California Law Review

VOL. 72 SEPTEMBER 1984 NO. 5

Religion as a Concept in Constitutional Law

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Because federal and state constitutions forbid government from infringing upon religious liberty or supporting religion, courts must sometimes decide whether a claim, activity, organization, purpose, or classification is religious. In most cases arising under these religion clauses, the religiousness of an activity or organization will be obvious.[1] However, when the presence of religion is seriously controverted, the threshold question, "defining religion," becomes important. Most courts have prudently eschewed theoretical generalizations in approaching that question. Academic commentators have struggled to startlingly diverse proposals.

This Article suggests that in both free exercise and establishment cases, courts should decide whether something is religious by comparison with the indisputably religious, in light of the particular legal problem involved. No single characteristic should be regarded as essential to religiousness.[2] Furthermore, a threshold determination that religion

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1. Even in these cases, the courts' application of relevant constitutional standards implicitly acknowledges that some threshold showing concerning religion has been made.

2. These claims are also made in a recent article by George C. Freeman, *The Misguided Search for the Constitutional Definition of "Religion,"* 71 GEO. L.J. 1519 (1983). Though our main conclusions overlap significantly, we differ considerably in our perspectives, in the emphasis we put on respective problems, and in the development of our analysis. My own arrival at the Article's major theses preceded publication of Mr. Freeman's article, and I had written a nearly final draft before I became aware of it. I have indicated in footnotes the important points where we disagree or where he pursues a different line of analysis. Generally, his essay is more oriented to the philosophical and related literature than is mine.

is present should not automatically invoke use of the compelling interest test or similar standards of review.

I explicate these suggestions more fully in Part III, illustrate their applications in Part IV, and compare them against other approaches in Part V. These efforts follow a preliminary clarification in Part I of the ways in which the threshold question about religion arises and a sketch in Part II of standards for judging the adequacy of general approaches to that question. Though my discussion deals explicitly only with clauses of the federal constitution, it applies to state provisions as well.

I

THE CONTEXTS IN WHICH THRESHOLD QUESTIONS ARISE

Substantive principles of constitutional law determine when courts must resolve threshold questions about religion. If, for example, the government has a special constitutional obligation to accommodate religious use of drugs, courts must decide if certain claims to use drugs are truly religious. If, instead, the law allowed no distinction between religious and other uses, then a court would not need to determine whether a particular claimant's use was religious.[3]

Substantive principles also determine what exactly must be shown to be religious if a claim is to succeed. The claimant in a standard free exercise case, urging that his religious beliefs or activities are being inhibited, needs to show that those beliefs or activities (say, corporate use of drugs) are religious.[4] The crux of a standard establishment argument is that the government is supporting someone else's religious activity. The crucial threshold question thus concerns not the claimant's activities, but those receiving government support.[5]

3. That other substantive rules would require more frequent threshold determinations of religiousness in fact underlies one argument in favor of the position that the religion clauses should be read to bar *any* favoring or disfavoring of religious interests. Academic proponents of that view have urged the inappropriateness of judicial determinations of what constitutes religion as a strong reason for this strict form of government neutrality toward religion. *See* Kurland, *Of Church and State and the Supreme Court*, 29 U. CHI. L. REV. 1 (1961); Weiss, *Privilege, Posture and Protection: "Religion" in the Law*, 73 YALE L.J. 593 (1964). Though strict neutrality would reduce the occasions when determinations about religion would be necessary, it would not eliminate them. If state officials favored particular groups or activities, courts would still have to determine whether the differentiations fell along forbidden religious lines. Neither strict neutrality nor any other remotely plausible view of the United States Constitution could get courts altogether out of the business of determining what is religious.

4. This generalization is not true of all free exercise claims, partly because of the significant overlap between coverage of the free exercise and establishment clauses. Since one aspect of free exercise is liberty from government coercion of religious practice, persons objecting to government efforts to coerce them into such practice (say, by requiring everyone to pray) could raise free exercise claims without asserting the religiousness of their own beliefs and practices.

5. A complicating problem with respect to establishment is whether government support of nonreligion or antireligion can constitute a forbidden establishment, or raises only free exercise objections. Douglas Laycock suggests that support of nonreligion raises only free exercise issues,

Of course, not all claimants who surmount the threshold barrier will prevail. In some free exercise cases, the government will have a strong interest in prohibiting an activity (for example, snake handling) whether it is religious or not; in other cases, the impingement on religious activities will be deemed too indirect to be unconstitutional.[6] Furthermore, the claimant may fail to surmount a second threshold barrier, that of sincerity.[7] Establishment claimants will lose if government support of a religious enterprise is indeed permissible (chaplains in the military) or too indirect and remote to be of consequence (providing bus transportation for parochial school children).[8]

Sometimes courts in establishment cases need to decide if purposes or effects are religious; and when claims under both religion clauses are based on comparative treatment of different groups, courts must determine if classifications are religious. Though constitutional determinations of what counts as "religious" can arise in these diverse ways, I suggest below that characterizations of purposes, effects and classifications are largely parasitic on characterizations of activities and beliefs.[9]

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though he acknowledges dicta that point in the contrary direction. Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 COLUM. L. REV. 1373, 1378-85 (1981). If such support does implicate the establishment clause, then a claim of support to religion would not be a prerequisite of every establishment argument. Gail Merel has suggested that "irreligion" or antireligion is a religion for both free exercise and establishment purposes, though nonreligion is not a religion for either purpose. Merel, *The Protection of Individual Choice: A Consistent Understanding of Religion Under the First Amendment*, 45 U. CHI. L. REV. 805, 812-15 (1978). Under that analysis, aid to antireligion would violate the establishment clause.

6. *See* Braunfeld v. Brown, 366 U.S. 599 (1961) (Sunday closing laws not unconstitutional as applied to persons who worship on Saturdays). My use of this familiar example is not meant to reflect endorsement of the Court's conclusion that Braunfeld suffered no denial of his free exercise right, a conclusion with which I disagree.

7. Although the two are sometimes conflated, the question of sincerity is separable from the question of religiousness. A person may insincerely advance a religious claim or sincerely make a claim that turns out not to be religious. A person may even do both at the same time by asserting a package of beliefs, some of which are sincere but nonreligious and others of which are religious but insincere. For a case in which a court apparently took that view of a claimant's faith, see Theriault v. Silber, 391 F. Supp. 578 (W.D. Tex. 1975), *vacated and remanded*, 547 F.2d 1279 (5th Cir. 1977). Ordinarily a free exercise claim must be both religious and sincere to qualify for constitutional protection. When the issue is whether literature with religious claims may be circulated, courts may be able to avoid any evaluation of sincerity, United States v. Ballard, 322 U.S. 78, 92 (1944) (Jackson, J., dissenting), but when people seek on free exercise grounds valued privileges that are denied to most people, some test of sincerity is unavoidable. *See* Greenawalt, Book Review, 70 COLUM. L. REV. 1133, 1135-36 (1970) (reviewing M. KONVITZ, RELIGIOUS LIBERTY AND CONSCIENCE: A CONSTITUTIONAL INQUIRY (1968)).

8. Everson v. Board of Educ., 330 U.S. 1 (1947).

9. *See infra* Part IV, Sections *B* and *C*.

II
REQUISITES FOR AN ADEQUATE APPROACH TO CATEGORIZATION

At the outset, it is necessary to define some standards against which the various proposals for how courts should make determinations about religiousness can be evaluated. In this Part, I suggest some general standards that may be employed in that effort. The standards suggested are comprehensiveness, correspondence to concepts of religion in ordinary language, unity of approach, fit with Supreme Court jurisprudence, ability to produce sound results, and compatibility with adequate tests of sincerity. Without arguing that the best approach necessarily will satisfy each standard, I do claim that satisfying a standard counts in favor of an approach.

A. Coverage of All Cases in Which Threshold Characterizations May Be Needed

An adequate approach should encompass all the cases in which courts must decide whether or not something is religious. I do not mean an approach must invariably yield a definite answer, only that it must formulate an appropriate way to address the issue. So stated, the point may seem trivial and obvious; but it contains two important cautions.

First, one must not assume that what works for some particular kind of problem will work for all others. As I show later, some scholarly discussions that capture profound insights fall short precisely because they fail to sample a rich enough menu of establishment and free exercise situations.[10]

Second, one must not exclude all issues that might now be resolved on the basis of a constitutional provision other than a religion clause. Many forms of religious classification could be held violative of the equal protection clause (or its analogue in the fifth amendment due process clause). But it does not follow, as Dean Jesse Choper seems to suggest,[11] that for these cases we can disregard the threshold question. Some concept of religion must be employed to decide what puts a classification in that "disfavored" category. Further, and more important, the "definition" of religion for equal protection purposes cannot be analytically independent of the "definition" of religion for free exercise and establishment purposes. The "suspectness" of religious classifications did not have to await judicial creativity; it has always been im-

10. *See infra* Part V.

11. Choper, *Defining "Religion" in the First Amendment*, 1982 U. ILL. L. REV. 579, 582-83. As Dean Choper points out, the free speech clause may also be a source of invalidation of some classifications based on religious belief or practice. *Id.*

plicit in the religion clauses. Deciding that a classification is religious under the equal protection clause demands either direct interpretation of the religion clauses or, at the very least, a judgment deeply informed by the values underlying those clauses.[12]

A more debatable question is whether issues of belief and expression can be disregarded on the ground that free exercise claims of this variety collapse into free speech claims.[13] The Supreme Court has frequently treated claims of religious speech and ordinary speech interchangeably[14] and in a great many cases, courts need not decide if expressive activities are religious. But plausible speech and free exercise claims may not always be of exactly equal strength.[15] Any easy assumption that a concept of religion is never required for claims of belief and expression is mistaken.[16]

B. Linkage to Modern Nonlegal Concepts of Religion

Because constitutional determinations of religion are made for legal purposes, they should not be expected to track in every respect determinations made for other purposes; yet, we should be surprised to learn that what is religious for the law is widely at variance with what otherwise counts as religious. After all, the term derives from natural language and refers to a deep and important social phenomenon. Unless powerful reasons of a legal or social dimension dictate noncorrespondence, an approach should tie the constitutional concept of religion to concepts in more general use.

One possible argument for noncorrespondence is that the guide to a constitutional concept of religion should be what the framers and adopters of the first and fourteenth amendments[17] had in mind. They

12. One might reasonably take the position that if an approach can deal with other free exercise and establishment issues, the classification issues will fall into place. Choper's efforts might be viewed in that light, and my own presentation follows roughly those lines.

13. *See* Choper, *supra* note 11.

14. *See, e.g.*, Heffron v. International Soc'y for Krishna Consciousness, Inc., 452 U.S. 640 (1981).

15. I suggest below some instances in which their strength may be unequal. *See infra* notes 100-02 and accompanying text.

16. I have two other, more abstract, objections to such a proposal. The first is that should the free speech clause ever be repealed, or qualified in some respect (say not to reach urgings of illegal acts), courts might have to decide if the free exercise clause protects expression that is now protected as free speech. My second objection concerns the general climate of discussion regarding freedom of speech. Some scholars have proposed that the free speech clause is essentially about political speech. *E.g.*, Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 26-31 (1971). Recognition that the free exercise clause undoubtedly protects religious speech is an important first step to understanding the ludicrousness of suggestions that the entire first amendment has no bearing on speech about nonpolitical moral values. The relegation of all speech issues to the free speech clause could blur the force of this insight.

17. Since, according to modern doctrine, the fourteenth amendment made the first amend-

undoubtedly conceived of religion mainly as theistic,[18] though existing nontheistic eastern religions must have been at least vaguely understood by some of them. Whether a strict "framers' intent" approach could limit the constitutional concept to theistic beliefs is not a question I shall try to resolve. Instead, I begin with an assumption that represents common ground among virtually all modern courts and commentators facing this issue: the scope for interpretation of the constitutional document is at least broad enough to encompass changing concepts of religion.

C. *A Unitary Approach*

The language of the first amendment proscribes any law "respecting an establishment of religion, or prohibiting the free exercise thereof." The single appearance of the word "religion" and the place of the word "thereof" strongly point toward a unitary concept of religion that applies to both clauses.[19] Nevertheless, implication of the constitutional language is not dispositive. If to accomplish the purposes of the religion clauses in a modern setting we need a different concept of religion for each clause, some straining of textual language is an acceptable cost; still, a unitary concept begins with a presumption in its favor. And, if a unitary concept can explain those cases where dual concepts seem most persuasive, while still retaining the flexibility necessary to be sensitive to other aspects of the legal context, it will be the preferable approach.

A constitutional concept of religion could be unitary if whatever amounts to religion in one context automatically amounts to religion in another; the precise legal issue presented would not affect whether a particular combination of factors was labeled religious. But the concept of religion could be unitary in a more subtle sense if the courts employ a unitary strategy in making determinations about religion. This sense, perhaps best called a "unitary approach," admits that what amounts to religion in one context may not amount to religion in another. The approach that I suggest is unitary in this second sense, but not in the first.

D. *Consonancy with Supreme Court Jurisprudence*

If an approach to religion is to be applicable by courts here and now, it must fit reasonably well with what the Supreme Court has said

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ment applicable against the states, the ideas that accompanied its adoption have as much importance as those that accompanied the original religion clauses.

18. The views of the "Founding Fathers" are briefly outlined in Freeman, *supra* note 2, at 1520-23.

19. *See* Eversou v. Board of Educ., 330 U.S. 1, 32 (1947) (Rutledge, J., dissenting).

about "defining" religion and with the substantive principles the Court employs to decide cases involving religion.

1. The Supreme Court and the Concept of Religion

Achieving a decent fit with what the Supreme Court has said about defining religion in the last few decades is not particularly difficult, because the Court has said very little. In 1890, it did essay an explicit constitutional definition of religion, referring in *Davis v. Beason*[20] 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."[21] Dissenting in 1931, Chief Justice Hughes spoke of religion as involving "belief in a relation to God involving duties superior to those arising from any human relation."[22] Not until 1961 did the Court clearly indicate a more latitudinarian concept of religion. Striking down a state law that required office holders to declare a belief in God, the Court in *Torcaso v. Watkins*[23] indicated that Buddhism, Taoism, Ethical Culture, and Secular Humanism (at least in the organized form of the Fellowship of Humanity) were religions; and it held that the state's preference for theistic religions over nontheistic ones violated the establishment clause.

The Supreme Court's most lengthy discussions of the nature of religion have not occurred in connection with overtly constitutional adjudication, but rather in the Court's efforts to construe section 6(j) of the Universal Military Training and Service Act,[24] which controls exemptions from military service. At the time of *United States v. Seeger*,[25] the exemption reached those who were conscientiously opposed to military service by reason of "religious training and belief." The required religious belief was defined as "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."[26] Congress had adopted this definition after a dispute among the courts of appeals over how broadly religion should be understood. The statutory language rather clearly represented endorsement of a traditional

20. 133 U.S. 333 (1890).

21. *Id.* at 342.

22. United States v. MacIntosh, 283 U.S. 605, 633-34 (1931) (Hughes, C.J., dissenting).

23. 367 U.S. 488 (1961). As Freeman, *supra* note 2, at 1527, points out, the Court did in Wisconsin v. Yoder, 406 U.S. 205, 215 (1972), 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*.

24. 50 U.S.C. app. § 456(j) (1976).

25. 380 U.S. 163 (1965).

26. *Id.* at 165 (quoting from 50 U.S.C. app. § 456(j)).

theistic conception of religion.[27] Nonetheless, the Supreme Court construed the language to reach people like Seeger, who rejected dependence on a Creator for a guide to morality and had a "belief in and devotion to goodness and virtue for their own sakes, and a religious faith in a purely ethical creed."[28] Referring to encompassing modern conceptions of religion, especially those of the theologian Paul Tillich, the Court concluded that "[a] sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by the God of those admittedly qualifying for the exemption comes within the statutory definition."[29] In *Welsh v. United States*,[30] a plurality of the Court went one step further. Welsh had struck the word "religious" from his application, claimed beliefs formed through readings in "history and sociology," and grounded his objection to military service on his perception of world politics and the wastefulness of devoting human resources to military endeavors. Nevertheless, four Justices found him to be religious, since his beliefs "play the role of a religion and function as a religion in [his] life."[31] The exemption of section 6(j) was held to extend to "those whose consciences, spurred by deeply held moral, ethical, or religious beliefs, would give them no rest or peace if they allowed themselves to become a part of an instrument of war."[32]

To formulate these concepts of religion, the *Seeger* Court had to overcome a contrary legislative intent and the *Welsh* Court effectively had to disregard the specific statutory exclusion of "political, sociological or philosophical views or a merely personal moral code." Therefore, commentators reasonably supposed that the Court's interpretation of statutory language defining religious training and belief was guided by strong constitutional doubts about the lines Congress had tried to draw.[33] Justice Harlan, the necessary fifth vote in *Welsh*,[34] had explicitly found it a violation of the establishment clause for Congress to differentiate between religious conscientious objectors and nonreligious objectors with the same intensity of moral conviction. Even if the results in *Seeger* and *Welsh* are constitutionally required, Justice Harlan's opinion shows that the theory could be that a distinction between the religious and nonreligious is here impermissible rather than that all conscientious objection *is religious* in the constitutional sense. Nevertheless, the Supreme Court's broad statutory construction of reli-

27. The earlier cases and legislative response are briefly discussed in Greenawalt, *All or Nothing At All: The Defeat of Selective Conscientious Objection*, 1971 SUP. CT. REV. 31, 37-38.

28. *Seeger*, 380 U.S. at 166 (quoting from the trial record).

29. *Id.* at 176.

30. 398 U.S. 333 (1970).

31. *Id.* at 339.

32. *Id.* at 344.

33. See Greenawalt, *supra* note 27, for discussion of some of these commentators.

34. 398 U.S. at 344-67 (Harlan, J., concurring).

gion, as well as its decision in *Torcaso*, 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.

