What Is Religion?

Introduction

> *Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.*[1]

These sixteen words, all of fairly common usage, have nonetheless been the subject of seemingly endless controversy. Scholars have debated the levels of government to which the First Amendment really applies, what it means to make a law, and what it means to establish or prohibit. Perhaps the most important inquiry is what religion is, and whether the First Amendment requires one or two definitions of religion.

Several courts have had to determine if presented beliefs or practices are religious, especially in the last 70 years or so. Followers of traditionally recognized religions, like Christianity, Judaism, Islam, Hinduism, or Buddhism, can be sure that the free exercise clause protects most or all of their religious practices. Believers of less populous religions, such as Scientology, or of less socially acceptable religions, such as Satanism, or of ideals some would not call religion at all, such as secular humanism or atheism, have sometimes less protected lives.

This paper undertakes to examine this problem. Because some dispute whether religion should be defined differently for the free exercise clause than for the establishment clause, this paper will be restricted to free exercise analysis: what constitutes a religion to be accorded free exercise protection? The first part of this paper outlines the history and purpose of defining religion for free exercise purposes. The bulk of the paper examines the two basic modes of analysis in this area, definitional and analogical approaches. A future paper will analyze the second question, of what religion is for purposes of establishment clause protection. The final paper in this trilogy will examine the problems inherent in having two definitions versus those in having one definition, and offer some solutions to these problems.

The History and Purpose of Defining Religion

The Framers of our Constitution and early state and national governments lived in a time when religious persecution was a powerful demon. They knew the dangers of allowing states to exercise control over religious life. James Madison's famous Memorial and Remonstrance described free exercise as a way for each individual to best serve his or her God.[2] Madison

[1] U.S. CONST. amend. 1.

 Copyright 1998 Lisa Price All rights reserved.

also saw that in addition to benefiting God and the individual, greater religious freedom would improve society.[3]

While the ideal of promoting free exercise of religion may be noble, putting that ideal into practice has proven complicated at times. As the Supreme Court pointed out in *United States v. Seeger*,[4] religions in our modern society vary widely.[5] Since the beliefs or practices which the law recognizes to be religions may be many and varied, defining just which ones are religions warranting free exercise protection becomes a tricky task. A court's main goal when faced with a free exercise claim is to minimize the chances of allowing an infringement on the religion of a sincere believer. However, a court must balance that goal against the possibility of letting an insincere claimant get away with something. In addition to these concerns, courts must balance free exercise protection against appearing to endorse particular religions, or to endorse religion over non-religion, for fear of violating the establishment clause.[6]

What Is Religion?

As with defining any concept, there are two basic ways of defining religion: to describe its major characteristics, or to compare it to something already familiar. Courts and scholars use both of these approaches to determine what constitutes a religion for free exercise purposes.

Definitional Approach

Early legislatures and courts, and indeed some current ones, used this direct "definitional approach." The approach takes several forms, however, with the definition process itself demonstrating the diversity of religious experience and understanding in our culture. The definitions overlap, but one thing these definitional approaches have in common is the search for the things all religions—and only religions—have in common, whether those be their content (for example, Supreme Being definitions), or their structure (such as their significance or function in the lives of their believers).

Content-Based Definitions

In 1931, Chief Justice Hughes defined "the essence of religion" simply as "belief in a relation to God involving duties superior to those arising from any human relation."[7] The Chief Justice had good reason to believe this theistic definition would be accurate and acceptable: Madison had invoked a Creator,[8] legislatures from the first session of Congress on had opened with reading of prayers to God,[9] and public school classes still engaged in daily Bible

---

[2] JAMES MADISON, MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ASSESSMENTS, 8 PAPERS 298-304 (June 20, 1785), *reprinted in* 5 THE FOUNDERS' CONSTITUTION 82 (Philip B. Kurland and Ralph Lerner, eds., University of Chicago Press 1987).

[3] *Id*.

[4] 380 U.S. 163, 85 S. Ct. 850 (1965).

[5] 380 U.S. at 174-75, 85 S. Ct. at 858-59.

[6] JOHN H. GARVEY AND FREDERICK SCHAUER, THE FIRST AMENDMENT: A READER 594-95 (2d ed. 1996).

