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Definitions, Religion, and Free Exercise Guarantees

Mark Strasser

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I. Introduction

The First Amendment to the United States Constitution protects the free exercise of religion. Non-religious practices do not receive those same protections, which makes the ability to distinguish between religious and non-religious practices important. Regrettably, members of the Court have been unable to agree about how to distinguish the religious from the non-religious—sometimes, the implicit criteria focus on the sincerity of the beliefs, sometimes the strength of the beliefs or the role that they play in an individual's life, and sometimes the kind of beliefs. What qualifies as religious under one of these criteria might not qualify as religious under another, which means that whether particular practices will be protected under free exercise guarantees may vary depending upon which of these criteria are used or emphasized.

The Court has repeatedly stated that free exercise guarantees do not protect non-religious practices, but has nonetheless refused to state the criteria in light of which the religious can be distinguished from the non-religious. To make matters even more confusing, the Court has sometimes suggested that it is beyond the competence of courts in almost all cases to determine what qualifies as religious. In short, the Court has virtually guaranteed an incoherent jurisprudence by sending contradictory signals with respect to one of the most basic questions in free exercise jurisprudence—what counts as religion.[1]

This Article traces the Court's wavering approaches to free exercise guarantees, noting some of the areas in which the Court continues to send mixed messages—the Court has both affirmed

[1] But see Christopher L. Eisgruber & Lawrence G. Sager, Does It Matter What Religion Is?, 84 **Notre Dame L. Rev.** 807, 833-34 (2009) ("We want to cast doubt on the common assumption which holds that to interpret the Constitution's Religion Clauses one must define what religion is, and that it is therefore something of an embarrassment that this fundamental question has gone unanswered in American constitutional jurisprudence.").

and rejected that religious practices are afforded special protection under free exercise guarantees and has been utterly inconsistent with respect to whether courts can decide which beliefs qualify as religious or what criteria would be appropriate to make such a determination. While some of the Court's articulated positions are simply impossible to reconcile, the Article nonetheless concludes that many of the Court's seemingly inconsistent assertions are reconcilable, although in a way that doubtless will leave all parties in the Culture Wars somewhat dissatisfied.

Part II of this Article discusses the Court's developing jurisprudence regarding what counts as religion for free exercise purposes, noting some of the Court's contradictory messages with respect to how this matter should be resolved. Part III discusses some of the competing interpretations of the Court's jurisprudence regarding which beliefs and practices qualify, explaining why many commentators' interpretations are too restrictive. The Article concludes that the Court's expansive definition of religion for free exercise purposes will likely be cause for celebration (and sorrow) for both sides of the Culture Wars. Traditionalists will be pleased (and some non-traditionalists displeased) because the Free Exercise Clause does indeed privilege religion over non-religion, while non-traditionalists will be pleased (and some traditionalists displeased) because the guarantees may be triggered by the burdening of beliefs and practices that would never count as religion as conventionally understood.

II. The Free Exercise of Religion

The Court's approach of free exercise guarantees has been inconsistent in a number of areas, making free exercise jurisprudence murky if not incomprehensible.[2] Further, the Court's lack of

[2] See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 564 (1993) (Souter, concurring in part and concurring in the judgment) ("we are left with a free-exercise jurisprudence in tension with itself"); Christopher N. Elliott, Note, Federalism and Religious Liberty: Were Church and State Meant to Be Separate?, 2 **Rutgers J. L. & Religion** 5 (2000) (discussing "the United States Supreme Court's establishment and free exercise

clarity with respect to these issues has been surprisingly persistent. The Court has emphasized some indicia in certain cases and other indicia in other cases without making clear how the factors relate. Employment Division v. Smith[3] may have involved an attempt by the Court to extricate itself from some of the difficulties that its own jurisprudence had created, although that case did not clarify what counts as religion but simply made resolution of that issue less important in many cases.[4] The Court has offered very broad outlines of what counts as religion, making that category much more inclusive than many seem to appreciate.

A. Setting the Stage

Over one hundred and forty years ago, the United States Supreme Court suggested that free exercise rights have robust protection. In Watson v. Jones, the Court explained that "the full and free right to entertain any religious belief, to practice any religious principle, and to teach any religious doctrine which does not violate the laws of morality and property, and which does not infringe personal rights, is conceded to all."[5] Here, the Court seemed to be offering a ringing endorsement of robust free exercise guarantees, although the strength and breadth of those protections depended upon how broadly the exceptions involving morality, property, and personal rights were construed.[6] If the state could prohibit any religious practice thought to contravene conventional morality and if it were believed immoral to ingest alcoholic beverages,

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cases, which are frequently logically incomprehensible"); Timothy J. Santoli, Note, A Decade After Employment Division v. Smith: Examining How Courts Are Still Grappling with the Hybrid-Rights Exception to the Free Exercise Clause of the First Amendment, 34 **Suffolk U. L. Rev.** 649, 672 (2001) ("The Supreme Court of the United States … confused federal courts and instilled unpredictability in free exercise jurisprudence.").

[3] 494 U.S. 872 (1990).

[4] For a discussion of Smith, see infra notes 313-46 and accompanying text.

[5] Watson v. Jones, 80 U.S. 679, 728 (1871).

[6] Cf. Philip A. Hamburger, A Constitutional Right of Religious Exemption: An Historical Perspective, 60 **Geo. Wash. L. Rev.** 915, 918 (1992) (discussing "a willingness to allow government to deny the otherwise guaranteed religious liberty to persons whose religious beliefs or actions threatened the capacity of civil society to fulfill its functions … [the requirement that persons] avoid disturbing the 'good order,' 'safety,' or 'happiness' of society or of the state appears to have demanded a greater degree of obedience than just peaceful behavior").

for example, then it would seem that communion could be prohibited without offending constitutional guarantees.[7]

In Reynolds v. United States,[8] the Court examined the degree to which free exercise rights were protected, at least with respect to whether the Constitution afforded protection to polygamy. The Court noted that "[r]eligious freedom is guaranteed everywhere throughout the United States, so far as congressional interference is concerned,"[9] because of the First Amendment restriction stating that "Congress shall pass no law respecting an establishment of religion or prohibiting the free exercise thereof."[10] But the question at hand was, "[W]hat is the religious freedom which has been guaranteed?"[11]

When discussing the First Amendment's free exercise guarantees, the Court distinguished between belief and practice in a way that would be repeated in the subsequent case law.[12] "Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices."[13] Thus, religious beliefs as such are immune from regulation, although the same cannot be said of religious practices. The Court offered some illustrations of why free exercise rights cannot be thought absolute. "Suppose one believed that

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[7] Cf. Smith, 494 U.S. at 913 n.6 (Blackmun, J., dissenting) ("During Prohibition, the Federal Government exempted such use of wine from its general ban on possession and use of alcohol. See National Prohibition Act, Title II, § 3, 41 Stat. 308. However compelling the Government's then general interest in prohibiting the use of alcohol may have been, it could not plausibly have asserted an interest sufficiently compelling to outweigh Catholics' right to take communion.").

[8] 98 U.S. 145 (1878).

[9] Id. at 162.

[10] **U.S. Const.** amend. I. See also Reynolds, 98 U.S. at 162 ("Congress cannot pass a law for the government of the Territories which shall prohibit the free exercise of religion. The first amendment to the Constitution expressly forbids such legislation.").

[11] Reynolds, 98 U.S. at 162.

[12] See, for example, Smith, 494 U.S. at 879 ("'Laws,' we said, 'are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices.'") (citing Reynolds, 98 U.S. at 166); Cantwell v. Connecticut, 310 U.S. 296, 303-04 (1940) ("the Amendment embraces two concepts, freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society.") (citing Reynolds, 98 U.S. 145); United States v. Ballard, 322 U.S. 78, 86 (1944) ("Thus the Amendment embraces two concepts, freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be.") (citing Cantwell, 310 U.S. at 303, 304).

[13] Reynolds, 98 U.S. at 166.

human sacrifices were a necessary part of religious worship, would it be seriously contended that the civil government under which he lived could not interfere to prevent a sacrifice?"[14] Or, "if a wife religiously believed it was her duty to burn herself upon the funeral pile of her dead husband, would it be beyond the power of the civil government to prevent her carrying her belief into practice?"[15] It soon became clear, however, that free exercise guarantees are limited even when human lives do not hang in the balance.

The Reynolds Court noted that Congress has the power to prohibit polygamy in federal territories as a general matter,[16] and then examined whether an exception had to be recognized for those whose practice of polygamy involved a religious exercise.[17] Contrary to the Watson opinion issued just seven years earlier suggesting that the Constitution's free exercise guarantees are robust,[18] the Reynolds opinion suggested that religious practices do not receive special protection from the Constitution. Any other view would allegedly have anomalous implications, because those in plural marriages "who do not make polygamy a part of their religious belief may be found guilty and punished, while those who do, must be acquitted and go free."[19] The law "provided that plural marriages shall not be allowed,"[20] and the Court feared that permitting individuals to be immune from the operation of that law because of their religious belief "would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself."[21]

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[14] Id.
[15] Id.
[16] Id. ("In our opinion, the statute immediately under consideration is within the legislative power of Congress. It is constitutional and valid as prescribing a rule of action for all those residing in the Territories, and in places over which the United States have exclusive control.").
[17] Id. ("[T]he only question which remains is, whether those who make polygamy a part of their religion are excepted from the operation of the statute.").
[18] See supra note 2 and accompanying text.
[19] Reynolds, 98 U.S. at 166.
[20] Id.
[21] Id. at 167.

The Court's fear that protecting religious exercise would make each citizen a law until himself or herself[22] was unwarranted for a few different reasons.[23] First, the individual might be required to establish the sincerity of the religious belief at issue before an exemption could be afforded. Many individuals would have much difficulty in establishing that their sincere religious beliefs require that they be exempted from a variety of laws,[24] so the worry that recognition of free exercise rights would invite anarchy is overstated. Second, the importance of the implicated state interest would determine whether even sincere religious practices could be prohibited—the state's interest in the preservation of human life presumably justifies the prevention of human sacrifice (by self or other), sincere religious beliefs notwithstanding. Third, the Court might try to limit which "religious" beliefs and practices counted for purposes of federal constitutional guarantees, although such an approach has its own problems.[25]

There is some difficulty in interpreting Reynolds, precisely because the Court did not rest its upholding the polygamy ban on the alleged great dangers of polygamy. That is not to say that the Court treated the "odious"[26] practice of polygamy lightly, having mentioned that the punishment for it in England was death.[27] Nonetheless, if it is anomalous to punish certain lawbreakers but to

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[22] Cf. Micah Schwartzman, Religion, Equality, and Public Reason, 94 **B.U. L. Rev.** 1321, 1327 (2014) (discussing the ""anarchy objection, which is that no society can tolerate individuals deciding for themselves, on the basis of their religious or secular consciences, which laws they will follow and which are morally objectionable").

[23] See Kathleen M. Sullivan, Religion and Liberal Democracy, 59 **U. Chi. L. Rev.** 195, 218 (1992) (discussing the "overstated fear of religious anarchy").

[24] See Robert N. Anderson, Just Say Not to Judicial Review: The Impact of Oregon v. Smith on the Free Exercise Clause, 76 **Iowa L. Rev.** 805, 824 (1991) ("The sincerity test alone sufficiently prevents unwarranted religious exemptions."); David B. Cruz, Disestablishing Sex and Gender, 90 **Cal. L. Rev.** 997, 1035 (2002) ("In the religion context, such anarchy concerns were in part assuaged by the sincerity requirement. While the truth or falsity of religious beliefs is deemed outside the province of government, whether a person was sincerely motivated to engage in conduct for religious reasons is an allowable inquiry."); Bradley P. Jacob, Free Exercise in the "Lobbying Nineties," 84 **Neb. L. Rev.** 795, 802 (2006) ("the government always has the option of attempting to prove that the claimed religious belief is a sham").

[25] See infra notes 349-406 and accompanying text (discussing differing proposals regarding the best way to distinguish between religion and non-religion).

[26] Reynolds, 98 U.S. at 164 ("Polygamy has always been odious among the northern and western nations of Europe").

[27] See id. at 165 ("the offence, if committed in England or Wales, was made punishable in the civil courts, and the penalty was death").

refrain from punishing other lawbreakers who have religious compunctions about following the law at issue, then that anomalousness is also present in cases involving religious prohibitions or requirements with respect to matters other than polygamy.