2. *Religion Clause Principles*

Developing an approach to the threshold question that is compatible with all the modern Supreme Court's decisions under the religion clauses is somewhat more complicated, and perhaps no tenable approach can fit with everything the Court has decided, said, and implied. In capsule summary, the Court's present view of the free exercise clause is that a valid religious claim to engage in an activity that the government has forbidden or discouraged will succeed unless the government's interference is necessary to accomplish a compelling interest.[35] Under this compelling interest test, the government must establish both a very powerful interest and the absence of any "less restrictive alternative" to achieve that interest. In most establishment cases, the Court has relied heavily upon a threefold test: government assistance to an organization or activity must have a secular purpose; it must not have a substantial effect that advances or inhibits religion; and it must not foster an excessive entanglement of government with religion.[36] In some recent cases, the Court has indicated that the threefold test is an often helpful guide rather than an exclusive touchstone of establishment;[37] but no broad alternative has been offered in its place. When the Court has invalidated state programs on establishment grounds, it has usually found a substantial effect of advancing religion or a forbidden entanglement.[38] Attempts to accommodate religious exercise do not necessarily constitute a religious effect or purpose of the impermissible sort.[39] The Court has assumed that religious classifications are highly suspect, sustainable only upon a showing of necessity to accomplish a compelling state interest.[40]

This brief account of the abstract principles now guiding religion clause decisions is not adequate for evaluating suggestions concerning what counts as religion. However, the principles are given more con-

35. *See, e.g.*, Sherbert v. Verner, 374 U.S. 398 (1963).

36. Lemon v. Kurtzman, 403 U.S. 602 (1971).

37. In Lynch v. Donnelly, 104 S. Ct. 1355, 1362 (1984), Chief Justice Burger's majority opinion has specific language to this effect. As that opinion points out, the threefold test played little role in the case upholding prayers by publicly paid chaplains in state legislatures. *See* Marsh v. Chambers, 103 S. Ct. 3330 (1983).

38. Stone v. Graham, 449 U.S. 39 (1980) (per curiam) (ten commandments posted in classrooms) and Epperson v. Arkansas, 393 U.S. 97 (1968) (state prohibition of teaching of evolution) are unusual cases relying on religious purpose.

39. *See* Trans World Airlines v. Hardison, 432 U.S. 63 (1977).

40. *E.g.*, Larson v. Valente, 102 S. Ct. 1673, 1684 (1982); Gillette v. United States, 401 U.S. 437, 450-51 (1971).

crete content when I discuss various approaches to the threshold question and their application to particular kinds of cases.

E. Consonancy with Sound Results

When combined with appropriate substantive principles, an approach to the concept of religion should have the capacity to yield sound results in religion clause cases. An avowed reformer might put forward an approach that does not fit with what the Supreme Court has yet said and done; but even he would need to defend his suggestion in terms of the outcomes it would help produce.

F. Religion and Sincerity

For a broad range of free exercise cases, once a court makes the threshold determination that the acts or beliefs in question are religious, it will have to determine whether a claimant, or members of the claimant's group, sincerely believe the ideas that are espoused.[41] An approach to the concept of religion must adequately fit with an appropriate test of sincerity.

III
THE ANALOGICAL APPROACH TO THE CONSTITUTIONAL CONCEPT OF RELIGION

My basic thesis is that for constitutional purposes, religion should be determined by the closeness of analogy in the relevant respects between the disputed instance and what is indisputably religion. The relevant respects are determined by the purposes underlying the applicable constitutional clause viewed in light of the particular legal context. In this Part, I explain the significance and desirability of this approach. I also explore very briefly how it fits with substantive standards under the religion clauses, and I indicate its descriptive power as an account of what courts are actually doing when they face troublesome borderline cases.

A. Religion as a Complex Concept

Religion is a highly complex concept. As courts have occasionally noted,[42] dictionary definitions of religion vary widely, and agreement upon a settled account of what makes something religious has been elusive.

The very assumption that some kind of "dictionary" approach will

41. *See supra* note 7 and accompanying text; *infra* note 108.

42. *E.g.*, Washington Ethical Soc'y v. District of Columbia, 249 F.2d 127, 129 (D.C. Cir. 1957).

suffice may constitute a significant stumbling block. By a dictionary approach, I mean the identification of a single element or a conjunction of two or more central elements that are taken to be essential for the application of a concept. Thus, if religion is constituted by "belief in a Supreme Being," one would decide whether a doubtful instance involves religion by determining whether such belief is present. Under this approach, religion would be characterized by a condition that is both necessary and sufficient. A decision about the presence or absence of that condition would determine whether something was religious.[43] Some other major suggestions about defining religion share with the Supreme Being standard a focus on one central feature, such as "ultimate concern"[44] or "belief in extratemporal consequences."[45] However, a single central element is not an inevitable feature of the dictionary approach in my sense. One might believe that two or three, or more, crucial features are all present in every genuine instance of religion.

Nevertheless, any dictionary approach oversimplifies the concept of religion, and the very phrase "definition of religion" is potentially misleading. No specification of essential conditions[46] will capture all and only the beliefs, practices, and organizations that are regarded as religious in modern culture and should be treated as such under the Constitution.

A more fruitful approach to understanding and employing the concept of religion is to identify instances to which the concept indisputably applies, and to ask in more doubtful instances how close the analogy is between these and the indisputable instances. Such an approach can yield applications of the concept to instances that share no common feature, a result that the dictionary approach precludes.

Perhaps the best known presentation of this underlying idea is Ludwig Wittgenstein's suggestion that games have no common feature but rather family resemblances.[47] H.L.A. Hart has also touched upon

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43. Acceptance of a dictionary approach does not, of course, imply the absence of thorny borderline cases. One who regards belief in a Supreme Being as crucial to religion might acknowledge as highly debatable whether certain beliefs are of this sort.

44. *See* Choper, *supra* note 11, at 594-97; Note, *Toward A Constitutional Definition of Religion*, 91 HARV. L. REV. 1056 (1978).

45. *See* Choper, *supra* note 11, at 597-601. Readers who are particularly skeptical about the assertions made in this and the preceding paragraph may wish to proceed directly to Part V, where relevant positions are discussed in some depth.

46. The term "essential condition" is used here and elsewhere in this Article in a restricted sense to mean either a single feature necessary and sufficient, or else a conjunction of simple features (*A* and *B* and *C* and . . .) that is necessary and sufficient for the application of a term.

47. L. WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS ¶¶ 66-67 (3d ed. 1958).

> 66. Consider for example the proceedings that we call "games". I mean board-games, card-games, ball-games, Olympic games, and so on. What is common to them all?—Don't say: "There *must* be something common, or they would not be called

this idea in his *Concept of Law*. In discussing whether international law is really law, Hart compares its features to those of municipal law without a presupposition that any single feature, such as centrally organized sanctions, is a necessary requirement of law.[48]

The thrust of this Article is not a proposal of a new approach to the elucidation of concepts, but rather the application of a widely accepted idea to the constitutional concept of religion. Even this more focused claim is hardly novel; it corresponds closely with what many courts have done and what one court has explicitly said,[49] it has been proposed by at least one scholar,[50] and it may be implicit in other scholarly discussions that decline to set out required conditions of religion.[51]

How one defends the analogical approach against the dictionary approach depends on the focus of the inquiry. If the question is general usage, one would investigate whether definition by essential conditions captures the understanding of either "ordinary" people or some group of people with special competence to say what religion is. To find out whether a person's concept of religion includes a Supreme Be-

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'games' "—but *look and see* whether there is anything common to all.—For if you look at them you will not see something that is common to *all*, but similarities, relationships, and a whole series of them at that. To repeat: don't think, but look!—Look for example at board-games, with their multifarious relationships. Now pass to card-games; here you find many correspondences with the first group, but many common features drop out, and others appear. When we pass next to ball-games, much that is common is retained, but much is lost.—Are they all 'amusing'? Compare chess with noughts and crosses. Or is there always winning and losing, or competition between players? Think of patience. In ball games there is winning and losing; but when a child throws his ball at the wall and catches it again, this feature has disappeared. Look at the parts played by skill and luck; and at the difference between skill in chess and skill in tennis. Think now of games like ring-a-ring-a-roses; here is the element of amusement, but how many other characteristic features have disappeared! And we can go though the many, many other groups of games in the same way; can see how similarities crop up and disappear.

And the result of this examination is: we see a complicated network of similarities overlapping and criss-crossing: sometimes overall similarities, sometimes similarities of detail.

67. I can think of no better expression to characterize these similarities than "family resemblances"; for the various resemblances between members of a family: build, features, colour of eyes, gait, temperament, etc., etc. overlap and criss-cross in the same way.—And I shall say: 'games' form a family.

Id.

48. H.L.A. HART, THE CONCEPT OF LAW 208-31 (1961). In a note to his introductory chapter Hart talks explicitly of Wittgenstein's passage on games and says his advice "is peculiarly relevant to the analysis of legal and political terms." *Id.* at 234. Since Hart does apparently regard governance by rules as a necessary feature of law, *id.* at 202, he acknowledges at least one essential condition for that concept. But the satisfaction of that condition alone would not be sufficient for law.

49. *See infra* notes 68-98 and accompanying text.

50. *See* Freeman, *supra* note 2.

51. In his chapter on Rights on Religious Autonomy, for example, Laurence Tribe does not attempt any definition of religion in terms of essential conditions. L. TRIBE, AMERICAN CONSTITUTIONAL LAW 812-85 (1978); *cf.* Alston, *Religion*, in 7 ENCYCLOPEDIA PHILOSOPHY 140 (P. Edwards ed. 1967) (approaching religion in terms of typical "religion-making characteristics").

ing as a necessary condition, one might present him with examples of polytheistic and nontheistic beliefs and practices and ask if they are religious. If the person responded "yes," and similar questions and answers revealed that he did not regard any other typical features as necessary for religion, one could conclude that this person's concept of religion did not include any single element as a necessary condition. Assertions about general usage depend on assumptions about what an examination like this would show if it were carried out more broadly.

Defending the analogical approach for constitutional purposes is a decidedly different exercise. It is an exercise that rests on the consonancy of the approach with the fundamental purposes that underlie the constitutional concept of religion. A systematic defense would demand a full account of those purposes, of appropriate tests of constitutionality, and of how the tests would apply to particular cases.[52] Within this context, the analogical approach would be rated against alternatives. Since I do not undertake such a full-scale theory, my defense of the analogical approach is necessarily less systematic. However, I do show how the approach works and how it connects to various substantive standards of constitutionality. I also demonstrate that major alternative approaches that constitute varieties of the dictionary approach are wholly inadequate to produce acceptable results in a wide range of religion clause cases.[53] I therefore suggest that the analogical approach deserves further development as the most plausible approach.

A full discussion of alternatives occupies the last part of this Article, but even a brief reflection on the variety of cases that may arise under the religion clauses generates skepticism about the adequacy of any dictionary definition. That a Supreme Being approach unduly constricts the ambit of what counts as religious is a familiar criticism explicated in Supreme Court cases like *Torcaso* and *Seeger*. The more modern, and liberal, notion that "ultimate concern" is the key to religion involves similar difficulties. Are we to conclude that the free exercise clause has no bearing on claims about practices of worship that do not derive directly from ultimate concern? Are we to conclude that neither religion clause touches belief in and worship of gods that is detached from the development of ultimate concerns? The oddity of

52. Such an account might be based on the implications of what the Supreme Court has decided or upon one's view of what would be correct decisions under the religion clauses, or upon some combination of the two.

53. *See infra* Part IV. Because I do not offer extended argument about why the results I call acceptable are strongly indicated by Supreme Court decisions or a sound view of the religion clauses, my demonstrations are open to the counterargument that I have simply got these results wrong in important ways. Of course, some set of logically conceivable results would be compatible with some dictionary approaches to the concept of religion; but this Article does demonstrate that any approach in terms of a single feature or conjoined features will treat large numbers of cases and circumstances differently than courts have and than most scholars recommend.

such conclusions has yet to be faced by those who have recommended ultimate concern as the constitutional touchstone of religion. Final rejection of this and other single feature definitions must await examination of their responsiveness to a range of constitutional problems, but even these preliminary remarks should suggest that careful review of the implications of an analogical approach is warranted.

Before proceeding further, I need to indicate somewhat more precisely how the analogical approach relates to the "dictionary" approach and other approaches to definition. The distinctive feature of the analogical approach is not that it employs reasoning by analogy. Commonly when we are doubtful about applying a concept to an activity, we reflect on how closely the activity compares with activities that the concept undoubtedly reaches. Such comparisons help us resolve borderline questions and work toward clarification of the conditions required for application of the concept. This use of analogical reasoning is compatible with definition by essential conditions, and the two may go hand in hand in illuminating the scope of a concept. The analogical approach that I propose is special because it denies that a search for essential conditions is a profitable method for applying the concept of religion. If this denial is correct, analogical comparison has an exclusivity here that it does not enjoy when it is a tool in the search for essential conditions.

Definition in terms of a single set of conditions that are necessary and jointly sufficient is not the only form of definition in terms of necessary and sufficient conditions; how the analogical approach relates to more complex forms of such definition is complicated. One possibility is that any one of a number of conditions is sufficient and the presence of one among them is necessary. A more complex version of this possibility is that a number of combinations of conditions are sufficient and that having one of those combinations is necessary. Conceivably, if one worked long enough and hard enough, he could identify all the combinations of conditions that would qualify as religious under the Constitution; the resulting specification might occupy volumes. Were such an exercise theoretically possible, the analogical approach would be reconcilable with such an account of necessary and sufficient conditions, but the account would not be one any court should be attempting to provide.

Yet another possibility is that one or more specific conditions are necessary, but are sufficient only if joined with other conditions no one of which is necessary. I claim that no single condition is necessary for religion. Were this view wrong, one might conclude that the delineation of religion in a particular case should begin with a search for the one or more necessary conditions, and continue with an application of

the analogical approach to determine whether the presence of other conditions adds enough to constitute religion.

Whether or not such complex definitions of religion are correct in theory, my point is simply that courts should not be attempting to offer an encompassing account of what counts as religious. My thesis is philosophically modest; it does not take a position on the debate whether definition by necessary and sufficient conditions is theoretically possible for concepts in natural language.[54] Whatever may be true for concepts in natural language, I assume that many important legal concepts are properly delineated in terms of essential conditions. I claim only that the constitutional concept of religion is not among them, that for it an analogical approach is appropriate.

B. The Analogical Approach to Religion in Ordinary Usage and in Constitutional Law

To use the analogical approach to determine the boundaries of religion, one begins with instances of the indisputably religious, instances about which virtually everyone would say, "This certainly is religion." Such instances do not require a consensus about all the concept of religion signifies or about treatment of borderline cases.[55] For example, no one doubts that Roman Catholicism, Greek Orthodoxy, Lutheranism, Methodism, and Orthodox Judaism are religions.[56] Our society identifies what is indubitably religious largely by reference to their beliefs, practices, and organizations. 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 repentence and forgiveness of sins; "religious" feelings of awe, guilt, and adoration; the use of sacred texts; and organization to facilitate the corporate aspects of reli-

54. The general philosophical problem is explored and much of the important literature is cited in Freeman, *supra* note 2, at 1549-52. I am dubious about Freeman's apparent equation of the vagueness of concepts—what he calls a "penumbra of uncertainty"—with the impossibility of definition by necessary and sufficient conditions. *Id.* at 1552.

55. It is logically possible that a concept could be employed with such diversity that no agreement about indisputable instances would be forthcoming. That might occur during a period of extreme transformation of the meaning of a term, such as has occurred with the word "nice." Additionally, a concept, such a justice, may be at such a high level of generality that people with very different views about how its contours are to be filled in may disagree about even its core applications. If agreement cannot be reached about even core applications of a concept, the analogical approach either is not fruitful or must begin from some initial specification of core instances that is otherwise derived.

56. There may be disagreement over what constitutes a separate religion. Lutheranism, for example, might be considered a subcategory of the Protestant or Christian religion.

gious practice and to promote and perpetuate beliefs and practices. This list could be expanded or organized differently. The main point is that among religions typical in this society a number of different elements are joined together.[57]

Should any single feature be absent, religion, as far as general usage is concerned, could still exist. A set of beliefs and practices would still be religious, for example, if it were based on polytheism or nontheism rather than monotheism, if it failed to assert any claim between transcendental reality and proper moral practices, or if it did not involve any corporate organization. Religions need not share any single common feature, because no single feature is indispensable.[58]

Whether any features of the paradigm instances are, by themselves, *sufficient* to make something religious is more complicated. Some of these features have nonreligious manifestations. Professional and fraternal organizations have rituals and ethical codes that are not religious. Marxism presents a comprehensive view covering the deepest questions of human existence that is not usually considered religious. Ordinary practices of psychological therapy that help people assuage their feelings of guilt are not religious. Other features of paradigm instances, such as belief in God, may by themselves always be religious, but they do not always make the broader practices and organizations associated with them religious. A simple requirement that members believe in God would not alone make an organization religious, nor would commencement with a prayer make a legislative meeting religious. In seeking to categorize an organization or a broad set of practices, one must examine the combination of characteristics that constitute it. A final decision to consider something religious depends on how closely the combination of characteristics resembles those of the paradigm instances, judged in light of the particular reason for the inquiry.[59]

In this brief discussion of the ordinary concept of religion, I have

57. *See* Alston, *supra* note 51.

58. Whether some overlap of features would exist among any two instances of religion would depend on how many features of the indisputably religious are required to constitute religion. Very roughly, if something would not be considered a religion unless it exhibited six of the nine central features, any two instances would share at least three features. If only a few features were required to make a religion, two instances of religion might have no feature in common. This possibility, raised by Wittgenstein's treatment of the word "game," *see supra* note 47, may seem strongly counterintuitive, until we reflect on how the words "religion" and "religious" are actually used. Individuals who reject all forms of corporate worship and organization, but who believe that they are capable of opening their hearts to God in moments of concentrated solitude are considered not only to have religious beliefs, but also to engage in solitary religious practices. Individuals who are strongly skeptical about any "higher reality," but who participate in secular versions of traditional corporate religious services, believing that such services promote inner peace and brotherhood, are thought to be engaged in religious practices.

59. Since my aim in this Article is not to classify definitively but to support an approach to

not explored the plausible claim that some deep characteristic such as "faith" or the "transcending of ordinary experience" does unite all instances of religion. My reason is that a common characteristic as vague and general as these would be little help for someone trying to classify beliefs and practices as religious or not. For legal purposes, one needs to concentrate on features of religion that are specific enough to be employed by judges and other actors in the legal system.

