

DEFINING RELIGION UNDER THE  
FIRST AMENDMENT:  
AN ARGUMENT FOR ANCHORING A  
DEFINITION IN INJURY

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The founding fathers left the United States with a clear map to guide almost every aspect of government: the United States Constitution. This map includes detailed explanations of how and for what purpose many of the institutions that are essential to American life should be organized and defined. Yet one of the most fundamental aspects of American life—religious belief and practice—while protected by the First Amendment, was left without a definition of religion to guide the amendment’s

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application. Some believe no definition of religion was provided because the Founders believed a strictly theistic definition was the obvious choice, while others think that perhaps the Founders were being purposefully vague.<sup>1</sup> Whatever the Founders' reasoning may have been, the limited language of the Religion Clauses provides little guidance regarding what constitutes a religion deserving of protection, which has caused this area of constitutional discourse to become "a conceptual disaster area."<sup>2</sup> This has left some of the most important questions about religion's place in American life to the courts, forcing judges to pick up where the Constitution leaves off and do the work of unraveling religion's legal position in the United States by trying to define what the intent of the Founders was when they drafted the Religion Clauses.<sup>3</sup> This task has proven particularly difficult given the inherently enigmatic nature of religion. There are a number of difficulties that make any attempt at defining religion fraught with uncertainty and complications. The most notable of these concern whether sincerity of belief should be a part of defining religion for purposes of exemption from a law of general applicability; how a court could go about assessing sincerity; whether a belief which the holder acknowledges is irreligious can qualify for religious protections; what criteria distinguish religion from sincerely held secular beliefs (if this distinction is even necessary); and whether a static definition of religion is possible at all.

Many may wonder why a definition of religion would be required. Some scholars see a definition as a necessary "screening mechanism,"<sup>4</sup> while others feel that religion transcends any attempt at being defined.<sup>5</sup> A definition, or at least some way of sorting which beliefs are entitled to the protections of the Religion Clauses, is necessary precisely because of the existence of the Religion Clauses. If those clauses are properly interpreted as granting special protections for people with beliefs that are considered

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<sup>1</sup> Jeffrey L. Oldham, Note, *Constitutional "Religion": A Survey of First Amendment Definitions of Religion*, 6 TEX. F. ON C.L. & C.R. 117, 121 (2001) (citing Jesse H. Choper, *The Establishment Clause and Aid to Parochial Schools—An Update*, 75 CALIF. L. REV. 5, 6 (1987)).

<sup>2</sup> Steven G. Gey, *Why is Religion Special? Reconsidering the Accommodation of Religion Under the Religion Clauses of the First Amendment*, 52 U. PITT. L. REV. 75, 75 (1990).

<sup>3</sup> *Id.* at 120.

<sup>4</sup> Jesse H. Choper, *Defining Religion in the First Amendment*, 1982 U. ILL. L. REV. 579, 591 (1982) ("In effect, the [legal definition of religion] acts as a screening mechanism that determines what claims will be subjected to the substantive "balancing test" that the Court has developed for judging whether an exemption for religion must be granted. Thus, the more inclusive the legal definition of religion, the greater the number and diversity of claims under the free exercise clause that must be considered on the merits.")

<sup>5</sup> James M. Donovan, *God is as God Does: Law, Anthropology, and the Definition of "Religion"*, 6 SETON HALL CONST. L.J. 25, 27 (1995).

religious, there needs to be some means of sorting who is entitled to these protections from individuals who are not. The alternative would be to deny that the Religion Clauses single out religious beliefs for special treatment. If the judiciary can deem some beliefs deserving of religious protection while excluding others, there needs to be some means of rationalizing these choices, whether it be through a definition of religion or otherwise. Without “objective criteria” for determining what beliefs should receive protection under the Religion Clauses, there is the constant danger that judges will only recognize as religious those beliefs which fall within “conventional Western patterns of religion.”<sup>6</sup> This would allow Free Exercise claims by minority religions to be trampled by the narrow ideas of religion that judges may bring to their work.<sup>7</sup> Scholars have recognized a certain “hostility” by the judiciary towards minority religious groups that “maintain nontraditional belief systems,” leading judges to downplay the “relative importance of religiously motivated behavior that conflicts with a neutral law of general applicability.”<sup>8</sup> If a definition of the beliefs that should be protected by the Religion Clauses is proposed which can too easily be manipulated by judges, religious minorities stand to lose the most.<sup>9</sup> Unless the protections of the Religious Clauses are abandoned entirely, it seems there is no way of avoiding the prickly question of which beliefs are deserving of constitutional protection and which are not. In addition, nuanced criteria for distinguishing protected beliefs allows the Court to protect minority religions and unorthodox beliefs that rise to the level of religion, while still refraining from protecting the purely political and philosophical ideas to which the Religion Clauses were seemingly never intended to extend.<sup>10</sup>

The religious pluralism of the United States has made defining religion a particularly difficult task, given that there are so many forms of religious practice and observance that any definition must accommodate.<sup>11</sup> How can the Supreme Court define religion in terms that are broad enough to grow and include minority religions, without eviscerating the distinction between secular and religious? Should the distinction between secular and

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<sup>6</sup> Ira C. Lupu, *Where Rights Begin: The Problem of Burdens on the Free Exercise of Religion*, 102 HARV. L. REV. 933, 958 (1989).

<sup>7</sup> *Id.*

<sup>8</sup> Ronald J. Krotoszynski, *If Judges Were Angels: Religious Equality, Free Exercise, and the (Underappreciated) Merits of Smith*, 102 NW. U. L. REV. 1189, 1193 (2008); when referring to “nontraditional belief systems” I am referring to beliefs outside of the Judeo-Christian tradition.

<sup>9</sup> David B. Salmons, *Towards a Fuller Understanding of Religious Exercise: Recognizing the Identity Generative and Express Nature of Religious Devotion*, 62 U. CHI. L. REV. 1243, 1250 (1995).

<sup>10</sup> THOMAS C. BERG ET AL., RELIGION AND THE CONSTITUTION 59–60 (Wolster Kluwer 2016).

<sup>11</sup> Choper, *supra* note 4, at 579.

religious even be maintained? These questions only lead to more difficult questions. If the distinction between religious and secular is maintained, should religious exemption require a person to believe in a certain doctrine? Should it require belief in a “god”? Need the belief be irrational? Can the beliefs that are protected be moralistic and ethical rather than inherently religious, whatever that means? These are complicated questions that many would argue a court is not equipped to ask or answer, as many of these questions require intrusive inquiries into the private practices of individuals and which could never be answered with any certainty, as many aspects of religion are premised on experiences that cannot be proven or even explained through words.<sup>12</sup> In this way, questions of religion have proven to be some of the most slippery and elusive the Court has faced and have at times proven incompatible with a legal system premised on taking as true only that which can be proven in a courtroom. Because these questions are so difficult, there has been a remarkable amount of turnover in the Supreme Court’s jurisprudence on this subject, as different members of the Court have had different opinions of the position and nature of religion in the law and, by extension, American life.

This Note will begin by examining the history of the Supreme Court’s attempts to assign a definition to religion. Reviewing the Court’s earlier definitions shows progression from a narrow view of religion that is centered on orthodox Christian values towards a more inclusive definition capable of encompassing moralistic and unorthodox concepts of religion.<sup>13</sup> Many of these unorthodox religious ideas do not evoke the existence of a god or higher power at all. This expansion was followed by a backtracking towards a definition that does require that a specific belief at least be religious. The Note will then evaluate some of the most prominent questions the Court has applied when attempting to define religion and describe the extent to which these questions have been successful in guiding the Court. This will include considering whether these questions are appropriate for the Court to apply at all, keeping in mind that religion is a personal practice which many would argue only the individual adherent is equipped to assess the sincerity and nature of.

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<sup>12</sup> *United States v. Ballard*, 322 U.S. 78, 86 (1944).

<sup>13</sup> When discussing “moralistic” concepts of religion, I am referencing views of religion that are centered around a code of conduct but do not necessarily incorporate belief in a higher power. When discussing “unorthodox” concepts of religion, I am referencing ideas of religion outside the most popularly practiced religions in the United States. See Reid Wilson, *The Second Largest Religions in Each State*, WASH. POST (Jun. 4, 2014), <https://www.washingtonpost.com/blogs/govbeat/wp/2014/06/04/the-second-largest-religion-in-each-state/>.