In Davis v. Beason,[28] the Court explained its view of the dangers of bigamy and polygamy, which "tend to destroy the purity of the marriage relation, to disturb the peace of families, to degrade woman, and to debase man."[29] The practice of polygamy was condemned in no uncertain terms, because "[f]ew crimes are more pernicious to the best interests of society, and receive more general or more deserved punishment."[30] Affording an exemption to those who committed polygamy out of religious belief would "shock the moral judgment of the community."[31] The danger posed by polygamy was allegedly so great that the Davis Court seemed to reject the belief/action dichotomy discussed in Reynolds a little over a decade earlier, explaining that calling "advocacy [of polygamy] a tenet of religion [and thus protected] is to offend the common sense of mankind."[32]

Here, the Court's meaning was not immediately clear. The Davis Court might have been suggesting that because engaging in polygamy was a crime, advocating that individuals enter into polygamous relationships was also a crime. "If they [bigamy and polygamy] are crimes, then to teach, advise, and counsel their practice is to aid in their commission, and such teaching and counseling are themselves criminal, and proper subjects of punishment, as aiding and abetting crime are in all other cases."[33] If teaching religious doctrine counts as act rather than belief (and thus is subject to prohibition), then the belief/act distinction has either been rejected

[28] 133 U.S. 333 (1890), abrogated by Romer v. Evans, 517 U.S. 620 (1996).
[29] Id. at 341.
[30] Id.
[31] Id.
[32] Id. at 342.
[33] Id.

or at least modified in an important way. The Reynolds Court suggested that the Constitution protects the belief that polygamy is appropriate (at least for certain people[34]) or that God approves of polygamy as long as one does not act on that belief, i.e., enter into a polygamous relationship, whereas the Davis Court suggested either that the belief/action distinction is not viable or that the prohibited activity includes not only entering into a polygamous relationship but also teaching that polygamy is viewed positively by one's religion.

A different explanation of why advocacy of polygamy could not be considered a religious tenet was that the Court (may have) rejected that the Church of Latter Day Saints was really a religion. The Court explained that the "term 'religion' has reference to one's views of his relations to his Creator, and to the obligations they impose of reverence for his being and character, and of obedience to his will."[35] However, the Court noted that the term "religion" is sometimes "confounded with the cultus or form of worship of a particular sect, but is distinguishable from the latter."[36] Here, the Davis Court seemed to be suggesting that polygamy is not entitled to free exercise protection because it does not count as a religious exercise.[37]

Basically, the Court offered two explanations for its rejection of protection for polygamy, one suggesting that polygamy did not even count as a religious practice and the other suggesting that polygamy was not protected even if it was a religious practice. The First Amendment permits everyone to "entertain such notions respecting his relations to his Maker and the duties

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[34] See Reynolds, 98 U.S. at 161 ("it was an accepted doctrine of that church 'that it was the duty of male members of said church, circumstances permitting, to practise polygamy").
[35] Davis, 133 U.S. at 342.
[36] Id.
[37] Cf. Keith E. Sealing, Polygamists Out of the Closet: Statutory and State Constitutional Prohibitions Against Polygamy Are Unconstitutional Under the Free Exercise Clause, 17 **Ga. St. U. L. Rev.** 691, 738 (2001) "[I]n Davis v. Beason, … Mormonism was defined as a "cultus,"); Ashby D. Boyle II, Fear and Trembling at the Court: Dimensions of Understanding in the Supreme Court's Religion Jurisprudence, 3 **Seton Hall Const. L.J.** 55, 67-68 (1993) ("In Davis v. Beason, the Court undertook to determine the meaning of 'religion.' It held that the Mormon Church fell outside of the Court's definition of religion, and therefore, the constitutional language that guarantees the free exercise of religion was deemed an irrelevant application to the case.").

they impose as may be approved by his judgment and conscience."[38] In addition, the amendment permits each person "to exhibit his sentiments in such form of worship as he may think proper, not injurious to the equal rights of others."[39] However, that amendment "was never intended [to] … be invoked as a protection against legislation for the punishment of acts inimical to the peace, good order, and morals of society."[40] The Court believed that a good indicator of what was inimical to the good order of society was whether a particular practice had been criminalized, and "[h]owever free the exercise of religion may be, it must be subordinate to the criminal laws of the country, passed with reference to actions regarded by general consent as properly the subjects of punitive legislation."[41]

Suppose that a particular sect believed that individuals should have sexual relations outside of marriage, perhaps because the sect did not believe in marriage.[42] Would such individuals be immune from prosecution under fornication statutes?[43] The Davis Court explained that should such a sect "find its way into this country, swift punishment would follow the carrying into effect of its doctrines, and no heed would be given to the pretense that, as religious beliefs, their supporters could be protected in their exercise by the constitution of the United States."[44] Again, the Davis Court seemed to be offering two differing rationales, one focusing on religious practices that might be thought immoral and the other focusing on practices that should not be considered religious. Because practices involving sexual relations between unmarried parties were "recognized by the general consent of the Christian world in modern times as proper

[38] Davis, 133 U.S. at 342.
[39] Id.
[40] Id.
[41] Id. at 342-43.
[42] Id. at 343 ("There have been sects which denied as a part of their religious tenets that there should be any marriage tie, and advocated promiscuous intercourse of the sexes, as prompted by the passions of its members.").
[43] The Court did not suggest that fornication was constitutionally protected until Lawrence v. Texas, 539 U.S. 558 (2003). See Martin v. Ziherl, 607 S.E.2d 367, 370 (Va. 2005) (holding that the Virginia fornication statute violates due process guarantees in light of Lawrence).
[44] Davis, 133 U.S. at 343.

matters for prohibitory legislation,"[45] the Court rejected that the "punitive power of the government for [such] acts … must be suspended in order that the tenets of a religious sect encouraging crime may be carried out without hindrance."[46] Thus, the Court suggested, such religious practices cannot be permitted because contrary to societal welfare. Yet, by talking about the pretense that non-marital relations must be protected because based on religious beliefs, the Court might instead have been suggesting that such beliefs and practices do not count as religious.

The Davis Court offered ambiguous rationales in other parts of the opinion as well. "While legislation for the establishment of a religion is forbidden, and its free exercise permitted, it does not follow that everything which may be so called can be tolerated. Crime is not the less odious because sanctioned by what any particular sect may designate as 'religion.'"[47] Here, too, the Court offers two different rationales, one suggesting that merely because certain views are called or designated as religious does not make them so and the other suggesting that even if particular practices are religious, they may nonetheless be odious and subject to punishment.

Perhaps there was no need to choose between the two rationales, because a practice, e.g., human sacrifice, might be sufficiently pernicious that it could be regulated whether or not religiously required. Nonetheless, there were clear costs associated with the Court's failure to make clear what it was arguing. If indeed the practices described did not count as religious, then there was no need to undermine the strength of free exercise protections because they had not even been triggered. If these practices did count as religious but were so odious that they could not be countenanced notwithstanding their triggering free exercise guarantees, then there was no need to suggest that criminal laws as a general matter could be enforced against those practicing

[45] Id.
[46] Id.
[47] Id. at 345.

their religion. Instead, such enforcement might be appropriate when compelling state interests were at stake but not, for example, when merely legitimate but not compelling state interests were implicated.

One additional aspect of Davis is worthy of note. The Idaho statute at issue specified that no person

> who is a member of any order, organization, or association which teaches, advises, counsels, or encourages its members or devotees, or any other persons, to commit the crime of bigamy or polygamy, or any other crime defined by law, either as a rite or ceremony of such order, organization, or association, or otherwise, is permitted to vote at any election, or to hold any position or office of honor, trust, or profit within this territory.[48]

The Davis Court believed this provision "not open to any constitutional or legal objection,"[49] even though application of the statute might result in an individual's losing the right to vote just by being a member of the Church. Such a person might be prevented from voting, even if that individual was not in addition someone who "teaches, advises, counsels, or encourages any person or persons to become bigamists or polygamists, or to commit any other crime defined by law, or to enter into what is known as plural or celestial marriage."[50]

When discussing Davis, the Romer Court suggested that an individual could not be denied the vote merely because the person advocated polygamy,[51] and noted in addition that Davis's willingness to deny the vote merely because of group membership would also be unlikely to

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[48] Id. at 347.
[49] Id.
[50] Id. at 346-47.
[51] Romer v. Evans, 517 U.S. 620, 634 (1996) ("To the extent Davis held that persons advocating a certain practice may be denied the right to vote, it is no longer good law.") (citing Brandenburg v. Ohio, 395 U.S. 444 (1969)).

survive constitutional review.[52] Davis's apparent rejection of the belief/action distinction was addressed in a subsequent case, Cantwell v. Connecticut.[53]

B. Modern Free Exercise

Cantwell is important for a number of reasons, not least of which was that the Court held that the free exercise guarantees of the First Amendment were incorporated through the Fourteenth Amendment against the states.[54] The case involved a challenge to the convictions of the Cantwells—Newton, Jesse and Russell—for soliciting funds without the required certificate[55] and for breach of the peace.[56] The Cantwells were Jehovah's Witnesses[57] who went from house to house attempting to distribute religious pamphlets and books in exchange for donations.[58]

The Cantwell Court explained: "Freedom of conscience and freedom to adhere to such religious organization or form of worship as the individual may choose cannot be restricted by law."[59] The Constitution "safeguards the free exercise of the chosen form of religion."[60] Echoing a distinction offered in Reynolds, the Court distinguished between the "freedom to believe and [the] freedom to act."[61] The freedom to believe is "absolute,"[62] although "[c]onduct remains subject to regulation for the protection of society."[63] As support for the proposition that the state

[52] Id. ("To the extent it held that the groups designated in the statute may be deprived of the right to vote because of their status, its ruling could not stand without surviving strict scrutiny, a most doubtful outcome.") (citing Dunn v. Blumstein, 405 U.S. 330, 337 (1972)).
[53] 310 U.S. 296 (1940).
[54] Id. at 303 ("We hold that the statute, as construed and applied to the appellants, deprives them of their liberty without due process of law in contravention of the Fourteenth Amendment. The fundamental concept of liberty embodied in that Amendment embraces the liberties guaranteed by the First Amendment. The First Amendment declares that Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof. The Fourteenth Amendment has rendered the legislatures of the states as incompetent as Congress to enact such laws.").
[55] See id. at 300-02.
[56] See id. at 300.
[57] See id.
[58] See id. at 301.
[59] Id. at 303.
[60] Id.
[61] Id.
[62] Id.
[63] Id. at 304.

can reach religious conduct, the Court cited both Reynolds and Davis,[64] although the Court nowhere intimated that the Reynolds and Davis Courts disagreed even implicitly[65] about whether the action/belief distinction was good law.

When suggesting that the state can regulate religious activity under certain conditions, the Cantwell Court nonetheless warned that the fact that the activity was religious was important—"the power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom."[66] One of the questions at hand involved who had the power to determine whether the activity in question was religious. The Connecticut statute read:

> No person shall solicit money, services, subscriptions or any valuable thing for any alleged religious, charitable or philanthropic cause, from other than a member of the organization for whose benefit such person is soliciting or within the county in which such person or organization is located unless such cause shall have been approved by the secretary of the public welfare council.[67]

The Cantwell Court reasoned that the Connecticut law "requires an application to the secretary of the public welfare council of the State; … he is empowered to determine whether the cause is a religious one, and … the issue of a certificate depends upon his affirmative action."[68] If the secretary found that the cause was not religious, then solicitation for it would be a crime,[69] which might adversely impact the ability of the group to survive.[70] But "to condition the solicitation of aid for the perpetuation of religious views or systems upon a license, the grant of

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[64] See id. at 304 n.4
[65] See supra notes 33-34 and accompanying text (discussing the Davis Court's treatment of the belief/action distinction).
[66] Cantwell, 310 U.S. at 304.
[67] Id. at 301-02.
[68] Id. at 305.
[69] Id. ("If he finds that the cause is not that of religion, to solicit for it becomes a crime.").
[70] Id. ("He is authorized to withhold his approval if he determines that the cause is not a religious one. Such a censorship of religion as the means of determining its right to survive is a denial of liberty protected by the First Amendment and included in the liberty which is within the protection of the Fourteenth.").

which rests in the exercise of a determination by state authority as to what is a religious cause, is to lay a forbidden burden upon the exercise of liberty protected by the Constitution."[71]

The state interest supporting the legislation was the prevention of fraud.[72] While not "intend[ing] even remotely to imply that, under the cloak of religion, persons may, with impunity, commit frauds upon the public,"[73] the Court nonetheless suggested that the fate of a religion could not be based on a state official's "appraisal of facts, … exercise of judgment, and … formation of an opinion"[74] with respect to whether certain beliefs constituted a religion.