Use of the analogical approach in constitutional cases must be sensitive to the reason for the inquiry, and to the connection between threshold characterization and ultimate outcome. "Framers' intent" could serve as the critical starting point for what is religious, but the approach I explicate and defend is anchored in a modern understanding of religion and its place in society. In resolving a troublesome case, a court needs to attend not only to the legal character of its inquiry[60] and the relevance of the clause under which the case arises, but also to the particular nature of the claim involved. If the claim concerns government support for an organization, what the organization actually does will be more important than what its members believe. If the claim concerns an action based on conscience, the nature of the underlying belief will be critical.[61] Within the framework of a unitary method for ascertaining religion, the analogical approach is responsive to the accurate perception of those proposing dual concepts of religion that the crucial aspects of many free exercise claims differ from the crucial aspects of many establishment claims.[62] Focus on the specific purpose of the inquiry permits accommodation of these differences without a rigid distinction between free exercise and establishment cases that both strains the constitutional language and obscures important differences among cases arising under each clause.

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the exercise of classification, I do not defend most of the classifications I suggest. My basic thesis could survive considerable disagreement about these classifications.

60. In the most obvious sense, the legal character of the inquiry concerns the fact that legal consequences of one sort or another may turn on the determination. In a more complex sense, the legal character includes the ways in which courts reach decisions in specific cases. The role of precedent is of particular importance in this context. A court applying the analogical approach to religion will properly be influenced by what courts previously have determined to be religious in similar contexts. As more cases are decided, this standard of judgment might in some instances largely obviate the need for a court to refer to ordinary paradigms of religion. However, as I conceive the analogical approach, the clear or paradigm cases of what is religious would not be "pushed outward" by each new case classifying a borderline instance as religious.

61. *Cf.* Giannella, *Religious Liberty, Nonestablishment, and Doctrinal Development Part I. The Religious Liberty Guarantee*, 80 HARV. L. REV. 1381, 1426 (1967) (advocating a definitional approach but stressing that definition should be flexible and sensitive to the particular claim involved).

62. *E.g.*, L. TRIBE, *supra* note 51; Note, *supra* note 44.

C. *The Analogical Approach and Constitutional Standards of Decision*

The connection between the analogical approach and substantive standards of decision is the second important subject of this Article. I later test my proposals by discussion of actual and hypothetical cases, but in this Section, I offer a few general observations.

If applied with the relative generosity I suggest for doubtful cases, the analogical approach will not foreclose careful assessment under the religion clauses of all matters that warrant such assessment. In other words, no artificial restriction of what counts as religious will prematurely foreclose consideration of a legal problem in light of the values derived from the clauses. The potential difficulty with the analogical approach lies elsewhere; designation of something as religious may propel a court to apply a doctrine derived from the religion clauses when the outcome dictated by the doctrine is inapt.

Prevailing establishment doctrine does not raise this potential difficulty. The threefold test (secular purpose, no substantial effect that advances religion, no excessive entanglement), usually applied when activities or organizations receiving some form of aid are identified as religious,[63] is well designed to deal with remoteness, indirectness, and slight effect. Thus, categorization of things as religious does not push courts to invalidate when that would be inappropriate.

By contrast, the compelling interest test gives rise to a problem of fit for free exercise cases, and for establishment cases involving religious classifications. The Supreme Court has sometimes said that to satisfy that test, the government must convincingly establish, with something more than unproven assertions of administrative inconvenience, that restricting the otherwise protected activity is required to satisfy some interest of major importance.[64] On that understanding, the government faces an extremely heavy burden whenever an activity that is forbidden or inhibited is labeled religious. As I illustrate below,[65] courts have been understandably hesitant to impose such a heavy burden on the government whenever a genuinely religious claim appears.

While accommodation of the compelling interest test may be more difficult under a "generous" analogical approach than under most single feature definitions of religion, it is a problem that affects any plausible general approach to the constitutional concept of religion. The basic dilemma may be dealt with in at least four ways. One is to expand radically the class of free exercise claims that will succeed. A second is to restrict sharply those activities that will count as religious,

63. *But see infra* note 150.

64. *See, e.g.*, Shapiro v. Thompson, 394 U.S. 618 (1969).

65. *See, e.g., infra* notes 136-40 and accompanying text.

with courts recognizing as religious *only* those activities as to which the government really should have to meet a very stringent compelling interest test. That approach, as we shall see, would sometimes result in extremely artificial answers to whether the threshold requirement of religion is met. A third possibility is to construe the compelling interest test in a much looser way, as little more than a straightforward balancing test with, as Judge Richard Posner has put it, a thumb on the scales of the claimant.[66] Under this view, the government need only show an interest strong enough to override the particular force of the religious claim presented in a specific case.[67] The analogical approach could coexist comfortably with this watered-down version of the compelling interest test. The fourth possibility is to retain a highly stringent compelling interest test for certain sorts of cases, but to acknowledge that that test is not appropriate every time a genuine religious activity (or classification) is found. This approach would differ from Judge Posner's by retaining the idea that some broad categories of prohibitions and restrictions should be disallowed in the absence of a very strong government interest. This last approach represents my own view of the law's proper clarification and development, and generates my claim that a threshold finding of religion should not automatically determine the operative standard for review.

D. The Analogical Approach and the Courts

A 1979 concurring opinion by Judge Arlin Adams of the Third Circuit is apparently the first explicit judicial reference to "definition by analogy" in religion clause cases.[68] Two years later a unanimous panel in an opinion by Judge Adams adopted that approach to decide a very difficult borderline case.[69] That these cases, which I shall shortly discuss, are the first to talk about an analogical approach does not, however, mean that such an approach lacks prior judicial support. A careful examination of past borderline cases indicates that the courts have been employing an analogical strategy for some time, rarely starting with a settled definition of religion but comparing the debated belief, activity, or organization with what is undeniably religious. Of course, not every use of analogy amounts to the analogical approach as I have described it. Nevertheless, if an opinion either does not refer to essential conditions of religion or makes references that appear only to be hasty and implausible afterthoughts, then analogical comparison is doing the real work of decision.

66. Menora v. Illinois High School Ass'n, 683 F.2d 1030, 1033 (7th Cir. 1982).
67. *Id.*
68. Malnak v. Yogi, 592 F.2d 197, 200, 207 (3d Cir. 1979) (Adams, J., concurring).
69. Africa v. Commonwealth of Pennsylvania, 662 F.2d 1025 (3d Cir. 1981).

Among the earliest opinions grappling seriously with what makes something religious are two cases deciding that the Washington Ethical Society and a California Fellowship of Humanity were entitled to tax exemptions made available to churches. The opinion in the former case was authored by Chief Justice Burger when he sat on the United States Court of Appeals for the District of Columbia.[70] Though the Ethical Society propounded no theist beliefs, the court determined that it was a religious corporation or society within the meaning of the relevant provision of the District of Columbia Code. The court accepted a broad notion of religion and found a strong similarity between traditional religious practices and aims and those of the Society. The Society emphasized spiritual values and guidance and the need for inward peace; held Sunday services with bible readings, sermons, singing and meditation, as well as Sunday school classes; and used "Leaders," trained graduates of established theological institutions who preached and ministered and conducted services for naming, marrying and burying.[71] The opinion did not essay a statement of conditions that were necessary for a religion or church. Indeed, its indication that the broad purposes of the tax exemption statute influenced its classification amounted to an implicit acknowledgement that what might be religious for one legal purpose would not necessarily be religious for another. In terms of the analogical approach, the case confirms this Article's suggestion that the respects of analogy must be sensitive to the particular legal context.

A California court of appeal engaged in a similar process of comparison in concluding that the Fellowship of Humanity was engaged in "religious worship" within the meaning of the California constitutional provision allowing a tax exemption for real property devoted to that purpose.[72] The lengthy opinion raised the possibility that a narrow construction of "religious worship" for purposes of determining tax exemptions might constitute an impermissible discrimination among types of religious belief under the Constitution.[73] The opinion, like Chief Justice Burger's, related its expansive view of religious worship to the reasons underlying the exemption, which included support of institutions that "inculcate principles of sound morality," an aim pursued by the nontheist Fellowship as well as by more traditional religions.[74]

The California court did attempt to state necessary and sufficient

70. Washington Ethical Soc'y v. District of Columbia, 249 F.2d 127 (D.C. Cir. 1957).

71. *Id.* at 128.

72. Fellowship of Humanity v. County of Alameda, 153 Cal. App. 2d 673, 315 P.2d 394 (1957).

73. *Id.* at 691-92, 315 P.2d at 405-06.

74. *Id.* at 697, 315 P.2d at 409.

conditions for an exemption and did so in a way that reveals the quicksand on which such statements are likely to rest. It said that religion includes "(1) a belief, not necessarily referring to supernatural powers; (2) a cult, involving a gregarious association openly expressing the belief; (3) a system of moral practice directly resulting from an adherence to the belief; and (4) an organization within the cult designed to observe the tenets of belief."[75] This specification is both underinclusive and overinclusive. The presence of a system of moral practice in the Fellowship of Humanity was rightly regarded as a strong reason for treating it as religious. However, it seems most unlikely that an exemption would be denied to an unabashedly theistic group whose practices otherwise reflected those of traditional religions but that took no position on moral questions. The court's criteria might well include fraternal orders and professional associations that almost certainly would not be counted as religious.

In *Seeger*[76] and *Welsh*,[77] the Supreme Court stressed the similarity between the beliefs of the claimants and those of traditionally religious persons in relation to the reasons for an exemption from military service. Though these cases may be viewed as resting on a "dictionary approach" to religion that makes "ultimate concern" or "conscientious feeling" the indispensable feature, they may also be understood as employing an analogical approach to a statutory formulation of religion for which ultimate concern or conscientious feeling turns out to be the decisive aspect of analogy.

Diverse kinds of free exercise cases have led courts to compare new doctrines, practices, and organizations with those of acknowledged religions. In *Founding Church of Scientology v. United States*,[78] the Court of Appeals for the District of Columbia had to decide whether the government could proceed against Hubbard "E-meters" on grounds of misleading labeling. Much turned on whether claims about the physical benefits of a process called "auditing," which included use of the "E-meters," were essentially spiritual or nonreligious.[79] The court analyzed the beliefs and organization of the Scientology movement, which postulated no deity. The movement's leader had developed a theory of mind that bore resemblance to the ideas of some eastern religions, and the movement had ministers performing func-

75. *Id.* at 693, 315 P.2d at 406.

76. United States v. Seeger, 380 U.S. 163 (1965). *Seeger* is discussed *supra* in text accompanying notes 24-29 & 32-35.

77. Welsh v. United States, 398 U.S. 333 (1970). *Welsh* is discussed *supra* in text accompanying notes 30-35.

78. 409 F.2d 1146 (D.C. Cir. 1964).

79. *Id.* at 1151.

tions like those of ministers of traditional religions.[80] Without offering an account of the essential conditions of religion, the court concluded that Scientology was a religion and that the process of auditing, which was designed to enable people to work clear of "engrams" that cause mental disorder, was religious. Since the claims made on behalf of auditing and the "E-meters" were essentially spiritual, they could not be challenged on any ordinary theory of false or misleading labeling.[81]

In a series of inconclusive cases on the status of the Church of the New Song, a sect seeking religious rights within prisons, courts have looked at its activities against the backdrop of traditional religious practices. Stating that "a succinct and comprehensive definition of [religion] . . . would appear to be a judicial impossibility,"[82] one court held in favor of the new faith, noting its belief in a supreme force called Eclat, the existence of an Eclatarian bible, and the claimed therapeutic value for participants. Another district court, acting after a remand that did not specify essential conditions of religion,[83] dismissed the group's doctrines as political and nonreligious—doctrines that encouraged a "do-as-you-please" philosophy disruptive of discipline. Moreover, the court found the group's services nothing more than "gripe sessions."[84]

Though many of these cases evidence both the centrality of analogical reasoning in religion clause cases and the intractability of any attempt to state essential conditions of religion, only in Judge Adams' opinions does the analogical approach rise to articulate self-consciousness. The first of these opinions, *Malnak v. Yogi*,[85] concerned one of the most interesting cases involving the borderlines of religion. *Malnak* presented an establishment challenge to a course in Creative Intelligence-Transcendental Meditation offered as an option in the New Jersey schools. Those who taught the course claimed that it was nonreligious. However, both the federal district court and the court of appeals concluded that it was religious, largely because students received individual mantras at a puja where the student heard teachers chant and make offerings to a deified "Guru Dev." In his concurring opinion, Judge Adams explored the problem of defining religion in depth, and concluded that cases like *Seeger*, *Welsh*, *Torcaso*, and *Founding Church of Scientology* established a "new definition" which

80. *Id.* at 1152.

81. *Id.* at 1159-60.

82. Remmers v. Brewer, 361 F. Supp. 537, 540 (S.D. Iowa 1973).

83. Theriault v. Carlson, 495 F.2d 390 (5th Cir. 1974).

84. Theriault v. Silber, 391 F. Supp. 578, 582 (W.D. Tex. 1975), *vacated and remanded*, 547 F.2d 1279 (5th Cir. 1977) (absence of basis for district court's findings of fact).

85. 592 F.2d 197 (3d Cir. 1979).

could be described as one by analogy.[86] In determining what criteria to examine in drawing the analogy, Adams emphasized that religions concern themselves with "fundamental problems of human existence"[87] and lay claim to a "comprehensive 'truth.' "[88] He stated that a third element to be considered was the presence of formal or surface signs similar to those of accepted religions.[89] Adams is quite clear that the criterion of external signs need not be met in every instance of religion, but at points his opinion seems to suggest that the other two criteria are necessary conditions of religion. Yet he subsequently cautions that the three indicia, though helpful, "should not be thought of as a final 'test' for religion."[90] Adams' conclusion that the course was religious was based partly on the association of its teachers with an organization devoted to the Science of Creative Intelligence, which, in its doctrines concerning a pervasive and fundamental life force and in its practices, met his stated criteria.[91]

In *Africa v. Commonwealth of Pennsylvania*,[92] Judge Adams wrote for a unanimous panel, employing the same basic approach to determine whether a state prisoner was entitled to a "religious" diet of raw food based on his membership in MOVE, a " 'revolutionary' organization absolutely opposed to all that is wrong."[93] Though the claim to raw food was related to organizational tenets about peace, nonviolence, purity, and harmony with the natural, the court concluded that MOVE lacked the structural characteristics of religion and that its ideology was not religious, since it failed to satisfy the indicia relating to fundamental questions and comprehensiveness.[94] The opinion bears the signs of some agonizing, for it concedes that whether MOVE deals with ultimate ideas is "not wholly free from doubt"[95] and that the conclusion

86. *Id.* at 207 (Adams, J., concurring). In a case sustaining a claimed exemption from payroll taxes for the Church of Scientology, the opinions of the High Court of Australia discussed the American cases and Judge Adams' *Malnak* opinion at some length. The Church of the New Faith v. Commissioner for Payroll Tax (Oct. 27, 1983) (on file with the *California Law Review*). Justice Murphy wrote that "There is no single acceptable criterion, no essence of religion," *id.* at 27, and the opinion of Justices Wilson and Deane also evidences sympathy with the analogical approach. Justices Mason and Brennan proposed a twofold standard of religion for legal purposes: belief in something supernatural and acceptance of canons of conduct to give effect to that belief. *Id.* at 10. Though the degree of emphasis might vary, the assumption is that any religion must display both characteristics.

87. *Malnak*, 592 F.2d at 208.

88. *Id.* at 209.

89. *Id.*

90. *Id.* at 210.

91. *Id.* at 213-14. The organization possessed only some of the surface aspects of traditional religious groups.

92. 662 F.2d 1025 (3d Cir. 1981).

93. *Id.* at 1026.

94. *Id.* at 1033-36.

95. *Id.* at 1033.

about comprehensiveness "is not unassailable."[96] Furthermore, the court acknowledges that other members of MOVE might be able to establish free exercise rights,[97] and it strongly intimates that prison officials should exercise their discretion to give Africa his diet of raw food.[98] The result in this borderline case is partly the product of Judge Adams' emphasis on fundamental questions and comprehensiveness, elements that seem more important in the setting of a course in transcendental meditation than in this context. For Africa's claim, intense belief in doctrines allowing only raw food appears more significant.

Although Judge Adams' opinions clarify this perspective on religion cases, the analogical approach is not radically new. Far from requiring drastic alteration of what the courts have been doing, it is a method faithful to those efforts.

IV
APPLICATIONS OF THE ANALOGICAL APPROACH

The persuasiveness of an approach to the constitutional concept of religion can be fairly tested only by applying it to a variety of religion clause problems. Testing the versatility of the analogical approach is one purpose of this Part. At the same time, this Part strives to develop with some concreteness the factors courts should emphasize in various contexts when making threshold determinations about religion. This Part also serves as a source for the critique of the alternative approaches presented in Part V.

Applying the analogical approach to particular problems involves three steps. First, one must identify those circumstances in which threshold determinations about religiousness are important. Second, one must demonstrate how those determinations can be made. Finally, those determinations must be tied to substantive standards governing free exercise and establishment claims. Distinguishing the religious from the nonreligious can itself be usefully seen in stages. First, one must determine what is indisputably religious. Second, one must determine the significant respects of analogy for the particular legal context. Finally, one must determine the religiousness of disputed cases by comparison to the indisputably religious in the contextually relevant respects.

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96. *Id.* at 1035.

97. *Id.* at 1036 n.22. Africa represented himself at the crucial hearing about his beliefs, and one has the sense that these beliefs might have looked different if formulated with professional help.

98. *Id.* at 1037.

A. Free Exercise

The free exercise clause, which bars Congress from "prohibiting the free exercise" of religion, has been interpreted to reach impediments as well as outright prohibitions, and executive and state action as well as federal legislation. The Supreme Court has departed from the narrow view reflected in *Reynolds v. United States*[99] that the clause protects only belief and opinion, not practices. Though religious belief and communication remain among the subjects that the clause most clearly safeguards, it also protects, among other things, nonverbal acts of worship, "ordinary" acts, and decisions of religious organizations.

In fact, this Article does not extensively address claims to believe and communicate freely.[100] Any assumption that the broader liberty of conscience derived from the free speech clause will always encompass a valid free exercise claim is definitely mistaken in the area of communication[101] and very likely wrong in the area of belief.[102] Nevertheless, belief and communication cases *rarely* require courts to distinguish the religious from the nonreligious. I therefore concentrate on areas in which that determination most frequently arises.

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99. 98 U.S. 145, 166 (1878). The Court relied on Jefferson's observation that "[man] has no natural right in opposition to his social duties." *Id.* at 164.