[7] United States v. Macintosh, 283 U.S. 605, 633-34, 51 S. Ct. 570, 578, 75 L. Ed. 1302 (1931) (Hughes, C.J., dissenting).

[8] MADISON, *supra* note 2.

[9] Marsh v. Chambers, 463 U.S. 783, 792, 103 S. Ct. 3330, 3336 (1983).

 Copyright 1998 Lisa Price All rights reserved.

readings.[10] Despite the diversity prevalent in modern American culture, or perhaps because of it, there are some who would still say that the Chief Justice's definition should prevail, that only traditional theistic religions ought to have the kind of protection guaranteed by the First Amendment. After all, they might argue, that is the kind of religion the Framers had in mind when they wrote the First Amendment.

The Supreme Court officially rejected this theistic type of definition in *Torcaso v. Watkins*.[11] In this case the Court expressly stated that state and federal governments could not prefer theistic over non-theistic religions.[12] It based this assertion in part on the fact that many traditionally recognized religions such as Buddhism, and legally recognized religions such as Ethical Culture[13] and Secular Humanism,[14] do not subscribe to a belief in a Supreme Being or traditional God.[15] This rejection of the Supreme Being definition was affirmed by Justice Douglas' concurrence in *Seeger*, where he expounded upon the basic tenets of Hinduism and Buddhism, and the intricacies and nuances of words like "God" and "Supreme Being."[16]

Structural Definitions

Upon rejection of one test, however, the Court faced the problem of coming up with a new one. Still the Court chose a definitional approach, this time in a case interpreting a congressional statute in *Seeger.* Congress had defined the required religious belief for exemption from the draft as being "in a relation to a Supreme Being."[17] The petitioners in *Seeger* and in a similar case, *Welsh v. United States*,[18] did not believe in a Supreme Being, but sought exemption from the draft based on broader views. Seeger believed in "goodness and virtue for their own sakes, and a religious faith in a purely ethical creed."[19] Welsh declined to use the word "religious," emphasizing the moral aspects of his belief system that he said he derived from reading history and sociology texts.[20]

Instead of focusing this time on the content of the beliefs as the Supreme Being definitions did, the Court turned to a structural definition. The *Seeger* Court asserted the following test for religious beliefs as a basis for exemption from the statute: "whether a given belief that is sincere and meaningful occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God of one who clearly qualifies for the exemption."[21] While not rejecting the legislature's use of Supreme Being language, the Court's focus here was on the role that the asserted beliefs hold in the believer's life as the dispositive issue. It claimed to do so based on congressional intent, stating that since Congress had used "Supreme Being" instead

---

[10] Abington School Dist. v. Schempp, 374 U.S. 203, 83 S. Ct. 1560 (1963).
[11] 367 U.S. 488, 81 S. Ct. 1680, 6 L. Ed. 2d 982 (1961).
[12] 367 U.S. at 495, 81 S. Ct. at 1682-83.
[13] Washington Ethical Society v. District of Columbia, 101 U.S. App. D.C. 371, 249 F. 2d 127 (1957).
[14] Fellowship of Humanity v. County of Alameda, 153 Cal. App. 2d 673, 315 P. 2d 394 (1957).
[15] 367 U.S. at 495 n. 11, 81 S. Ct. at 1684 n. 11.
[16] 380 U.S. at 189, 85 S. Ct. at 865-66 (Douglas, J., concurring).
[17] Universal Military Training and Service Act of 1948, Section 6(j), 50 App. U.S.A. §456 (1958 ed.).
[18] 398 U.S. 333, 90 S. Ct. 1792 (1970).
[19] 380 U. S. at 166-67, 85 S. Ct. at 854-55.
[20] 398 U.S. 333 (1970).
[21] 380 U. S. at 165, 85 S. Ct. at 854.

