with a tribal chief,[117] Roy's testimony indicated that this was a personal religious belief, rather than one associated with any organized formal group.[118] Under an approach that focuses on external manifestations of religion, these beliefs might be considered nonreligious simply because they were privately held by individuals, rather than by a formal group or organization.

Moreover, an undue focus on organizational elements might exclude religious beliefs of a member of one sect where they conflict with the views of other members of the sect. The Supreme Court recognized this problem in *Thomas v. Review Board.*[119] In *Thomas*, the

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112 Malnak v. Yogi, 592 F.2d 197, 209 (3d Cir. 1979) (Adams, J., concurring). The first two parts of Judge Adams' test are discussed in Part IV. *See infra* notes 131-34 and accompanying text.

113 *Malnak*, 592 F.2d at 209 (Adams, J., concurring). Judge Adams' test does not make these signs necessary conditions for religion, but suggests that in light of the Court's dicta in Yoder (*see supra* note 41 and accompanying text), "formal and organizational signs may prove to be more important in defining religion than the conscientious objector cases would suggest." *Malnak*, 592 F.2d at 209 n.43 (Adams, J., concurring).

114 *See* United States v. Seeger, 380 U.S. 163, 166-69, 186-88 (1965).

115 106 S. Ct. 2147 (1986).

116 *Id.* at 2150.

117 *Id.*

118 *See id.* at 2150 n.3.

119 450 U.S. 707 (1981).

Court rejected the Indiana Supreme Court's suggestion that a Jehovah's Witness' refusal to participate in the production of war materials was based on personal, rather than religious beliefs.[120] Observing that the Indiana court improperly gave "significant weight to the fact that another Jehovah's Witness had no scruples about working on tank turrets," the Court held that "the guarantee of free exercise is not limited to beliefs which are shared by all the members of a religious sect."[121] The Court also criticized the Indiana Supreme Court for relying on "the facts that Thomas was 'struggling' with his belief and that he was not able to 'articulate' his belief precisely."[122] The Court added that "courts should not undertate to dissect religious beliefs because the believer admits that he is 'struggling' with his position or because his beliefs are not articulated with . . . clarity and precision . . . ."[123]

These examples suggest that any definition that focuses on external signs of traditional religions would recognize the beliefs and practices of institutions as religious more easily than it would recognize the beliefs of individuals as religious. This would be inconsistent with the role of the Bill of Rights to protect the liberty of individuals. As Professor Tribe has argued, definitions which "focus on the externalities of a belief system or organization . . . unduly constrain the concept of religion."[124] Accordingly, courts cannot properly rely on externalities, such as "the belief system's age, its apparent social value, its political elements, the number of its adherents, the sorts of demands it places on those adherents, the consistency of practice among different adherents, and the system's outward trappings—e.g., prayers, holy writings, and hierarchical organizational structures."[125]

That external manifestations should not be relied on in determining whether something is a religion does not mean they are irrelevant to First Amendment analysis. To be entitled to free exercise protection, a claimant must demonstrate the sincerity of his alleged religious beliefs.[126] The fact that a claimant can show that

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120 *See id.* at 714-16.

121 *Id.* at 715-16.

122 *Id.* at 715. *See also* In Re Jenison, 375 U.S. 14 (1963) (vacating for reconsideration in light of Sherbert v. Verner, 374 U.S. 398 (1963)) (*see infra* note 152 and accompanying text), a Minnesota judgment denying exemption for woman opposed to jury duty based on her own (apparently unique) interpretation of the Bible). *Cf.* Hobie v. Unemployment Appeals Comm., 107 S. Ct. 1046, 1051 (1987) (holding recently adopted religious beliefs are entitled to full free exercise protection).

123 *Thomas*, 450 U.S. at 715.

124 L. TRIBE, *supra* note 8, § 14-6, at 1181.

125 *Id.* at § 14-6, at 1181-82 (citations omitted).