It is simply unclear whether the Cantwell Court was suggesting that state officials as a general matter must refrain from deciding which groups are religious. If so, then state courts would have much difficulty in rejecting that a group's claimed religious beliefs were in fact religious, although courts might still determine whether the beliefs in question were sincerely held.[75]

Assuming that the Constitution permits courts to distinguish between religious and non-religious beliefs, an important issue involves the appropriate criterion for making that determination.[76] The Court has repeatedly admitted the difficulty posed in distinguishing between the religious and non-religious,[77] has provided no clear criteria in light of which such a

[71] Id. at 307.
[72] Id. at 304 ("The State insists that the Act … merely safeguards against the perpetration of frauds under the cloak of religion.").
[73] Id. at 306.
[74] Id. at 305.
[75] See infra notes 97-141 and accompanying text (discussing Ballard).
[76] See infra notes 349-406 and accompanying text (discussing different possible criteria).
[77] See Frazee v. Illinois Dep't of Employment Sec., 489 U.S. 829, 833 (1989) ("Nor do we underestimate the difficulty of distinguishing between religious and secular convictions."); see also Thomas v. Review Bd., 450 U.S. 707, 714 (1981) ("The determination of what is a 'religious' belief or practice is more often than not a difficult and delicate task.").

determination should be made,[78] but nonetheless continues to assert that the distinction is of constitutional consequence.[79]

C. Echoes of Nineteenth Century Ambivalence?

Murdock v. Pennsylvania[80] illustrated that the Court's ambivalence in the Nineteenth Century about whether to treat polygamy as a religious practice continued into the Twentieth Century. At issue in Murdock was whether Jehovah's Witnesses could be forced to buy a license to sell religious literature.[81] The issue presented differed from what had been decided in Cantwell, because the state official was not trying to determine which groups were religious.[82] Nonetheless, this state law would impose a financial burden on poor groups seeking to distribute their religious tracts.[83] The petitioners had not purchased a license,[84] and had nonetheless gone door-to-door distributing religious literature and asking for donations.[85]

When evaluating the constitutionality of the ordinance, the Court noted that the "hand distribution of religious tracts is an age-old form of missionary evangelism—as old as the history

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[78] See Alan Brownstein, Taking Free Exercise Rights Seriously, 57 **Case W. Res. L. Rev.** 55, 68 (2006) ("[N]o attempt to define religion has won sufficiently wide support to be accepted as providing the answer to this problem").

[79] Cf. Frazee v. Illinois Dep't of Employment Sec., 489 U.S. 829, 833 (1989) ("There is no doubt that '[o]nly beliefs rooted in religion are protected by the Free Exercise Clause.'") (citing Thomas v. Review Board, 450 U.S. 707, 713 (1981) See also id. ("Purely secular views do not suffice.") (citing United States v. Seeger, 380 U.S. 163 (1965); Wisconsin v. Yoder, 406 U.S. 205, 215-16 (1972)).

[80] 319 U.S. 105 (1943).

[81] Id. at 106

> That all persons canvassing for or soliciting within said Borough, orders for goods, paintings, pictures, wares, or merchandise of any kind, or persons delivering such articles under orders so obtained or solicited, shall be required to procure from the Burgess a license to transact said business and shall pay to the Treasurer of said Borough therefore the following sums according to the time for which said license shall be granted.
> For one day $1.50, for one week seven dollars ($7.00), for two weeks twelve dollars ($12.00), for three weeks twenty dollars ($20.00), provided that the provisions of this ordinance shall not apply to persons selling by sample to manufacturers or licensed merchants or dealers doing business in said Borough of Jeannette.

[82] See supra notes 67-75 and accompanying text.

[83] Murdock, 319 U.S. at 113 ("[T]he license tax … is not a nominal fee.").

[84] Id. at 107 ("None of them obtained a license under the ordinance.").

[85] Id. ("Before they were arrested each had made 'sales' of books.").

of printing presses."[86] Distribution of religious tracts by hand involved a combination of preaching and of distributing religious literature,[87] and thus "occup[ied] the same high estate under the First Amendment as do worship in the churches and preaching from the pulpits, [which meant that it had] … the same claim to protection as the more orthodox and conventional exercises of religion."[88] The Court had no difficulty in classifying the Witnesses' activity as religious and entitled to First Amendment protection, echoing one of the worries articulated in Cantwell, namely, that the state must not be permitted to prevent poor religious groups from engaging in free exercise.[89] Were the tax upheld, then "[s]preading religious beliefs in this ancient and honorable manner would … be denied the needy."[90]

Lest its meaning be misunderstood, the Court expressly rejected that "any conduct can be made a religious rite and by the zeal of the practitioners swept into the First Amendment."[91] The Court explained that Reynolds and Davis "denied any such claim to the practice of polygamy and bigamy."[92] Presumably, this meant that polygamy did not even fall under the First Amendment (i.e., could not be swept into that amendment),[93] although the Court might merely have been suggesting that such practices, even if religious, would not be protected under the First Amendment. Thus, when noting that "[o]ther claims may well arise which deserve the same fate,"[94] the Court did not explain whether those envisioned practices would not even trigger First Amendment analysis or whether, instead, the First Amendment analysis would be applied but

[86] Id. at 108.
[87] Id. at 109 ("It is more than preaching; it is more than distribution of religious literature. It is a combination of both.").
[88] Id.
[89] See Cantwell, 310 U.S. at 305 (The secretary of the public welfare council "is authorized to withhold his approval if he determines that the cause is not a religious one. Such a censorship of religion as the means of determining its right to survive is a denial of liberty protected by the First Amendment and included in the liberty which is within the protection of the Fourteenth.").
[90] Murdock, 319 U.S. at 112.
[91] Id. at 109 (citing Reynolds, 98 U.S. at 161).
[92] Id. at 110.
[93] Id. at 109 (citing Reynolds, 98 U.S. at 161).
[94] Id. at 110.

would be unavailing to save the practice. The Murdock Court clearly envisioned that some types of religious conduct could be regulated, noting that the way in which certain evangelistic actions are "practiced at times gives rise to special problems with which the police power of the states is competent to deal."[95]

That certain practices might fall within the First Amendment but be subject to regulation "merely illustrates that the rights with which [the Court had been] … dealing are not absolutes."[96] Thus, as had been true in previous cases, the Murdock Court's analysis was ambiguous with respect to whether there were some unspecified criteria by which to determine which practices were religious or whether, instead, the Court was only suggesting that certain religious practices are not protected by the Free Exercise Clause.

D. The Court Refuses to Classify Beliefs as Non-Religious

In Ballard v. United States,[97] the Court had a golden opportunity[98] to illustrate that certain beliefs do not qualify as religious, even if the Court was unprepared at that time to offer the criteria in light of which such decisions should be made. At issue were the claims of those in the "I Am" movement. One of the beliefs of those in the movement was that certain individuals "had, by reason of supernatural attainments, the power to heal persons of ailments and diseases and to make well persons afflicted with any diseases, injuries, or ailments."[99] These "designated persons had the ability and power to cure persons of those diseases normally classified as curable and also of diseases which are ordinarily classified by the medical profession as being incurable diseases."[100] Not only did these individuals claim to have such powers, but they claimed to have

[95] Id. (citing Cox v. New Hampshire 312 U.S. 569 (1941) and Chaplinsky v. New Hampshire, 315 U.S. 568 (1942)).
[96] Id. (citing Schneider v. State, 308 U.S. 147, 160, 161 (1938)).
[97] 322 U.S. 78 (1944).
[98] Cf. id. at 92 (Jackson, J., dissenting) ("I can see in their teachings nothing but humbug, untainted by any trace of truth.").
[99] Id. at 80.
[100] Id.

exercised them. Allegedly, "the three designated persons had in fact cured … hundreds of persons afflicted with diseases and ailments."[101] The Ballards publicly represented that they had these powers, and members of the public would send money,[102] presumably in the hopes that the power to cure the incurable would be used.[103] The Ballards were charged with fraud.[104]

A fraud conviction requires that false representations have been made.[105] However, the Ballard Court explained that courts cannot judge which religious beliefs are true and which false.[106] The First Amendment "embraces the right to maintain theories of life and of death and of the hereafter which are rank heresy to followers of the orthodox faiths."[107] The Founders had been aware of the varied religious views that people might have,[108] and "[t]hey fashioned a charter of government which envisaged the widest possible toleration of conflicting views."[109] While "[t]he religious views espoused by respondents [the Ballards] might seem incredible, if not preposterous, to most people,"[110] the Court reasoned that "if those doctrines are subject to trial before a jury charged with finding their truth or falsity, then the same can be done with the religious beliefs of any sect."[111]

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[101] Id.
[102] See id. at 82 (noting that the Ballards "used the mail for the purpose of getting money").
[103] Charles W. Collier, Terrorism As an Intellectual Problem, 55 **Buff. L. Rev.** 815, 824 (2007) ("On the basis of their extensive contacts in the afterworld and their stellar qualifications as "ascended masters," the Ballards offered to heal those afflicted with otherwise incurable diseases and solicited money for that purpose.").
[104] Ballard, 322 U.S. at 83 (discussing "the scheme to defraud alleged in the indictment").
[105] See id. (discussing "the eighteen alleged false representations").
[106] Id. at 86 ("[W]e do not agree that the truth or verity of respondents' religious doctrines or beliefs should have been submitted to the jury. Whatever this particular indictment might require, the First Amendment precludes such a course.").
[107] Id.
[108] Id. at 87 ("The Fathers of the Constitution were not unaware of the varied and extreme views of religious sects, of the violence of disagreement among them, and of the lack of any one religious creed on which all men would agree.").
[109] Id.
[110] Id.
[111] Id. Cf. Presbyterian Church in U.S. v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church, 393 U.S. 440, 449 (1969) ("First Amendment values are plainly jeopardized when church property litigation is made to turn on the resolution by civil courts of controversies over religious doctrine and practice.").

Chief Justice Stone dissented, denying that "the constitutional guaranty of freedom of religion affords immunity from criminal prosecution for the fraudulent procurement of money by false statements as to one's religious experiences, more than it renders polygamy or libel immune from criminal prosecution."[112] For example, if the individuals had claimed to have cured hundreds of people, then it was open to the government to try to show that no people had ever been cured.[113]

Perhaps the claims of effecting cures could have been shown to be false, e.g., if the Ballards had claimed to have gone to San Francisco and cured hundreds and it could be shown that the Ballards had never even visited California.[114] Of course, fraud would have been more difficult to establish if particular individuals believed themselves to have been cured after having had contact with one of the Ballards.[115]

The approach adopted by Ballard Court is important, a least in part, because of its refusal to classify the contested beliefs as non-religious. While sympathetic to the Cantwell Court's denial that "under the cloak of religion, persons may, with impunity, commit frauds upon the public,"[116] the Ballard Court nonetheless held that the Constitution precludes the trier of fact from finding that certain beliefs were "cloaked"[117] as religious, i.e., were not really religious. The Court was silent as to how a fraud conviction could withstand constitutional review if an essential element of the crime involved the falsity of religious beliefs.

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[112] Ballard, 322 U.S. at 88-89 (Stone, C.J. dissenting).
[113] Id. at 89 (Stone, C.J. dissenting) ("[I]t would be open to the Government to submit to the jury proof that … no such cures had ever been effected.") .
[114] See id. (Stone, C.J., dissenting) ("it would be open to the Government to submit to the jury proof that he had never been in San Francisco").
[115] Cf. Barry Nobel, Religious Healing in the Courts: The Liberties and Liabilities of Patients, Parents, and Healers, 16 **U. Puget Sound L. Rev.** 599, 606 (1993) ("The assertion that religious practices may directly benefit mental or physical health is more likely to engender debate.").
[116] Cantwell, 310 U.S. at 306.
[117] Id.

As a general matter, an individual can only be convicted of fraud if he made an intentional misrepresentation of a fact or state of affairs with the purpose of inducing someone to surrender something of value.[118] For example, an individual might induce someone to give him money for a particular charitable purpose but then might use the money for his own enrichment as he had intended all along.[119] But the jury trying the Ballards was precluded from evaluating the truth or falsity of the Ballards' underlying religious beliefs,[120] which might be taken to mean that the jury was precluded from finding that there had been a false statement regarding the Ballards' power to effect cures.[121]

Suppose that the Ballards in fact had the power to cure people but, unfortunately, were unaware that they indeed had that power. Their claims to having the power would be insincere (because they did not believe that they had such a power), but ex hypothesi the underlying representation of their power would have been true rather than false. It is not fraud to insincerely assert the truth.

After affirming the trial court's jury instructions directing jury members to assess the Ballards' sincerity but not the underlying truth or falsity of the religious beliefs,[122] the Court

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[118] See In re E.P., 185 S.W.3d 908, 910 (Tex. App. 2006) ("Fraud is defined as 'trickery or deceit,' 'intentional misrepresentation, concealment, or nondisclosure for the purpose of inducing another in reliance upon it to part with some valuable thing belonging to him,' or 'a false representation of a matter of fact by words or conduct ... or by the concealment of what should have been disclosed that deceives or is intended to deceive another so he shall act upon it to his legal injury.'") (citing Webster's Third New International Dictionary 904 (1986)).

[119] See Ballard, 322 U.S. at 95 (Jackson, J., dissenting) ("[R]eligious leaders may be convicted of fraud for making false representations on matters other than faith or experience, as for example if one represents that funds are being used to construct a church when in fact they are being used for personal purposes.").

[120] Id. at 88 ("the District Court ruled properly when it withheld from the jury all questions concerning the truth or falsity of the religious beliefs or doctrines of respondents"). See also Ronald J. Krotoszynski, Jr., The Apostle, Mr. Justice Jackson, and the "Pathological Perspective" of the Free Exercise Clause, 65 **Wash. & Lee L. Rev.** 1071, 1080 (2008) ("Justice Douglas, writing for the majority, reinstated the district court's approach.").

[121] But see infra notes 136-38 and accompanying text (discussing whether the falsity might have referred to the Ballards' intentions rather than to their religious beliefs about their powers).