100. Worship services, of course, involve communication, but religious communication also includes teaching, proselytizing, and solicitation that can occur outside the context of ordinary worship. Such activities may themselves be viewed as a kind of worship, International Soc'y of Krishna Consciousness, Inc. v. Barber, 650 F.2d 430, 432 (2d Cir. 1981), or as the performance of a specific duty owed to God. In any event, they may constitute an important aspect of the religious life of a group or individual.

101. For example, prisoners have no right to receive most sorts of communications, but they do have a right to receive communications relating to their religious faith. *E.g.*, Remmers v. Brewer, 361 F. Supp. 537 (S.D. Iowa 1973). Other possible distinctions are more debatable, but the infrequent cases involving prosecutions for fraud directed at religious literature, *e.g.*, United States v. Ballard, 322 U.S. 78 (1944); Founding Church of Scientology v. United States, 409 F.2d 1146 (D.C. Cir. 1969), may well extend protection that is more absolute than would be enjoyed by other kinds of literature. Furthermore, while recent Supreme Court jurisprudence inclines in the direction of equating religious solicitation and solicitation that enjoys only free speech protection, *e.g.*, Heffron v. International Soc'y for Krishna Consciousness, Inc., 452 U.S. 640, 644 n.5 (1981); Village of Schaumberg v. Citizens for a Better Env't, 444 U.S. 620 (1980), it is still too early to conclude that religious solicitation never enjoys special immunity.

102. It is rarely necessary to determine the religiousness of beliefs since the government may not *compel* persons to believe anything, and may rarely, if ever, condition benefits on the holding of certain beliefs. However, suppose that a careful sociological study establishes a strong correlation between police personnel who abuse citizens and police personnel who believe that physical power signifies virtue. Assume further that an equally strong correlation exists between abusive personnel and belief that God is vengeful. Can the police department refuse to hire applicants who subscribe to these beliefs? Conceivably the Constitution would permit use of the nonreligious belief but not of the religious one. If so, the religiousness of the belief becomes decisive in this context. *See generally* Hollon v. Pierce, 257 Cal. App. 2d 468, 64 Cal. Rptr. 808 (1967) (dismissal of bus driver upheld on ground that his extraordinary religious views evidenced mental instability).

1. Worship

Free exercise claims to worship can involve a right to hold services or a right to perform acts during worship that are generally forbidden. Since government prohibitions of meetings are unusual, and would usually run afoul of the guarantees of free speech and assembly,[103] the right to hold religious services becomes significant only in controlled environments in which other meetings are not permitted. For example, prisoners need not be allowed to engage in political or social gatherings, but, barring a serious threat to prison security, they must be permitted to engage in corporate religious worship. Thus a determination that a meeting is religious is likely to be critical in this context.[104]

Of more general relevance are claims to engage in acts of worship involving generally proscribed behavior—claims, for example, to use drugs or handle poisonous snakes. I shall concentrate on such claims, since they amply show the difficulties of determining what is religious and of fitting such determinations with the compelling interest test.

a. Religious Claims to Perform Proscribed Acts

i. Threshold inquiry. Claimants seeking free exercise protection for acts of worship need to establish that the acts have religious significance and that religious reasons underlie the wish to engage in them. The familiar use of wine as a part of Christian communion services can illustrate these points. We can imagine, with some flight from realism, that this use has been proscribed as part of a general prohibition on the use of alcohol.[105]

Roman Catholics would obviously have a free exercise claim, since they regard wine as an indispensable substance for a mass in which participants take both the body and blood of Christ. However, the ambit of genuinely religious claims would stretch much further. Suppose that a local Protestant church, in a denomination leaving such decisions to individual churches, has decided by majority vote to use wine rather than grape juice for communion, because wine was drunk

103. In Widmar v. Vincent, 454 U.S. 263 (1981), the Supreme Court held that a state university may not make premises available for other purposes while precluding their use for religious meetings.

104. The determination is also important because prison authorities already permit religious services for members of traditional denominations. This accommodation creates a problem of discrimination among religions if it is not extended to members of new groups.

105. Corporate sacramental use of minimal amounts of wine might not itself be within the boundaries of the secular evil at which the legislature could justifiably aim. However, a legislature fettered only by the minimal "rational basis" test of substantive due process review could reasonably conclude that permitting such religious use might help create desires for improper use, allow diversion of alcohol to such use, or create dangers of intoxication among priests who must consume leftover consecrated wine. Thus, those claiming a constitutional right to use wine for religious purposes could succeed only by employing a free exercise argument.

at the Last Supper and gives a warm feeling that well symbolizes the love of the Holy Spirit. The members' reasons for using wine, though less exigent than those of Roman Catholics, are undoubtedly religious.[106] This religious claim would extend even to individual members who thought grape juice preferable since they would have religious bases for associating in forms of worship with their fellow members.

Religious claims might be made to individual as well as organized corporate use. When priests perform mass by themselves, their acts are sanctioned by a religious organization, but an individual unconnected to any religious denomination might conceivably claim that individual or family use of liquor is an integral aspect of private worship of God. All the claims thus far supposed are clearly religious, and the law's refusal to recognize them as such would be odd.

In borderline cases, the critical inquiries would concern context and purpose. In the typical religious setting, use of wine is an aspect of forms of worship, such as prayer and ritual, and is connected to beliefs about some higher reality. One of these features might be present without the other. An individual might sincerely believe that use of wine is a direct act of worship of a Supreme Being, one that need not be mediated by prayer or ritual. Assuming that he also believes that no substitute for wine is as efficacious, his claim to use wine would be religious. Somewhat more troublesome is an instance in which a group of secular humanists shares a small amount of wine during meetings that closely resemble typical worship services except for the noninvocation of theistic ideas. They believe that wine is symbolic of human brotherhood and the importance of sacrifice, and that, because of psychological associations with the practices of Judaism and Christianity, any other substance will be less effective. Is their argument that wine is an important part of a religious service persuasive?

Distinguishing a religious service from a philosophical or political meeting becomes difficult if no ideas about higher reality are involved. In drawing distinctions, it may matter that a group aspires to an account of human existence that is comprehensive and deals with the most important human questions. These are the factors Judge Adams emphasized in his concurrence in *Malnak v. Yogi*.[107] The closely related aspiration to touch and involve the whole personality of adherents may also be of significance. These aspirations might be present, however, among persons who meet regularly for philosophical discus-

106. If the only reason for continuing to use wine was that it was marginally less expensive than any alternative, the claim to use would not be religious.

107. 592 F.2d 197, 208-09 (3d Cir. 1979) (Adams, J., concurring). *See supra* text accompanying notes 85-91.

sion or who form a Marxist group devoted to revolutionary social change. The forms of the meeting also count. If a meeting involves only rational discourse or urgings to progressive action, it is not a religious service. However, if meditation, singing, rituals of personal renewal, and reading of revered texts are important, a meeting might be religious despite the absence of claims about higher reality. Attention to all these factors might well lead to the conclusion that the secular humanists have a valid religious claim to use wine. On the other hand, claims by separate individuals, and by groups otherwise engaged in straight philosophical discussions, that their use of wine promotes feelings of human brotherhood would be too far removed from the typically religious to be so treated.

Actual claims to use proscribed drugs, such as peyote, LSD, and marijuana for religious worship closely parallel the hypothetical claims about wine. Use in corporate services in which the drug itself is worshiped or in which the drug is used to relate to an independent deity are obviously religious. Individual use for these purposes would also be religious. The borderline between religious and nonreligious use is made particularly complicated here because some people believe that ingestion of drugs actually produces insights into higher reality, the experiences of many drug users closely resembling those of religious mystics. If a person enjoys, even feels uplifted by, mystical experiences, that alone should not establish a religious claim to use a substance that produces such experiences. Some people enjoy and are uplifted by hearing Mozart symphonies, but that does not make the wish to continue to hear them religious. However, if a person believes that drug-induced experiences reveal true and otherwise inaccessible insights about a reality that transcends everyday life, the claim to have such experiences should be considered religious. The approach sketched here would yield a broad catalogue of religious claims to use drugs, many of which could not be confidently discarded as insincere.[108]

A clear implication of the discussion thus far is that a free exercise

108. United States v. Kuch, 288 F. Supp. 439 (D.D.C. 1968), is a rare instance in which to state the supposed tenets of a group is to reveal the substantial insincerity of its members. For example, the "Catechism and Handbook" contained pronouncements of Chief Boo Hoo, and the group's official songs were "Puff, the Magic Dragon" and "Row, Row, Row Your Boat." *Id.* at 444. The opinion affords an interesting example of how, in practice, threads of insincerity and nonreligiousness can run together.

I pass over some complexities about judgments of sincerity. In different litigating contexts they may be made before or after a threshold determination about religiousness, and they may be made by judge or jury. Conceivably the issue for some situations should be not the common one of whether it is more likely than not that claimants are sincere, but rather whether they are patently insincere, a standard that would indulge a heavy presumption in favor of sincerity. A further complicating factor concerns the proper disposition of claims for groups composed of a mixture of sincere and insincere members, with substantial numbers of both kinds.

claimant should not have to show that continuation of a challenged act of worship is central or indispensable to his religious practice in order to have the claim count as religious. Whatever role centrality or indispensability may play in assessing the strength of a free exercise claim, they are inappropriate elements of the threshold inquiry.[109]

For example, the Alaska Supreme Court overturned the conviction of an Athabascan Indian on a religious claim possibly lacking both centrality and indispensability.[110] The defendant was charged with transporting game illegally taken. A moose had been killed for a funeral potlatch, a feast that is part of the tribe's cultural religion and for which native food is required. Moose meat is at the apex of local foods and is used at virtually every funeral potlatch, but the lower courts had determined that moose was not essential. Though doubting this finding, the supreme court rested on its view that "absolute necessity" is too strict a standard, that the rooting of a practice in religious belief is sufficient.

ii. Standards of review. Defense of this broad approach to what counts as religious for claims of worship depends on compatibility with existing, or sensible, standards of review. I have already noted that the major problem in this respect is the dominance of the compelling interest standard.

Corporate religious use of small amounts of wine presents a very slight threat to the government's interest in preventing intoxication. Public use ensures that the amount of wine consumed is consistent and observable. Individuals will not attend services to get an occasional sip of wine, nor will they create bogus religions for that purpose. No government interest in preventing minimal corporate use is strong enough to overcome free exercise claims, whether the claims are made by those

109. Struggling with novel claims by American Indian groups that the flooding or development of sacred land would infringe their free exercise of religion, two federal courts of appeals suggested that free exercise claimants must make a threshold showing of centrality to religion, Sequoyah v. Tennessee Valley Auth., 620 F.2d 1159 (6th Cir. 1980), or of indispensability to religious practice, Wilson v. Block, 708 F.2d 735 (D.C. Cir. 1983). From an analytical point of view, these cases are sharply distinguishable from the ordinary free exercise claim that the government is interfering with *one's own activities* in an impermissible way. In part, the claimants urge that the government is committing a kind of desecration by flooding or developing the lands; but they also urge that practices of worship will be compromised by the unavailability or despoliation of sacred sites. Without deciding that such claims concerning worship can never succeed, the courts have understandably been hesitant to conclude that groups whose worship is focused on particular property that they do not own can prevent development of the property that might impede their worship in some way. *See* Wilson v. Block, 708 F.2d 735 (D.C. Cir. 1983); Badoni v. Higgenson, 638 F.2d 172 (10th Cir. 1980); Sequoyah v. Tennessee Valley Auth., 620 F.2d 1159 (6th Cir. 1980); and cases cited in *Wilson*, 708 F.2d at 742-43 n.4. Some requirement of centrality or indispensability may be appropriate to limit similar situations requiring judicial balancing, but the requirement should be understood as applicable only for claims of harm that are indirect.

110. Frank v. State, 604 P.2d 1068 (Alaska 1979).

who regard wine as indispensable or by those who think only that it is better than possible substitutes.

Individual use of wine outside of organizational constraint creates greater risks of insincerity and overindulgence. Deciding whether an isolated individual has a genuine belief that he needs to use alcohol to worship is difficult, and the amount that he uses is not conveniently subject to effective monitoring. In this context, the stringency of the applicable test makes an important difference. Perhaps serious dangers of fraud and difficulties in administration should be enough to sustain application of the prohibition. Nevertheless, if the government must show both that its interest in proscribing alcohol is very strong and that individual religious use gravely threatens that interest, the individual's claim may succeed.

Religious claims to use psychedelic drugs powerfully exhibit this problem. The reasons why most courts have viewed these claims unsympathetically are not hard to comprehend. Use of psychedelic drugs is not rooted in traditional religious practice. Since the purpose of using drugs in worship is to induce by physical means a radical alteration in perception, that use resembles the typical use at which a prohibition is aimed, and may involve similar danger to health.[111] Perhaps most important, some people have a strong enough desire to use psychedelic drugs for nonreligious reasons that they would join existing religious groups or create purportedly religious groups in order to immunize their use from legal penalty.

In one major case, the basic free exercise claim to use psychedelic drugs has succeeded. The California Supreme Court held in *People v. Woody*[112] that the members of the Native American Church had a constitutional right to use peyote in religious services. The religious claim in *Woody* was especially persuasive because peyote is not as dangerous as some other psychedelic drugs and its use in worship services was absolutely central to members of the Church, who regarded it as a deity. Moreover, the longstanding nature of the religion left no doubt about its genuineness, and the supervised once-a-week use sharply reduced any danger that individuals were employing worship services as a cover for nonreligious use. Finally, the effective limitation of the church membership to American Indians and the church's isolated physical location minimized any threat to effective administration of the general prohibition on use.

111. Fear that persons under the influence of a drug may act irresponsibly, for example, by driving dangerously, may also extend to instances in which a drug is ingested during a religious service.

112. 61 Cal. 2d 716, 394 P.2d 813, 40 Cal. Rptr. 69 (1964); *see also* State v. Whittingham, 19 Ariz. App. 27, 504 P.2d 950 (1973).

Other courts, presented with less appealing claims, have responded less favorably. The leading case is the Fifth Circuit's decision in *Leary v. United States*,[113] in which the court rejected the defendant's argument that his conviction for marijuana violations should be reversed because use of marijuana was called for by his Hindu faith. In assessing Leary's claim, the court noted that marijuana use was not central to Hinduism in the way that peyote use was central to the Native American Church.[114] However, the driving force of the opinion was the court's view that recognition of a religious right to possess and transport marijuana would render prohibitive laws "meaningless, and enforcement impossible."[115] In subsequent cases courts have followed the lead of *Leary*. Sometimes expressing doubts about the genuineness of novel sects whose tenets strikingly resemble those of the Native American Church, most have concluded that no direct free exercise right exists even if the genuineness of the religion is granted.[116]

The unsatisfying character of the *Leary* opinion and its successors reflects the uneasy status of the compelling interest test in free exercise law. If that test applies to each religious claim that is not demonstrably insincere, it will require a serious evaluation of the strength of the government's basic interest. If possible fraud and administrative difficulties are inadequate to support denials of exemptions, many religious claims to use drugs should be successful. Yet, as the courts have realized, substantial success for these claims might well undermine enforcement of the drug laws.

What is needed is frank recognition: first, that serious dangers of fraud and administrative difficulty can be sufficient to defeat a free exercise claim;[117] and, second, that the government should not have to demonstrate an overwhelming interest in suppressing a drug to succeed against a free exercise claim that its interest is not "compelling." However, courts may appropriately conclude that recognition of the religious right will not defeat pursuit of the government's interest. This conclusion implicates the necessity of the existing breadth of the prohi-

113. 383 F.2d 851 (5th Cir. 1967), *rev'd on other grounds*, 395 U.S. 6 (1969).

114. *Id.* at 861.

115. *Id.*

116. *E.g.*, United States v. Middleton, 690 F.2d 820 (11th Cir. 1982); Native American Church v. United States, 468 F. Supp. 1247 (S.D.N.Y. 1979), *aff'd*, 633 F.2d 205 (2d Cir. 1980); Randall v. Wyrick, 441 F. Supp. 312 (W.D. Mo. 1977). Claimants have enjoyed greater success with the argument that if an exemption is given to the Native American Church it must also be given to other groups.

117. As J. Morris Clark has said,

> In a number of areas where religious beliefs overlap with secular self-interest, and where the sincerity of religious belief may be harder to define than the sectarian belief in the sanctity of the Sabbath, the government may invoke both administrative difficulty and the broad possibility of error as legitimate factors militating against an exemption.

Clark, *Guidelines for the Free Exercise Clause*, 83 HARV. L. REV. 327, 335 (1969).

bition. The strength of the government's interest will thus come into play (less directly) when a court judges whether a constitutionally grounded exception to a prohibition would be tolerable. These principles of interpretation can be clarified either by abandonment of the assumption that every genuine religious claim triggers a compelling interest test or by greater candor about the significance of the test and the flexibility with which it is applied.

b. Claims to Hold Religious Meetings

If a group makes a claim to hold religious meetings in a setting in which political and social meetings are barred, a court using the analogical approach must assess how closely the meeting activities and the group's doctrines and organization resemble those of the traditionally religious. Courts have essentially applied this approach in deciding whether to allow members of the Church of the New Song to meet in prison.[118] In this context, the overall nature of the meetings are the most crucial element. For example, if a group of prisoners wants to meet to perform acts that are identical to those performed in traditional worship services, the group's lack of a comprehensive account of the fundamental issues of human life should not defeat its claim. If, however, the activities are themselves more borderline, involving, for example, extensive discussion of political affairs, then the doctrines and organizational character of the group may be determinative. When a group makes extensive claims about higher reality, recognizes the authority of sacred texts, and has officers with ministerial functions, its meetings should be more readily acknowledged as religious.

Once a group meets the relevant threshold standard of sincerity and establishes that its proposed meetings would constitute religious worship, a court should sustain its claim, absent a very powerful showing of harm by the government. Since prison authorities are capable of monitoring the nature of meetings and of assessing their effect on prison discipline, vague worries about fraud and disruption should not be sufficient grounds to bar the meetings. Denying a group any opportunity to gather for religious services is a harsh restraint on free exercise, and use of a stringent compelling interest test is appropriate in this context.