Deciding the appropriateness of these questions requires balancing the interest of the Court in providing appropriate Free Exercise exemptions against the interest of individuals in not being required to define and defend their religious beliefs in a courtroom setting.<sup>14</sup> The Note will close by questioning whether a single definition of religion is possible, or even necessary. In the end, I argue that perhaps the best definition of religion is based on the injury caused to an adherent if their beliefs are not protected. In this way, I will argue for a definition that avoids defining specific practices or characteristics of a religion itself, but instead will look at the role of the practice in the adherent's life and how denying protection of specifically religious beliefs will harm the adherent. In applying this definition, the Court would look to a combination of what the Religion Clauses were designed to protect and whether denial of an exemption would lead to a cognizable injury. This functionalist approach looks at the position of the religious belief in the life of the adherent and whether the consequences of forcing an adherent to break with those beliefs would cause a cognizable psychological injury. This approach avoids assessing the quality or nature of beliefs themselves, but instead looks to the injury to an adherent that would come from denying the free exercise of those beliefs and whether that injury is the product of a specifically religious belief.

This Note will not attempt the grand undertaking of defining what religion is in theological terms but will aim only to delineate which legal approaches to defining religion have been more and less successful, ultimately suggesting that perhaps it is most appropriate to develop a standard that avoids defining religion in terms of its theological characteristics. This approach is important because it provides the most room for protection of minority and unorthodox beliefs. Defining religion is an almost impossibly complex undertaking, and courts should therefore stick to a functionalist approach which focuses only on getting the proper legal outcome when facing the determination of whether a claim for an exemption to a law should be allowed under the Religion Clauses. Additionally, this inquiry is limited to cases decided by the United States Supreme Court, in part because to frame this inquiry more broadly creates more complication than can be addressed in the present Note, and because the decisions of the United States Supreme Court have the most direct practical implications on claimants due to their binding effect on lower courts.

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<sup>14</sup> See Dmitry N. Feofanov, *Defining Religion: An Immodest Proposal*, HOFSTRA L. REV. 309, 335–36 (1994) (discussing *Ballard*, in which the Court held that its inquiry into a claimant's religion may focus on the sincerity of the religious belief, but not the content of the religious belief).

## I. THE RELATIONSHIP OF THE ESTABLISHMENT AND FREE EXERCISE CLAUSES TO A DEFINITION OF RELIGION

The Religion Clauses of the First Amendment state that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.”<sup>15</sup> First of these is the Establishment Clause, which prohibits government establishment of religion. Through this clause, the Founding Fathers intended to protect the United States from a situation in which one religion might be held above others, or one in which citizens might be forced to practice or conform to a certain religion, or any religion at all.<sup>16</sup> The second portion of the Religion Clause, and the portion that is most relevant to this Note, is the Free Exercise Clause. The Free Exercise Clause, by the wording of its text, forbids the government from prohibiting the practice of one’s religion. This ambiguous wording has led to incredible amounts of debate regarding what counts as a prohibition on religious exercise and to what extent the free exercise of religion should be protected. After several expansions and revisions of the Court’s interpretation of the Free Exercise Clause, in *Employment Division v. Smith*, Justice Scalia, writing for the majority, explained that “[t]he free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires,” and that if a burden on religion is an “incidental effect” of an otherwise “generally applicable” law, free exercise has not been infringed upon.<sup>17</sup> Therefore, while the Court unequivocally affirmed the right of Americans to believe in whatever faith they chose, the Court narrowed the protection of actions under the Free Exercise Clause, finding that Free Exercise claims do not excuse individuals from complying with a “valid and neutral law of general applicability.”<sup>18</sup>

The basic purpose underlying the Free Exercise Clause is to protect freedom of conscience by ensuring that no individual is compelled to engage in behavior which is contrary to their religious beliefs.<sup>19</sup> Application of this simple-sounding principle has proven to be a constant thorn in the United State Supreme Court’s side. Deciding which beliefs are

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<sup>15</sup> U.S. CONST. Amend. I.

<sup>16</sup> Cf. BERG ET AL., *supra* note 10, at 57. (“[James Madison] said that he “apprehended the meaning of the words to be, that Congress should not establish a religion, and enforce the legal observation of it by law, nor compel men to worship God in any manner contrary to their conscience,” and that the impetus behind the proposal was that “the people feared one sect might obtain pre-eminence, or two combine together, and establish a religion to which they would compel others to conform.”).

<sup>17</sup> *Emp’t Div. v. Smith*, 494 U.S. 872, 877–78, 894 (1990).

<sup>18</sup> *Id.* at 879.

<sup>19</sup> LAURENCE TRIBE, *AMERICAN CONSTITUTIONAL LAW* 818 (Foundation Press 2000).

deserving of Free Exercise protection—and to what extent—has forced the Court to decide what constitutes an impermissible prohibition on religious practice, as well as what beliefs even qualify as a religion deserving of Free Exercise protection.<sup>20</sup> While religious speech and thought can also be protected through the First Amendment’s freedom of speech and assembly provisions, religious practice and observance requires protection by the Free Exercise Clause.<sup>21</sup> The Free Exercise Clause has been invoked both when the government compels conduct that is prohibited by one’s religious beliefs (*e.g.*, working on the Sabbath, military service)<sup>22</sup> and when religious behaviors have been barred by government interference.<sup>23</sup> It is not beliefs that are barred by these laws, but behaviors motivated by religious beliefs (*e.g.*, polygamy, animal sacrifice, use of narcotics in ritual practice).<sup>24</sup> Many would argue that a definition of religion for constitutional purposes is required so that a distinction can be made between Free Exercise claims that are based on personal preferences (whether those preferences be moral, political, philosophical, or otherwise) that the Founders may not have intended to protect, and Free Exercise claims that are based on sincerely-held beliefs that rise to the level of religious, either explicitly by name or by their place in the consciousness of the belief-holder.<sup>25</sup> Being able to make this distinction, based on the intent of the Founders, is why it is important to have a definition, or at least functionalist criteria, for determining which beliefs are protected and which are not.

In addition, there has been little clarity regarding what actually

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<sup>20</sup> Choper, *supra* note 4, at 581.

<sup>21</sup> *Id.* at 583.

<sup>22</sup> See *Sherbert v. Verner*, 374 U.S. 398, 410 (1963) (holding that a state’s denial of employment benefits to an applicant who would not accept employment that required her to work on the Sabbath violated the Free Exercise Clause); see also *Gillette v. United States*, 401 U.S. 437, 441–48 (1971) (analyzing the relationship between conscientious objection to compelled military service and the Free Exercise Clause).

<sup>23</sup> See BERG ET AL., *supra* note 10 at 61 (discussing the significance of the term “prohibiting” in the Free Exercise Clause).

<sup>24</sup> See *Reynolds v. United States*, 98 U.S. 145, 166 (1878) (holding that it was constitutional for a state government to prohibit polygamy without exempting from the prohibition those who wish to have multiple spouses as part of their religious exercise); see also *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 542–46 (discussing a city ordinance’s lack of neutrality towards religion in prohibiting animal sacrifice); see also *Emp’t Div. v. Smith*, 494 U.S. 872, 890 (1990) (holding that a prohibition of a drug was a law of general applicability and thus did not violate the Free Exercise Clause as applied to those who ingested the drug as part of a religious ceremony).

<sup>25</sup> BERG ET AL., *supra* note 10, at 59.

constitutes a burden on the free exercise of religion.<sup>26</sup> The Court has held that the Free Exercise Clause protects an individual against “governmental compulsion” but does not allow an individual “[the] right to dictate the conduct of the Government’s internal procedures.”<sup>27</sup> Indeed, even “indirect coercion or penalties” against an individual based on the practice of their religious beliefs triggers the protections of the Free Exercise Clause and “are subject to scrutiny under the First Amendment.”<sup>28</sup> Yet an individual is not protected from all government coercion burdening their religious practice. The Court has found that “incidental effects of governmental 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” do not constitute a burden for the purpose of supporting a Free Exercise claim.<sup>29</sup> In this way, what constitutes a burden has remained a moving target with no clear definition, creating great confusion regarding what claims meet the threshold requirements of asserting a Free Exercise claim.<sup>30</sup>

In attempting to understand the application of the Religion Clauses, it is helpful to look at the Framers’ intent in writing them, as well as the predominant religious currents that were present in the colonies and original thirteen states around the time of the drafting of the Bill of Rights. At the time of the drafting of the Religion Clauses, James Madison urged that the meaning behind the Bill of Rights be imputed from the “sense attached to it by the people in their respective State Conventions.”<sup>31</sup> This implies that the meaning behind the amendments should be gleaned from the state constitutions of convention delegates and the religious views that informed the drafting of those constitutions.<sup>32</sup> It is generally accepted that the Founders believed that the treatment of religion should remain the prerogative of the states.<sup>33</sup> The views of New England Puritans, the Evangelical tradition, Enlightenment thinkers, and civic republicans are believed to have made up the major religious influences that would have informed the thinking of state governments and the drafters of the Bill of

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<sup>26</sup> See generally Lupu, *supra* note 6, at 933 (“One question upon which little attention has been focused, however, is the character of government activity necessary to constitute a ‘burden.’”).