126 *See id.* at § 14-12, at 1242 ("In order to gain the exemption, the claimant must show . . . a sincerely held religious belief"). *See also* Wisconsin v. Yoder, 406 U.S. 205,

he has consistently taken part in the ceremonial aspects of an organized religion will certainly be probative as to the sincerity of his beliefs. Nonetheless, the absence of any ceremonial aspects connected with a claimant's asserted religious belief should not have any bearing on whether the belief qualifies as religious.[127]

IV
A FUNCTIONAL APPROACH TO THE CONCEPT OF RELIGION

A. Seeger: A Definition Based on the Role or Function That Recognized Religions Have in the Life of the Adherents

The very concept of religious liberty suggests the inappropriateness of an overly content-based definition.[128] In order to embrace new forms of religion, religion should be defined in a flexible manner that reflects the general purposes of religious liberty rather than the specific practices or beliefs of traditional religions. An approach that focuses on the function of religion in the adherent's life performs this task far better than an approach that focuses on the more tangible physical manifestations of religion. The Supreme Court offered the bare skeleton of such a functional approach in *United States v. Seeger*.[129]

In *Seeger*, the Court held that to qualify for a military service exemption under a statute that required a "belief in relation to a Supreme Being," a claimant must have a "belief that is sincere and meaningful [and] occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God of one who clearly qualifies for the exemption."[130] This definition focuses on the function of belief in God in the life of a traditional religionist. Since the First Amendment protects religious belief rather than "belief in relation to a Supreme Being," the focus should be on the function of religious belief, rather than the function of belief in God. Accordingly, applying the functional approach to the religion clauses, religion might be defined as a set of beliefs that occupies a place in the life of its possessor parallel to that filled by the religious beliefs of an ad-

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235 (1972) ("the Amish in this case have convincingly demonstrated the sincerity of their religious belief"); Africa v. Pennsylvania, 662 F.2d 1025, 1030 (3d Cir. 1981) (in a free exercise case, "[a] court's task is to decide whether the beliefs avowed are . . . sincerely held").

127 *Cf.* L. TRIBE, *supra* note 8, at 1182 ("To be sure, courts should be wary of sudden births of religions that entitle practitioners to special rights or exemptions. But the proper place for that inquiry is in the assessment of the believer's sincerity, not in any evaluation of the belief's externalities.").

128 *See supra* note 15 and accompanying text.

129 380 U.S. 163 (1965). *Seeger* is discussed more fully *supra* notes 28-39 and accompanying text.

130 *Id.* at 166.

herent to something that would clearly qualify as a religion within the meaning of the First Amendment.[131] However, without an explanation as to what role religious belief usually plays for the follower of a recognized religion, this definition provides little guidance.[132] The next section will attempt to remedy this by providing content to the function of religion in individual's lives.

B. The Religious Function: Addressing The Fundamental Questions of Human Existence and Providing A Guide for Conducting One's Life

Although *Seeger* did not spell out what role religion plays in the life of a traditional religionist, several opinions of the circuit courts shed light on this issue. The most complete discussions of the specific content of *Seeger's* functional approach have appeared in two opinions by Judge Adams of the Third Circuit. The first of these was a concurring opinion in *Malnak v. Yogi*,[133] a case holding that the teaching of Science of Creative Intelligence—Transcendental Meditation in the public schools violates the establishment clause. Explaining his "definition by analogy,"[134] Judge Adams has identified the role of religion in the life of the religionist, as providing a comprehensive belief system that "addresses fundamental and ultimate questions having to do with deep and imponderable matters."[135] Such fundamental questions include "the meaning of life and death, man's role in the Universe, [and] the proper moral code of right and wrong."[136]

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131 Although strictly speaking, *Seeger* was a case of statutory interpretation, courts and commentators have commonly used it as a guide to approaching issues raised under the religion clauses. *See supra* note 39 and accompanying text.

132 *See* Choper, *supra* note 10, at 593 ("One major ambiguity of the *Seeger-Welsh* formulation concerns what 'place' religion occupies in the life of a member of a conventional religious sect.").

133 592 F.2d 197 (3d Cir. 1979).

134 *Id.* at 207 (Adams, J., concurring).

135 Africa v. Pennsylvania, 662 F.2d 1025, 1032 (3d Cir. 1981); *see also Malnak*, 592 F.2d at 208-09 (Adams, J., concurring). In these opinions, Judge Adams proposes a test for religion consisting of three indicia:

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

Africa, 662 F.2d at 1032. *See also Malnak*, 592 F.2d at 207-09. The third element is discussed *supra* notes 112-27 and accompanying text.