2. Ordinary Acts

People sometimes have strong religious reasons for performing, or refusing to perform, acts which ordinarily have no special religious significance. If government requirements create a direct conflict or severe

118. *See supra* notes 82-84 and accompanying text.

tension with what an individual feels called upon to do by his religion,[119] does he have a free exercise right to be exempted from those requirements? The modern Supreme Court has established that the free exercise clause sometimes requires government to accommodate religious claims regarding ordinary acts.[120] It held in *Sherbert v. Verner*[121] that receipt of unemployment compensation cannot be conditioned on a willingness to work on Saturday, when a refusal to accept Saturday work is a matter of religious conscience. Other cases have followed.[122]

a. Threshold Inquiry

When a person claims that adherence to the state's rule violates religious conscience, the major factor under an analogical approach is the nature of the belief involved.[123] Any belief of the sort, "God does not want me to do this," would qualify as religious, whether or not the individual belongs to a religious organization or holds systematic theological views. Persons who establish a similar connection between a less common belief in higher reality and their disinclination to perform an act also have claims that are religious.[124]

A more troubling question is whether connection to a religious organization should be a basis for qualifying an objection as religious. Usually, a religious objector's church membership is superfluous to the religiousness of his claim (though membership may help establish his sincerity and bear on whether an exemption will be tolerable). But

119. In understanding the kinds of conflicts that may arise, we can draw three distinctions. The government's rule may push someone to perform an act he thinks he should not perform (jury duty) or not to perform an act he thinks he should perform (killing moose out of season for a funeral potlatch). *See supra* note 110 and accompanying text. The rule may directly require behavior believed to be wrong (payment of social security taxes) or create an incentive to engage in such behavior (as the withholding of unemployment compensation from those who refuse to work on Saturday creates an incentive to work on Saturday). The religious claim may be that performing the act is directly forbidden or that its performance interferes with religions activities (a person who does not object in principle to work on the Sabbath may nonetheless object to working when the worship services of his religion occur).

120. For academic commentators opposed to this development, see, e.g., Kurland, *supra* note 3 (no preference for or against religious claims); Weiss, *supra* note 3 (function of Constitution is to exclude calculation of religious values); *see also* Fernandez, *The Free Exercise of Religion*, 36 S. CAL. L. REV. 546, 548 (1963).

121. 374 U.S. 398 (1963).

122. *See, e.g.*, Thomas v. Review Bd., 450 U.S. 707 (1981); Wisconsin v. Yoder, 406 U.S. 205 (1972).

123. In cases in which the claimant's argument is that adherence to the state's rule will prevent him from engaging in religious activity (for example, work on Saturday will preclude his worshipping on Saturday), the status of the activity to be foregone would be crucial. That status would be determined along the lines suggested in respect to religious worship.

124. So long as an objection is genuinely grounded in religious belief, the fact that the claimant also objects for secular reasons would not matter. *See* Callahan v. Woods, 658 F.2d 679 (9th Cir. 1981).

some people who do not believe in any higher reality may have objections to acts that are closely related to their membership in a religious organization, such as the Society of Friends. A position that derives closely from participation in religious activity should count as religious even if the position is otherwise nonreligious.[125]

An even more troubling question concerns moral claims that are neither connected to beliefs about higher reality nor to participation in religious organizations. We can summarily dispose of moral claims of this variety that are not absolute. For example, a utilitarian does not have a religious claim simply because he balances all likely consequences and concludes that a different action is morally preferable to what the government demands. But should moral claims viewed as ultimate or absolute be sufficient to qualify as religious?[126] Since ultimacy and absoluteness typify modern religions, and since most traditional believers regard some actions as absolutely wrong, one employing an analogical approach might conclude that belief in an absolute duty comes close enough to the traditionally religious to be religious. However, the religion clauses were not enacted, and should not be interpreted, to grant special protection to whatever people care most deeply about or regard as absolute duties. On the contrary, the clauses were designed, and should be interpreted, to protect particular kinds of activities and beliefs. Pacifist beliefs as secular as those involved in *Welsh v. United States*[127] should probably not be counted as religious for free exercise purposes.

b. Standards of Review

When the threshold determination of the religiousness of objections to ordinary acts is related to the substantive standards of review, the problem of the compelling interest test emerges again. In this context, a brief litany of what the Supreme Court has actually done demonstrates its own sensitivity to the difficulty. In addition to sustaining religious claims in *Sherbert v. Verner*,[128] the Court declared in

125. When I say "derives closely," I do not mean in just a causal sense. An atheist's conscientious objection is not religious simply because it arose out of prior experience in the Roman Catholic Church. What I have in mind is the situation in which a person's identification of himself or herself as a member of a religious group strongly contributes to his objection: e.g., "I do not believe in God or any other higher reality, but as a Quaker I feel that killing in war is wrong."

126. At this point, I do not examine what it means to say that a claim is absolute or relates to ultimate concern. Those questions are examined in some depth when I show why ultimate concern is not the exclusive standard of religiousness for free exercise purposes. *See infra* Part V. Though that discussion bears significantly on the issue discussed here, it by no means resolves it.

127. 398 U.S. 333 (1970). *See supra* text accompanying notes 30-32.

128. 374 U.S. 398 (1963). *See also* Thomas v. Review Bd., 450 U.S. 707 (1981). The *Thomas* Court held it a violation of the free exercise clause for a state to deny unemployment compensation benefits to a Jehovah's witness who left his employer on religious grounds after being involuntarily transferred to a department engaged directly in the manufacture of weapons.

Wisconsin v. Yoder[129] that Amish parents cannot be required to send their children to accredited schools after the eighth grade. It also strongly hinted in *In re Jenison*[130] that persons for whom jury service offends religious conscience cannot be required to serve. Other courts have looked favorably on free exercise claims not to acquire social security numbers,[131] not to attend public school on religious holidays,[132] not to participate in processing draft registration forms,[133] not to remove yarmulkes while playing basketball,[134] and not to have one's hair cut.[135]

In other major cases, the Supreme Court has denied free exercise claims. In *Braunfeld v. Brown*,[136] it refused to create for Sabbatarians any constitutional exception from the application of Sunday closing laws. In *Gillette v. United States*,[137] it denied that a selective conscientious objector has a right to an exemption from the draft. Most recently, in *United States v. Lee*,[138] it held that an employer must pay social security taxes, even if both he and all his employees object to the social security system and are unlikely ever to make use of it. Although various majority opinions employ the compelling interest language, both *Braunfeld* and *Lee* show that the Court does not really demand a strong showing that the government's aims would be defeated by an exception.[139] The cases in which free exercise claims have been successful are ones in which the dangers of fraud and administrative inconvenience are minimal because self-interest would not be likely to

129. 406 U.S. 205 (1972).

130. 375 U.S. 14 (1963). That hint was picked up by the state court, *In re* Jenison, 267 Minn. 136, 125 N.W.2d 588 (1963).

131. Callahan v. Woods, 658 F.2d 679 (9th Cir. 1981); Stevens v. Berger, 428 F. Supp. 896 (E.D.N.Y. 1977).

132. Church of God v. Amarillo Indep. School Dist., 511 F. Supp. 613 (N.D. Tex. 1981).

133. McGinnis v. United States Postal Serv., 512 F. Supp. 517 (N.D. Cal. 1980). *But see* Rosenthal v. United States Postal Serv., 513 F. Supp. 45 (E.D.N.Y. 1981).

134. Menora v. Illinois High School Ass'n, 683 F.2d 1030 (7th Cir. 1982). In this case, the court rejected claims by Orthodox Jewish basketball players that they could violate the state's rule against headgear by wearing their yarmulkes in the usual manner, attached with a bobby pin. Judge Posner's ingenious opinion suggested that a secure head covering would satisfy both the religious interest and the state's interest in safety. The opinion made clear that the state could not bar players with religious motives from wearing a secure covering.

135. Teterud v. Burns, 522 F.2d 357, 360 (8th Cir. 1975). That case is particularly interesting because the court held that a showing that a practice "is deeply rooted in religious belief" is sufficient to support an Indian prisoner's claim to wear long braided hair; he was not required to prove that wearing such hair was "an absolute tenet of the Indian religion."

136. 366 U.S. 599 (1961).

137. 401 U.S. 437 (1971). The free exercise issue is discussed in Greenawalt, *supra* note 27, at 82-91.

138. 455 U.S. 252 (1982).

139. Concurring in *Lee*, Justice Stevens makes precisely this point, 455 U.S. at 262-63. He frankly adopts a much less generous test for free exercise claims.

lead others to replicate the behavior of the religious claimants.[140] When the government has presented moderately plausible arguments that effective administration of a general rule might be compromised, the Court has acquiesced, even given a fairly powerful religious claim. Thus, the Court's application of "compelling interest" to free exercise cases has often been less than literal. That conclusion suggests that the more flexible approach I urge for worship cases not only has appropriate application to cases involving ordinary acts, but also articulates what the Court has actually been doing.

3. Church Decisions

Religious organizations have a free exercise claim to regulate their affairs without secular interference.[141] Such claims reach property and contract disputes between church factions and between churches and their employees,[142] but I shall focus on the claim of churches to hire and fire personnel without the application of antidiscrimination ordinances.

The free exercise clause most obviously concerns the right of a religious organization to use religious criteria for positions central to its functioning. As to these positions, the clause also covers criteria of gender, race, and sexual orientation if these criteria are prescribed by religious doctrine. To take an obvious example, the state may not force the Roman Catholic Church to ordain and hire women priests. For lesser positions, free exercise interests may also be present. A church regarding homosexual acts as sinful may object on religious grounds to having a known homosexual as its organist.[143] As Douglas Laycock has argued, the claim to noninterference is not eliminated even when a church's policy about discrimination conforms with the state's.[144] Suppose a female applicant charges that a church with an announced pol-

140. This observation is not entirely accurate with respect to keeping children home from school since farmers and some other parents may be guided by economic incentives. No doubt, this worry is one reason why in *Yoder*, the Court placed such great emphasis on the continuity of the Amish religion and the close-knittedness of the Amish culture. Wisconsin v. Yoder, 406 U.S. 205, 216-18 (1972).

141. *See, e.g.*, NLRB v. Catholic Bishop, 440 U.S. 490 (1979); Serbian E. Orthodox Dioccse v. Milivojevich, 426 U.S. 696 (1976); Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church, 393 U.S. 440 (1969); Bagni, *Discrimination in the Name of the Lord: A Critical Examination of Discrimination by Religious Organizations*, 79 COLUM. L. REV. 1514 (1979); Laycock, *supra* note 5; Note, *Judicial Resolution of Intrachurch Disputes*, 83 COLUM. L. REV. 2007 (1983).

142. For a recent canvass of these issues, ushering in the conclusion that secular courts should employ neutral principles of secular law rather than deferring to hierarchical authorities, see Note, *supra* note 141, at 2037-38.

143. *See* Walker v. First Orthodox Presbyterian Church, 22 Fair Empl. Prac. Cas. 762 (BNA) (Cal. Super. Ct. 1980).

144. Laycock, *supra* note 5, at 1398-401.

icy against gender discrimination nevertheless discriminated against her when it hired a male minister. A judicial finding in her favor followed by an order that she be hired would impinge on the church's corporate religious freedom,[145] and even the state's review of a decision made partly on spiritual grounds would constitute significant interference.[146]

a. Threshold Inquiry

An organization claiming a free exercise right to autonomy must show its own religious character[147] and the religious underpinning of its claim to autonomy. The nature of the organization will turn mainly on the kinds of activities it sponsors—for example, ritual, prayer, education—and on the beliefs and aims that underlie those activities. Even if the organization is religious, a claim to autonomy that is remote from religious purposes will not qualify as religious. If, for example, a major denomination objected to state interference with its hiring for its investment office solely because of the resulting expense and inconvenience, its claim to autonomy would not be religious.

b. Standards of Review

Although government should never be able to dictate hiring standards for ministers, as the religious claim weakens[148] the state's interest

145. A damage remedy would avoid posing such a stark conflict of church autonomy and state policy. *See* Note, *supra* note 141, at 2033.

146. The degree of interference would depend on how searching the inquiry was. Suppose the minutes of the church governing board meeting showed an initial decision to hire a male because no female applicant would receive serious consideration due to the sexist views of some wealthy members. Then, establishing the use of gender criteria would not render the court decision a second-guessing on the basis of its own assessment of the applicants' respective credentials. Even in such a case, however, the church might claim a free exercise right of its own membership to be free to depart from stated organizational policy.

147. If one focuses exclusively on the threshold question, it is not clear that the organization should be required to have a religious character. Suppose that all the shareholders of a small business corporation believed that close association with Jews was sinful. They might have a religious claim not to hire Jews. Were such claims actually to win, antidiscrimination laws would be substantially undercut because courts would be hard put to gauge the sincerity of such claims by people in ordinary secular endeavors. Thus, even if the claim is religious for free exercise purposes, it is not one that will be seriously considered by courts.

148. Whether courts should even engage in inquiries about the strength of religious claims is somewhat doubtful after Supreme Court decisions that courts should not be involved in settling factional disputes within denominations if such involvement would require their passing on matters of religious doctrine. *See, e.g.*, Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696 (1976); Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church, 393 U.S. 440 (1969). The powerful reasons against assessing questions of doctrine in such cases have much weaker application in this context. When a free exercise claim is made against state regulation, a court will not usually have to decide which of the two groups claiming to speak for the religion is more faithful to its underlying premises. Rather, it will have to assess a group's uniform representation of the significance of its practices, or the individual's account of its

necessary to override the religious claim should also lessen.[149] A religious school's claim to autonomy in hiring all personnel, including janitors, may be sincerely based on the idea that every employee affects the spiritual environment. But such a claim may also easily serve as a cover for sloppiness or injustice that has no relation to religion. In such circumstances, courts should recognize that some genuinely religious claims can be outweighed by something less than a very powerful state interest.

Identification of an organizational autonomy claim as religious should not automatically trigger a stringent compelling interest test. More delicate balancing of the strength of the religious claim and the state interest is needed.

B. Establishment

In a typical establishment case, a court using the analogical approach will follow the same basic approach as in free exercise cases. It must compare the debatably religious with the indisputably religious in light of the purposes underlying the establishment clause. In establishment cases, the precise relationship between the threshold inquiry and substantive tests of constitutionality varies considerably in its practical significance. Therefore, I have divided the topic along those lines, selecting a few examples of two major types.

On the one hand, the government may directly support a particular activity that is itself religious. Such support is unconstitutional unless it amounts to a permissible accommodation of religious traditions and practices or bears the imprimatur of historical approval.[150] In a direct support case, the answer to the threshold question is likely to

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significance for him or her, against a competing state interest. The court will not need to decide a disputed doctrinal issue, but will only have to evaluate the sincerity of those who make claims about doctrine. Further, part of the underlying rationale for noninvolvement in the factional dispute cases is that religious organizations should be capable of arranging their affairs so that the courts need not be relied upon to settle doctrinal issues. When a state regulation gives rise to a claim of religious liberty, religious groups have no power to avoid the conflict that arises. For both these reasons, the principles governing intrachurch controversies should not be viewed as precluding consideration of the *strength* of a claim of religious liberty in relation to its importance for the individual or group involved.

149. Among the effective discussions of these matters are Bagni, *supra* note 141, and Laycock, *supra* note 5.

150. Two recent Supreme Court cases, Marsh v. Chambers, 103 S. Ct. 3330 (1983), and Lynch v. Donnelly, 104 S. Ct. 1355 (1984), leave the relevant guidelines here very amorphous. In *Marsh*, the Court upheld the practice of publicly paid chaplains offering prayers at the beginning of legislative sessions, an indisputably religious practice. The Court relied heavily on the founders' acceptance of such prayers and also spoke of them as "a tolerable acknowledgment of beliefs widely held . . . ." 103 S. Ct. at 3336. In *Lynch*, the Court sustained a city's display of a crèche along with other Christmas figures and decorations, indicating that the aim to show the historical origins of Christmas was a proper secular purpose. 104 S. Ct. at 1363. Refusing to adopt an "absolutist approach," *id.* at 1361, Chief Justice Burger's opinion also intimates that some government en-

determine the outcome. On the other hand, when the government supports activities of religious organizations that carry important secular benefits apart from their religious significance, such as education and medical care, the classification of the organization receiving aid is not crucial; the important factor is the connection between the aid and the religious tasks of the organization. In some of these cases, as well as others in which the benefit to the organization is not differentiated (for example, tax exemptions), a second issue may be whether the assistance does really amount to support of the religious organization.

1. Direct Support of Things that May Be Religious

a. Meditation in Schools

In *Malnak v. Yogi*,[151] the Third Circuit reviewed the constitutionality of transcendental meditation classes in the New Jersey schools. This direct support case is a recent example in which the threshold classification is largely determinative.

Like the use of psychedelic drugs, meditation can be a religious part of a religious undertaking or it can be purely secular; organizations that promote meditation can also be religious or nonreligious. Considered by many adherents of traditional religions as a form of communication with God and a deep source of insight into ultimate truth, meditation has also been recommended by medical authorities as a straightforward method of dealing with stress.[152] From that vantage point, although an experience of oneness with the universe occurring during meditation might help one cope with life's vicissitudes, it would not represent any transcendent truth. Under the analogical approach, whether meditation in a particular context is religious turns on the manner in which the activity itself is characterized (is it put forward as a method to relax or to attain knowledge of ultimate reality?), on the setting in which it occurs (is it a part of activities of worship?),[153] on the belief structure that underlies its approval,[154] and on the nature of its

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couragement of religious practices may be acceptable if the encouragement does not tend in reality to establish a religious faith. *Id.*

It has long been assumed that some government sponsorship of religion is permissible if free exercise would otherwise be inhibited, a principle that has been thought to justify the provision of army chaplains. *Marsh* and *Lynch* suggest some broader scope for minor accommodations to religious belief and practice; *Marsh* indicates that historical acceptance is of considerable importance, but *Lynch* indicates that a showing of such acceptance is not essential to sustain a government program.

151. 592 F.2d 197 (3d Cir. 1979). *See supra* notes 85-96 and accompanying text.

152. *See generally* H. BENSON, THE RELAXATION RESPONSE (1975).

153. In Malnak v. Yogi, 592 F.2d 197, 198 (3d Cir. 1979), the majority put particular stress on the puja at which individual students received their mantras and heard teachers chant and make offerings to a deified "Guru Dev."

154. Concurring in *Malnak*, Judge Adams placed greater emphasis on the doctrines of the

organizational sponsorship. However secular the presentation of the grounds for meditation may be, if meditation is recommended and supervised by persons who are transparently priests of a well-known religious sect, the activity is bound to have a religious tinge for many of those who participate.