<sup>27</sup> *Bowen v. Roy*, 476 U.S. 693, 700 (1986).

<sup>28</sup> *Lyng v. Northwest Indian Cemetery Protective Ass’n.*, 485 U.S. 439, 450 (1988).

<sup>29</sup> *Id.*

<sup>30</sup> Lupu, *supra* note 6, at 935–37.

<sup>31</sup> John Witte, Jr., *The Essential Rights and Liberties of Religion in the American Constitutional Experiment*, 71 NOTRE DAME L. REV. 372, 377 (1996).

<sup>32</sup> *Id.*

<sup>33</sup> Stuart D. Poppel, *Federalism, Fundamental Fairness, and The Religion Clauses*, 25 CUMB. L. REV. 247, 251 (1995).



Rights as they decided how religion should be treated in the United States.<sup>34</sup> While the views of these groups varied—ranging from Puritans and civic republicans who allowed little room for religious diversity to Evangelical and enlightenment thinkers who were more open to protections for differing religious views—there was general agreement that the Bill of Rights’ protections include “liberty of conscience, free exercise of religion, pluralism, equality, separationism, and disestablishment of religion.”<sup>35</sup> While these notions leave great latitude for the freedom in practicing *religious* ideas, there is no indication that Framers intended for the protections of religion to be extended to irreligious ideas. Indeed, the ideas that the colonists were so adamant about protecting, which brought many of them to the new world in the first place, were explicitly theological in nature.<sup>36</sup>

In addition, the history of the drafting of the First Amendment indicates that the Founders made an intentional choice to protect “religion” over “conscience” generally.<sup>37</sup> The language of the Religion Clauses, as originally proposed by James Madison, was written to protect “the full and equal rights of conscience.”<sup>38</sup> After debate in the House, the language was changed to that proposed by Fisher Ames, reading “Congress shall make no law establishing religion, or to prevent the free exercise thereof, or to infringe the rights of conscience.”<sup>39</sup> Once the proposal got to the Senate, there was debate over whether the Religion Clauses should include the phrase “right of conscience” or “free exercise of religion,” and eventually the latter was selected. The choice to include only “religion” in the clause demonstrates an explicit choice by the Framers to protect only religious convictions rather than the non-religious ideas (moral, ethical, political etc.) that one might tie to freedom of “conscience.”<sup>40</sup> This choice to protect only religion gives credit to the idea that religion is special and that injuries to conscience inflicted by denial of Free Exercise are different from injuries that arise from being denied the

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<sup>34</sup> Witte, *supra* note 31, at 378–87.

<sup>35</sup> *Id.* at 388, 396.

<sup>36</sup> Christopher N. Elliott, Note, *Federalism and Religious Liberty: Were Church and State Meant to be Separate?*, 2 RUTGERS J. LAW & RELIG. 5 (2000 / 2001).

<sup>37</sup> BERG ET AL., *supra* note 10, at 60.

<sup>38</sup> *Id.* at 59.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at 60. William Lee Miller also suggests that “conscience,” as used by the Founders, had an exclusively religious connotation and “meant belief or convictions about religious matters.” *Id.* Therefore, even if “conscience” had been included, the intention of the framers still would have been to protect only the free exercise of religion. *Id.* (citing WILLIAM LEE MILLER, *THE FIRST LIBERTY: RELIGION AND THE AMERICAN REPUBLIC* 112–23 (1985)).

right to freely exercise a moral or political belief. It can be argued that the tension between beliefs that should be deemed religious and beliefs that should not, as well as the need for a means of delineating the two, can be found in the Court's Free Exercise jurisprudence, which has provided those with religious beliefs accommodations and "consideration not afforded to the nonreligious."<sup>41</sup> If the court is to require accommodation of religiously motivated conduct, but fails to extend accommodation to "nonreligious practices that are closely connected to the exercise of first amendment rights such as free speech,"<sup>42</sup> the Court has a responsibility to justify which beliefs qualify for accommodation and which do not. I propose that the court look to the injury caused by denying accommodation of specifically religious beliefs (as opposed to moral, ethical, political, philosophical, etc.) in determining which beliefs be given the protections of the Religion Clauses.

## II. PRIOR CASE LAW: THE SUPREME COURT'S ATTEMPTS AT DEFINING RELIGION

The Supreme Court's complicated attempts at defining religion date back to over one hundred years ago.<sup>43</sup> Initially, unraveling the intent and meaning behind the Religion Clauses was left to state legislatures and courts, but during the 20th century, this burden became predominately that of the United States Supreme Court and the lower federal courts.<sup>44</sup>

The first case in which the Court attempted to define religion was *Davis v. Beason* in 1890, in which a Mormon man was not allowed to vote because of laws prohibiting those who practiced polygamy from registering to vote.<sup>45</sup> The Court held that religious practice and religious belief are two separate entities, and that while the law may not interfere with someone's religious belief, it may interfere with an individual's religious practice if that practice is contrary to the laws of the United States.<sup>46</sup> The Court found that to hold otherwise would be "in effect to permit every citizen to become a law unto himself."<sup>47</sup> The Court gave a brief definition of religion in its opinion, stating "[t]he term 'religion' has reference to one's views of his relations to his Creator, and to the

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<sup>41</sup> Gey, *supra* note 2, at 80.

<sup>42</sup> *Id.* at 86.

<sup>43</sup> See, e.g., *Davis v. Beason*, 133 U.S. 333 (1890), *abrogated by* *Romer v. Evans*, 517 U.S. 620 (1996) (upholding a law preventing a Mormon polygamist from registering to vote).

<sup>44</sup> Witte, *supra* note 30, at 373.

<sup>45</sup> *Davis*, 133 U.S. at 341, 346-47.

<sup>46</sup> *Id.* at 344.

<sup>47</sup> *Id.*

obligations they impose of reverence for his being and character, and of obedience to his will.”<sup>48</sup> This definition takes a narrow view of religion that implies adherence to a recognizable god and orthodox ideas of religious practice, without any thought of purely moralistic or purely ethical considerations that a person might treat as the highest concern and, by extension, as religion. The *Davis* Court explained that the Religion Clauses were “intended to allow every one under the jurisdiction of the United States to entertain such notions respecting his relations to his Maker and the duties they impose as may be approved by his judgment and conscience.”<sup>49</sup> While this statement does affirm the Court’s commitment to religious freedom, it makes no mention or attempt at considering less orthodox or non-Western ideas of religion, only seeming to allow for religious ideas centered around a person’s “Maker” or “Creator.” By continuing to define religion in relation to a person’s relationship with a “Maker” or “Creator,” the Court leaves no room for treating as religious ideas that are only moralistic or ethical, nor those which do not prescribe their meaning from a relationship to a higher power. While this definition is a far cry from the far more elastic definitions put forth by the Court in later cases, it serves as a helpful point of reference by demonstrating where the Court started out in its analysis of the meaning of religion, and it attempts to provide definitional guidance regarding the beliefs that should be protected by the Free Exercise Clause. These early attempts at protecting Free Exercise looked to the religious nature of a practice rather than the outcome or injury that might be incurred if an observer was forced to break with religious practice.

The Supreme Court maintained a notion of religion premised on a relationship with a Christian God through the 1930s, as evidenced by the Court’s holding in *United States v. Macintosh* in 1931.<sup>50</sup> In this case, an applicant for U.S. citizenship made claims of conscientious exemption from war, stating he would “not promise in advance to bear arms in defense of the United States unless he believed the war to be morally justified.”<sup>51</sup> The Court held that having a guiding moral or ethical belief did not qualify Mr. Macintosh for an exemption from the requirements of U.S. citizenship, and that he therefore should be excluded from U.S. citizenship because of his unwillingness to defend the Constitution.<sup>52</sup> In its

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<sup>48</sup> *Id.* at 342.

<sup>49</sup> *Id.*

<sup>50</sup> See *United States v. Macintosh*, 283 U.S. 605, 625 (1931) (“We are a Christian people, according to one another the equal right of religious freedom, and acknowledging with reverence the duty of obedience to the will of God.”) (internal citation omitted).