[122] See Ballard, 322 U.S. at 81-82 (discussing with approval the trial court's jury directions:

> Did these defendants honestly and in good faith believe those things? If they did, they should be acquitted. … If these defendants did not believe those things, they did not believe that Jesus came down and dictated, or that Saint Germain came down and dictated, did not believe the things that

remanded the case to the circuit court to address some remaining issues.[123] On remand, the Ninth Circuit affirmed the conviction.[124] That decision was appealed and the Supreme Court reversed, because of the "intentional and systematic exclusion of women"[125] from the jury pool.[126] That exclusion was contrary to California law,[127] which was the applicable law for the federal courts in California.[128] The United States Supreme Court dismissed the indictment, which had been tainted by the illegal, purposeful exclusion of women,[129] although the Court acknowledged that the Ballards might again be tried and convicted.[130]

Justice Jackson suggested in his concurrence that if the applicable statute required not only insincerity but, in addition, that the underlying assertion be provably false,[131] then the fraud

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> they wrote, the things that they preached, but used the mail for the purpose of getting money, the jury should find them guilty.

[123] Id. at 88 ("The judgment is reversed and the cause is remanded to the Circuit Court of Appeals for further proceedings in conformity to this opinion.").
[124] See Ballard v. United States, 329 U.S. 187, 189 (1946) ("On the remand the Circuit Court of Appeals, one judge dissenting, affirmed the judgment of conviction.").
[125] Id. at 190.
[126] See id. at 189-90 ("[W]omen were not included in the panel of grand and petit jurors in the Southern District of California where the indictment was returned and the trial had.").
[127] See id. at 191 ("In California, as in most States, women are eligible for jury service under local law.").
[128] Id. at 190 ("Congress has provided that jurors in a federal court shall have the same qualifications as those of the highest court of law in the State.") (citing Judicial Code s 275, 28 U.S. 338; Criminal Code s 37, 18 U.S.C. s 88, C. s 411, 28 U.S.C.A. s 411).
[129] See id. at 193 ("Recognition must be given to the fact that those eligible for jury service are to be found in every stratum of society. Jury competence is an individual rather than a group or class matter. … To disregard it is to open the door to class distinctions and discriminations which are abhorrent to the democratic ideals of trial by jury.") (quoting Thiel v. Southern Pacific. Co., 328 U.S. 217, 220 (1946)).
[130] Id. at 196 ("The United States may or may not present new charges framed within the limits of our earlier opinion. A properly constituted grand jury may or may not return new indictments. Petitioners may or may not be convicted a second time.").
[131] Id. at 196-97 (Jackson, J., concurring) ("It requires, in my opinion, a provably false representation in addition to knowledge of its falsity to make criminal mail fraud.").

conviction could not stand.[132] The majority apparently had a different view, expecting that the government would reindict the Ballards.[133]

The majority nowhere stated how the finding of insincerity[134] could itself suffice for a finding of fraud, given the requirement that there be a knowingly false assertion made to induce someone to surrender something of value.[135] Nonetheless, the dispute between Justice Jackson and the majority might be understood in the following way:

Justice Jackson viewed the requisite false assertion as the claim that the Ballards "had, by reason of supernatural attainments, the power to heal persons of ailments and diseases and to make well persons afflicted with any diseases, injuries, or ailments."[136] Because that was a religious belief and the jury was precluded from finding it false, a necessary element of fraud (a false representation of a fact or state of affairs) was missing.[137] However, the majority may instead have been focusing on the Ballards' alleged assertion that they would attempt to cure individuals who donated money. If it could be shown that the Ballards had no intention of doing anything (perhaps there were incriminating statements to that effect), then perhaps it could be

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[132] Id. at 196-97 (Jackson, J., concurring) ("This leaves no statutory basis for conviction of fraud and especially no basis for conviction under this indictment."). After the Ballard decision was issued, the prosecution decided not to charge the Ballards again. See Bernadette Meyler, Commerce in Religion, 84 **Notre Dame L. Rev**. 887, 894 (2009) ("[T]he prosecution may have been convinced by Justice Jackson's reasoning; in any event, no additional charges were filed and the "I Am" movement appears to have been thriving through at least 1950.").

[133] See Meyler, supra note 132, at 894 ("[T]he majority seemed assured that the federal government would simply reindict the Ballards").

[134] The majority held that that the jury could reach the Ballard's sincerity but could not address the underlying truth or falsity of the religious claims. See Ballard, 322 U.S. at 87 ("[I]f those [religious] doctrines are subject to trial before a jury charged with finding their truth or falsity, then the same can be done with the religious beliefs of any sect. When the triers of fact undertake that task, they enter a forbidden domain.") The Supreme Court reversed the circuit court's holding that restricting the issue to the sincerity of belief was error. See id. at 83 ("The Circuit Court of Appeals reversed the judgment of conviction and granted a new trial, one judge dissenting. In its view the restriction of the issue in question to that of good faith was error.") (citation omitted) and id. at 88 ("The judgment is reversed and the cause is remanded to the Circuit Court of Appeals for further proceedings in conformity to this opinion.").

[135] See supra note 118 and accompanying text.

[136] See Ballard, 322 U.S. at 80.

[137] See Ballard, 329 U.S. at 196 (Jackson concurring) ("[I]t is improper for the trial court to inquire whether the religious professions and experiences as represented by defendants were true or false but that … leaves no statutory basis for conviction of fraud.").

shown that there was both a false assertion (i.e., that the Ballards would attempt to cure donors) and the requisite insincerity (if there was evidence that the Ballards knew when making the promise that they had no intention of doing anything to cure those who had donated money).[138]

Even Justice Jackson did not want to foreclose fraud prosecutions as a general matter, "for example, if one represents that funds are being used to construct a church when in fact they are being used for personal purposes."[139] Nonetheless, Justice Jackson wanted to foreclose such prosecutions where the allegedly false assertion was itself a religious belief.

One of the unexplored difficulties raised by the Ballard case involves the potential missteps that might be taken by jury members insofar as they were attempting to make the requisite sincerity assessment. At the very least, careful jury instructions would have to be offered. Else, the sincerity test might simply be another way of asking the jury about the plausibility of the beliefs—jury members might say that they could not find that the defendant sincerely believed something that they themselves found incredible. The Court was sensitive to the possibility that an unsympathetic jury might well find certain beliefs false,[140] and the same attitude might make a jury less sympathetic to the claim that anyone could sincerely hold such views.[141]

E. Special Treatment for Religion?

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[138] Cf. **Restatement (Second) of Torts** § 553 (1977) ("One who by a fraudulent misrepresentation, or by the nondisclosure of a fact which as between himself and another it is his duty to disclose, intentionally induces the other to make a gift to him or to a third person is subject to liability to the donor for the loss caused by the making of the gift.")

[139] Ballard, 322 U.S. at 95 (Jackson, J., dissenting).

[140] Id. at 87 ("The miracles of the New Testament, the Divinity of Christ, life after death, the power of prayer are deep in the religious convictions of many. If one could be sent to jail because a jury in a hostile environment found those teachings false, little indeed would be left of religious freedom.")

[141] See Krotoszynski, supra note 120, at 1075 ("[I]f minority religions and religionists face pervasive forms of discrimination and widespread hostility within the general culture, is a trial limited to subjective belief likely to afford an adequate margin of protection for strange, or even offensive, religious beliefs?").

Just as the Nineteenth Century ambivalence about whether polygamy was a religious rather than a non-religious practice was also present in the Twentieth Century case law,[142] the Nineteenth Century ambivalence about whether the Constitution afforded religious practice special treatment was also present in the Twentieth Century case law.[143] Everson v. Board of Education[144] is a good example. At issue was the authorization of reimbursement to parents of transportation costs to parochial schools.[145] The appellant, a taxpayer,[146] claimed inter alia that this expenditure was "an establishment of religion."[147] The Court disagreed.[148]

While the focus of the decision was on whether the reimbursement program violated Establishment Clause guarantees, the Court also addressed free exercise protections, noting that "other language of the [First] amendment commands that New Jersey cannot hamper its citizens in the free exercise of their own religion."[149] The way that the Court spelled out those protections was worthy of note, because the Court reasoned that the state was constitutionally precluded from "exclud[ing] individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians, or the members of any other faith, because of their faith, or lack of it, from receiving the benefits of public welfare legislation."[150] Here, the Court implied that free exercise guarantees were not reserved for those professing a religion, because they also applied

[142] See supra notes 91-95 and accompanying text.
[143] For a discussion of this ambivalence in Reynolds, see supra notes 16-21 and accompanying text.
[144] 330 U.S. 1 (1947).
[145] Id. at 3 (discussing New Jersey statute which authorized school district to "authorize[] reimbursement to parents of money expended by them for the bus transportation of their children on regular busses operated by the public transportation system. Part of this money was for the payment of transportation of some children in the community to Catholic parochial schools.").
[146] Id. (discussing the "appellant, in his capacity as a district taxpayer").
[147] Id. at 8.
[148] Id. at 17 ("[W]e cannot say that the First Amendment prohibits New Jersey from spending tax-raised funds to pay the bus fares of parochial school pupils as a part of a general program under which it pays the fares of pupils attending public and other schools.").
[149] Id. at 16.
[150] Id. (emphasis added).

to "Non-believers" and to those lacking faith. [151] Perhaps the Court had in mind some of the difficulties associated with determining what counts as a religion.[152]

In Torasco v. Watkins,[153] the Court examined the constitutionality of a religious test for employment—the appellant was denied a commission as a notary republic because he would not affirm his belief in God's existence.[154] The Court held that "[t]his Maryland religious test for public office unconstitutionally invades the appellant's freedom of belief and religion and therefore cannot be enforced against him."[155]

Torasco can be interpreted in a number of ways. Insofar as the state is seeking to privilege certain religious beliefs over others, the requirement implicates Establishment Clause guarantees.[156] In addition, requiring an individual to assert something contrary to faith[157] implicates free exercise concerns.[158]

Insofar as the focus is on free exercise, one way to understand the Court's decision is that the state cannot privilege religion over non-religion,[159] although a different way to understand the decision is that the State cannot privilege theocentric religions over non-theocentric religions.[160]

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[151] Id.
[152] See infra notes 349-406 and accompanying text.
[153] 367 U.S. 488 (1961).
[154] Id. at 489 ("The appellant Torcaso was appointed to the office of Notary Public by the Governor of Maryland but was refused a commission to serve because he would not declare his belief in God.").
[155] Id. at 496.
[156] Id. at 490 (discussing "the formal or practical 'establishment' of particular religious faiths in most of the Colonies"). See also Kent Greenawalt, Religion as a Concept in Constitutional Law, 72 **Cal. L. Rev.** 753, 759 (1984) ("Striking down a state law that required office holders to declare a belief in God, the Court in Torcaso v. Watkins 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.").
[157] See Torasco, 367 U.S. at 495 ("[N]either a State nor the Federal Government can constitutionally force a person 'to profess a belief or disbelief in any religion.'") (quoting Everson, 330 U.S. at 15).
[158] Id. at 490 (discussing the "burdens imposed on the free exercise of the faiths of nonfavored believers").
[159] Id. at 495 ("[N]either a State nor the Federal Government … can constitutionally pass laws or impose requirements which aid all religions as against non-believers.").
[160] Id. ("[N]either a State nor the Federal Government … aid those religions based on a belief in the existence of God as against those religions founded on different beliefs.").

In a footnote, the Court noted several "religions in this country which do not teach what would generally be considered a belief in the existence of God."[161]

Arguably, the Maryland requirement at issue in Torasco violated both establishment and free exercise guarantees, and at least one question involves how to distinguish between the requirements of each. The Court in Engel v. Vitale[162] provided a partial answer.

Engel involved an official prayer to start the school day. The prayer at issue, "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our Country,"[163] was struck down as a violation of the Establishment Clause.[164]

The Court distinguished between establishment and free exercise by noting: "The Establishment Clause, unlike the Free Exercise Clause, does not depend upon any showing of direct governmental compulsion and is violated by the enactment of laws which establish an official religion whether those laws operate directly to coerce nonobserving individuals or not."[165] Here, the Court implied that free exercise guarantees may be violated when "laws operate directly to coerce non-observing individuals."[166] At least one question raised by such a distinction is whether the coercion of non-observant individuals itself violates free exercise guarantees (regardless of what those individuals actually believe) or whether such coercion is a violation only because the coercion contravenes religious beliefs that the (non-observant)

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[161] Id. at 495 n.11.
[162] 370 U.S. 421 (1962).
[163] Id. at 422.
[164] Id. at 424 ("We think that by using its public school system to encourage recitation of the Regents' prayer, the State of New York has adopted a practice wholly inconsistent with the Establishment Clause.").
[165] Id. at 430. The Court wants to differentiate the two in other respects as well. See Walz v. Tax Comm'n of City of New York, 397 U.S. 664, 673 (1970) ("The limits of permissible state accommodation to religion are by no means co-extensive with the noninterference mandated by the Free Exercise Clause. To equate the two would be to deny a national heritage with roots in the Revolution itself.") See, for example, Sherbert v. Verner, 374 U.S. 398, 409 (1963) ("[P]lainly we are not fostering the 'establishment' of the Seventh-day Adventist religion in South Carolina, for the extension of unemployment benefits to Sabbatarians in common with Sunday worshippers reflects nothing more than the governmental obligation of neutrality in the face of religious differences, and does not represent that involvement of religious with secular institutions which it is the object of the Establishment Clause to forestall.").
[166] Engel, 370 U.S. at 430.

individual has. If the former view accurately captures the relevant protections, then free exercise guarantees preclude an individual from being coerced to do or say something religious even if the individual has no religious beliefs of her own. However, if the latter is accurate, then free exercise guarantees preclude an individual from being coerced to do or say something religious only if the individual has religious beliefs of her own that would be contravened were the person to succumb to the coercion.