Once it is determined that the meditation taught in schools is "religious," a judgment of unconstitutionality follows easily since the state is barred from direct promotion of religious practices.

b. Government Sponsorship of Ideas

Characterizing the presentation of ideas as religious for establishment purposes is more complicated than characterizing varieties of meditation. The government generally may not sponsor religious ideas,[155] but what constitutes such ideas? In the present stage of understanding, certain ideas, such as God's relationship to humans and the nature of the Trinity, are inherently religious.[156] Someone who makes claims to truth on these questions is making religious claims, whether relying on faith or reason.[157] Some assertions about human reality or ethical principle may be religious or not, depending on the purported source of authority. A claim that humans are selfish may be grounded on empirical observation or biblical authority. The moral injunction that humans should care for each other may be advanced as a secular ethical principle or as God's commandment. The recommendation of an idea on the basis of faith rather than reason may be an aspect that suggests religiousness, though some secular outlooks also approve leaps of faith. Because the presentation of ideas is often colored by the known beliefs and organizational ties of those who present them, such beliefs and ties may also matter. It is doubtful that a public school

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Science of Creative Intelligence, whose adherents taught the courses. *Id.* at 213-14 (Adams, J., concurring). For Adams, the two critical indicia of religious beliefs are comprehensiveness and ultimacy; but presumably an assertion that God wants us to meditate would be religious even if those making it offered no comprehensive account of reality and failed to address many ultimate questions.

155. Lynch v. Donnelly, 104 S. Ct. 1355, 1360 (1984), speaks approvingly of the government's sponsorship of holidays with religious significance. The government's traditional involvement with Thanksgiving may be viewed as promoting the idea that thanks to the deity are appropriate. Paying chaplains to give prayers may also be viewed as a sponsorship of religious ideas. *See* Marsh v. Chambers, 103 S. Ct. 1330 (1983). Such exceptious preclude an unqualified statement that the government may not sponsor religious ideas.

156. We can at least imagine a strictly empirical investigation of God's possible existence and character. Relevant information could be obtained by communication with people who have died and experienced life after death. Such an investigation aud its frnits might not count as religious. The commeut in text assumes that such an enterprise cannot now be carried out in accord with accepted standards of empirical investigation.

157. Of course, neither a historical account of what people have believed about such matters nor a philosophical analysis of varieties of religious belief is itself religious.

could employ a popular local minister to give a course in basic ethical principles, even if the minister says nothing in the course that would be inappropriate for a lay teacher. The doubts are created not by the religious motivation of the minister, but by the audience's difficulty in distinguishing the secular message from the religious spokesman.[158] What matters for establishment purposes is the substance of ideas, the coloring the ideas take from context, and the known characteristics of the speaker. However, a person's own private religious reasons for presenting ideas that on their face are secular should not affect their classification.[159]

Exactly how to draw the line between religious and secular ideas will depend considerably on both development of secular branches of knowledge and discourse and the shared ethical values of a particular society and historical era. The controversy over "Creationism" as an alternative to evolution is illustrative. It may be irrelevant how creationists themselves characterize the bundle of assertions that comprise their beliefs. If a court can discover no scientific evidence in favor of those assertions, it must take Creationism as a religious thesis, not a scientific one.[160] As with meditation, labeling ideas as religious effectively determines the conclusion that they may not receive government sponsorship.[161]

One narrow but perplexing question about ideas remains: are atheism, agnosticism, and other negative views about claims of religious truth themselves religious? If the establishment clause is understood as barring government from sponsoring claims of truth in the domain of religion,[162] then antireligious ideas may be understood as a subset of religious ideas.[163] According to the contrary view, the estab-

158. Two important factors in this example are the youth of the listeners and the face-to-face presentation. A mature audience may more easily separate ideas from the public characteristics of the speaker, and those characteristics intrude much less forcefully in writing.

159. By contrast, in a free exercise context, in which one's conscientious opposition to a practice is critical, a person who employs secular philosophic analysis to conclude that a practice is too immoral has a free exercise claim if he believes that God wants humans to forego practices determined to be immoral by such analysis.

160. *See* McLean v. Arkansas Bd. of Educ., 723 F.2d 45 (8th Cir. 1983). A corollary of the government's inability to sponsor religious ideas is its inability to restrict nonreligious ideas (such as the scientific theory of evolution) on the *ground* that these ideas conflict with religious truth. *See* Epperson v. Arkansas, 393 U.S. 97 (1968).

161. The definition of sponsorship and the limitations on permissible education about religious ideas are complex issues. A history course obviously may include a description of rudimentary doctrines of various religions. At the highest levels of education, state universities may be able to present courses taught by individual teachers who do make claims about religious truth in their classes.

162. Gail Merel argues for this position and cites the considerable Supreme Court dicta in its favor. Merel, *supra* note 5, at 810-11.

163. A different formulation of the same substantive position is that the establishment clause bars support of certain ideas that are not religious, namely those that are antireligious.

lishment clause should be understood to deal only with support of proreligious views. Therefore, public sponsorship of atheism should be treated as raising only free exercise claims in those who profess religion. What matters practically is not so much the relevant clause, but whether government sponsorship of antireligion is any easier to defend constitutionally than government sponsorship of religion. On this point, the answer should be that the two kinds of sponsorship are equally disfavored.

c. Ambiguous Symbols

Sometimes questions about religion involve a symbol or practice that has had religious significance and now has nonreligious significance, such as crèches, Christmas carols, Santa Claus, and Sunday closing. If the government supported a religious organization's sponsorship of such a symbol, its action would be impermissible. The difficult cases are ones in which the government promotes the symbol or practice directly.

These cases illustrate forcefully the relevance for establishment purposes of public perceptions. If everyone has come to regard Santa Claus as a nonreligious symbol, the government's employment of a public Santa Claus or its depictions of Santa Claus in holiday decorations would not be religious. On the other hand, if everyone thought seriously of Santa Claus as a Christian saint and the government's use of the symbol were taken to promote that view, the government's acts would support religion. Last term's Supreme Court decision upholding display of a crèche on public property[164] indicates that when a symbol has both religious and traditional national significance, society's view of the symbol per se matters less than its view of what the government's action signifies about the symbol. As long as the government is not understood to be endorsing the religious aspect, its use of the symbol will be deemed acceptable.[165] The perceptions of those who do not accept the religious view that the symbol represents are as important as those of the people who do accept the religious view. The former need

164. Lynch v. Donnelly, 104 S. Ct. 1355 (1984).

165. The way I have put this point is much more directly reflected in Justice O'Connor's concurring opinion, *id.* at 1366, than in the majority opinion. In the majority opinion, which concentrates on secular purpose, it is not entirely clear whether Justice O'Connor's views about effect are implicitly accepted. Nor is it clear whether sponsorship of the crèche would be permissible even if most people did assume that the city was endorsing its religious significance, on the ground that the degree of endorsement was very slight.

Like the four dissenters in *Lynch*, *id.* at 1370, I find very disturbing the majority's intimations that the permissibility of sponsorship of religious practices and ideas is all a matter of degree. Moreover, I am unpersuaded by Justice O'Connor's conclusion that most people do not perceive an endorsement of Christian ideas when the crèche is accompanied by nonreligious symbols of Christmas.

not tolerate the state's endorsement of symbols they reject, and the latter should not suppose that the government stands behind their position. For this purpose, whether people themselves continue to regard the symbol as religious is less important than whether they understand the government as supporting the religious sense of the symbol.[166]

2. *Benefits for Religious Organizations that May Not Constitute Forbidden Support or Are Directed at Secular Functions*

In most establishment cases, the government engages in an activity that undoubtedly results in some benefit for a religious organization; the crucial question is whether the nature of the government's involvement somehow avoids the establishment taint. If the state grants a property tax exemption for religious organizations or allows a deduction for personal contributions to such organizations, the organizations will benefit financially; but such indirect assistance may be permissible even if direct aid would not.[167] If the state helps finance the medical facilities of a religious hospital, the assistance is regarded as to a secular activity and any benefit to the religious purpose of the hospital is too indirect and remote to violate the establishment clause. In the vast majority of these cases, the religious nature of the organization affected is not in doubt,[168] so the threshold question is not posed. If the threshold question were posed, the organization's character would be determined by its purposes, the underlying beliefs associated with it, the activities it sponsors, and its institutional linkage with religious organizations.

Ordinarily,[169] the critical inquiry in an establishment case is

166. When one talks abont the effects of symbols, one refers to how they are regarded today. However, it does not follow that public perceptions of whether something is religious will always be critical. If an activity, such as purely secular meditation, is nonreligious in light of general concepts of religion, government support would not be rendered an establishment by a popular view that all meditation is religious, if that view were based on false assumptions about what meditation necessarily involves or on some failure to apply the implications of concepts of religion to this phenomenon. Preventing public apprehension that particular religious views are receiving state support is one purpose of the establishment clanse, but mistaken public perceptious about whether something is religions (even could these be ascertained by courts) should not determine the outcome of cases.

167. *See* Walz v. Tax Comm'n, 397 U.S. 664 (1970). In that case, the Court emphasized both the historical tradition of tax exemptions and the possibility that taxation of religious bodies would cause more entanglement in religious affairs. The breadth of the favored organizations or activities will often be an important element when benefits derive from favored tax status. If churches are only part of a much larger class that benefits, establishment difficulties will be less severe. When the Supreme Court sustained tax deductions for school tuition, Mueller v. Allen, 103 S. Ct. 3062 (1983), the four dissenters objected that the benefits went overwhelmingly to parents sending their children to parochial schools. *Id.* at 3071.

168. Under some statntory formulas, an organization has to qnalify as religious if it or its contributors are to receive the tax benefit. *See, e.g.*, CAL. CONST. art. XIII, §§ 3, 5; CAL. REV. & TAX. CODE § 206 (West Supp. 1984) (granting property tax exemptions on land, buildings, and equipment used exclusively for religious worship).

169. This qualifying word is required given the Court's recent announcement that the three-

whether the benefits that flow to the religious organization from the government have a religious purpose, have a substantial religious effect, or unduly entangle government and church. If any one of these criteria is met, support is impermissible. These standards are well designed to deal with remoteness and indirectness, though how precisely the line should be drawn between permissible and impermissible support is an issue on which the Supreme Court has been sharply divided, especially in school cases.[170]

What is particularly relevant for this Article is the way in which the purpose and effect strands of the threefold test themselves require determinations of what counts as religious. Sometimes, as in the meditation case,[171] whether an activity is religious or not will determine whether the primary effect of sponsoring the activity is religious. Sometimes, as in a world history course taught from a particular religious perspective, secular and religious elements will combine. The Court has said that a substantial religious effect may constitute an establishment even though it is accompanied by an equally strong secular effect.[172] In either event, whether an "effect" is religious is largely determined by that which constitutes religious belief, activity, or organization.

The same point applies to religious purpose: a purpose is religious if the government's aim is to promote or support beliefs, activities, or organizations that are religious.[173] Thus, an unambiguous legislative aim to encourage prayer by school children would be a religious purpose that would render an otherwise nonreligious prescribed moment of silence a forbidden establishment.

Government programs that are designed to accommodate the needs of religious believers present a particular problem of linguistic classification of purposes and effects. Our prior discussion of such diverse subjects as military chaplains and exceptions to jury duty shows

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fold "test" is an inquiry that will often be of use. Lynch v. Donnelly, 104 S. Ct. 1355, 1362 (1984). By negative implication there may be situations where it is inappropriate.

170. *See, e.g.*, Mueller v. Allen, 103 S. Ct. 3062 (1983); Committee for Pub. Educ. v. Regan, 444 U.S. 646 (1980).

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

172. Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 783 n.39 (1973). In certain situations, the primary effect test might lead courts to give weight to the most frequent manifestations of an activity. For example, a moment of silence is not intrinsically religious. It may be employed for collecting one's thoughts or organizing the day's activities as well as for praying. It may be frittered away in daydreams or worry. *See* Gaines v. Anderson, 421 F. Supp. 337 (D. Mass. 1976). If a public school introduced a moment of silence, and a showing could be made that 95% of the students used the moment for prayer, perhaps a primary effect would be to advance religion.

173. Problems of purpose can also arise in free exercise cases if the proscribed purpose is to inhibit religious activities and organizations. Again, a finding of religious purpose is parasitic on those factors that constitute religious beliefs, activities, or organizations.

that such accommodations are sometimes constitutionally appropriate. The Supreme Court has occasionally spoken as if a purpose to accommodate is one kind of legitimate secular purpose.[174] However, to call the purpose "secular" is to obscure the reality that the purpose to accommodate religion is often not very different from the purpose to promote religion,[175] a purpose that would render many other programs unconstitutional. The difference here is not so much the nature of the purpose, but the manner or degree in which the religion benefits and other nonreligious interests are affected.[176] The Court might do better to say explicitly that the question whether accommodation is permissible is distinguishable from the question whether purpose and effect are to be considered "religious."

C. Religious Classifications

Some government programs affecting religion explicitly or implicitly draw distinctions between religious beliefs or groups. Those disfavored by a classification may claim that their own free exercise is impeded and that the favored groups are being impermissibly established. Thus, if a state explicitly permits only members of the Native American Church to use peyote during worship, members of other churches sharing similar beliefs about peyote can claim a denial of free exercise and establishment rights (even if they concede that the government could bar all use of peyote if it chose to do so). Overarching the tests of the religion clauses is the equal protection principle that suspect classifications, including religious classifications, are sustainable only when necessary to achieve a compelling state interest.

Two critical issues must be examined. First, one must determine which classifications are religious. Second, one must determine whether religious classifications are necessarily suspect.

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174. *See, e.g.*, Gillette v. United States, 401 U.S. 437, 452 (1971), commented on in Greenawalt, *supra* note 27, at 80-81.

175. One might distinguish a permissible purpose to avoid hindering religion from an impermissible purpose to promote it. Although such a distinction might well illuminate certain situations, for others it would be little more than a conclusory label to be applied once a court decided whether the particular form of assistance was acceptable. *See infra* note 176.

176. In Badoni v. Higginson, 638 F.2d 172 (10th Cir. 1980), *cert. denied*, 452 U.S. 954 (1981), Navajo Indians sought restrictions on tourists at Lake Powell on the ground that disrespectful actions of tourists interfered with religious worship. *Id.* at 176. The court said that to forbid access to tourists would violate the establishment clause. *Id.* at 179. Yet, one should suppose that if the government denied tourists access for only an hour each week to a small open area where Indians held corporate worship services, the restriction would be a permissible accommodation. The crucial distinction would not lie in the purposes that underlie the broad and narrow restrictions.

1. The Threshold Inquiry About Classifications

A classification is obviously religious if it directly distinguishes between religious organizations or between individuals on the basis of religious belief, activity, or organizational membership. Identifying what is religious for these purposes involves the same sort of analogical inquiry suggested for standard free exercise and establishment claims. However, two special problems deserve notice here, and their resolutions require reference to the underlying objectives of the religion clauses.

Some government programs explicitly or implicitly distinguish religion from nonreligion. Are those classifications religious within the sense of the clauses? The answer to this question depends on the nature of the classification involved. If the public schools teach ethical principles in a nonreligious way, they distinguish in a sense between religious and nonreligious ethics. However, since this distinction is a necessary result of the state's effort to avoid promoting religious ideas, such an implicit "classification" should not be considered religious.

Different issues arise if the state distinguishes between religious and nonreligious reasons for performing, or refusing to perform, the same act. An exemption from military service given only to religious conscientious objectors would be an example.[177] Since granting favoritism to those with religious claims over those with nonreligious claims does tend to promote religious belief and membership, a result in tension with the establishment clause, such classifications should be regarded as religious.[178]

A second troubling question about categorization concerns classifications made in terms of ethical doctrines (or other matters) significantly correlated with varying religious perspectives and organizations. Congress' grant of an exemption to pacifists, but not to selective objectors, is illustrative. If the distinction lacks a plausible secular basis, substantially promotes membership in particular religious groups, or reflects a legislative purpose to favor particular groups, the correlation should be viewed as making the classification religious;[179] otherwise it should not. Substantial secular reasons do support limiting an exemp-

177. In Welsh v. United States, 398 U.S. 333 (1970), the plurality opinion construed the statutory definition of religion broadly enough to include all true conscientious objectors. Both Justice Harlan's concurring opinion and Justice White's dissenting opinion treated the statutory exemption as limited to objectors who are religious in a narrower sense. Justice White believed that the resulting classification was constitutional, *id.* at 369, and Justice Harlan concluded it was unconstitutional, *id.* at 357-58.

178. *But see* Merel, *supra* note 5, at 812-15 (arguing that the religion clauses concern only differences between religions and between religion and antireligion).

179. Here, inquiries about religious purpose and effect would determine the labeling of the classification.

tion to pacifists, and given its availability to pacifists who belong to nonpacifist churches or no church, the exemption probably has exerted no powerful push toward membership in pacifist sects.[180] Thus, the Supreme Court correctly declined to treat the distinction between pacifists and selective objectors as a religious classification in *Gillette v. United States.*[181]

2. *Standards of Review*

Religion may be regarded as the original suspect classification. Even now, parceling out benefits and burdens on the basis of religious membership or belief would be as presumptively unconstitutional as the use of racial criteria.[182] Yet the government's power to accommodate free exercise complicates matters and cautions against any quick assumption that every religious classification is subject to a stringent compelling interest test.

The point is clearest when the government is constitutionally required to accommodate a religious claim. Let us suppose that the Native American Church has a constitutional right to use peyote, as found in *People v. Woody*,[183] and that a new church using peyote in a more incidental way lacks such a right. A statutory exemption that includes the Native American Church and excludes the new church is undoubtedly religious, but since it meets a constitutional obligation to accommodate, the classification should not automatically be considered suspect. The lack of a constitutional right of the new church reflects the existence of substantial secular reasons for denying it an exemption. These same reasons should suffice to sustain the classification that favors the Native American Church, though the acceptability of limiting an exemption to a single named church is more doubtful.[184]

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180. A confident judgment on this score would have to include an assessment of how registrants suppose their chances of gaining an exemption are affected by such membership.

181. 401 U.S. 437, 450-51 (1971). Both the reasons for limiting the exemption to pacifists and the constitutional issue are discussed in Greenawalt, *supra* note 27, at 47-67, 72-75. The World War I exemption, limited to members of pacifist churches, was undoubtedly a religious classification. Act of May 18, 1917, ch. 15, § 4, 40 Stat. 78, 78-79 (1917).

182. A state ageucy could not, for example, interview only Protestants for a job on the assumption that Protestants geuerally work harder than Catholics.