<sup>51</sup> *Id.* at 613.

<sup>52</sup> *Id.* at 626.

opinion, the Court explains:

We are a Christian people . . . whose government must go forward upon the assumption, and safely can proceed upon no other, that unqualified allegiance to the Nation and submission and obedience to the laws of the land, as well as those made for war as those made for peace, are not inconsistent with the will of God.<sup>53</sup>

The Court's reasoning is premised on a belief in a Christian God as being the lens through which the relationship of religion to the Constitution should be understood.<sup>54</sup> While the majority of the Court remains true to this narrow idea of religion in its opinion,<sup>55</sup> the dissent shows the beginning stirrings of a new conception of what might qualify as religion.<sup>56</sup> In his dissent, Justice Hughes defines religion in terms of a relationship with God.<sup>57</sup> However, he also recognizes that it would be contrary to American principles of liberty and freedom to force someone to pledge allegiance to a text in order to gain entry to the United States if doing so would require that person to abandon closely-held beliefs.<sup>58</sup> Justice Hughes explains freedom of religion not as about the significance of religion itself but as the importance of "supremacy of consciousness" and that "putting aside dogmas with their particular conceptions of deity, freedom of conscious itself implies respect for an innate conviction of paramount duty."<sup>59</sup> Justice Hughes's dissent signals the beginning of a shift in the Court's jurisprudence about religion, from focusing on the nature of the religious belief itself as the basis for its relationship to the Constitution to thinking of religion as something more abstract and deserving of constitutional protection because of its relationship to freedom of consciousness and position within the life of the observant. This view shows the beginning of a more individualistic idea of religion. It relates to injury because a view of religion that is centered on the relationship of a belief to practical implications in the life of the observant naturally must consider the injury incurred when the observant is forced to break with religious beliefs.

The first major break with earlier definitions of religion was signaled

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<sup>53</sup> *Id.* at 625.

<sup>54</sup> *See id.*

<sup>55</sup> *See id.* at 625.

<sup>56</sup> *See id.* at 634 (Hughes, J., dissenting).

<sup>57</sup> *Id.* at 634 (Hughes, J., dissenting).

<sup>58</sup> *Id.* (Hughes, J., dissenting).

<sup>59</sup> *Id.* (Hughes, J., dissenting).

by the Supreme Court's opinion in *United States v. Ballard*.<sup>60</sup> Guy Ballard was tried for mail fraud after soliciting monetary contributions through the mail in exchange for promises that he would communicate with God on behalf of others; he claimed to have special status as an "ascertained master" with the capability of receiving and sending "divine messages."<sup>61</sup> The trial court instructed the jury to premise its verdict on whether Mr. Ballard sincerely held a good faith belief in the ideas that he professed.<sup>62</sup> The Court departed from its earlier ideas of religion, centered around the orthodox belief in a Christian God, and instead held that the First Amendment:

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. Heresy trials are foreign to our Constitution. Men may believe what they cannot prove. They may not be put to the proof of their religious doctrines or beliefs. Religious experiences which are as real as life to some may be incomprehensible to others. Yet the fact that they may be beyond the ken of mortals does not mean that they can be made suspect before the law.<sup>63</sup>

In effect, the Court conceded that a person can hold a sincere religious belief, deserving of the protections of the Religion Clauses, even if that belief is outside generally accepted orthodox ideas of religion. The Court formally abandoned its earlier explanations of religion which centered on Christian ideas of a "Maker" or "Creator," and instead showed a new openness to religious ideas which seemed "incomprehensible" or outside the generally accepted norm. In addition, the Court recognized in its opinion that a person cannot be forced to prove their beliefs in a court because what may be unquestionably real to one person may be "incomprehensible" to another.<sup>64</sup> In other words, the Court accepted that a person may hold valid religious ideas even without a basis other than personal conviction. Some see this decision by the Supreme Court as building on the Second Circuit's decision the previous year in *United States v. Kauten*,<sup>65</sup> in which the Court of Appeals stated that moral belief

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<sup>60</sup> *United States v. Ballard*, 322 U.S. 78 (1944).

<sup>61</sup> *Id.* at 79.

<sup>62</sup> *Id.* at 83.

<sup>63</sup> *Id.* at 86–87.

<sup>64</sup> *Id.* at 86.

<sup>65</sup> John Sexton, *Towards a Constitutional Definition of Religion*, 91 HARV. L. REV. 1056, 1062 (1978).

and conscientious objection could be “the equivalent of what has always been thought [of as] religious impulse.”<sup>66</sup> The *Kauten* court recognized that religion “accepts the aid of logic but refuses to be limited by it” and that a person’s response to an “inward mentor, call it conscience or God” was deserving of being categorized as religious.<sup>67</sup> While the *Kauten* court examined the issue of whether moral beliefs such as issues of the conscience are religious, rather than the issue of unorthodox or unproven beliefs as the Supreme Court did in *Ballard*, both decisions demonstrate the trend toward growing willingness by the courts to treat as religious those beliefs which fall outside of generally accepted normative ideas of religion. The *Kauten* decision further recognized that some things may be “a compelling voice of conscience, which [the court] should regard as a religious impulse.”<sup>68</sup> By using the word “impulse,” the court implied something reflexive or involuntary about religion, as though the observant may not have complete control over their belief in a particular faith or set of ideas.

*Ballard* and *Kauten* signify a broadening of judicial understanding of religion, to apply not only to man’s relationship to God but also to “the relationship of man to the broad universe and to other men.”<sup>69</sup> The *Ballard* Court accepted that beliefs that cannot be explained or understood by non-believers are still worthy of the protection of the Religion Clauses, effectively recognizing that religious beliefs that may seem unusual or unorthodox and cannot be readily explained are still deserving of protection. This idea is an outgrowth of *Kauten* in that *Kauten* recognizes that an individual’s beliefs that may be unique to them and motivated by their conscience are deserving of protection. These explanations of religion represent a significant recalibration of the Court’s jurisprudence about religion, expanding religious exemption to beliefs far beyond orthodox religious ideas and to beliefs that focus on an individual’s moral relationship to the world, even when it may be unknown by those who are not the practitioner. The Court’s choice of language when describing these beliefs implies that the Court is willing to accept unorthodox ideas as occupying the place of religion in the lives of observants because there is something about holding these beliefs which is outside the control of the observant (*i.e.*, the beliefs are an “impulse”). While both these opinions still look to religiousness as the foundation and the point of comparison for their inquiries, they also act as an intermediary between early cases—

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<sup>66</sup> United States v. Kauten, 133 F.2d 703, 708 (1943).

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> Sexton, *supra* note 65, at 1061.

in which orthodox religious belief was the only understanding of religion allowed—and later cases—in which the Court will openly abandon any requirement of religious affiliation.

The Court’s acceptance of unorthodox religious beliefs continued in *United States v. Seeger*, in which the Court was asked to define “Supreme Being” for purposes of application of the Universal Military Training and Service Act.<sup>70</sup> Mr. Seeger claimed conscientious objector status but did not profess any belief in God, instead claiming “belief in and devotion to goodness and virtue for their own sakes, and a religious faith in a purely ethical creed.”<sup>71</sup> The Court held that in order to qualify for an exemption based upon religious training or belief, individuals only need “[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.”<sup>72</sup> The most important part of this rule was its acknowledgement that a religious belief could be one that was “parallel” to that of a belief in a god but not necessarily premised on any god.<sup>73</sup> This decision shows a new willingness by the Court to recognize beliefs as religious even if they include no reference to a god and are “purely ethical,” so long as those beliefs hold the same place in the life of a sincere adherent as a belief in a god would hold for a similarly sincere observer. The statutory definition the Court found “purely ethical” beliefs could fit within for purposes of exemption in *Seeger* required “an individual’s belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but [not including] essentially political, sociological, or philosophical views or a merely personal moral code.”<sup>74</sup> By holding that explicitly nonreligious beliefs could fit within this statutory definition, the Court seemingly held that explicitly moral or ethical beliefs may serve as the functional equivalent of religious beliefs, without declaring those beliefs as one and the same with religion. Many point to *Seeger* as creating the “parallel belief test,” under which any belief that is parallel to religious belief can be afforded the same protections as religion for purposes of statutory construction.<sup>75</sup> In effect, through the parallel belief test, the Court turned a person’s “ultimate concern” into his religion, even if the Court did not actually recognize that belief as religious.