 Copyright 1998 Lisa Price All rights reserved.

of "God," it must have done so in order "to embrace all religions and to exclude essentially political, sociological, or philosophical views."[22]

In setting forth this test, the *Seeger* Court seemed to believe it was creating a simpler schema for courts to determine what religion is or is not:

> *The examiner is furnished a standard that permits consideration of criteria with which he has considerable experience. While the applicant's words may differ, the test is simple of application. It is essentially an objective one, namely, does the claimed belief 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 exemption?*[23]

This, of course, assumes that the judge examiner is intimately familiar with at least one of the traditional religions in order to make this comparison so simple. Because it is essentially standardless, it also somewhat resembles Justice Stewart's observation about obscenity: "I know it when I see it."[24] While *Seeger* was a statutory construction case, later judges noted that, rather than limiting this opinion for constitutional interpretation purposes, the opinion actually is even narrower than it could be for constitutional claims: "the Court defined the phrase ["religious belief'] broadly in an exercise of statutory construction, an area in which the Court is far more circumscribed in defining terms than it is in the area of constitutional interpretation."[25] Just as the Supreme Being definitions had their critics, however, so too do parallel position definitions. The major criticism of parallel position analysis is that by holding in *Welsh* and *Seeger* that ethical or moral beliefs that did not include a belief in a Supreme Being could be religious, the Court could be starting down the proverbial slippery slope of religious free exercise.[26] The First Amendment created a special protection for religious beliefs, yet the Court here includes arguably secular beliefs based on the similar position to religion that they may hold in believers' lives.

Recognizing perhaps the weakness of the parallel position definition alone, the *Seeger* Court strengthened its position and furthered its analysis by including reference to one s "ultimate concern." The Court studied the philosophy of noted theologian Paul Tillich, who explained this concept, central to his work on religion: "And if that word (God) has not much meaning for you, translate it, and speak of the depths of your life, of the source of your being, or your ultimate concern, of what you take seriously without any reservation."[27] Tillich' s words rang true as a fair definition of religion for the Court, enough to adopt it as the core of its religion doctrine. Ultimate concern became the shorthand for all that a religion ought to be in order to be afforded free exercise protection: "The word 'concern' denotes the affective or motivational aspect of human experience; the word 'ultimate' signifies that the concern must be of an unconditional, absolute, or unqualified character."[28] Each individual would determine what that ultimate concern is for them, and since everyone has one and it has only

---

[22] *Id*.
[23] 380 U.S. at 183-84, 85 S. Ct. at 863.
[24] Jacobellis v. Ohio, 378 U.S. 184, 197, 84 S. Ct. 1676, 1683 (1964) (Stewart, J., concurring).
[25] Malnak v. Yogi, 440 F. Supp. 1284, 1314 (D. N.J. 1977).
[26] Note, *Toward a Constitutional Definition of Religion*, 91 HARV. L. REV. 1056 (1978).
[27] 380 U.S. at 187, 85 S. Ct. at 865.
[28] Note at 1066-67.

 Copyright 1998 Lisa Price All rights reserved.

to be discovered, every person has a religion, and therefore everyone is protected under the free exercise clause.[29]

A Note in the Harvard Law Review twenty years ago[30] examined the merits of the ultimate concern definition.[31] The author argued that it was a good test for four reasons. First, the author writes, the ultimate concern approach "does not violate the idea of free exercise itself because it focuses on functional rather than content-oriented criteria."[32] The truth of this statement depends, however, on whether "the idea of free exercise" is primarily concerned with function or with content. The free exercise clause (assuming it embodies this idea of free exercise as well as anything does) states that "Congress shall make no law...prohibiting the free exercise thereof."[33] Since no one seriously debates that "thereof' refers to the word "religion" in the previous clause, it would seem that the Framers were in fact *solely* concerned with content that the thing not to be prohibited was exercise of one's *religion.* Couple that word choice with the rejection of other, secular words the Framers could have chosen, like "conscience," and it seems clear that the Note is incorrect on this point: the Framers were not concerned that laws not infringe on the exercise of individuals' ultimate concerns of just any nature, but that they not inhibit the exercise of their religion, specifically.

Next, the Note's author claims that because the ultimate concern definition "rejects any belief which for the individual is subordinate or capable of compromise,"[34] the ultimate concern definition is the correct one. Here the assumption seems to be that the free exercise clause is primarily concerned with not putting an individual in the position of having to choose between damnation and imprisonment, or some equivalently unappealing choice between one's belief and one's freedom. As with the previous rationale, while it may be true that this would be an unpleasant position in which to find oneself, it does not seem to have been the primary concern of the Framers when they passed the final draft of the free exercise clause. Having explicitly rejected any reference to conscience generally, and passed language only referring to religion, the Framers seem to have resisted any impulse toward encompassing ultimate concerns on this ground as well.