183. 61 Cal. 2d 716, 394 P.2d 813, 40 Cal. Rptr. 69 (1964) (discussed *supra* in note 112 and accompanying text).

184. Favoritism for particular named denominations is troublesome, but when the longevity of a church and its use of drugs are highly important factors that minimize the chances of fraud, a legislature aware of all relevant groups may be able to say that particular named groups are the only oues who will receive an exemption. *Cf.* City of New Orleans v. Duke, 427 U.S. 297 (1976). State and federal rules exempting the Native American Church from restrictions on peyote use are so cast. *See, e.g.*, Kennedy v. Bureau of Narcotics and Dangerous Drugs, 459 F.2d 415 (9th Cir. 1972) (indicating exemption unconstitutional but refusing to add one more church to the exemption); Native Am. Church v. United States, 468 F. Supp. 1247 (S.D.N.Y. 1979) (interpreting statute to allow exemption for similar groups), *aff'd*, 633 F.2d 205 (2d Cir. 1980); *cf.* Dalli v. Board of

The treatment of "accommodating" classifications becomes more troublesome if a legislative body chooses to afford an exemption to persons who lack a free exercise entitlement to it. Given the Supreme Court's consistent view that exemptions from military service are not constitutionally required, Congress' attempt to exempt religious conscientious objectors who believe in a Supreme Being might be regarded as such an accommodation.[185] Federal exemptions for the Native American Church might be similarly understood, if the holding of *Woody* is regarded as wrong. Since all members of the Court in *Braunfeld v. Brown*[186] assumed that state legislatures could exempt Sabbatarians from Sunday closing laws, the premise that legislatures have some room to accommodate religious exercise even when they are not required to do so is solidly established. But that premise does not by itself establish that a religious classification resulting from permissible accommodation is also acceptable.

If nonfavored religious groups have a claim to relief as strong as the favored ones, and if they present no greater dangers of fraud, the differentiation would be impermissible. The hard question is how strong should the government's argument that the disfavored groups are relevantly different have to be for the classification to be sustained. Requiring that government establish *necessity* to serve a very powerful interest may be asking too much since showing that some further extension of an exemption will have dire consequences will always be difficult.[187] Yet requiring only a rational basis would be asking too little because the government should not be able to distinguish between religious beliefs or organizations whenever it has some barely plausible basis for doing so. Perhaps the court should ask whether strong reasons support limitation of the exemption. Applying such a test, a court might properly conclude that an exemption for pacifists could not be limited to those who believe in a Supreme Being. It would almost certainly conclude that a privilege to use peyote could be limited to corporate worship in organized churches[188] and it might conclude that a limitation to long-established churches was also warranted.

A similar test requiring strong reasons in favor of a limitation is also appropriate when the interest of accommodation has led to favoring those with religious reasons for performing an act over those with-

Educ., 358 Mass. 753, 267 N.E.2d 219 (1971) (exemption from vaccination cannot be limited to adherents of recognized denominations).

185. *See* Welsh v. United States, 398 U.S. 333, 369-72 (1970) (White, J., dissenting).

186. 366 U.S. 599 (1961).

187. *See* Greenawalt, *supra* note 27, at 79-80.

188. *Cf.* Wisconsin v. Yoder, 406 U.S. 205, 215-16 (1972) (strongly implying that a privilege to keep children home from school need not be afforded to parents with personal idiosyncratic religious views).

out religious reasons. That is, once a legislature has chosen to accommodate those with religious claims to do something, a court should extend the privilege to those with otherwise similar but nonreligious claims to do the same thing, barring strong reasons against the extension.[189]

D. Applications of the Analogical Approach and the Criteria of a Sound Approach to the Concept of Religion

Having surveyed how the analogical approach might work in a variety of contexts, we can now see how well it satisfies the criteria of a sound approach proposed early in this Article.

The analogical approach is capable of being employed in every constitutional case in which a threshold question about religion must be answered. At least as developed here, it ties closely to ordinary ideas about what makes something religious. It involves a unitary method for determining what is religious, though it does not dictate that the factors that count as religious for one constitutional issue will necessarily count as religious for every other.

The analogical approach is compatible with what the Supreme Court has said in modern times about the concept of religion, and with what it has actually decided in applying the religion clauses. A tension does exist between what the Court has occasionally said about the compelling interest test and the relatively generous approach to religion that I have suggested. However, this tension can be resolved by discarding simplistic notions about the significance of the compelling interest standard and the occasions of its application.

The analogical approach can lead to sound results. One must quickly acknowledge that the approach as an abstract statement is highly open ended. But, when it is described in relation to the aims of particular constitutional inquiries, it has greater directive force. Even when its use leads to disagreement over whether something is religious, the disagreement will be focused on the appropriate question: how particular underlying constitutional purposes relate to the debatable instances. As long as substantive standards of review retain appropriate flexibility, answers to the threshold questions about religion will not force the courts to inappropriate results; and this observation will hold even for substantive standards quite different from those the courts presently use.

The analogical approach fits well with inquiries into sincerity. When an individualized determination of sincerity is called for, the an-

189. Welsh v. United States, 398 U.S. 333 (1970), would have been a case of this kind if the statute had been interpreted in the manner Justice Harlan and the dissenters agreed upon. *See supra* note 177.

alogical approach is applied to the set of beliefs. When dangers of fraud and insincerity cannot adequately be met by individual determinations, the analogical approach, in conjunction with sound substantive standards, permits rejection of some claims that are classed as religious.

V
THE INAPPROPRIATENESS OF PROPOSED ALTERNATIVES TO THE ANALOGICAL APPROACH

This Part on proposed alternatives is divided into three sections. I first treat single-factor approaches, versions of what I have called dictionary approaches to the task of categorization. I then turn to suggestions that the courts can largely avoid defining religion. Finally, I discuss the suggestion that whatever method courts use to decide what is religious, the category of the religious should be radically different for free exercise purposes than it is for establishment purposes. For each discussion, the previous section is important background, for the same variety of cases against which the analogical approach was tested evidences the serious shortcomings of the alternatives.

A. Single-Factor Approaches

Although what I have called a dictionary approach could involve any number of essential conditions, prominent attempts to define law for constitutional purposes have focused on a single feature, and I concentrate here on such attempts. The criticisms I offer also apply, with minor adjustments, to attempts to conjoin two or more essential conditions; but I do not carry out that exercise in this Article.

I first discuss briefly the traditional notion that belief in a Supreme Being is the key to religion, and two approaches that do not depart too radically from that perspective. I then devote more space to the idea that religion should be defined in terms of ultimate concern, an approach whose grave flaws are less obvious and less discussed.

1. "Supreme Being," Extratemporal Consequences, and Higher Reality

The main objection to a Supreme Being definition of religion is that it restrains the legal concept of religion in a highly artificial manner, given modern varieties of religion. Interpreting the free exercise clause to protect worship only for believers in a single Lord of the universe construes the clause in a way strongly partial to traditional western religions. Whatever "framers' intent"[190] or "line-drawing"

190. In fact, given the framers' familiarity with Greek and Roman religious ideas, the argu-

arguments might be advanced in favor of a Supreme Being approach, the Supreme Court clearly has rejected that course. For example, in *Torcaso v. Watkins*,[191] the Court held that a required oath of belief in God impermissibly discriminates against other religious views; in *United States v. Seeger*[192] the Court refused to effectuate Congress' effort to require belief in a Supreme Being as a condition for an exemption from military service.

In an interesting recent article that provides reasoned support for a different boundary that also favors traditional Western forms of religion, Jesse Choper has urged that an appropriate constitutional test of a religious claim is belief in extratemporal consequences.[193] Dean Choper defends this limited conception of religion on the ground that people have distinctively strong feelings about performing acts when they believe extratemporal consequences are involved: "[I]ntuition and experience affirm 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 only violated a moral scruple."[194] As this passage reflects, Choper apparently means that a free exercise claimant would have to believe that extratemporal consequences would flow from his performing or failing to perform the particular act in question.

The use of wine for communion and the Alaskan case in which moose meat was used for a funeral potlatch[195] show that Choper's approach is inapt for straightforward matters of worship. A sincere claim, based on religious perspectives, to engage in some practice of worship should count as religious even if the claimant does not believe that damnation or some like consequence will result from abandoning the practice.

The apparent clarity and simplicity of Choper's standard quickly evaporates and its deeper difficulties emerge if one briefly surveys the variety of beliefs that practicing Christians have about extratemporal consequences. Many persons believe that God forgives the sins of the contrite, thus removing potential extratemporal consequences for those who repent. Many persons suppose that sins bring definite negative

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ment that reliance on their intent would lead to a Supreme Being concept of religion is highly implausible.

191. 367 U.S. 488, 495 (1961).

192. 380 U.S. 163, 165-66 (1965).

193. Choper, *supra* note 11. In standard establishment cases, Choper's approach might in theory disfavor familiar religions, making it more difficult to aid them than other religions. However, traditional believers might well be able to contest aid to other religions on free exercise and classification grounds.

194. *Id.* at 598.

195. Frank v. State, 604 P.2d 1068 (Alaska 1979). *Frank* is discussed *supra* in text accompanying note 110.

consequences in this life or a next existence, such as purgatory, but that these consequences need not be eternal. Other persons who believe in extratemporal consequences may not suppose that they relate to particular sins. A strict Calvinist, for example, might think that election to heaven is determined on some basis beyond human comprehension.[196] Some persons believe in divine love and an afterlife, but not in extratemporal divine punishment. Others confess uncertainty about exactly what will happen after death, while retaining faith in the continuing power of God's love. Many Christians are deeply unsure about the precise relation of sins in this life to the nature of existence in a possible afterlife. When 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.

Neither a narrow nor a broad construction of Choper's position provides a viable approach to a free exercise definition of religion. Under a narrow construction, courts would demand that the claimant believe in a tight connection between performance or nonperformance of an act and severe extratemporal consequences. Such an approach would require searching scrutiny of the claimant's specific beliefs about life after death, and issues of sincerity would be highly complicated by the uncertainty many people feel about the precise nature of extratemporal consequences. More important, this narrow construction would yield much too truncated a range of protection for religious practices. Under a broad construction, virtually any belief in extratemporal consequences would suffice, whatever the nature of the consequences and however loosely they are connected in the claimant's mind to the particular act at issue. So extended, the definition of religion would cover many claims that lack the underlying rationale of special psychological pain that supports Choper's basic proposal. However it is construed, Choper's position yields unsound results for many free exercise cases.

The inaptness of his test for establishment purposes is even more obvious. States cannot teach in public schools the truth of religions that do not refer to extratemporal consequences, nor may they financially support activities of prayer and worship by persons who do not believe in life after death.[197]

196. A person of this view who also believes, as many Calvinists have, that a good life is evidence of election, might be particularly pained by commission of a grave wrong because it would constitute evidence of his or her nonelection.

197. Only Choper's very broad reading of the free speech clause, *see* Choper, *supra* note 11, at 610-12, allows him to salvage his definition for establishment problems.

By far the most plausible single-factor approach to religion is one that is based on "higher reality" in some broad sense. Under this approach, the essential feature of religion is 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. The somewhat awkward phrase "higher reality" is meant to include not only belief in a "transcendent" reality, but also the belief that all truth is to be found within oneself once layers of illusion are peeled away. As used here, the phrase embraces nontheistic perspectives that claim the apparent world is unreal and true meaning is "immanent" rather than transcendent. Not every view is easily classifiable as one that does or does not invoke higher reality, since the edges of natural and social science, and of rational philosophy, are hardly sharp. Perspectives that make claims to scientific demonstrability but are viewed by outsiders as essentially nonscientific or spiritual—for example, scientology—are particularly troublesome. Nevertheless, the main outlines of this approach are relatively clear, and the vast majority of groups, practices, and beliefs now thought of as religious are treated as such.

However, this approach has two serious drawbacks. It treats as nonreligious the activities of groups, such as Ethical Culture, that engage in practices closely resembling the worship services of the traditional religions but that do not assert a realm of meaning inaccessible to ordinary observation.[198] Cases allowing such groups the tax exemptions accorded to churches or religious societies[199] support the assumption in this Article that such groups do enjoy protection under the free exercise clause, and may be religious for establishment purposes. Consider a particularly striking, if fantastic, illustration of this point. Suppose a particular group rejects all belief in higher reality, but regards powerful natural phenomena, like the sun and sea, as fitting objects of worship. One would not conclude that the government could provide direct financial assistance for these worship activities or adopt them for public schools.

The second drawback of the higher reality standard is its vagueness. Taken as the exclusive touchstone of religion, the higher reality approach is too open ended. It would almost certainly provide less guidance for courts assessing various views and the activities that accompany them than an approach that also allows references to how those activities compare to typically religious activities.[200] Nonetheless,

198. Addressing the beliefs of the philosopher R.M. Hare, Freeman, *supra* note 2, at 1556-57, discusses whether someone who accepts many principles and practices of the Christian religion but does not believe in higher reality has a belief system that is religious.

199. *E.g.*, Washington Ethical Soc'y v. District of Columbia, 249 F.2d 127 (D.C. Cir. 1957).

200. This particular criticism could be deflected by a position that takes "higher reality" as an

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, and is perhaps the only plausible competitor to the analogical approach I have outlined.

2. *Ultimate Concern*

The idea that the central feature of a religious claim is "ultimate concern" gained currency after *Seeger*. In *Seeger*, the Supreme Court drew from the theological writings of Paul Tillich the suggestion that the ultimate concern of an individual is his God.[201] Thus, the Court held that a conscientious objector qualified for an exemption under the statute if his beliefs "occupy the same place in the life of the objector as an orthodox belief in God holds in the life of one clearly qualified for the exemption."[202] This exercise in statutory interpretation was expanded in *Welsh*[203] to cover avowedly nonreligious persons, permitting objectors with unorthodox views to be treated like traditional believers. This result appealed to many persons of liberal sentiment, but the ultimate concern approach also appeared to possess other virtues. As a standard of religion, it promised to extricate the courts from doctrinal inquiries and to prevent parochially narrow constructions of the nature of religion. Discussed at length by academic commentators,[204] "ultimate concern" received systematic endorsement as *the* free exercise standard of religion in a 1978 Harvard student Note.[205] Since the author displays deep sophistication about the nature and variety of religious belief, and mounts powerful arguments for a criterion of ultimate concern, criticisms of his account serve to establish the grave objections to the ultimate concern standard.[206]

Ultimate concern is fundamentally flawed as a single criterion for religiousness. In part, the approach is marred by the difficulty in rendering any account of ultimate concern that both retains its attractive features and achieves an acceptable degree of coherence for a legal

indispensable feature of religion but also requires further features to be preseut. On this view, part of the inquiry about religion would involve a search for a necessary condition (higher reality); the rest of the inquiry might involve an analogical approach to determine the sufficiency of all the features in combinatiou.

201. United States v. Seeger, 380 U.S. 163, 187 (1965).

202. *Id.* at 184.

203. Welsh v. United States, 398 U.S. 333 (1970).

204. *See, e.g.*, Mansfield, *Conscientious Objection—1964 Term*, 1965 RELIGION & PUB. ORD. 3.

205. Note, *supra* note 44. For a case that invokes the ideas of the Note, see International Soc'y of Krishna Consciousness, Inc. v. Barber, 650 F.2d 430 (2d Cir. 1981). *See also* Boyan, *Defining Religion in Operational and Institutional Terms*, 116 U. PA. L. REV. 479 (1968).

206. Freeman, *supra* note 2, at 1534-41, also has an extended criticism of an "ultimate concern" standard focused on this Note. Some of the grounds of his criticisms are close to ones offered here.

standard. In part, the approach is flawed because some claims that do not directly implicate ultimate concerns plainly should count as religious.

As a proposed standard for legal categorization, ultimate concern retains deep ambiguity and vagueness. Plainly, it involves the relevance of something for one's life, not just the grandness of the questions answered by a system of belief.[207] Beyond this solid ground, we reach the ambiguities, which can best be introduced by a series of questions: Does everyone have an ultimate concern? Does anyone have more than one? Is a person's ultimate concern determined by his cognitive beliefs or his psychological attitudes? How does ultimate concern relate to absolute moral prohibitions? To one's deepest desires? For a claim to qualify as based on ultimate concern, what must be the connection between the act involved and that which constitutes the ultimate concern?

One virtue of the Harvard Note is that it does, at least implicitly, provide an answer to each of these questions. But the combination of answers is implausible in the extreme, if not intellectually incoherent. The answers to be found in the Note are: everyone has a single ultimate concern; this concern is what he psychologically cares about most and can be identified with his notions of absolute right and wrong; a legal claim is grounded in ultimate concern if it directly involves what the individual feels he absolutely must or must not do.[208]

The Note's choice of a psychological approach to ultimate concern is understandable. We are all familiar, by introspection or acquaintance, with an honest intellectual belief that some things should matter more than they actually do in the way we feel and behave. A woman believes that salvation is the most important aspiration of any human and she believes that her remarriage will forfeit her hope of salvation, yet she remarries. At an intellectual level, one can say that she regards salvation as more important than the benefits of remarriage, but at a psychological level her priorities are reversed.[209] The *Seeger* opinion left unclear whether the "parallel place" that a belief had to occupy was to be judged by intellectual or psychological criteria.[210] However,

207. Belief that a Supreme Being created the universe would not relate to one's ultimate concern unless that belief had some bearing on what mattered for one's own existence.

208. *See* Note, *supra* note 44, at 1075-76.

209. Strictly speaking, perhaps the fact of remarriage only proves that at a behavioral level the desire to remarry takes priority. When one perceives oneself as yielding to temptation one may *feel* one is pursuing something of less importance than what one is sacrificing. The text assumes that the woman does not take this attitude about remarriage, but feels that its benefits are more important than the remote prospect of damnation.

210. John Mansfield has provided a careful discussion of the kind of intellectual appraisal that might be made. *See* Mansfield, *supra* note 204, at 10. Freeman, *supra* note 2, at 1546-48, interprets and discusses Mansfield's views.

the plurality opinion in *Welsh* adopted the psychological approach.[211] Such an approach concentrates on what individuals really care about; it permits successful claims by those who have strong feelings of conscience without a settled pattern of belief; and it relieves the courts from outside examinations of an individual's system of beliefs.[212]

The Note's conclusion that each individual has one and only one ultimate concern is unsupported by argument. Many people care a great deal about a number of things—their own happiness, the welfare of their family, their country, perhaps their religion—without any clear ordering among these and without any single ordering principle for clashes between them. (Most people with traditional religious beliefs accept intellectually that religious concerns are ultimate, but their feelings and behavior are not always in accord with that premise.) Either such people do not have any ultimate concerns or their ultimate concerns have to be understood as amalgams of both the various things about which they care deeply and the ad hoc resolutions they make among them.