136 *Malnak*, 592 F.2d at 208 (Adams, J., concurring); *see also Africa*, 662 F.2d at 1033 ("Traditional religions consider and attempt to come to terms with what could best be described as 'ultimate' questions—questions having to do with, among other things, life and death, right and wrong, and good and evil."); Founding Church of Scientology v. United States, 409 F.2d 1146, 1160 (D.C. Cir. 1969) (characterizing recognized religions as having "underlying theories of man's nature or his place in the Universe").

The requirement of a comprehensive belief system addressing fundamental questions provides a good first criterion for the concept of religion. Taken alone, however, it fails to capture the generally accepted notion of religion as giving rise to duties of conscience. This notion is captured in the language of the conscientious objector statute which refers to belief "involving duties superior to those arising from any human relation."[137] The fact that religion generally involves a compelling sense of devotion and duty helps explain why the First Amendment singles out the practice of religion for special constitutional protection.[138] As one commentator has noted, this sense of a duty provides a "forceful explanation [and] justification for the free exercise clause" in that it is "particularly cruel for the government to require the believer to choose between violating [the commands of religious belief] and suffering meaningful temporal disabilities."[139] Moreover, the general understanding of the religion clauses as serving to protect the sanctity of conscience reflects this view of religion.[140]

Supplementing Judge Adams' idea of a comprehensive belief system that addresses fundamental questions with the notion of duties of conscience provides a workable definition of religion for purposes of the First Amendment. Taking these two ideas together, religion can be defined as a comprehensive belief system that addresses the fundamental questions of human existence, such as the meaning of life and death, man's role in the universe, and the nature of good and evil, and that gives rise to duties of conscience. The following section suggests a number of possible objections to this definition and attempts to justify the definition by providing responses to these objections.

V
IMPLICATIONS AND POSSIBLE OBJECTIONS

A. Underinclusiveness

One possible criticism of the proposed definition is that it will exclude certain recognized religious beliefs. For example, Dean

137 *See Seeger*, 380 U.S. at 165. *See also* United States v. MacIntosh, 283 U.S. 605, 633-34 (1931) (Hughes, C.J., dissenting) ("belief in a relation to God involving duties superior to those arising from any human relation").

138 James Madison's definition of religion suggests the importance of religious duty. Madison viewed religion as "the duty which we owe to our Creator." Walz v. Tax Comm'n, 397 U.S. 664, 719 (1970) (Douglas, J., dissenting) (quoting Madison, *supra* note 12, at 183-91).

139 Choper, *supra* note 10, at 597.

140 *See supra* note 14 and accompanying text. Arguably, this notion of duties of conscience is implicit in Judge Adams' identification of "the proper moral code of right and wrong," *Malnak*, 592 F.2d at 208, as one of the fundamental questions.

Choper argues that a definition focusing on a comprehensive belief system that addresses fundamental questions creates problems of underinclusiveness. He claims that the difficulty "is that at least some traditional religious beliefs would not appear necessarily to be comprehensive."[141]

The claim that not all religious beliefs are comprehensive seems to misunderstand the approach. The comprehensiveness requirement does not mean that each religious belief or practice must be "comprehensive." Rather, it simply recognizes that religions are "not generally confined to one question or moral teaching."[142] Similarly, the fundamental question requirement does not mean that each belief or practice must address or directly relate to a fundamental question to be considered religious.[143] The belief or practice need only be a part of a belief system that addresses fundamental question.[144] Thus, a practice such as the use of wine for communion, which does not necessarily have any comprehensive relation to fundamental questions, but is an integral part of a system meeting the criteria for religion, would be recognized as a religious practice.

B. Overinclusiveness

Dean Choper also argues that "many comprehensive beliefs are not necessarily religious."[145] He illustrates his overinclusiveness argument by suggesting that "atheistic Marxism may be fairly described as comprehensive because it supplies answers to profound questions and denies the significance of other issues."[146] One might apply this overinclusiveness objection to the proposed approach, by further claiming that a philosophy such as Marxism gives rise to duties of conscience in its adherents.

Although Marxism and other comprehensive political philoso-

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141 Choper, *supra* note 10, at 596 n.104.

142 *Malnak*, 592 F.2d at 209 (Adams, J., concurring).

143 This may be Choper's real concern, as he seems to equate the comprehensive element with the fundamental question element. *See* Choper, *supra* note 10, at 596 n.104 ("Marxism may fairly be described as *comprehensive* because it supplies answers to profound *questions*") (emphasis added).