Third, the Note continues, the ultimate concern definition "does as much as possible to avoid the dangers of religious chauvinism."[35] One can only imagine that this means it is less likely than Supreme Being definitions or parallel position definitions to look to other religions for guidance, thus being fairer to nontraditional or new religions. It is unclear how structural comparisons are necessarily better at avoiding such prejudices than are content comparisons.

Finally, the Note reverts to earlier reasoning about Framers' intent: "[T]his test is peculiarly appropriate to the preferred status given to religious freedom by the first amendment. Indeed, what concerns could be more deserving of preferred status than those deemed by the individual to be ultimate?"[36] The Framers answered this question centuries earlier: one type

---

[29] Note at 1066-67, *citing* P. TILLICH, THE PROTESTANT ERA 58, 87 (1948).
[30] 91 HARV. L. REV. 1056 (1978).
[31] Note at 1066.
[32] *Id*. at 1075.
[33] U.S. CONST. amend. 1.
[34] Note at 1075.
[35] *Id*.
[36] *Id*.

 Copyright 1998 Lisa Price All rights reserved.

of concern *could* be more deserving of preferred status than those deemed by the individual to be ultimate, and that type is simply those concerns which the court deems to be religious. The Note's author seems to want to call the things individuals deem worthy of protection "religion," so that they can receive protection. In other words, rather than adding unprotected or ambiguous beliefs and practices to the list of things protected (a list defined by the legislature), the author seems to suggest instead altering or stretching the definition of a word to encompass them.

The ultimate concern definition and the Harvard Note drew their share of criticism from Kent Greenawalt. Greenawalt appreciates the functional nature of this definition, but posits that use of this definition begs a litany of unanswered 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?*[37]

While Greenawalt acknowledges that the Harvard Note attempts to answer several of these questions,[38] he finds those answers insufficient or inconclusive. For one thing, many people have, he says, higher intellectualized concerns, such as salvation or damnation, but few of us base our actual decisions on those concerns very often.[39] Also, Greenawalt writes, most of us have multiple important concerns, many of which overlap, but perhaps none of which completely overrides all others.[40] Under the Note's author's view, at least, Greenawalt writes, "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.[41]

Further, Greenawalt critiques, ultimate concerns do not always equal "absolute mandates of conscience."[42] Greenawalt uses as his example a drug addict whose ultimate concern is getting the next "fix"; this concern has nothing probably to do with conscience.[43] Other ultimate concerns may not be absolutes, such as the ultimate concern in connecting to God through wine at communion, but compromising by using grape juice if there are minors, alcoholics, or teetotalers in the congregation.[44] On the other hand, he writes, many people have beliefs in absolute ethical duties, whether grounded in religion or not, but which are not ultimate concerns in the sense of being central to their lives. For this proposition Greenawalt presents the example of someone who believes it is absolutely wrong to receive blood

---

[37] Kent Greenawalt, *Religion as a Concept in Constitutional Law*, 72 CALIF. L. REV. 753, 807 (1984).
[38] "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." *Id*.
[39] *Id*. at 807-08.
[40] *Id*.
[41] *Id*. at 809.
[42] *Id*.
[43] *Id*. at 808-09.
[44] *Id*. at 809.

 Copyright 1998 Lisa Price All rights reserved.

transfusions, but who rarely if ever has to think about them.[45] The validity of this argument depends upon how one defines the ultimate concern: is it to refuse blood transfusions, or is it something broader, like doing God's will, or keeping the body pure and intact?[46] Greenawalt's examples are many, but his point is simple: "claims may be religious even though they do not satisfy a standard of ultimate concern or absolute duty," thus rendering the ultimate concern definition incomplete and insufficient.[47]

Greenawalt's final criticism of the ultimate concern test is that it has a two-part fatal flaw: first, in order to adequately cover genuine claims, it must expand to include duties which may not be absolute, such as keeping kosher while in prison.[48] Second, if such an expansion were allowed, perhaps by allowing the question to be whether there is a nexus between the ultimate concern and the practice to be protected, the test may become too broad to be useful. Greenawalt sees this as a fatal flaw because it does not seek to protect "religion," which is, after all, what the free exercise clause was written to do. The ultimate concern test would also embrace secular ethical beliefs, which have not been textually included in the First Amendment at all.[49] If the free exercise clause were read to include protections for secular as well as religious moral objections, "the clause would be separated both from any general understanding of what is religious and from the purposes that gave it birth."[50] The ultimate concern definition only makes sense from a policy perspective if the policy to be furthered is the preservation of individuals' conscience over state requirements. That policy goal has not yet been made clear by the legislature.