Consider School District of Abington Township. v. Schempp,[167] which involved the constitutionality of prayers beginning the schoolday.[168] Pennsylvania law required that Bible verses be read every day, although children would be excused with a written note from their parents.[169] The Schempps, Unitarians, challenged the law.[170] While Edward Schempp had considered having his children excused, he believed that their leaving the classroom during these readings would put them at a disadvantage.[171]

The Court struck down the state law on Establishment Clause grounds,[172] but made numerous points about free exercise protections while doing so. For example, the Court noted that the Free Exercise Clause "recognizes the value of religious training, teaching and observance and, more particularly, the right of every person to freely choose his own course with reference thereto, free of any compulsion from the state."[173] Echoing analyses previously offered in the case law, the Court explained that "it is necessary in a free exercise case for one to show the coercive effect of

[167] 374 U.S. 203 (1963).
[168] Id. at 205 ("These companion cases present the issues in the context of state action requiring that schools begin each day with readings from the Bible.").
[169] Id. ("The Commonwealth of Pennsylvania by law … requires that 'At least ten verses from the Holy Bible shall be read, without comment, at the opening of each public school on each school day. Any child shall be excused from such Bible reading, or attending such Bible reading, upon the written request of his parent or guardian.'").
[170] Id. at 206 ("The appellees Edward Lewis Schempp, his wife Sidney, and their children, Roger and Donna, are of the Unitarian faith.").
[171] Id. at 208 ("Schempp testified at the second trial that he had considered having Roger and Donna excused from attendance at the exercises but decided against it for several reasons, including his belief that the children's relationships with their teachers and classmates would be adversely affected.").
[172] Id. at 223 ("[T]he exercises and the law requiring them are in violation of the Establishment Clause").
[173] Id. at 222.

the enactment as it operates against him in the practice of his religion."[174] The Schempp comment suggests that fee exercise guarantees are implicated only if an individual is coerced to do something that violates his religious beliefs.

Yet, the Schempp Court's understanding of what counted as religion seemed rather broad—one of the questions presented was whether prohibiting Bible-reading would create a "religion of secularism" in the schools.[175] The Court agreed that it was impermissible to "establish a 'religion of secularism' in the sense of affirmatively opposing or showing hostility to religion, thus 'preferring those who believe in no religion over those who do believe,'"[176] although the Court rejected that its ruling had that impermissible effect.[177]

In his concurrence, Justice Brennan noted that "the line which separates the secular from the sectarian in American life is elusive."[178] Explaining that "our religious composition makes us a vastly more diverse people than were our forefathers,"[179] he pointed out that "[t]oday the Nation is far more heterogeneous religiously, including as it does substantial minorities not only of Catholics and Jews but as well of those who worship according to no version of the Bible and those who worship no God at all."[180] Here, Justice Brennan included among the religious "those who worship no God at all,"[181] citing to Torasco's discussion of "those religions founded on different beliefs,"[182] i.e., beliefs not predicated on the existence of God or, perhaps, beliefs predicated on the non-existence of God.

F. Conflicts between Religious and Civil Requirements

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[174] Id. at 223.
[175] See id. at 225.
[176] Id. (citing Zorach v. Clauson, 343 U.S., 306, 314 (1952)).
[177] Id. ("We do not agree, however, that this decision in any sense has that effect.").
[178] Id. at 231 (Brennan, J., concurring).
[179] Id. at 240 (Brennan, J., concurring).
[180] Id. (Brennan, J., concurring). See also United States v. Seeger, 380 U.S. 163, 174 (1965) (discussing "the richness and variety of spiritual life in our country").
[181] Schempp, 374 U.S. at 240 (Brennan, J., concurring).
[182] Torcaso, 367 U.S. at 495.

Many free exercise cases do not involve the state's requiring an individual to engage in a religious practice such as affirming a belief in God (if only because of the Establishment Clause issues implicated by such requirements). Instead, the state requires an individual to do (or, perhaps, refrain from doing) something secular in contravention of the individual's firmly held religious beliefs. Sherbert v. Verner[183] involved a Seventh Day Adventist, Adell Sherbert, who lost her job because she refused to work on her Sabbath, Saturday.[184] She was unable to secure other employment because those employers required Saturday work, and she applied for unemployment compensation.[185] Her application was denied because her reason for refusing Saturday work was not viewed as "good cause."[186]

The Sherbert Court explained that free exercise challenges to state regulations have not been successful when "[t]he conduct or actions so regulated have … posed some substantial threat to public safety, peace or order."[187] However, because the refusal to work on Saturday posed no such threat,[188] the Court reasoned that the South Carolina refusal would only be upheld if (1) that refusal did not constitute an infringement of free exercise guarantees, or (2) while it was an infringement, it was justified because narrowly tailored to promote compelling state interests.[189]

The Court rejected (1), reasoning that the statute burdened Sherbert's free exercise rights: "the pressure upon her to forego … [her religious] practice is unmistakable."[190] Basically, she

[183] 374 U.S. 398 (1963).
[184] Id. at 399 ("Appellant, a member of the Seventh-day Adventist Church was discharged by her South Carolina employer because she would not work on Saturday, the Sabbath Day of her faith").
[185] Id. at 399-400 ("She filed a claim for unemployment compensation benefits under the South Carolina Unemployment Compensation Act.").
[186] Id. at 401.
[187] Id. at 403 (citing Reynolds, 98 U.S. 145).
[188] Id. ("Plainly enough, appellant's conscientious objection to Saturday work constitutes no conduct prompted by religious principles of a kind within the reach of state legislation.").
[189] Id. ("[I]t must be either because her disqualification as a beneficiary represents no infringement by the State of her constitutional rights of free exercise, or because any incidental burden on the free exercise of appellant's religion may be justified by a 'compelling state interest in the regulation of a subject within the State's constitutional power to regulate.'") (citing NAACP v. Button, 371 U.S. 415, 438 (1963)).
[190] Id. at 404.

was forced to "choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand."[191] Because such a forced choice abridged free exercise guarantees,[192] South Carolina was precluded from denying Sherbert unemployment compensation.

Sherbert suggests that religion can be treated differently from non-religion—an individual unavailable for work for personal (non-religious) reasons would likely not have been afforded an exemption.[193] United States v. Seeger[194] and Welsh v. United States[195] also support that religion is privileged over non-religion, although they suggest that the distinction between religion and non-religion must be spelled out in a way that places more in the religion category than might originally be thought.[196]

Seeger involved whether a particular individual was entitled to conscientious objector status. Daniel Seeger "was conscientiously opposed to participation in war in any form by reason of his 'religious' belief; … [although] he preferred to leave the question as to his belief in a Supreme Being open, 'rather than answer 'yes' or 'no.'"[197] He testified that "his 'skepticism or disbelief in the existence of God' did 'not necessarily mean lack of faith in anything whatsoever'; that his was a 'belief in and devotion to goodness and virtue for their own sakes, and a religious faith in a purely ethical creed."[198] His belief was sincere,[199] but he was denied the conscientious objector status because his deeply held beliefs were not connected to a belief in a Supreme Being.[200]

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[191] Id.
[192] See id. at 410 ("Our holding today is only that South Carolina may not constitutionally apply the eligibility provisions so as to constrain a worker to abandon his religious convictions respecting the day of rest.").
[193] Id. at 420 (Harlan, J., dissenting) ("What the Court is holding is that if the State chooses to condition unemployment compensation on the applicant's availability for work, it is constitutionally compelled to carve out an exception—and to provide benefits—for those whose unavailability is due to their religious convictions.").
[194] 380 U.S. 163 (1965).
[195] 398 U.S. 333 (1970).
[196] See infra notes 202-218 and accompanying text (discussing more and less traditional approaches to religion).
[197] Seeger, 380 U.S. at 166.
[198] Id.

Congress had "declared that 'religious training and belief' was to be 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.'"[201] The Court noted that the conflict was not "between theistic and atheistic beliefs,"[202] but instead a conflict of interpretation of Supreme Being pitting "the orthodox God … [against] the broader concept of a power or being, or a faith, 'to which all else is subordinate or upon which all else is ultimately dependent.'"[203]

The statute precluded certain people from being awarded conscientious objector status—"those whose opposition to war stems from a 'merely personal moral code,'"[204] or "those persons who, disavowing religious belief, decide on the basis of essentially political, sociological or economic considerations that war is wrong and that they will have no part of it."[205] The distinction at issue did not involve the conflict between "between theistic and atheistic beliefs"[206]—the merits of any such challenge would have to be addressed on another day.[207]

When interpreting the applicable test, 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."[208] By interpreting

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[199] See id. at 166-67 ("His belief was found to be sincere, honest, and made in good faith.").
[200] Id. at 167 ("Seeger's belief was not in relation to a Supreme Being as commonly understood.")
[201] Id. at 172.
[202] Id. at 173.
[203] Id. at 174 (citing Webster's New International Dictionary (2nd ed.)).
[204] Id. at 173.
[205] Id.
[206] Id.
[207] Id. at 173-74 ("The question is not, therefore, one between theistic and atheistic beliefs. We do not deal with or intimate any decision on that situation in these cases.").
[208] Id. at 176.

congressional intent that way, the Court was able to "avoid[] imputing to Congress an intent to classify different religious beliefs, exempting some and excluding others."[209]

The Court discussed various views that would count as religious, including a view identifying "God not as a projection 'out there' or beyond the skies but as the ground of our very being,"[210] and a view of religion that was "anthropocentric, not theocentric,"[211] which involved "the devotion of man to the highest ideal that he can conceive."[212] Seeger cited United States v. Kauten[213] with approval,[214] an opinion that Justice Frankfurter also cited with approval when pointing to ways in which state officials could permissibly distinguish between religion and non-religion.[215]

Justice Frankfurter worried that a determination of "whether a cause is, or is not, 'religious' opens up too wide a field of personal judgment to be left to the mere discretion of an official."[216] Nonetheless, he cited to an opinion of Judge Augustus Hand which involved an "allowable range of judgment regarding the scope of 'religion.'"[217] Judge Hand explained:

> There is a distinction between a course of reasoning resulting in a conviction that a particular war is inexpedient or disastrous and a conscientious objection to participation in any war under any circumstances. The latter, and not the former, may be the basis of exemption under the Act. The former is usually a political objection, while the latter, we think, may justly be regarded as a response of the

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[209] Id.
[210] Id. at 180 (citing Paul Tillich, including a quotation from his book II Systematic Theology 12 (1957)).
[211] Id. at 183.
[212] Id. (citing Dr. David Saville Muzzey, Ethics as a Religion (1951)).
[213] 133 F.2d 703 (2d Cir. 1943).
[214] See Seeger, 380 U.S. at 179.
[215] See infra notes 216-17 and accompanying text.
[216] Saia v. People of State of New York, 334 U.S. 558, 564 (1948) (Frankfurter, J., dissenting). But cf. Greenawalt, supra note 155, at 762 ("[F]or constitutional purposes, religion should be determined by the closeness of analogy in the relevant respects between the disputed instance and what is indisputably religion").
[217] Saia, 334 U.S. at 564 (Frankfurter, J., dissenting) (citing United States v. Kauten, 133 F.2d 703, 708 (2nd Cir. 1943)).

> individual to an inward mentor, call it conscience or God, that is for many persons at the present time the equivalent of what has always been thought a religious impulse.[218]

The suggestion that an objection to all wars be classified as religious for purposes of the conscientious objector statute played an important role in Welsh v. United States.[219] At issue in Welsh was whether Elliot Welsh, II was entitled to claim conscientious objector status, notwithstanding his refusal to base his sincere opposition to all war on religious grounds[220] in the "conventional sense"[221] of that term. However, the Court noted that "very few registrants are fully aware of the broad scope of the word 'religious' as used in s 6(j), and accordingly a registrant's statement that his beliefs are nonreligious is a highly unreliable guide for those charged with administering the exemption,"[222] and Welsh did characterize his beliefs as "religious in the ethical sense of the word."[223]

The Welsh Court distinguished "views that are 'essentially political, sociological, or philosophical' or of those who have a 'merely personal moral code'"[224] on the one hand from those "whose consciences [are] spurred by deeply held moral, ethical, or religious beliefs."[225] The latter are those exempted by 6(j) from military service.[226] Basically, the criterion used by the Court was whether the relevant "beliefs play the role of a religion and function as a religion in the registrant's life."[227]

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[218] United States v. Kauten, 133 F.2d 703, 708 (2nd Cir. 1943)
[219] 398 U.S. 333 (1970).
[220] See id. at 341 ("Welsh was far more insistent and explicit than Seeger in denying that his views were religious.").
[221] Id. at 342.
[222] Id. at 341.
[223] Id.
[224] Id. at 343 (citing section 6(j)).
[225] Id. at 344.
[226] See id.
[227] Id. at 339.