144 *See Malnak*, 592 F.2d at 197. Judge Adams stated:

> It should not be reasoned that those teachings of accepted religious groups that do not address "ultimate" matters are not entitled to religious status. . . . Once a belief-system has been credited as a "religion" through an examination of its "ultimate" nature, its teachings on other matters must also be accepted as religious.

Id. at 208-09 n.40 (Adams, J., concurring).

145 Choper, *supra* note 10, at 596 n.104.

146 *Id.* at 596-97 n.104. *See also* L. TRIBE, *supra* note 8, § 14-6, at 1182-83 ("A generous functional definition would seem to classify any deep-rooted philosophy as religion, Marxism as well as Methodism.").

phies may indeed address profound questions, it is not clear that they address fundamental questions as defined in the proposed definition.[147] Their concerns tend to be more mundane than the fundamental questions suggested above. For example, rather than addressing "man's role in the universe," most political philosophies address man's role in some political community, such as a city-state, a nation-state, or under a "dictatorship of the proletariat."[148] Moreover, with the possible exception of natural law theories, political philosophies do not usually address the nature of good and evil in a normative sense; they generally attempt to define "good" in a descriptive sense, and then advocate means to obtaining that good or goods.[149] And few, if any, political philosophies, Marxism included, attempt to explain the meaning of life and death. Thus, even focusing solely on the first criterion of the fundamental question/duties of conscience approach, the approach does not appear overinclusive.

When we consider the second requirement of the proposed approach, that the belief system give rise to duties of conscience, strictly political philosophies are even more removed from the definition. Although political philosophies generally provide guides to action, these guides, for most people, are better characterized as prudential maxims, than duties of conscience. A duty of conscience serves as an end in itself, which cannot be compromised to serve some more mundane duty (such as the duty to obey the law). A duty arising from one's political philosophy generally serves as a means to some other end, and lacks the compelling nature of a duty of conscience. For example, persons who believe strongly in democracy may feel a duty to vote, but few would view this duty as too compelling to be outweighed by other considerations, such as a family or professional obligation that would make it impossible to vote.

For some people, however, a political philosophy does give rise to imperative duties of conscience. For example, persons advocat-

147 *But see infra* text following note 148.

148 *See, e.g.*, K. MARX, THE COMMUNIST MANIFESTO 92-95 (J. Katz ed. 1964).

149 In so far as natural law theories do address the nature of good and evil, they often tend to have religious underpinnings. For example, Thomas Hobbes argued that the laws of nature correlate to the laws of God. *See* Hobbes, *De Cive*, in T. HOBBES, MAN AND CITIZEN 295 (B. Gert ed. 1972) ("Because the word of God, ruling by nature only, is supposed to be nothing but right reason . . . it is manifest that the laws of God . . . are only the natural laws . . . ."). Indeed, the natural law notions of equality embodied in the Declaration of Independence seem to suggest a divine source: "When in the course of human events, it becomes necessary for one people . . . to assume among the powers of earth the separate and equal station to which the laws of nature and of nature's *God* entitle them. . . . We hold these truths to be self evident; that all men are *created* equal, that they are *endowed by their creator* with certain unalienable rights . . . ." The Declaration of Independence para. 1 (U.S. 1776) (emphasis added).

ing civil disobedience often view the duty to disobey unjust laws as a duty of conscience.[150] Under the proposed approach, this would not necessarily make that person's political philosophy a religion. The person would also have to view their political philosophy as addressing the fundamental questions. But if a person views a certain political philosophy as providing imperative duties of conscience, perhaps even duties he would sacrifice his life for, then that person may also view the philosophy as addressing such fundamental questions as man's role in the universe, the nature of good and evil, and perhaps even the meaning of life and death. If a philosophy does play such a role in a person's life, then it should be treated as a religion with regard to that person. Similarly, if a public school were to present philosophical teachings as a comprehensive belief system addressing fundamental questions and creating duties of conscience, it might well violate the establishment clause.[151]

C. Risk of Fraudulent Claims Under The Free Exercise Clause

A strict functional definition that does not include the element of formal religious trappings arguably presents a greater risk of fraudulent claims than a definition that requires or at least considers such trappings. Since a purely functional definition considers only whether the alleged belief or practice relates to the internal religious function of the individual, there will be less opportunity to rely on external evidence in assessing a religious claim. However, as I argue above, any focus on such external manifestations of religion would tend to discriminate against unorthodox religions in a manner inconsistent with the concept of religious liberty.[152] Moreover, the proposed approach does require that the alleged religious belief play a certain role in the claimant's life: it must be part of a comprehensive belief system that addresses certain fundamental questions and gives rise to duties of conscience. Thus, the issue in a free exercise case is not simply whether the claimant sincerely believes that the belief or practice in question is a religious belief, but whether he sincerely believes that it plays the religious role in his life. The definition of that role provides a basis for the factfinder to question the nature of the belief, and to assess the claimant's sincerity, thereby reducing the likelihood of successful fraudulent claims.