There is one remaining problem with the ultimate concern definition: not all, or perhaps even not most, subscribers to traditional religions hold their religious tenets to be their ultimate concerns, so why submit other believers to a harder test? Many people adhering to traditionally recognized religions, such as Catholicism or Judaism, subscribe to the tenets intellectually of their belief system, and carry out the ceremonies and rituals which go along with those systems, yet would not necessarily consider those beliefs to be their ultimate concern. Ultimate concerns for many are stripped down to the bare necessities of life, like feeding one's family, or simply physical survival. When asked what is the most important thing to them, many practicing Baptists would not say "Salvation," or "My relationship with the Lord," but instead would reply, "My family," or "My job." This does not undermine the fact that Baptists are practicing a bona fide religion. But it does emphasize that even bona fide religions are not always the ultimate concern of their practitioners.

Problems with Definitional Approaches Generally

Scholars have rejected not only specific definitional approaches as inadequate, but this entire analytical method of attempting to define religion. Religion, they say, is too complex to be defined as a word in a dictionary would be.[51] Kent Greenawalt explains, "No specification of essential conditions will capture all and only the beliefs, practices, and organizations that are

---

[45] *Id*.
[46] *Id*.
[47] *Id*.
[48] *Id*. at 810.
[49] *Id*. at 810.
[50] *Id*. at 810.
[51] *Id*. at 813.

 Copyright 1998 Lisa Price All rights reserved.

regarded as religions in modern culture and should be treated as such under the Constitution."[52]

Analogical Approach

Where definitional approaches fail is in their attempt to focus on required features that, if not present in a particular instance, preclude free exercise protection. Kent Greenawalt, among others, has suggested a way of reading *See ger* and *Welsh* to circumvent this problem:

> *[Tljhough 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 ... for which ultimate concern or conscientious feeling turns out to be the decisive aspect of analogy.*[53]

[52] *Id*. at 763.
[53] *Id*. at 773.

 Copyright 1998 Lisa Price All rights reserved.

This analogical approach of which Greenawalt writes is one which tries to use the certainty of a definitional approach while embracing the plurality required by our modern culture. Essentially it is a matter of looking at religions which the court *knows* would be covered, like Christianity, then compares the presented set of beliefs or practices to them.

One of the earliest and most eloquent proponents of an analogical approach was Judge Adams of the Third Circuit in his concurrence in *Malnak v. Yogi*.[54] While *Malnak* was an establishment clause case, Judge Adams' treatment of the problem of defining religion is thorough, and the principles he set forth apply equally to free exercise analysis. Judge Adams notes the early use of the analogical approach in such cases as *Washington Ethical Society*[55] and *Fellowship of Humanity*.[56] In each case, the courts declined to state a formal test, but simply enumerated facts which they felt were dispositive, or at least instructive, in finding that the petitioners' societies were religious: the Washington Ethical Society "held regular Sunday services and espoused a group of defined moral precepts"[57] the Fellowship for Humanity "also met weekly on Sundays and functioned much like a church."[58] What distinguishes an analogical approach from definitional approaches is that analogical approaches may compare the challenged practice to traditional religions *both* in content and in structure, rather than relying on key characteristics in either category for the definition.

Judge Skelly Wright in *Founding Church of Scientology of Washington, D. C. v. United States*[59] used an analogical approach to determine that Scientology was a religion:

> *On the record as a whole, we find that appellants have made out a Prima facie case that the Founding Church of Scientology is a religion. It is incorporated as such in the District of Columbia. It has ministers, who are licensed as such, with legal authority to marry and to bury. Its fundamental writings contain a general account of man and his nature comparable in scope, if not in content, to those of some recognized religions.*[60]

This is a classic example of use of the analogical approach: describing features of the challenged belief or practice system, then concluding simply that those things add up to a close enough approximation of traditionally recognized religions to pass muster and warrant constitutional protection.