The latter possibility would gravely complicate the idea of ultimate concern. The Note plainly rejects the idea that such an amalgam of different values could constitute an ultimate concern, since a "goal the individual elects to compromise cannot be called ultimate."[213] How then do we classify those people whose scale of values is precisely of this sort? While the author speaks of a person who might "try to define his ultimate concern" in this multivalue manner,[214] the prevailing, undefended assumption is that no one could *accurately* describe his values in this way. That assumption blinks reality, leaving us with the uneasy conclusion that either all those people lacking a single ultimate concern have no free exercise rights, or the ultimate concern standard is infinitely more complex than it first appears.

The Note's assumption of a basic identity between what people care most about and what they take as absolute mandates of conscience is also unjustified. The author accepts Tillich's statement that an ultimate concern happens "in the center of the person's life."[215] The lives of people addicted to hard 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. On the other hand, some people believe

211. Welsh v. United States, 398 U.S. 333, 339-40 (1970).

212. Of course, insofar as inquiries about patterns of belief are guides to whether individuals' claims of conscience are sincere and strongly held, courts do not avoid such inquiries altogether under a psychological approach.

213. Note, *supra* note 44, at 1076 n.110.

214. *Id.*

215. *Id.* (quoting P. TILLICH, DYNAMICS OF FAITH 4 (1958)).

they have absolute duties, derived from scripture or rational ethical thought, that limit the pursuit of their objectives but are not at the center of their lives. They may think it is absolutely wrong to receive a blood transfusion, for example, but they rarely even think about blood transfusions. Perhaps the response to this objection is that the person's ultimate concern is living according to God's will, which includes refusing blood transfusions; but the implications of this expansion of ultimate concern are startling.

When a person is devoted to doing God's will or living a good life, almost any of his judgments about right and wrong actions will be *connected* to his ultimate concern. These judgments include ones that are not absolute in the ordinary sense, such as "Unless someone will suffer greatly, we should use wine rather than grape juice because it better reminds us of God's love." If the question is whether the person can think of any reasons strong enough to overcome the preference for wine, the answer is "Yes." The judgment, though related to ultimate concern, is not absolute.[216]

This somewhat abstract exploration of the possible significance of ultimate concern shows that further refinement is needed before "ultimate concern," or variants of it, can be put to general use by the courts. It also prepares the way for the major point of this section: claims may be religious even though they do not satisfy a standard of ultimate concern or absolute duty.

Though most modern religions both give answers to major questions of existence and offer an overarching focus for people's lives, some belief systems, commonly regarded as religious, have existed that do not make such claims. In these systems, how life should be lived has been determined on some other basis; and religious worship has been mainly a matter of placating the gods or enlisting their help for projects with preestablished value. If the ultimate concern test were accepted in any of its versions, practitioners of these religions would have no free exercise rights.

If the test were understood as requiring a tight nexus between a particular claim and the ultimate concern of the claimant, the main

216. The preference for wine might be absolute on a particular occasion in the sense that the person perceives no strong reasons for using grape juice. Were this sense of "absoluteness" enough to qualify a claim as religious, a person faced with a state prohibition could make a "religious" claim to use wine if the prohibition and threatened state sanctions were not sufficient to alter his judgment that wine should be used. But this avenue leads to a ludicrous conclusion: namely, that a person faced with a minor fine for using wine, a sanction not severe enough to alter his judgment about what action is right, could make a religious claim to use wine; but that the same person, faced with lengthy imprisonment if he uses wine, could not make a religious claim to use wine if he believes it would be wrong to forfeit his physical liberty rather than substitute grape juice. Whether a claim is religious or not surely cannot sensibly turn on whether the individual regards the threatened sanction as sufficient to alter his judgment about desirable action.

impact of its restrictiveness would fall on members of traditional religions. Such a nexus between the claim and ultimate concern would exclude practices generated by religious reasons but not considered absolute duties. The use of wine during communion is one such example; another is a claim by an Orthodox Jewish prisoner to receive a kosher diet even though he believes that nonobservance is appropriate when one is "in extremis."[217] Further examples may be found in many claims of religious organizations to be free from state interference in their decisions. A further difficulty with this restrictive version of the ultimate concern test is the inquiry into sincerity that it would generate. Courts would be in the position of assessing the truthfulness of assertions about intensity of commitment and unwillingness to compromise.[218]

Expansion of ultimate concern to cover duties conceived as less than absolute cannot save it as *the* threshold standard for free exercise cases. If connection to ultimate concern were all that were required, the test would lose most of its bite as a useful tool for categorization. Moreover, it would embrace moral claims that would now be regarded as obviously nonreligious. Suppose a person is a thoroughgoing utilitarian and thinks that accepting jury duty will not maximize utility. His position is not absolute: he thinks submission would be better than wasting time in jail, but his view is derived from his ultimate commitment to the principle of utility. If the free exercise clause were construed to treat his claim and every other claim that ties remotely to the claimant's ultimate concern as religious, the clause would be separated both from any general understanding of what is religious and from the purposes that gave it birth.

For establishment cases, the inadequacy of an ultimate concern standard is more readily apparent. Consider again groups that believe in gods capable of affecting human destiny, whose aid can be enlisted on behalf of independently determined aims. Believers do not regard their relationship to these gods as a matter of ultimate concern, nor are ultimate concerns developed in response to the gods. Could the state give a direct grant to such a group to carry out its activities of prayer and sacrifice? Could the state teach the group's doctrines as true in the public schools? To ask these questions is to answer them. These activities are indisputably religious for establishment purposes. Not only can religion be present without ultimate concern; matters that are not religious may involve ultimate concerns. The state may, in schools and

217. United States v. Kahane, 396 F. Supp. 687 (E.D.N.Y. 1975).

218. I recognize that conscientious objector cases do involve just such an inquiry; but the issue of willingness to fight in any war gives the inquiry a focus that might be lacking in other contexts, such as religious use of drugs.

elsewhere, promote ethical principles, such as concern for fellow human beings, that represent the ultimate concerns of some persons. Ultimate concern is not a viable approach to establishment problems, as the Harvard Note recognizes.[219]

In summary, an ultimate concern standard is inapt for a wide variety of free exercise and establishment cases; it is incapable of yielding sound results across a broad spectrum of religion cases. Moreover, in most forms, it would make assessment of sincerity especially difficult.[220]

B. Strict Neutrality and Self-Definition: Strategies of Avoidance

Religion clause adjudication has produced the enduring concern that when courts define religion, they inevitably favor some religious views over others.[221] This worry has engendered proposals that the first amendment should be read to require "strict neutrality" toward religion.[222] Under strict neutrality, the government is required to be religion-blind in the same way that the first Justice Harlan thought the government should be colorblind;[223] no government action would be allowed to favor or disfavor particular religions or religion in general. Adoption of the strict neutrality approach would reduce the occasions when courts must decide what is religious. However, it would not eliminate them, since courts would still have to determine when classifications and legislative purposes fall along forbidden religious lines.[224] The strict neutrality approach purchases partial avoidance of definitional difficulties at the cost of elimination of free exercise accommodation; under it, Christians would have no constitutional right to use wine during communion, Jewish prisoners would have no right to a kosher diet, and the Roman Catholic Church would have no right to limit priests to males.

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219. Note, *supra* note 44, at 1083-89. The Note proposes that for establishment purposes courts use three "operational" criteria—organization, theology, and attitudinal conformity—each of which is further broken down into multiple criteria. *Id.* at 1087. Because the author believes that a threat to the values of the establishment clause is largely dependent on whether support is perceived as being for a religious group, *id.* at 1086, the Note's operational criteria reflect an assumption that common understanding of what is religious cannot be captured by any single standard.

220. Freeman, *supra* note 2, at 1541-46, discusses an alternative he calls a cardinal concerns test. I agree with him that concentration on important concerns rather than ultimate concern cannot yield a viable approach to what is religious.

221. *See, e.g.*, M. KONVITZ, RELIGIOUS LIBERTY AND CONSCIENCE: A CONSTITUTIONAL INQUIRY (1968). Professor Konvitz's conclusion that exteusive protection of free exercise rights can be combined with a rule that prohibits court-defined religion is criticized in Greenawalt, *supra* note 7, at 1136-37.

222. *See* Kurland, *supra* note 3; Weiss, *supra* note 3.

223. Plessy v. Ferguson, 163 U.S. 537, 552 (1896) (Harlan, J., dissenting).

224. *See supra* note 9 and accompanying text.

Another possible approach that minimizes the judicial role has less radical implications for substantive outcomes: courts should follow an individual's own determination whether a practice is religious or not. This determination would be subject to a test of sincerity, but as long as a person honestly thought his claim was religious, it would be treated as such. In the extreme version of the approach, the individual's judgment would be given full sway. In the moderate version, courts would decide whether some minimum objective requisites were met; if they were met the individual's judgment would be conclusive.

In either version, the defects of the approach far outweigh its advantages. The extreme version is most obviously vulnerable. It would be odd to extend the umbrella of free exercise protection to an activity only because the individual who engaged in it has a highly idiosyncratic view of what constitutes religion. The moderate version, explicated in an article by Gail Merel,[225] may avoid such absurd results, but it remains subject to the same fundamental objection. The free exercise clause protects beliefs and practices of a particular sort, however hard these may be to categorize; the clause does not grant or withhold protection based on where a particular individual happens to think the boundaries of the *concept* of religion lie. Imagine two members of a group that engages in corporate use of drugs who have exactly the same views about ultimate reality, human life, and the place of drug use; further imagine that because of different courses on the nature of religion, one member thinks that her use of drugs is religious while the other member does not. Their difference over conceptual borderlines is manifestly an inappropriate basis for putting them in radically different constitutional postures. Even assuming the free exercise clause is meant to safeguard a sense of liberty, a person's feeling that his liberty has been invaded is unlikely to track his conceptualization of what is religion.

The inaptness of self-definition for establishment cases is more obvious, since in addition to the perspectives of members of the supported group, the perspectives of outsiders are crucial.[226] A government's ability to provide financial support to an organization or to permit its leaders to engage in activities in the public schools should not turn mainly on the members' conception of the religiousness of the organization and its activities.

Because of its unresponsiveness to the basic concerns underlying the religion clauses, self-definition is incapable of producing sound results in a wide range of religion clause cases.

225. Merel, *supra* note 5, at 829-36.

226. Merel recognizes this problem but still opts for emphasis on the self-understanding of the supported group. *Id.* at 837-38.

C. *Arguably Religious and Arguably Nonreligious*

In the discussion of religion in his treatise on constitutional law, Laurence Tribe refrains from any account of necessary and sufficient conditions for religion.[227] Though he does not explicitly reject a dictionary definition of religion, his approach is compatible with the basic analogical strategy suggested here. Significantly, in his treatment of the threshold question, he proposes that everything "arguably religious" should count as religious for free exercise purposes, and everything "arguably nonreligious" should count as nonreligious for establishment purposes.[228] This dual standard is justified by the main underlying rationale of religion clause interpretation—the promotion of voluntarism—which can be achieved by broad free exercise and narrow establishment concepts of religion.

Professor Tribe's standard obviously does not meet the criterion of a unitary approach to the concept of religion; more importantly, it is not consonant with the criterion of sound results. A full demonstration of the shortcomings of his approach would require a deeper examination of the purposes behind the religion clauses and of relevant tests of constitutionality for various cases. However, a cursory appraisal suggests that the open-ended vagueness of the "arguably" standard is unacceptable and that no neat divorce of free exercise and establishment issues can support such wide divergence in what counts as religious under the two religion clauses.

The "arguably" standards are highly amorphous. They conjure up visions of the clearly religious, the clearly nonreligious, and a slice of the "arguably religious-arguably nonreligious" in between. However, the criteria of religion are so many and the boundaries so open and unclear that this intermediate category is extremely large; courts would be mistaken to consider everything that falls into that category as religious for free exercise purposes and as nonreligious for establishment purposes. Almost any use of psychedelic drugs, for example, may be "arguably religious" because of the close similarity between the states of mind those drugs induce and the states of mind of religious mystics. Yet not every use of such drugs should be considered religious by the courts. If I am right that Marxism is not a religion, at least it is arguably a religion. Were Marxism and Marxist organizations once to be accorded free exercise protection as "arguably religious," other political doctrines that do not now seem even "arguably religious" might soon become so. Among things that are "arguably nonreligious," we might include the pseudoscientific doctrine of Creationism, Transcen-

227. L. TRIBE, *supra* note 51, at 812-87.
228. *Id.* at 828.

dental Meditation, and Christmas carols. The state should not be able to support all of these unrestricted by the establishment clause. Thus, the standards of arguably religious and arguably nonreligious are not only too vague to provide much guidance, but they yield a crucial intermediate category that is too large for wise interpretation of the religion clauses.[229]

The inaptness of the combination of Tribe's two standards can be illustrated by two hypotheticals. First, suppose that an arguably religious-arguably nonreligious organization sponsors arguably religious-arguably nonreligious meditation for both members of the general public and students in the public schools. Under Tribe's approach, the organization would have a free exercise right to be treated by taxing authorities like religious groups, but it could overcome the establishment argument that its school activities involve forbidden state sponsorship of religion. This organization would thus be in a more favorable position than either the explicitly religious organization (supporting a version of meditation that cannot be sponsored in public schools) or the plainly nonreligious organization (which has no constitutional right to the benefit of a tax exemption afforded religious groups).

Second, imagine an arguably religious-arguably nonreligious group that seeks the privileges given to religious groups in prison. This group has previously been successful in its claim that ministers of traditional religions may not, consistent with establishment values, report to the parole board on the participation of prisoners in traditional religious meetings.[230] Because its meetings are "arguably religious," the new organization has the right to meet and to have its meetings led by an outside "minister." Because it is "arguably nonreligious," its "minister" may report participation to parole authorities despite establishment objections.

In neither hypothetical does the free exercise issue seem sufficiently different from the establishment issue to warrant these paradoxical results. The values underlying the various religion clause limitations on government power do differ, and the threshold determination of religion under the analogical approach may properly be informed by relevant differences; but to suppose that these differences reduce to some rigid dichotomy between free exercise and establishment cases is a serious mistake. To suppose further that they call for sharply divided answers to the threshold inquiry about religion com-

229. In Malnak v. Yogi, 592 F.2d 197, 212-13 (3d Cir. 1979) (Adams, J., concurring), Judge Adams makes a similar criticism.

230. *See* Theriault v. Carlson, 339 F. Supp. 375 (N.D. Ga. 1972), *rev'd and remanded on other grounds*, 495 F.2d 390 (5th Cir. 1974).

pounds the error. As long as stringent operative tests do not follow automatically from characterizing a claim as religious, courts need not torture the concept of religion to reach appropriate results. In any event, however difficult it may be, the job of a court is to decide if a practice or organization is religious, not to decide if it is arguably religious or arguably nonreligious.

CONCLUSION

This exposition of grave flaws in the major proposed alternatives supports this Article's main thesis that courts must sometimes decide for themselves what is religious for constitutional purposes and that they should do so without assuming that religion has a specifiable essence. Determining whether questionable beliefs, practices, and organizations are religious by seeing how closely they resemble what is undeniably religious is a method that has been implicitly used by courts in difficult borderline cases. Moreover, it is consonant with Supreme Court decisions. Matched with appropriate substantive standards of review, its use can lead to sound outcomes.

These basic conclusions can survive rather drastic differences over what the religion clauses are understood to protect and over what attitudes courts should adopt in dealing with borderlines of religion. Even a radically different attitude about proper outcomes would not, for example, render ultimate concern or extratemporal consequences an adequate approach to the constitutional concept of religion;[231] the analogical approach fits comfortably with many different substantive standards, as long as they are not too closely tied to threshold determinations about religion.

The particular analogical approach I have suggested is relatively generous in its categorization of borderline instances as religious; it adopts a modern rather than a "framer-oriented" perspective toward religion; and, the specific purpose of the analogical inquiry is to help determine central factors. But even if the wisdom of one or more of these particular features is rejected, an analogical approach developed in a different way would still be preferable to a judicial search for the essential characteristics of religion. By precluding any assumption that a single core unifies everything that is religious, the analogical approach in any version deflects the courts from unpromising efforts to resolve cases by searching for such a core.

The approach becomes fuller as further features are specified. In this Article I have suggested a number of guides, the most important a

231. I do not deny, of course, that a logically possible rendering of the religion clauses could fit with a standard of extratemporal consequences or some (coherent) version of ultimate concern; but I do deny that such a rendering could be plausibly defended.

focus on relevant constitutional purpose. However, I acknowledge that the test will be inconclusive about what counts as religion in a number of borderline cases. Regrettably, every standard of judgment has its difficult borderlines, and one must simply not aspire to greater certainty than a subject yields. No doubt, one proper aim of the law is to circumscribe areas of uncertainty. But, we have seen that many of the single factor approaches are themselves much less certain in application than they might first appear. In any event, a slight gain in certainty is hardly worth serious distortion of the complex values of the religion clauses.

Finally, I should make clear that what I say here is addressed to the religion clauses and does not necessarily apply to judicial application of other constitutional words. This reservation goes beyond an author's usual caveat about unexamined implications, for two recent articles of mine on the speech clause adopt a much more categorical approach to the definition of speech for constitutional purposes than the approach I employ here.[232] In the context of the speech clause, I believe that fairly sharp distinctions among kinds of utterances correlate closely with the values of expression and appropriate constitutional outcomes.[233] Both the concept of religion and the values of the religion clauses are too complicated, however, to yield any similarly tight linkage between threshold categorization and proper outcome.

232. Greenawalt, *Speech and Crime*, 1980 AM. B. FOUND. RESEARCH J. 645, 675-87; Greenawalt, *Criminal Coercion and Freedom of Speech*, 78 NW. U.L. REV. 1081 (1983). In the latter article, I defend my position against an alternative that resembles the position I take in this Article. *Id.* at 1129-36.

233. The articles cited above and this Article do share the common conclusion that a highly stringent test of government need is not appropriate for every instance in which something is speech, or religion, in the constitutional sense.