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<sup>70</sup> *United States v. Seeger*, 380 U.S. 163, 164–65 (1965).

<sup>71</sup> *Id.* at 166.

<sup>72</sup> *Id.* at 176.

<sup>73</sup> *See id.*

<sup>74</sup> *Id.* at 165.

<sup>75</sup> *E.g.*, Feofanov, *supra* note 14, at 368.

While *Seeger*'s definition of religion might solve issues related to protecting minority religions, it does nothing to delineate religion from secular belief, instead treating the two as the same thing for purposes of constitutional and statutory analysis.<sup>76</sup> In addition, this test is unworkable because in many cases it would be impossible to determine an individual's ultimate concern without inquiries into that individual's private thoughts and beliefs, which would be unfeasible to prove in a court room.<sup>77</sup> Many religious adherents, particularly those who are not as fervent in their adherence to religious belief, might have ultimate concerns outside of religion that they profess a strong adherence to, thereby muddling the test further.<sup>78</sup> The test in *Seeger* implies that in theory, if a person is a Christian and attends church regularly, but perhaps also has very strong ideas about politics, the political beliefs could be that person's highest concern, implying that the Christian religious beliefs should receive no protection. Therefore, while *Seeger* did much to loosen the Court's strict requirements of formal religious practice for the purposes of legal protection, it did not significantly clarify the Court's definition of religion. Yet, it is possible that the lack of clarity in *Seeger* is a strength. By focusing on the place a belief holds in the life of an observant, rather than the nature or quality of that belief, the test provides the flexibility necessary to ensure that unconventional religious beliefs are not unfairly prejudiced just by virtue of their unfamiliarity to the Court.

The Court showed its willingness to stretch *Seeger*'s reasoning in *Welsh v. United States*, decided just two years after *Seeger*.<sup>79</sup> While *Seeger* had been willing to acknowledge some concept of a god and the possibility of a higher power, Elliott Welsh was explicitly an "outright atheist."<sup>80</sup> He refused military service for purely ethical and moral reasons but disavowed any religious belief.<sup>81</sup> The government attempted to distinguish his claim for exemption from *Seeger* based on his explicit denial of a belief in God, stating that his beliefs were only "religious in the ethical sense of the word," and by categorizing them as "essentially political, sociological, or philosophical views or a merely personal moral code."<sup>82</sup> The Court held that these facts were not grounds for a distinction, and that the logic of *Seeger* applied to Welsh's claimed grounds for

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<sup>76</sup> *Id.*

<sup>77</sup> Lupu, *supra* note 6, at 954.

<sup>78</sup> *Id.*

<sup>79</sup> *Welsh v. United States*, 398 U.S. 333 (1970).

<sup>80</sup> Lupu, *supra* note 6, at 954.

<sup>81</sup> *Welsh*, 398 U.S. at 341.

<sup>82</sup> *Id.* at 341–42.



exemption.<sup>83</sup> In doing so, the Court found that someone with no discernable religious beliefs—someone who even openly acknowledged being an atheist—was entitled to the same Free Exercise exemption as those with sincerely-held religious beliefs, thereby giving the irreligious the same status as the religious for the purpose of the First Amendment.<sup>84</sup> The only discernable limit the Court placed on religious protection in *Welsh* was on beliefs that “[rest] solely upon considerations of policy, pragmatism, or expediency.”<sup>85</sup> In making this distinction, the Court seems to hold that the line between religious and irreligious is found where a belief changes from being a personal moral or ethical conviction or faith in a higher power, to becoming a purely practical consideration. Therefore, the Court’s holding in *Welsh* seems to go a step further than *Seeger* by characterizing beliefs that are explicitly devoid of a god or theological basis as being actually religious, rather than just finding that they can serve as the functional equivalent for statutory and constitutional purposes.

It may be possible to view the opinions in *Seeger* and *Welsh* as the extremes of the Court’s willingness to engage an expansive definition of religion.<sup>86</sup> In the years following these opinions there was a sort of backpedaling by the Court, as it reigned in the definition of religion that it applied for purposes of First Amendment protection and attempted to delineate religion from irreligion on more narrow grounds. In *Wisconsin v. Yoder*, decided in 1972, the Court held that it was appropriate to exempt Amish children from a Wisconsin statute that required children to receive formal schooling through the age of sixteen; it based its holding on the distinctive religious and community norms of the Amish.<sup>87</sup> The Court, in part, premised its ruling on the fact that formal schooling would serve no useful purpose given the Amish way of life, and that formal schooling would in fact “imbue Amish children with values which [are] radically at variance with those of their community.”<sup>88</sup> The opinion found that the Amish way of life and religious beliefs are “inseparable and interdependent” and that

the very concept of ordered liberty precludes allowing every person to make his own standards on matters of conduct in which society as a whole has important

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<sup>83</sup> *Id.*

<sup>84</sup> L. Scott Smith, *Constitutional Meanings of “Religion” Past and Present: Exploring in Definition and Theory*, 14 TEMP. POL. & C.R. L. REV. 89, 96 (2004).

<sup>85</sup> *Welsh*, 398 U.S. at 342–43 (1970).

<sup>86</sup> Stanley Ingber, *Religion or Ideology: A Needed Clarification of the Religion Clauses*, 41 STAN. L. REV. 233, 234 (1989).

<sup>87</sup> *Wisconsin v. Yoder*, 406 U.S. 205, 224–25 (1972).

<sup>88</sup> Smith, *supra* note 84, at 97.

interests. Thus, if the Amish asserted their claims because of their subjective evaluation and rejection of the contemporary secular values accepted by the majority, much as Thoreau rejected the social values of his time and isolated himself 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... we see that the record in this case abundantly supports the claim that the traditional way of life of the Amish is not merely a matter of personal preference, but one of deep religious conviction, shared by an organized group, and intimately related to daily living.<sup>89</sup>

The opinion in *Yoder* indicates the Court's intention to backpedal from its previous decisions in *Seeger* and *Welsh* in three notable ways.<sup>90</sup> First, the Court rejects the idea that a person's "standards on matters of conduct" can be the basis for a Free Exercise exemption.<sup>91</sup> While not explicit, this clearly goes against the decision in *Welsh* by indicating that just because someone holds a certain ethical or moral standard which is their ultimate concern or is sincerely held, that personal ideal will not be enough to qualify for a Free Exercise exemption.<sup>92</sup> This contradicts the Court's ruling in *Welsh*, in which the claimant's personal moral objection to war was enough to qualify him for exemption, even though it would almost certainly be classified as an individual standard of conduct under *Yoder*.

The second way in which the Court breaks with its earlier rulings is when it states that one's "philosophical and personal" beliefs should not be the grounds for a Free Exercise exemption.<sup>93</sup> This again seems to directly contradict the Court's findings in *Seeger* and *Welsh*. In *Seeger*,

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<sup>89</sup> *Yoder*, 406 U.S. at 221.

<sup>90</sup> It is unclear exactly what led the Court to retreat from the more expansive definitions of religion put forth in *Seeger* and *Welsh*, though some think that perhaps it was a resurgence of moralism during the 1970s and 1980s. Ingber, *supra* note 86, at 234.

<sup>91</sup> *Yoder*, 406 U.S. at 216.

<sup>92</sup> Jeffrey Omar Usman, *Defining Religion: The Struggle to Define Religion Under the First Amendment and the Contributions and Insights of Other Disciplines of Study Including Theology, Psychology, Sociology, The Arts, and Anthropology*, 83 N.D. L. REV. 123, 173 (2007).

<sup>93</sup> See *Yoder*, 406 U.S. at 216 ("Thus, if the Amish asserted their claims because of their subjective evaluation and rejection of the contemporary secular values accepted by the majority, much as Thoreau rejected the social values of his time and isolated himself 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").