Judge Adams set out to describe three indicia which justify making such analogies (though he does not purport to give factors which are necessary or sufficient conditions for calling something a religion).[61] He bases the significance of these three indicia on two things: first, they are "basic to our traditional religions"[62] and second, they are "related to the values that undergird the first amendment."[63]

The first of Judge Adams' indicia is content-based: "the nature of the ideas in question."[64] This factor is fraught with all of the difficulties of a content-based definition, because it is a

---

[54] 592 F. 2d 197 (3d Cir. 1979).
[55] 101 U.S. App. D.C. 371, 249 F. 2d 127 (1957).
[56] 153 Cal. App. 2d 673, 315 P. 2d 394 (1957).
[57] *Id*. at 206 (Adams, J., concurring).
[58] *Id*.
[59] 133 U.S. App. D.C. 229, 409 F. 2d 1146 (1969).
[60] *Malnak* at 207 n. 33 (Adams, J., concurring), *citing Founding Church of Scientology*, 409 F. 2d at 1160.

 Copyright 1998 Lisa Price All rights reserved.

content-based factor. The same kinds of inquiries take place here as with the content definitions described earlier, with ultimate concern being the content sought. Judge Adams explains the importance of the ultimate concern content definition: "The first amendment demonstrates a specific solicitude for religion because religious ideas are in many ways more important than other ideas. New and different ways of meeting those [ultimate] concerns are entitled to the same sort of treatment as the traditional forms."[65]

Judge Adams' second factor in justifying analogizing something to religion is comprehensiveness. Religions, he posits, are all-encompassing in scope, not isolated teachings. Something may be comprehensive without being religious (i.e., the "Big Bang" theory[66]) or moral without being comprehensive. Religious beliefs are therefore, for Judge Adams, both ultimate in content and comprehensive in scope.

Those two factors are not enough to indicate religiosity for Judge Adams, however. The third of his three indicia are those "formal, external, or surface signs" which are analogous to those found in "accepted religions."[67] His list of what those signs might include is lengthy: "formal services, ceremonial functions, the existence of clergy, structure and organization, efforts at propagation, observation of holidays and other similar manifestations associated with the traditional religions."[68] Not all religions will have all of these factors, so Judge Adams writes, "they are not determinative, at least by their absence, in resolving a question of definition."[69] Their presence, however, may lend support to a claim of religious nature. Again Judge Adams cited *Washington Ethical Society* and *Fellowship of Humanity* to support this position.[70]

A similar approach was proposed by George C. Freeman III, who lists key features as well.[71] Freeman explicitly sets forth that the comparison against the paradigm religion, which embodies all of his eight enumerated desired features, will result in sort of a scoring system, a sliding scale of religiosity, and various systems may be found to fall anywhere along the spectrum between very religious and very secular. What Freeman does not spell out, however, is whether the religious-but-not-very-religious, the one or two on a scale of zero to ten, would be afforded proportionately less protection under the free exercise clause approach he proposes.

However, as with any attempt to define or describe a concept as varied and nebulous as religion, these analogical approaches still fall short of true usefulness. They seek sufficient certainty to accord free exercise protections only to those who warrant it, yet cannot find certainty in the face of the flexibility necessary for case-by-case analysis. They seek sufficient

---

[61] *Id*.
[62] *Id*. at 208 (Adams, J., concurring).
[63] *Id*.
[64] *Id*.
[65] *Id*.
[66] *Id*. at 209 (Adams, J., concurring).
[67] *Id*.
[68] *Id*.
[69] *Id*.
[70] *Id*. at 210 (Adams, J., concurring).
[71] *The Misguided Search for the Constitutional Definition of "Religion,"* 71 GEO. L.J. 1519 (1983).

 Copyright 1998 Lisa Price All rights reserved.

flexibility to accommodate an ever more diverse population, yet cannot find flexibility in the face of the search for certainty and ease of application.