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150 *See, e.g.*, M. L. KING, JR., *Letter From Birmingham Jail*, in WHY WE CAN'T WAIT 82 (1968) ("one has a moral obligation to disobey unjust laws").

151 *Cf.* Malnak v. Yogi, 592 F.2d 197, 209 (3d Cir. 1979) (Adams, J., concurring) ("moral or patriotic views are not by themselves 'religious,' but if they are pressed as divine law or a part of a comprehensive belief-system that presents them as 'truth,' they might well rise to the religious level").

152 *See supra* notes 114-24 and accompanying text.

D. Risk of Undue Interference with Government Activity

In combination with the strict scrutiny test established in *Sherbert v. Verner*,[153] the proposed, relatively broad definition of religion may appear to present a serious obstacle to the government's ability to act on behalf of the general welfare. In *Sherbert*, the Court indicated that in order to justify an infringement on a person's free exercise of religion, the government must demonstrate a "compelling state interest."[154] It is unlikely, however, that the proposed interpretation of religion would pose a serious threat to government activity, even assuming vigorous free exercise protection. First, a successful free exercise claim typically does not lead to invalidation of a statute or of an entire government program; it simply requires an exemption for the claimant.[155] Second, if the sincerity test is taken seriously, and claimants are made to demonstrate the sincerity of their claims,[156] then it will be difficult for persons to simply fabricate a belief in order to avoid a government restriction or obligation.

Even assuming the proposed definition would lead to an unmanageable number of exemptions, this result is more a function of the test set out in *Sherbert* than of the definition. The Court could limit the number of religious exemptions by applying the compelling state interest test only in cases in which the religious belief at issue is central to the claimant's religion.[157] Alternatively, the Court could apply a general balancing approach, under which it would measure the extent of the infringement of the claimant's religion against the impact of an exemption on the state interest.[158]

CONCLUSION

The First Amendment's command that the government "make

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153 374 U.S. 398 (1963).

154 *See id.* at 406.

155 The Court's recent decision in Lyng v. Northwest Indian Cemetery Ass'n, 108 S. Ct. 1319 (1988) seems to ensure that free exercise claims cannot go further than individual exemptions from government restrictions or obligations. In *Lyng*, the Court held that the free exercise clause does not "require the government to bring forward a compelling justification" for "government programs which may make it more difficult to practice certain religions but which have no tendency to coerce individuals into acting contrary to their religious beliefs." *Id.* at 1326.

156 *See supra* note 126 and text following note 150.

157 Such an approach was proposed in a recent dissenting opinion by Justice Brennan, joined by Justices Blackmun and Marshall. *See Lyng*, 108 S. Ct. at 1338 (Brennan, J., dissenting) ("I believe it appropriate . . . to require some showing of 'centrality' before the Government can be required . . . to come forward with a compelling justification. . . ."). The majority, however, rejected this approach. *Id.* at 1329.

158 Professor Greenawalt advocates a balancing approach and argues that courts already implicitly use this approach. *See* Greenawalt, *supra* note 12, at 781-84, 790.

no law respecting an establishment of religion, or prohibiting the free exercise thereof" requires an interpretation of religion that will allow the courts to distinguish between religious and nonreligious belief. On the other hand, the purpose of the religion clauses—to ensure religious liberty for all—requires an interpretation that will encompass the religious impulses in persons, whether these impulses are expressed in the form of a traditional religion, or in the form of a unique, unstructured, personal religion. These two goals are served by defining religion in terms of the religious function in an individual's life—addressing the fundamental questions of human existence and providing a guide for how to conduct one's life. The proposed definition embodies this religious function and provides a specific, but flexible guide for determining what is religion in both free exercise and establishment clause cases.

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