Seeger's beliefs were not based on his belief in any defined religion (the claimant declined to answer "yes" or "no" when asked if he believed in God), but instead were based on his own personal "ethical creed" and "devotion to goodness and virtue for their own sakes" and the teachings of philosophers, namely Aristotle, Pluto, and Spinoza.<sup>94</sup> In *Welsh*, the claimant went so far as to proclaim himself an atheist. Both claimants did not identify as adherents to any defined god or sect of religious or philosophical belief, but instead premised their exemption claims on their own personal systems of beliefs. Claims for exemption like *Welsh's* and *Seeger's*—premiered entirely on personal beliefs—seem to be the sort the Court explicitly rejects as qualifying for exemption in *Yoder*. Additionally, they are patently inconsistent with the intent of the Framers when providing special protections for those with religious beliefs when drafting the Bill of Rights.<sup>95</sup>

The third way in which *Yoder* departs from the reasoning of *Seeger* and *Welsh* is that *Yoder* emphasizes specific elements of Amish religious practice, qualifying Amish beliefs as religious for purposes of exemption. The Court declared both the organized community aspect of Amish life and the way in which Amish religious practices permeate all aspects of everyday existence in the Amish community as indicative of religion.<sup>96</sup> The Court also pointed to the continuity of the Amish's beliefs as a basis for their qualifying for religious exemption.<sup>97</sup> On this basis, the Court appears to be moving towards a "content-based definition" of religion, based on the qualities that define a belief rather than the priority or sincerity of a belief that defines its purpose in the life of an adherent.<sup>98</sup> While this content-based definition may be desirable for its ease of application, looking to specific qualities or characteristics of a belief as dictated by the Court would seem to create an unjustifiably significant danger that judges will project their own constructs onto religion.<sup>99</sup> A definition of religion that looks not to the specific characteristics or content of a belief, but instead the nature of the injury sustained if an individual is forced to engage in conduct that is contrary to their beliefs, is more appropriate; one that recognizes that such an injury is specific to religious beliefs because it is an outgrowth of the special rights and privileges religious beliefs are afforded.

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<sup>94</sup> *United States v. Seeger*, 380 U.S. 163, 166 (1965).

<sup>95</sup> *BERG ET AL.*, *supra* note 10, at 59–60.

<sup>96</sup> *Yoder*, 406 U.S. at 216–218.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *Lupu*, *supra* note 6, at 958.

Since *Yoder*, the Supreme Court has not made any significant additional attempts to define religion. Instead, it often crafts answers to constitutional questions in ways to avoid the definitional issues of religions entirely. The Court's past decisions are therefore all that is available to guide an understanding of what constitutes a belief worthy of religious protection under the First Amendment. These past decisions indicate a certain discomfort by the Court at each end of the definitional spectrum. By deciding *Welsh* and *Seeger* so that almost any sincerely held belief could be constitutionally protected as religious, regardless of its facially religious or irreligious nature, the Court indicated discomfort with too narrow a definition. But after *Yoder*, the Court also appears uncomfortable with a definition that is too broad, specifically rejecting personal philosophical beliefs as a basis for First Amendment Free Exercise exemption and indicating that there is an outer limit to the beliefs the Court finds deserving of protection. The Court's decisions indicate that some definition in the middle is most appropriate; however, the Court fails to provide any guidance as to what that definition might be or how one would go about making the fine distinction between an unconventional theistic belief and a belief that is simply a personal philosophical or moral conviction. The fact that the Court has not arrived at any workable or stable definition of religion for purposes of applying the Free Exercise Clause reflects that the Court focuses too much on the content of religious beliefs instead of the effect of those beliefs on the life of the observant and the harm that comes from forcing an observant to break with their religious beliefs.

### III. ATTEMPTS TO DEFINE RELIGION BROADLY

To recognize why it might be best to abandon the idea of defining religion by its ideological or practical characteristics, it is helpful to look at the strengths and pitfalls of some definitions that have been proposed by scholars. By examining two of the most expansive criteria for defining religion and understanding why these standards are still under inclusive, it becomes easier to see why a definition of religion centered around the justification for religion's special treatment and injury to the observant is a better option. Thus, a new standard for determining who is entitled to exemptions, premised on criteria wholly separate from traits of religiosity, is the most workable solution.<sup>100</sup>

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<sup>100</sup> I have chosen to discuss these two means of defining religion (sincerity of belief and irrationality of belief) because I feel they were the most expansive definitions that I encountered during my research that still provided enough guidance to be considered definitional in nature. Because of their expansive nature, I determined that they would provide the best means of

## A. SINCERITY OF BELIEF

One suggestion for defining religion is premised on accepting as religious any sincere belief that is structurally the same as, or equivalent to, a theistic belief.<sup>101</sup> This definition is highly flexible because it does not look at the content of a belief, but the place that belief holds in a claimant's life and how it relates to more universally recognized religious beliefs. Measuring the sincerity of a belief as a measure of entitlement to religious exemption has been suggested by the Court on a number of occasions. In *Seeger*, the Court premised its test on whether a belief was "sincere and meaningful,"<sup>102</sup> and effectively ruled that any belief that occupied the same "specific coordinates within an individual's mental structure" as religion, whether religious in nature or not, should be deemed religious for constitutional purposes.<sup>103</sup> After *Seeger*, a number of lower courts established sincerity as a necessary element of religious belief, including the 5th Circuit in *Theriault v. Carlson*<sup>104</sup> and the 9th Circuit in *Callahan v. Woods*.<sup>105</sup> Functionalism is premised on the goal of interpreting constitutional provisions in ways that best serve specific goals of governance.<sup>106</sup> A definition of religion premised on whether a belief is sincerely held is highly functionalist in that it creates a definition that can easily be applied to any religious belief—regardless of the requirements or structure of the beliefs—and is almost immune to claims of discrimination because of its inclusivity. While it is understandable why invoking sincerity of belief as a necessary element of religion might seem attractive and even-handed, practical implications make the sincerity standard untenable.

Many have found a definition premised on sincerity attractive

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showing how any definition premised on anything besides injury—even an extremely elastic one—fails to adequately account for the religious pluralism any definition would need to accommodate.

<sup>101</sup> James M. Donovan, *God is as God Does: Law, Anthropology, and the Definition of "Religion"*, 6 SETON HALL CONST. L.J. 25, 46–48 (1995).

<sup>102</sup> *United States v. Seeger*, 380 U.S. 163, 176 (1965).

<sup>103</sup> Donovan, *supra* note 101, at 46–48.

<sup>104</sup> *Theriault v. Carlson*, 495 F.2d 390, 395 (5th Cir. 1974) ("While it is difficult for the courts to establish precise standards by which the bona fides of a religion may be judged, such difficulties have proved to be no hindrance to denials of First Amendment protection to so-called religions which tend to mock established institutions . . . and whose members are patently devoid of religious sincerity").

<sup>105</sup> *Callahan v. Woods*, 658 F.2d 679, 683 (9th Cir. 1981) (citing *Theriault*, 495 F.2d at 395) (stating that a claimant of religious protection under the Free Exercise Clause of the First Amendment must demonstrate that the religious belief is "sincerely held").

<sup>106</sup> Mark Tushnet, *The Possibilities of Comparative Constitutional Law*, 108 YALE L.J. 1225, 1228 (1999).

because sincerity of belief is universal and, at least on its face, does not discriminate against less mainstream faiths in its applicability.<sup>107</sup> Those who argue in favor of sincerity as a necessary element of defining religion reason that the administrative and practical concerns of exemption would be enough to separate out those trying to gain an exemption based on insincere beliefs, and that it would not be an insurmountable burden on the state to allow a small number of insincere exemptions to get by.<sup>108</sup> It is also argued that sincerity could be determined based on continuity of action, reasoning that someone's belief is sincere if that person acts on that belief in a consistent manner over an extended period of time.<sup>109</sup>

Most arguments against sincerity as a standard start with the counter-argument that there is in fact no reasonable means of measuring sincerity of belief, and that it is not the Court's place to question the religiosity of the faithful.<sup>110</sup> Would the court look at extrinsic factors, such as how often one attends church services or whether one keeps Kosher? What if there is no extrinsic indication of a person's belief? Sincerity quickly becomes an impractical method of defining religion because religious practice can mean something different to every observer, and it would be outside the Court's province to try to equate how one practices their religion with how sincerely faithful one is in one's religious beliefs. How would the Court judge the sincerity of less orthodox beliefs, if the justices have no frame of reference for what sincerity would look like to the observer of an unorthodox faith? This question is premised on the reasonable concern that courts would show a slight but perceptible preference towards finding sincerity of belief in those with more conventional religious ideas because humans are automatically susceptible to heightened skepticism of unconventional ideas.<sup>111</sup> Would the court force claimants to take the stand and testify to their sincerity of belief? This too seems impermissibly intrusive, as well as unproductive.<sup>112</sup> In addition, there would be no means of separating those who feign sincerity for the purposes of receiving an exemption from those who are truly sincere.<sup>113</sup> A definition premised on equating sincerity of belief with religion would basically require the Court to take the claimant at the claimant's word regarding sincerity while allowing judges to unfairly discriminate against minority beliefs. This

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<sup>107</sup> Sexton, *supra* note 65, at 1080–81.