Kent Greenawalt proposes one possible solution: religion is perhaps most aptly described or defined as a family. Using the writings of 20th century philosopher Ludwig Wittgenstein analogizing to games as a family, Greenawalt postulates that religion might best be understood this way. For Greenawalt, religions do not necessarily share one defining characteristic, or even perform a common function in the lives of their followers. However, they share myriad common features that add up to recognition that they are religions. Wittgenstein explained that if we look at games of all sorts, we will not find any single common feature, as the definitional approach attempts, but we may find "a complicated network of similarities overlapping and crisscrossing: sometimes overall similarities, sometimes similarities of detail."[72] Rather than looking for specific cues or factors like Judge Adams' and George Freeman's approaches require, Wittgenstein' s approach builds on the notion of family, "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....'[G]ames' form a family."[73] What Greenawalt makes clear is that in his proposed method of analysis, no single common feature is indispensable.[74]

All of these analogical approaches account for the diversity inherent in religion, while also allowing for growth of the definition to encompass belief systems which many might not call religion. Yet still they suffer from the problem of application: how would a court ever apply such a test? With Judge Adams' approach, a court need not find all of the features, but how many should be present to qualify for protection? And to what degree? And how can a court know when a criterion has been sufficiently met? For Freeman's analysis, the answers are equally unclear. How many of the eight magic characteristics must be found to receive protection? If only one is present, but is clearly and strongly present, is it religion? What if it is only weakly met? Nor does Greenawalt's approach really solve the problem, for it sounds entirely too much like the obscenity remark: "I know it when I see it."[75] While such a cavalier attitude may be suitable for identifying games, it is not acceptable as a court's measure for when it should afford protection for a precious fundamental human right.

Conclusion

The danger of defining some set of beliefs or practices *not* to be religious risks leaving a religious person unprotected from some form of persecution or restricted from practicing that religion—precisely the evil the Framers sought to eliminate. The danger of defining some set of beliefs to *be* a religion risks letting someone get away with something that would otherwise be prohibited by law. Some may fear that this would lead to so many exemptions and accommodations that government programs would be ineffective or useless.[76] Others respond that this fear is exaggerated, because calling something a religion does not

---

[72] Greenawalt at 816, *citing* LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS ¶66 (3d ed. 1958).
[73] Greenawalt at 816, *citing* WITTGENSTEIN at ¶¶66-67.
[74] Greenawalt at 816.
[75] 378 U.S. at 197 (Stewart, J., concurring).
[76] Note at 1076-77.

 Copyright 1998 Lisa Price All rights reserved.

automatically afford its believers exemption from every law.[77] As the Harvard Note points out, the real risk of fraud is not from according additional protections to unrecognized religions. If someone merely seeks, for example, exemption from the draft, they could claim to believe in some established peace religion much more easily than going through the process of making up a fake religion and battling for its protection in the courts.[78] In contrast, "those genuinely moved by unorthodox beliefs would be faced with unacceptable alternatives: they could resist official commands and face penalties, follow those commands and thereby violate concerns deemed ultimate, or distort and falsely represent their beliefs in order more nearly to resemble the orthodox."[79].

It may seem a noble endeavor to include more in the word "religion" than is already there, by defining the word broadly. But some of these tests stretch the word beyond its limits. It should not be with disdain that we say something is not a religion. Either something is a religion or it is not. But if we wish for something to be protected as if it were a religion, then the logical thing and the legal thing—to do would be to write a constitutional amendment or a statute which creates protection for things we think should be protected, whether those be civic organizations or individual acts of conscience, rather than to try to call things religions which are not. To paraphrase an adage, you can call a dog a person all you want, but it will still be a dog. But if you want dogs to be treated like people, the answer is not to change the definition of dog or of person, but to enact laws that protect dogs as they protect people. To do otherwise undermines the credibility of the judiciary and the legislature, and defames those things we seek to protect. If we continue to say only religions are protected, but then call lots of things religions, we not only undercut the significance of religion, but we also defile conscience as important in its own right. For if conscience is not important enough on its own to warrant protection, then why try to protect it? But if it is important enough to warrant protection, then we should be able to pass a constitutional amendment or statute to protect it. This satisfies the conscientious nonreligious believer, the constitutional textualist, the conservatives who will have their say in the legislative process of writing that amendment or statute, and most importantly, the free exercise clause itself.

[77] *Id*. at 1078-79.
[78] *Id*. at 1079-82.
[79] *Id*. at 1080.

 Copyright 1998 Lisa Price All rights reserved.