The Welsh Court was interpreting a federal statute,[228] and a separate issue was whether the Constitution required a similar result.[229] Justice Harlan argued in his concurrence that "having chosen to exempt, [Congress] cannot draw the line between theistic or nontheistic religious beliefs on the one hand and secular beliefs on the other."[230] In contrast, Justice White argued in dissent that even if a conscientious objection exemption for the religious was constitutionally required, a similar exemption for the nonreligious would not be constitutionally required.[231]

A separate issue was whether Congress was required to create a conscientious objector exemption at all. Justice Harlan argued that Congress "could, entirely consistently with the requirements of the Constitution, eliminate all exemptions for conscientious objectors."[232] The Court had another opportunity to address the degree to which free exercise guarantees required a conscientious objector exemption the following year.

Gillette v. United States[233] involved two challenges to the denial of conscientious objector status by individuals who refused to serve in the Vietnam War.[234] One was by Guy Gillette, whose understanding "of his duty to abstain from any involvement in a war seen as unjust … [was] 'based on a humanist approach to religion,' … guided by fundamental principles of conscience and deeply held views about the purpose and obligation of human existence."[235] The

[228] See id. at 343-44 (discussing what the federal statute exempts)
[229] Cf. Greenawalt, supra note 156, at 760-61 ("the Supreme Court's broad statutory construction of religion, 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").
[230] Id. at 356 (Harlan, J., concurring in the result).
[231] See id. at 370 (White, J., dissenting) ("a statutory exemption for religionists required by the Free Exercise Clause is not an invalid establishment because it fails to include nonreligious believers as well").
[232] Id. at 356 (Harlan, J., concurring in the result).
[233] 401 U.S. 437 (1971).
[234] See id. at 439 ("Petitioner [Gillette] concluded that he could not in conscience enter and serve in the armed forces during the period of the Vietnam conflict."); id. at 440 ("Negre 'objects to the war in Vietnam, not to all wars,'") (citing Negre v. Larsen, 418 F.2d 908, 909-10 (9th Cir. 1969), aff'd sub nom. Gillette v. United States, 401 U.S. 437 (1971)).
[235] Id.

other was by Louis Negre, who believed that it was "his duty as a faithful Catholic to discriminate between 'just' and 'unjust' wars, and to forswear participation in the latter."[236]

The Court declined to follow the model suggested in the previous case law where the focus was on how to categorize the beliefs at issue,[237] expressly noting that the question presented was "not whether these petitioners' beliefs concerning war are 'religious' in nature"[238] or even whether "conscientious objection to a particular war necessarily falls within s 6(j)'s expressly excluded class of 'essentially political, sociological, or philosophical views, or a merely personal moral code.'"[239] Rather, the Court instead focused on the text of the statute whose "language, on a straightforward reading, can bear but one meaning; that conscientious scruples relating to war and military service must amount to conscientious opposition to participating personally in any war and all war."[240]

Given that reading, the Court had to address the constitutionality of Congress's failure to provide conscientious objector status to those with religious objections to participation in some but not all wars.[241] The Court noted that "s 6(j), on its face, simply does not discriminate on the basis of religious affiliation or religious belief, apart of course from beliefs concerning war."[242] While "the special statutory status accorded conscientious objection to all war, but not objection to a particular war, works a de facto discrimination among religions,"[243] the Court held that Congress's purpose in enacting the statute was not to favor some religions over others but,

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[236] Id. at 441.
[237] See id. at 447 ("our cases explicating the 'religious training and belief' clause of s 6(j), or cognate clauses of predecessor provisions, are not relevant to the present issue").
[238] Id.
[239] Id.
[240] Id. at 443 (citing Welsh, 398 U.S. at 340)
[241] Id. at 448 ("Both petitioners argue that s 6[j], construed to cover only objectors to all war, violates the religious clauses of the First Amendment.").
[242] Id. at 450.
[243] Id. at 451-52.

instead, to further secular goals.[244] Further, Congress's distinguishing as it did promoted "fairness"[245] and "serve[d] an overriding interest in protecting the integrity of democratic decisionmaking against claims to individual noncompliance."[246] While recognizing that "the Free Exercise Clause may condemn certain applications clashing with imperatives of religion and conscience, when the burden on First Amendment values is not justifiable in terms of the Government's valid aims,"[247] the Court held that the burdens imposed in this case were "strictly justified."[248]

In his dissent, Justice Douglas argued that the First Amendment protects conscience rather than religion per se. He noted that while "the First Amendment speaks of the free exercise of religion, not of the free exercise of conscience or belief, … conscience and belief are the main ingredients of First Amendment rights."[249] He would have held that both Seeger and Negre should be afforded conscientious objector status, because Congress's distinguishing between those conscientiously opposed to all wars and those conscientiously opposed to some wars was unconstitutional.[250]

The very next year, the Court seemed to change direction yet again.[251] In Wisconsin v. Yoder,[252] the Court examined a Wisconsin law requiring students to remain in school until they

[244] Id. at 454 ("We conclude not only that the affirmative purposes underlying s 6(j) are neutral and secular, but also that valid neutral reasons exist for limiting the exemption to objectors to all war, and that the section therefore cannot be said to reflect a religious preference.").
[245] Id. at 458.
[246] Id.
[247] Id. at 462 (citing Sherbert).
[248] Id.
[249] Id. at 465-66 (Douglas, dissenting).
[250] See id. at 468 (Douglas, J., dissenting) ("[T]he constitutional infirmity in the present Act seems obvious once 'conscience' is the guide.").
[251] Antony Barone Kolenc, Not "For God and Country": Atheist Military Chaplains and the Free Exercise Clause, 48 **U.S.F. L. Rev.** 395, 410 (2014) ("[T]he Supreme Court backed away from this expansive view of religion … [i]n Wisconsin v. Yoder").
[252] 406 U.S. 205 (1972).

reached age sixteen.[253] Jonas Yoder, Wallace Miller, and Adin Yutzy were Amish[254] who did not want their children, ages 14 and 15, to attend public school past the 8th grade.[255] Yoder et al were tried and fined for failure to comply with the compulsory schooling law.[256] They argued that having their children attend those schools would violate their religious beliefs[257]—indeed, the respondents "believed that by sending their children to high school, they would not only expose themselves to the danger of the censure of the church community, but … also endanger their own salvation and that of their children."[258]

These Amish parents believed that high school would undermine the values that they sought to impart to their children. "The high school tends to emphasize intellectual and scientific accomplishments, self-distinction, competitiveness, worldly success, and social life with other students."[259] In contrast, "Amish society emphasizes informal learning-through-doing; a life of 'goodness,' rather than a life of intellect; wisdom, rather than technical knowledge, community welfare, rather than competition; and separation from, rather than integration with, contemporary worldly society."[260]

The Yoder Court reasoned that "a State's interest in universal education … is not totally free from a balancing process when it impinges on fundamental rights and interests, such as those specifically protected by the Free Exercise Clause of the First Amendment."[261] In order for the Wisconsin statute to be upheld, "it must appear either that the State does not deny the free

[253] Id. at 207 ("Wisconsin's compulsory school-attendance law required them to cause their children to attend public or private school until reaching age 16.").
[254] Id.
[255] Id.
[256] See id. at 208.
[257] Id. at 209 ("their children's attendance at high school, public or private, was contrary to the Amish religion and way of life").
[258] Id.
[259] Id. at 211.
[260] Id.
[261] Id. at 214.

exercise of religious belief by its requirement, or that there is a state interest of sufficient magnitude to override the interest claiming protection under the Free Exercise Clause."[262]

Yoder discussed the negative "impact that compulsory high school attendance could have on the continued survival of Amish communities as they exist in the United States today,"[263] although more had to be shown that that the Amish children might be influenced by "teachers who are not of the Amish faith—and may even be hostile to it."[264] In addition, it was necessary to show the religious basis of the threatened way of life. "A way of life, however virtuous and admirable, may not be interposed as a barrier to reasonable state regulation of education if it is based on purely secular considerations."[265] The Yoder Court explained that "to have the protection of the Religion Clauses, the claims must be rooted in religious belief."[266]

If the Religion Clauses only afford protection to claims "rooted in religious belief,"[267] then it will be necessary to distinguish among kinds of beliefs. While acknowledging that "a determination of what is a 'religious' belief or practice entitled to constitutional protection may present a most delicate question,"[268] the Yoder Court nonetheless reasoned that "the very concept of ordered liberty precludes allowing every person to make his own standards on matters of conduct in which society as a whole has important interests."[269] For example, "if the Amish asserted their claims because of their subjective evaluation and rejection of the contemporary secular values accepted by the majority, much as Thoreau rejected the social values of his time

[262] Id.
[263] Id. at 209.
[264] Id. at 211.
[265] Id. at 215.
[266] Id.
[267] Id.
[268] Id. See also Jonathan C. Lipson, On Balance: Religious Liberty and Third-Party Harms, 84 **Minn. L. Rev.** 589, 615 (2000) (discussing "the constitutional and institutional impediments to defining religion").
[269] Yoder, 406 U.S. at 215-16.

and isolated himself at Walden Pond, their claims would not rest on a religious basis."[270] The Court announced that "Thoreau's choice was philosophical and personal rather than religious, and such belief does not rise to the demands of the Religion Clauses."[271]

Regrettably, the Court did not explain what made Thoreau's choice philosophical and personal.[272] It was not clear, for example, whether the Court believed Thoreau's beliefs failed to "play the role of a religion and function as a religion in … [his] life."[273] Instead, the Court explained what sufficed about the Amish beliefs to entitle them to protection—"the traditional way of life of the Amish is not merely a matter of personal preference, but one of deep religious conviction, shared by an organized group, and intimately related to daily living."[274]

By contrasting Thoreau's personal (idiosyncratic?) preferences with those shared by an organized group, Yoder raises whether actions must be based on shared values in order to trigger free exercise guarantees. That question was addressed in Thomas v. Review Board.[275]

At issue was the denial of a claim by Eddie Thomas for unemployment compensation.[276] Thomas, a Jehovah's Witness,[277] worked at a roll foundry making sheet metal for industrial use.[278] When the foundry closed, he was transferred to another department making tank turrets.[279] Because he could not make war weapons as a matter of conscience,[280] he checked to

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[270] Id. at 216.
[271] Id.
[272] George C. Freeman III, The Misguided Search for the Constitutional Definition of "Religion," 71 **Geo. L.J.** 1519, 1528 (1983) ("The Court simply asserted in Yoder, however, that Thoreau might be classified as a paradigm of the secular believer. The Court made no attempt either to explain or to justify this classification."); Scott C. Idleman, The Underlying Causes of Divergent First Amendment Interpretations, 27 **Miss. C. L. Rev.** 67, 73-74 (2008) ("the Court has explained that the religion does not encompass 'purely secular considerations' or 'philosophical and personal' beliefs such as those held by Henry David Thoreau, but this category remains elusive as well.").
[273] Welsh, 398 U.S. at 339.
[274] Yoder, 406 U.S. at 216.
[275] 450 U.S. 707 (1981).
[276] See id. at 709.
[277] Id. at 709.
[278] Id. at 710.
[279] Id. at 710.

see if there were a different position within the company that he could occupy without violating his conscience.[281] But none were available and he quit his job rather than violate his religious convictions.[282]

His application for unemployment benefits was denied,[283] allegedly because "the belief was more 'personal philosophical choice' than religious belief."[284] One of the factors contributing to the judgment that Thomas's reasons were more personal than religious was that a friend of his, also a Jehovah's Witness, had told him that it was "'scripturally' acceptable"[285] to make the turrets. Thomas disagreed with that interpretation, "conclud[ing] that his friend's view was based upon a less strict reading of Witnesses' principles than his own."[286] The Thomas Court noted that it is not unusual for members of the same faith tradition to have differing understandings of their religious obligations,[287] believing "the judicial process … singularly ill equipped to resolve such differences in relation to the Religion Clauses."[288] While conceding that it is possible to "imagine an asserted claim so bizarre, so clearly nonreligious in motivation, as not to be entitled to protection under the Free Exercise Clause;"[289] the Court emphasized that "the guarantee of free exercise is not limited to beliefs which are shared by all of the members of a religious sect."