<sup>108</sup> *Id.*

<sup>109</sup> Donovan, *supra* note 101, at 65–66.

<sup>110</sup> *See id.*

<sup>111</sup> Mark Tushnet, *Of Church and State and the Supreme Court*, 1989 SUP. CT. REV. 373, 382 (1989).

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

would make a definition premised on sincerity essentially worthless.

#### B. RATIONALITY OF BELIEF

Another highly inclusive means of defining religion is evaluating the rationality of a belief. Specifically, Dmitry N. Feofanov has proposed that “[r]eligion is a manifestly non-rational (i.e., faith-based) belief concerning the alleged nature of the universe, sincerely held.”<sup>114</sup> This definition is highly expansive because it does not require that a belief have a discernable organizational structure or be religious in name.<sup>115</sup> Instead, this definition only requires that the belief be a non-scientific means of explaining the universe—*i.e.*, a means of explaining the universe which is not premised on what can be proven through observation or scientific methodology.<sup>116</sup> Feofanov argues that it is the non-rational nature of a belief that makes it most worthy of protection because non-rational beliefs are the most vulnerable since there can be no tangible proof to support their validity.<sup>117</sup> This definition would essentially allow any belief to qualify as religious so long as it cannot be supported by scientific observation or analysis.<sup>118</sup> In other words, this criteria would draw a hard line between religious and irreligious beliefs at the point where a belief goes from being unsupported by verifiable observations of the known universe to supported by rational explanations and observations.

While this definition is highly flexible and provides for uniform application thanks to its objectivity, it too suffers from distinct shortcomings that make it inadequate for the purposes of defining religion under the First Amendment. Most notably, this definition is highly contingent on the representations of an individual adherent regarding their belief, in such a way that it would unfairly prejudice some and allow for insincere claims for exemption by others. The entire test is premised on what the adherent claims the belief to be. In theory, the rationality definition would allow an individual to equate any non-rational irreligious idea to religion and claim a certain exemption or protection, with no real means of verifying the validity of that belief. While there is nothing inherently wrong with this if the belief is sincere, it seems unreasonably unfair to those with rational but equally sincerely held beliefs to not allow them religious protection simply because their beliefs are premised on

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<sup>114</sup> Feofanov, *supra* note 14, at 385.

<sup>115</sup> *Id.*

<sup>116</sup> *Id.* at 388.

<sup>115</sup> *Id.* at 388–91.

<sup>118</sup> *Id.*

ideas that the Court deems rational.<sup>119</sup> Rationality seems arbitrary when applied to something as significant as religious exemption. In addition, there are many religious observants who would likely be deeply offended by the suggestion that their beliefs are irrational or unsupported by observation. Indeed, many religious individuals would argue that their beliefs are both rational and based on observations of the world surrounding them, and that the universe itself is proof of their belief's rationality. Many religious adherents would reasonably argue that their religious ideas are rational to them, even if they may not be rational to others.<sup>120</sup> In this way, rationality again seems to unravel and become untenably subjective. Additionally, premising a definition of religion entirely on rationality of belief would abandon the intent of the Framers to specifically protect religious beliefs.<sup>121</sup> A definition based on rationality does nothing to distinguish religious beliefs from irreligious beliefs by allowing exemptions for any belief that is found to be irrational.

#### IV. DEFINING BELIEFS THROUGH INJURY

As demonstrated in Part III, even the most expansive definitions of religion cannot avoid shortfalls and limitations that make them incompatible with the type of religious pluralism that the First Amendment must accommodate and the intention of the Framers in providing special protections for religion.<sup>122</sup> Indeed, it would seem that any definition which focuses on the particular characteristics of religious practice is destined to fail because as a matter of purpose, definitions establish what religion is and therefore dictate what a religion must be—whether that be a sincerely held belief, an ultimate concern, or non-rational—thereby contradicting the idea of freedom to practice whatever faith a person feels compelled to observe that is so dear to the American way of life.<sup>123</sup> Many therefore believe that a definition of religion is “contrary to the entire concept of religious liberty” and will only “create stagnancy by restricting the present and future growth of religion.”<sup>124</sup> I

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<sup>119</sup> Hypothetical: The Court provides an exemption from military service to Quakers who believe in nonviolence, while denying that same exemption to a nonreligious conscientious objector who holds a rational and sincere personal belief centered around treating others as they would like to be treated, *i.e.*, never harming others.

<sup>120</sup> Eugene Garver, *Why Should Anybody Listen? The Rhetoric of Religious Argument in Democracy*, 36 WAKE FOREST L. REV. 353, 369 (2001).

<sup>121</sup> BERG ET AL., *supra* note 10, at 57.

<sup>122</sup> See Usman, *supra* note 92, at 143–44.

<sup>123</sup> *Id.* at 173.

<sup>124</sup> *Id.* at 146.



believe that the most workable definition would be premised on the injury that is inflicted on an adherent by the denial of a Free Exercise claim. By looking to the injury to the claimant and interrogating whether that injury is tied to a larger system of beliefs which are premised on something that is not clearly moral or ethical, courts can take a functional approach to Free Exercise claims which provides clarity regarding whether beliefs are religious or irreligious, and which allows less potential for discrimination against minority beliefs.

Having considered the courts' and scholars' previous attempts at providing a definition of religion, perhaps the most salient and workable standard to employ for determining who is entitled to exemption would involve a definition which looks to the injury sustained by a believer by having the Free Exercise of their beliefs infringed. This could involve a variation or updating of the "extratemporal consequences" approach proposed by Jesse Choper, which looks only at the tangible effect on a person of denying an accommodation.<sup>125</sup> Choper proposes looking at "extratemporal consequences" that "extend in some meaningful way beyond [the claimant's] lifetime."<sup>126</sup> This definition is premised on the idea that "the frustration of religious obligations inflict[s] a peculiar harm on the believer."<sup>127</sup> Choper seems to believe that the most salient standard is to look at the extramoral consequences of violating a claimant's beliefs, and how those extramoral consequences are perceived by the adherent to be an injury which lasts beyond the claimant's lifetime by "affecting [the claimant's] own eternal existence or by producing a permanent and everlasting significance and place in reality for all persons that follow."<sup>128</sup> I believe premising exemption on a religious injury, and not other injuries, is appropriate because, as discussed earlier in this Note, the Founders explicitly intended to protect free exercise of religion.<sup>129</sup> The reasoning of this standard is logical because of its functionalist focus on the actual implications of denial of a Free Exercise claim, but that the standard should be more liberally applied to religious beliefs, which do not necessarily have consequences that are believed to extend beyond the claimant's lifetime. Choper specifically narrows his definition to religious beliefs which will affect the "eternal existence" of an individual.<sup>130</sup> By

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<sup>125</sup> JESSE H. CHOPER, *SECURING RELIGIOUS LIBERTY: PRINCIPLES FOR JUDICIAL INTERPRETATION OF THE RELIGION CLAUSES* 77 (Univ. Chi. Press 1995).

<sup>126</sup> *Id.*

<sup>127</sup> *Id.* at 76; Timothy L. Hall, *Religion, Equality, and Difference*, 65 *TEMP. L. REV.* 1, 34 (1992).

<sup>128</sup> CHOPER, *supra* note 125, at 77.

<sup>129</sup> BERG ET AL., *supra* note 10, at 57.

<sup>130</sup> CHOPER, *supra* note 125, at 77.

using consequences which “extend beyond the claimant’s lifetime” as the means of determining whether or not a Free Exercise claim is provided,<sup>131</sup> Choper’s definition narrowly requires that the actual characteristics of the belief be explained to a court, by requiring that a claimant explain how the consequences they will suffer will extend beyond their lifetime. A standard that requires that a belief be religious and which only focuses on the injury an adherent suffers, but which does not require that that injury be related to a specific “criteria” of religion which relates to ideas of eternity, is most consistent with the intentions underlying the Religion Clauses and the Court’s previous decisions. It accommodates the widest possible variety of beliefs, and is the most functionalist basis for exemption, without making a subjective distinction between beliefs based only on whether the consequences of their violation will extend beyond the adherent’s lifetime or the religious nature and characteristics of the belief its self. By only inquiring into whether the injury is specifically related to a religious doctrine or belief—*i.e.*, one that is not ground in moral, ethical, political, or philosophical beliefs—but not into the specific merits or characteristics of that religious belief, this definition under the Free Exercise clause would provide the most elasticity for protecting unconventional beliefs while still remaining true to the clear intentions behind the Religion Clauses.