Once it was established that Thomas's refusal to work implicated free exercise guarantees, the state had to establish that its interests were sufficiently compelling and the means chosen

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[280] Id. ("[H]e could not work on weapons without violating the principles of his religion.").
[281] Id. ("He checked the bulletin board where in-plant openings were listed, and discovered that all of the remaining departments at Blaw-Knox were engaged directly in the production of weapons.").
[282] Id. ("[H]e quit, asserting that he could not work on weapons without violating the principles of his religion.").
[283] See id. at 711.
[284] Id. at 713 (citing Thomas v. Review Bd., 391 N.E.2d 1127, 1131 (1979), rev'd 450 U.S. 707 (1981)).
[285] Id. at 715.
[286] Id. at 711.
[287] Id. at 715 ("Intrafaith differences of that kind are not uncommon among followers of a particular creed.").
[288] Id.
[289] Id.

sufficiently closely tailored to justify its infringement of Thomas's religious liberty.[290] The Court rejected the state's suggestion that "the number of people who find themselves in the predicament of choosing between benefits and religious beliefs is large enough to create 'widespread unemployment,' or even to seriously affect unemployment."[291] Basically, the Court believed Sherbert controlling and struck down Indiana's refusal to award the benefits.[292]

While the Thomas Court reiterated that "[o]nly beliefs rooted in religion are protected by the Free Exercise Clause, which, by its terms, gives special protection to the exercise of religion,"[293] the interpretation of what would not count as religious—"an asserted claim so bizarre, so clearly nonreligious in motivation, as not to be entitled to protection under the Free Exercise Clause"[294]—seems rather forgiving. After reiterating that the "determination of what is a 'religious' belief or practice is more often than not a difficult and delicate task,"[295] the Court explained the approach the courts should not take—"the resolution of that question is not to turn upon a judicial perception of the particular belief or practice in question; religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection."[296]

In Thomas, the Court refused to take sides when individuals of a particular sect disagreed about the content of particular religious obligations. Suppose, however, that an individual does not identify with a particular sect but nonetheless claims particular benefits by virtue of free

[290] See id. at 718 ("The state may justify an inroad on religious liberty by showing that it is the least restrictive means of achieving some compelling state interest.").
[291] Id. at 719.
[292] Id. at 720 ("Unless we are prepared to overrule Sherbert, Thomas cannot be denied the benefits due him on the basis of the findings of the referee, the Review Board, and the Indiana Court of Appeals that he terminated his employment because of his religious convictions.").
[293] Id. at 713 (citing Sherbert; Wisconsin v. Yoder, 406 U.S. 205, 215-16 (1972)).
[294] Id. at 715.
[295] Id. at 714.
[296] Id.

exercise protections. Frazee v. Illinois Department of Employment Security[297] involved an individual's sincere[298] refusal to work based on his "personal professed religious belief."[299] However, William Frazee did not belong to a particular sect and was not a member of a particular church.[300] Basically, he identified as a Christian and believed that it was religiously inappropriate to work on Sunday.[301] The Frazee Court noted that in the previous unemployment decisions involving claims of free exercise infringement, the claimant had been a member of a religious sect.[302] However, those decisions had not been predicated on sect membership. Instead, the "judgments in those cases rested on the fact that each of the claimants had a sincere belief that religion required him or her to refrain from the work in question."[303] Further, the Court never suggested that "unless a claimant belongs to a sect that forbids what his job requires, his belief, however sincere, must be deemed a purely personal preference rather than a religious belief."[304]

The Frazee Court reiterated its appreciation of the difficulty in "distinguishing between religious and secular convictions and in determining whether a professed belief is sincerely held."[305] Nonetheless, such determinations are important, because "[o]nly beliefs rooted in religion are protected by the Free Exercise Clause,"[306] and "[p]urely secular views" do not suffice.[307] Further, "States are clearly entitled to assure themselves that there is an ample

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[297] 489 U.S. 829 (1989).
[298] Id. at 831("The court characterized Frazee's refusal to work as resting on his "personal professed religious belief," and made it clear that it did "not question the sincerity of the plaintiff.") (quoting Frazee v. Dep't of Employment Sec., 512 N.E.2d 789, 791 (Ill. App. 1987), rev'd, 489 U.S. 829 (1989)).
[299] Id. (citing Frazee, 512 N.E.2d at 790).
[300] Id. ("Frazee was not a member of an established religious sect or church.").
[301] Id. (discussing "Frazee's position that he was 'a Christian' and as such felt it wrong to work on Sunday").
[302] Id. at 832 ("It is true … that each of the claimants in those cases was a member of a particular religious sect.").
[303] Id. at 833.
[304] Id.
[305] Id.
[306] Id. (citing Thomas, 450 U.S., at 713)
[307] Id. (citing United States v. Seeger, 380 U.S. 163 (1965); Wisconsin v. Yoder, 406 U.S. 205, 215-16 (1972)).

predicate for invoking the Free Exercise Clause"[308] and "membership in an organized religious denomination, especially one with a specific tenet forbidding members to work on Sunday, would simplify the problem of identifying sincerely held religious beliefs."[309] The Court nonetheless expressly "reject[ed] the notion that to claim the protection of the Free Exercise Clause, one must be responding to the commands of a particular religious organization."[310]

Because denying Frazee benefits triggered free exercise guarantees, the state was required to show that it had a sufficiently compelling interest to justify the imposition of a burden. The Court suggested that while "there may exist state interests sufficiently compelling to override a legitimate claim to the free exercise of religion,"[311] no such interests had been asserted in the instant case.[312]

In Employment Division v. Smith,[313] the Court construed free exercise protections in a way that undermined their reach.[314] Two drug counselors, Alfred Smith and Galen Black, had been fired from their jobs for their sacramental use of peyote.[315] Their applications for unemployment compensation were denied, because they had been fired for work-related misconduct.[316]

Smith and Black argued that "their religious motivation for using peyote places them beyond the reach of a criminal law that is not specifically directed at their religious practice, and that is

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[308] Id.
[309] Id. at 834.
[310] Id.
[311] Id. at 835.
[312] Id. ("No such interest has been presented here.").
[313] 494 U.S. 872 (1990).
[314] Mark G. Yudof, Religious Liberty in the Balance, 47 **SMU L. Rev.** 353, 354 (1994) ("[I]n Employment Division v. Smith the Supreme Court adopted a crabbed vision of the free exercise of religion that undermines our religious freedoms.").
[315] Smith, 494 U.S. at 874 ("Alfred Smith and Galen Black (hereinafter respondents) were fired from their jobs with a private drug rehabilitation organization because they ingested peyote for sacramental purposes at a ceremony of the Native American Church, of which both are members.").
[316] Id. ("When respondents applied to petitioner Employment Division (hereinafter petitioner) for unemployment compensation, they were determined to be ineligible for benefits because they had been discharged for work-related 'misconduct.'").

concededly constitutional as applied to those who use the drug for other reasons."[317] The Court rejected that position, suggesting that "an individual's religious beliefs [do not] excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate."[318] Thus, "the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'"[319] The Court explained that the apparent exceptions to this rule "involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections."[320] As examples, the Court cited inter alia Cantwell v. Connecticut,[321] described as also including "freedom of speech and of the press,"[322] Murdock v. Pennsylvania,[323] described as "invalidating a flat tax on solicitation as applied to the dissemination of religious ideas,"[324] and Wisconsin v. Yoder,[325] described as "invalidating compulsory school-attendance laws as applied to Amish parents who refused on religious grounds to send their children to school."[326] The Court interpreted the case before it as not involving "such a hybrid situation, but a free exercise claim unconnected with any communicative activity or parental right."[327] In addition, the Court held that the Sherbert balancing test should not be applied "to require exemptions from a generally applicable criminal law."[328]

[317] Id. at 878.
[318] Id. at 878-79.
[319] Id. at 879 (citing United States v. Lee, 455 U.S. 252, 263, n.3 (1982) (Stevens, J., concurring in judgment)).
[320] Id. at 881.
[321] Id. (citing Cantwell, 310 U.S. 304-07).
[322] Id.
[323] Id. (citing Murdock, 319 U.S. 105).
[324] Id.
[325] Id. (citing Yoder, 406 U.S. 205)
[326] Id.
[327] Id. at 882.
[328] Id. at 884.

Reasoning that the case law precludes the courts from "presum[ing] to determine the place of a particular belief in a religion or the plausibility of a religious claim,"[329] the Smith Court suggested that "[i]f the 'compelling interest' test is to be applied at all, then, it must be applied across the board, to all actions thought to be religiously commanded."[330] But "[p]recisely because 'we are a cosmopolitan nation made up of people of almost every conceivable religious preference,'[331] and precisely because we value and protect that religious divergence, we cannot afford the luxury of deeming presumptively invalid, as applied to the religious objector, every regulation of conduct that does not protect an interest of the highest order."[332] Raising the specter of Reynolds, the Court believed its approach preferable to a "system in which each conscience is a law unto itself"[333] or to a system "in which judges weigh the social importance of all laws against the centrality of all religious beliefs."[334]

Smith contradicts the past jurisprudence, which does not require a hybrid right to be at issue in order for strict scrutiny to be triggered.[335] However, the Smith Court captures the spirit of the past jurisprudence when suggesting that courts are not competent to judge the centrality of religious beliefs[336] and, further, is correct that applying a version of strict scrutiny that has not been watered down will mean that many laws will have to include religious exemptions in order to pass constitutional muster.[337]

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[329] Id. at 887.
[330] Id. at 888.
[331] Citing Braunfeld v. Brown, 366 U.S. 599, 606 (1961).
[332] Smith, 494 U.S. at 888.
[333] Id. at 890.
[334] Id.
[335] See Braunfeld v. Brown, 366 U.S. 599 (1961) (suggesting that Sunday closing laws pass muster under strict scrutiny); United States v. Lee, 455 U.S. 252 (1982) (suggesting that the refusal to exempt Amish employers from paying into the Social Security system passes muster under strict scrutiny).
[336] See Smith, 494 U.S. at 887 ("Judging the centrality of different religious practices is akin to the unacceptable 'business of evaluating the relative merits of differing religious claims.'") (citing United States v. Lee, 455 U.S. 252, 263 n.2 (1982) (Stevens, J., concurring).
[337] Id. at 888 ("Moreover, if 'compelling interest' really means what it says (and watering it down here would subvert its rigor in the other fields where it is applied), many laws will not meet the test.").

Smith's citation to Reynolds is unsurprising, because the Reynolds Court also worried about recognizing religious exemptions to criminal law. However, the tacks taken by the Smith and Reynolds Courts differed in an important respect. The Reynolds Court reasoned that polygamy was so inimical to societal interests that it could be subject to criminal prosecution even if qualifying as a religious practice.[338] However, the Smith Court did not adopt an approach in which the alleged harms of the practice at issue were magnified—rather than employ Justice O'Connor's rationale in her Smith concurring opinion that the War Against Drugs involved such a compelling interest that the Oregon law should be upheld,[339] the Court instead suggested that statutes burdening religious practices do not trigger strict scrutiny unless involving hybrid rights.[340] Perhaps the Smith Court adopted this approach because it realized that sacramental use of peyote could not plausibly be described as extremely dangerous, given the state's refusal to prosecute[341] and the absence of harm traced to such sacramental use.[342] Or, perhaps because the Court had so often upheld state practices burdening free exercise while allegedly employing strict scrutiny, the Court wanted to restore some integrity to its strict scrutiny jurisprudence[343] while nonetheless being no less deferential to state practices burdening free exercise.[344] Instead

[338] See supra notes 26-27 and accompanying text.
[339] See Smith, 494 U.S. at 907 (O'Connor, J., concurring in the judgment) ("I would therefore adhere to our established free exercise jurisprudence and hold that the State in this case has a compelling interest in regulating peyote use by its citizens and that accommodating respondents' religiously motivated conduct 'will unduly interfere with fulfillment of the governmental interest.'") (citing United State v. Lee, 455 U.S. 252, 259 (1982)).
[340] See id. at 881-82.
[341] See id. at 911 (Blackmun, J., dissenting) ("In this case, the State actually has not evinced any concrete interest in enforcing its drug laws against religious users of peyote. Oregon has never sought to prosecute respondents, and does not claim that it has made significant enforcement efforts against other religious users of peyote.").
[342] See id. at 911-12 (Blackmun, J., dissenting) ("The State proclaims an interest in protecting the health and safety of its citizens from the dangers of unlawful drugs. It offers, however, no evidence that the religious use of peyote has ever harmed anyone.").
[343] Cf. id. at 888 ("[I]f 'compelling interest' really means what it says (and watering it down here would subvert its rigor in the other fields where it is applied), many laws will not meet the test.").
[344] Cf. id. at 885 ("The government's ability to enforce generally applicable prohibitions of socially harmful conduct, like its ability to carry out other aspects of public policy, 'cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development.'") (citing Lyng v. Northwest Indian Cemetery Protective Assn., 485 U.S. 439, 451 (1988)).

of questioning which practices were religious or magnifying the alleged harms of the practice at issue, the Court instead modified the conditions under which state practices burdening[345] but not targeting religious practices would trigger strict scrutiny.[346]

III. What is Religion for Free Exercise Purposes

The United States Supreme Court has suggested that religion for free exercise purposes is to be construed rather broadly. While repeatedly insisting that free exercise guarantees are only triggered by religious (as opposed to non-religious) practices,[347] the Court has not explained how to distinguish between religion and non-religion.[348] There are various ways to understand the Court's approach, although a synthesis of several of the points made in the case law makes clear the direction that should be taken when outlining the prevailing approach.