This standard would not look at the nature of the burden on a religious practice itself but instead would look at the detrimental effect on an individual of interfering with or denying accommodation of the religious practice. It would still allow a distinction to be made between religion and nonreligions, consistent with the views of the Founders,<sup>132</sup> and would do so by looking at the harm to an individual caused by denying the exemption or accommodation that the individual seeks. In a way, this standard would be a variation on or subversion of the harm principle,<sup>133</sup> which holds that so long as someone’s beliefs do not harm others or frustrate some significant government interest, there is no reason to harm an individual by denying that individual an exemption. Some variation of the harm principle is necessary to provide a backstop and to protect third parties from harm caused by the free exercise of religious beliefs. Choper suggests that this standard could be applied to those with overtly religious views by considering the mental anguish and the “perceived

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<sup>131</sup> *Id.*

<sup>132</sup> BERG ET AL., *supra* note 10, at 59.

<sup>133</sup> Steven D. Smith, *Is the Harm Principle Illiberal?*, 51 AM. J. JURIS. 1, 4 (2006). The traditional statement of the harm principle, as stated by John Stuart Mills, is that “the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is . . . to prevent harm to others.” *Id.*

repercussions” of violating their religious doctrine.<sup>134</sup> This would be done by looking at whether the central tenants of a person’s professed beliefs would be frustrated or whether the ultimate reward that the person’s belief is centered on achieving would be denied without an accommodation. This would require a basic explanation to the court of what an individual’s beliefs are, but no inquiry into their merits, sincerity, or logic. By only looking at the “ultimate effects of beliefs,” this definition is highly flexible.<sup>135</sup> If the result of denying an exemption would be the same for both people in terms of harm sustained, it is inconsistent and arbitrary to protect the beliefs of one person because the belief has “eternal” consequences while forcing someone else to violate beliefs because of lack of eternal consequences, especially if both sets of beliefs are part of a religious doctrine that would harm individuals forced to violate them.<sup>136</sup> This standard would remain true to the First Amendment’s protection of free exercise but would use the harm caused by a prohibition as the point of reference when determining whether an exemption should be allowed, thereby looking at the tangible effects of burdening a belief rather than trying to use the nature or definition of a belief as the means of determining whether an exemption is appropriate.<sup>137</sup>

A definition that is based in evaluating the injury to a claimant is at the most basic level consistent with the Constitution’s requirement of “actual or imminent injury upon all claims in . . . federal courts.”<sup>138</sup> This makes the standard functionalist in the most fundamental sense by incorporating one of the most basic requirements of bringing a claim in federal court into the definition. It also has the functionalist advantages of definitions that are based on sincerity of belief, but it still allows a distinction to be drawn between beliefs that are secular and beliefs that are purely moral or ethical.<sup>139</sup> By requiring that the claim for exemption is tied to some type of non-logical or religious doctrine, the definition based on sincerity is narrowed to remain consistent with the spirit of the Religion Clause in protecting religious beliefs rather than any form of “conscience.” This distinction is in line with the Court’s decision in *Yoder*, in which it held that “philosophical and personal” beliefs should not be

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<sup>134</sup> CHOPER, *supra* note 125, at 77.

<sup>135</sup> *Id.* at 78.

<sup>136</sup> *Id.* at 77.

<sup>137</sup> This is a practical approach in that it avoids defining beliefs, and instead focuses on the damage or injury in the life of an adherent when determining whether an exemption should be allowed. This allows for religious and irreligious beliefs to be separated by looking at the relationship between the system of beliefs an individual adheres to and the injury sustained.

<sup>138</sup> Lupu, *supra* note 6, at 960.

<sup>139</sup> CHOPER, *supra* note 125, at 78.

grounds for exemption.<sup>140</sup> For many, the practice of religion is directly tied to the belief itself in such a way that the two cannot be untangled or understood to be independent of each other.<sup>141</sup> It therefore is the most functionalist approach not to untangle the two but to instead focus only on what the Free Exercise clause protects—the actual exercise of religion—when determining whether an individual’s exercise of religion should be protected. This standard would also have the advantage of premising exemption on something that can be proven through cognizable evidence. By premising exemption on the requirement that a claimant sustain (or be threatened with sustaining) harm, the Court would look for both extrinsic and intrinsic evidence of injury when deciding whether to grant an exemption, rather than trying to answer entirely abstract questions about the position of a belief in a claimant’s life.<sup>142</sup> This makes the standard provable because an injury by definition can be recognized and proven with cognizable evidence.<sup>143</sup> An individual is able to point to the actual harm and show how it is based in their religious beliefs, making it so judges are left with less power to make biased or unfounded determinations that harm the rights of minority religious groups.

In addition, this reasoning seems consistent with the expansive definitions of religion the Court grasped at in *Welsh* and *Seeger* while still remaining consistent with the intent of the Court in *Yoder* to rein in the definition of religion. In *Welsh* and *Seeger*, the Court postulated that overtly secular beliefs should be allowed exemptions if they were “parallel” to religious belief.<sup>144</sup> But in *Yoder*, the Court indicated an intent to rein in the beliefs that should qualify for exemption by requiring that there be a threatened or realized cognizable injury, by pinning part of their holding on the “hazard” to the Amish that the statute presented, thereby placing a certain threshold burden on the claimant.<sup>145</sup> *Yoder*’s focus on cognizable injury is very much consistent with a definition of religion which is centers on the nature of an injury in determining whether an individual should be granted an exemption under the Free Exercise Clause. In addition, scholars believe that concerns about more flexible

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<sup>140</sup> *Wisconsin v. Yoder*, 406 U.S. 205, 216, 221 (1972).

<sup>141</sup> Salmons, *supra* note 9 at 1246.

<sup>142</sup> This evidence can take the form of extrinsic evidence relating to a person’s conduct, as well as intrinsic evidence regarding the psychological burden of forcing someone to violate their beliefs. While this intrinsic evidence has recognizable short comings, it is still less arbitrary and more easily proven than the place a belief occupies in the life of an observant.

<sup>143</sup> Black’s Law Dictionary defines injury as: “Any wrong or damage done to another, either in his person, rights, reputation, or property.” *Injury*, BLACK’S LAW DICTIONARY (2d ed. 1910).

<sup>144</sup> *Welsh v. United States*, 398 U.S. 339 (1970); *United States v. Seeger*, 380 U.S. 163, 166 (1965).

<sup>145</sup> *Yoder*, 406 U.S. at 235.

definitions of religion being hijacked by insincere claims for exemption are unfounded, or at the very least, vastly over estimated and that “allowing religious exemptions is unlikely to undermine substantially the effectiveness of government policy-making.”<sup>146</sup> There is yet to be evidence that granting exemptions leads to a flood of claims for exemptions.<sup>147</sup> In addition, if a law was likely to lead to a large number of exemptions being claimed, it is unlikely such a law should be allowed to stand in the first place.<sup>148</sup>

## V. CONCLUSION

Religion pervades the private and public lives of Americans in more ways than can be counted, yet the Supreme Court has never been able to formulate a unitary definition of religion that suits the religious pluralism embraced by the United States. Instead, the Court has had to grapple with an unwieldy and often inconsistent “accommodation model of pluralism” which has only been made more complicated by inconsistencies in the Court’s view of what constitutes a religion.<sup>149</sup> Perhaps the most practical response to this problem is not to continue attempting to formulate definitions of religion based on the nature of the religious belief itself but instead to acknowledge that any religious belief held by an individual, which if violated would cause great distress and injury due to that belief’s central position in defining the observant’s relationship to the universe, should be given constitutional acknowledgement and protection under the Free Exercise Clause. Instead of making arbitrary distinctions between beliefs based on whether they “extend in some meaningful way beyond [the claimant’s] lifetime,”<sup>150</sup> perhaps it is more effective to look at the tangible effects of religious beliefs on the lives of observers and use those tangible effects as the point from which claims for accommodation should be evaluated, regardless of whether the effects are eternal.<sup>151</sup> This avoids the unnecessary confusion of defining religion by its practice and provides for more meaningful application of Free Exercise Clause exemptions based on the practical implications of interfering with an adherent’s free exercise of religion.

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<sup>146</sup> *E.g.*, Salmons, *supra* note 9, at 1253.

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> Douglas NeJaime, *Inclusion, Accommodation, and Recognition: Accounting for Differences Based on Religion and Sexual Orientation*, 32 HARV. J.L. & GENDER 303, 356 (2009).

<sup>150</sup> Choper, *supra* note 4, at 599.

<sup>151</sup> CHOPER, *supra* note 125, at 77.