A. Why Define Religion

Some commentators suggest that there is no need to define religion for free exercise purposes—instead, we should look at the commonalities among paradigmatic religions, which will provide all that is needed.[349] Certainly, we would expect paradigmatic religious practices to be included within those beliefs and practices potentially triggering free exercise protections, and

[345] See id. at 892 (O'Connor, J., concurring in the judgment) (" To reach this sweeping result, however, the Court must not only give a strained reading of the First Amendment but must also disregard our consistent application of free exercise doctrine to cases involving generally applicable regulations that burden religious conduct.").
[346] The Court will use strict scrutiny if a statute specifically targets religious practice. See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993).
[347] See Brian M. Murray, The Elephant in Hosanna-Tabor, 10 **Geo. J.L. & Pub. Pol'y** 493, 522 (2012) ("[T]he Court affirmed that religion is 'special' in Thomas v. Review Board.").
[348] Ethridge B. Ricks, The Gospel According to the Warden: RLUIPA, the First Amendment, and Prisoners' Religious Liberty Requests, 11 **First Amend. L. Rev.** 542, 548 (2013) (noting "the lack of a functional definition of religion").
[349] See Freeman, supra note 272, at 1565 ("There simply is no essence of religion, no single feature or set of features that all religions have in common and this distinguishes religion form everything else. There is only a focus, coupled with a set of paradigmatic features. These, without more, however, are enough.").

focusing on paradigmatic beliefs and practices might provide a useful guide in some respects.[350] Nonetheless, such an approach has its drawbacks, if only because it assumes agreement about which sets of beliefs are paradigmatically religious.[351] If that assumption is not warranted,[352] then the approach will lose much of its usefulness and may in effect give judges free rein to decide whether a particular set of beliefs qualifies as religious.[353]

Suppose that there were agreement about which beliefs or features were paradigmatically religious.[354] Even so, that might be much less helpful than might originally be thought, because religion for free exercise purposes might be much broader than the definition of religion for other purposes. As the Welsh Court noted, the conventional sense of religion did not correspond to the definition of religion that Congress had been using in its conscientious objector legislation[355] and the same point might be made about religion for free exercise purposes.[356]

B. The Breadth of What Counts as Religion

The Court's apparent willingness to construe religion broadly for free exercise purposes implies that judges should give the benefit of the doubt to assertions that particular beliefs are

[350] Cf. supra note 254 and accompanying text (discussing some aspects of Amish beliefs making them suitable for protection).
[351] Some commentators suggest that religion imposes certain requirements on individuals. See Chad Flanders, The Possibility of a Secular First Amendment, 26 **Quinnipiac L. Rev.** 257, 289 (2008) ("religion requires obedience to a higher authority; in other words, religion shows believers (and people in general) that they are accountable to a non-temporal judge, and that there may be extra-temporal consequences to their actions"). However, such a view would doubtless be quite controversial depending upon how the criteria for the non-temporal judge were spelled out.
[352] See Mason Blake Binkley, A Loss for Words: "Religion" in the First Amendment, 88 **U. Det. Mercy L. Rev.** 185, 210 (2010) ("[T]he approach unrealistically presupposes broad agreement on a set of paradigmatic features of religion.").
[353] Eduardo Penalver, The Concept of Religion, 107 **Yale L.J.** 791, 816 (1997) ("The … definitions by analogy … would do nothing to constrain the decisionmaking processes of individual judges. They would leave each judge completely free to determine whether or not a belief system is a religion according to the presence or absence of any single characteristic (or combination of characteristics) the judge chooses.").
[354] For a proposed criterion, see Andrew W. Austin, Faith and the Constitutional Definition of Religion, 22 **Cumb. L. Rev**. 1, 33 (1992) ("Religious beliefs are non-rational; they cannot be proven or demonstrated by their adherents because they are not based upon reason, but are based upon what might be referred to as intuition or faith.").
[355] See supra note 221 and accompanying text.
[356] See supra notes 180-81 (discussing a more inclusive definition of religion for free exercise purposes).

religious.[357] Yet, telling judges that they must give the benefit of the doubt to such assertions will not provide sufficient guidance unless much more is said about the kinds of beliefs that might qualify.

While the current jurisprudence countenances a much broader definition of religion than it once did,[358] the Court nonetheless believes that what counts as religion for free exercise purposes is not unlimited. Religion is expressly afforded special treatment in the First Amendment[359] and the protections contained therein would seem to do little work if religion could not be differentiated from non-religion.[360] The Court has explained that the beliefs in question must not merely be "philosophical,"[361] although the Court has not spelled out how to distinguish the philosophical from the non-philosophical.

Some commentators suggest that the Court's exclusion of the philosophical indicates that religious beliefs must be based on faith[362] rather than reason,[363] although that would seem to reject Catholicism as a religion[364] and would seem to limit philosophy too severely as well.[365]

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[357] Binkley, supra note 352, at 221 ("[I]n borderline free exercise cases, these principles suggest that the court should probably err on the side of a finding that the belief system or way of life at issue (i.e., the disputed instance) qualifies as a religion").

[358] Michael W. McConnell, The Origins and Historical Understanding of Free Exercise of Religion, 103 **Harv. L. Rev.** 1409, 1425 (1990) ("The term 'free exercise' first appeared in an American legal document in 1648, when Lord Baltimore required his new Protestant governor and councilors in Maryland to promise not to disturb Christians ('and in particular no Roman Catholic') in the 'free exercise' of their religion."); Mark C. Rahdert, A Jurisprudence of Hope: Justice Blackmun and the Freedom of Religion, 22 **Hamline L. Rev.** 1, 30 (1998) ("This 'Christian,' or perhaps one might say 'Eurocentric,' cast to the Court's free exercise jurisprudence was once overt.").

[359] Flanders, supra note 351, at 259 ("[T]he text of the Constitution proclaims that religion is to be "singled out" in respect to both its exercise and whether the state can establish a religion").

[360] Kolenc, supra note 251, at 418 ("[I]f religion can no longer be distinguished from nonreligion, then the Religion Clauses would seem to protect nothing special").

[361] Yoder, 406 U.S. at 216.

[362] Austin, supra note 354, at 33 ("Religious beliefs are non-rational; they cannot be proven or demonstrated by their adherents because they are not based upon reason, but are based upon what might be referred to as intuition or faith.").

[363] Id. at 34 ("In Yoder, the Court stated that purely philosophical systems cannot enjoy the protection (and presumably do not have to bear the burdens) of the religion clauses. Apparently, the Court was suggesting a rational/non-rational distinction.").

[364] Cf. Book Note, Religion and Roe: The Politics of Exclusion; the Politics of Virtue: Is Abortion Debatable? By Elizabeth Mensch and Alan Freeman. Durham: Duke University Press. 1993. Pp. x, 268. $39.95(Cloth), $14.95

Further, such an explanation does not capture the tone of the Court's jurisprudence. For example, the Thomas Court explained that beliefs do not need to be logical, consistent, or comprehensible to qualify as religious.[366] Yet, in suggesting that, the Court was not implying that religious beliefs could not be based on reason.

The Yoder Court's reference to philosophy may well have involved an attempt to capture the Seeger Court's exclusion of views that were "essentially political, sociological, or philosophical."[367] Perhaps the Court was attempting to limit religious beliefs by offering a negative definition and specifying which beliefs do not qualify. But that explanation is not plausible if only because the Court likely did not have particular contents in mind when referring to philosophy. For example, the Court often talks about a particular "economic philosophy,"[368] which seems to use "philosophy" to stand for a "set of beliefs" without a further specification of content. Further, the Seeger discussion of "Hindu philosophy, [where] the Supreme Being is the

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(Paper), 108 **Harv. L. Rev.** 495, 496 (1994) ("Catholicism's natural law tradition emphasizes an 'objective natural order' revealed to our 'careful human reason.'")

[365] See Ellis Washington, Reply to Judge Richard A. Posner on the Inseparability of Law and Morality, 3 **Rutgers J. L. & Religion** 1 (2001) (discussing "the philosophy of emotivism").

[366] Thomas, 450 U.S. at 714.

[367] Seeger, 380 U.S. at 165.

[368] See Mazer v. Stein, 347 U.S. 201, 219 (1954) ("The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in 'Science and useful Arts.'"); Eldred v. Ashcroft, 537 U.S. 186, 214 (2003) (quoting Mazer); Golan v. Holder, 132 S. Ct. 873, 899 (2012) (quoting Eldred, 537 U.S. at 212, n.18; Ferguson v. Skrupa, 372 U.S. 726, 729 (1963) (discussing a "particular economic or social philosophy"); New York Times Co. v. Tasini, 533 U.S. 483, 495 n.3 (2001) (citing Mazer); Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 519 (1969) (citing Skrupa, 372 U.S. at 729 ("There was a time when the Due Process Clause was used by this Court to strike down laws which were thought unreasonable, that is, unwise or incompatible with some particular economic or social philosophy.") Rochin v. California, 342 U.S. 165, 177 (1952) (Black, J., concurring) (discussing "the evanescent standards of the majority's philosophy have been used to nullity state legislative programs passed to suppress evil economic practices"); Schneider v. Smith, 390 U.S. 17, 24 (1968) (discussing "whether government can probe the reading habits, political philosophy, beliefs, and attitudes on social and economic issues of prospective seamen on our merchant vessels"); United States v. Trenton Potteries Co., 273 U.S. 392, 398 (1927) ("[I]in the absence of express legislation requiring it, we should hesitate to adopt a construction making the difference between legal and illegal conduct in the field of business relations depend upon so uncertain a test as whether prices are reasonable-a determination which can be satisfactorily made only after a complete survey of our economic organization and a choice between rival philosophies."); Cline v. Frink Dairy Co., 274 U.S. 445, 462-64 (1927) (quoting Trenton Potteries);, Coll. Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 691 (1999) (discussing an attempt "to impose a particular economic philosophy upon the Constitution").

transcendental reality which is truth, knowledge and bliss"[369] was meant to include rather than exclude religious beliefs. By the same token, the Seeger Court cited to various philosophical works upon which Seeger's protected belief system was based.[370] Thus, philosophical works may be treated as secular rather than religious, but also may be treated as religious rather than secular. Further, "philosophy" is sometimes used as a synonym for "set of beliefs" or "approach," suggesting that certain approaches (but not others) are secular without a clear exposition of which are which. A possible way to understand which philosophies are secular and which religious involves the difference between what it viewed as descriptive and what it viewed as normative or aspirational—the Welsh Court suggested that " deeply held moral, ethical, or religious beliefs"[371] are all protected.

Some commentators suggest that the proper way to understand the content protected by free exercise guarantees is that "any concern deemed ultimate [must] be protected."[372] But such a standard requires someone, e.g., the believer herself[373] or a court,[374] to decide whether the beliefs at issue are sufficiently important to meet that standard. But permitting a court decide whether a belief is sufficiently important would seem no more appropriate than having a court decide

[369] Seeger, 380 U.S. at 174-75 (emphasis added).
[370] Id. at 166 (noting that Seeger "cited such personages as Plato, Aristotle and Spinoza for support of his ethical belief in intellectual and moral integrity 'without belief in God, except in the remotest sense.'"). See also Donald L. Beschle, Does a Broad Free Exercise Right Require a Narrow Definition of "Religion"?, 39 **Hastings Const. L.Q.** 357, 368 (2012) ("Seeger rested his pacifism on his readings of philosophers such as Plato, Aristotle, and Spinoza.")..
[371] Welsh, 398 U.S. at 344.
[372] See Note, Toward A Constitutional Definition of Religion, 91 **Harv. L. Rev.** 1056, 1075-76 (1978). See also Michael Rhea, Denying and Defining Religion under the First Amendment: Waldorf Education as a Lens for Advocating a Broad Definitional Approach, 72 **La. L. Rev.** 1095, 1105-06 (2012) ("[T]he test does not examine the content of the belief at issue but instead aims to determine whether a belief is subjectively identifiable in the eyes of an adherent as an ultimate, gravely significant concern.").
[373] See Note, supra note 372, at 1076 ("[I]mplicit in this approach is recognition that the only actor competent to decide what constitutes an ultimate concern is the individual believer.").
[374] Terry L. Slye, Rendering Unto Caesar: Defining "Religion' for Purposes of Administering Religion-Based Tax Exemptions, 6 **Harv. J.L. & Pub. Pol'y** 219, 230 (1983) ("Ultimately, the courts must determine whether … [the] beliefs … [are] deeply and sincerely held … [and whether they] involve a matter of ultimate concern.").

which religious beliefs are true.[375] Further, such a standard would be both too narrow and too broad—purely secular beliefs might be matters of ultimate concern and thus protected,[376] and paradigmatic religious beliefs might not be viewed as sufficiently important by the believer herself to qualify.[377]

Nor does the ultimate concern approach capture the Court's jurisprudence—the definition of religion adopted for free exercise purposes has not excluded what would normally be thought of as religious beliefs even where there has been no showing that the believer viewed the beliefs as implicating matters of ultimate concern. A more plausible interpretation of the jurisprudence is that whatever degree of commitment is represented by a variety of believers is the requisite level of commitment, although that means that beliefs would not have to be of ultimate or even great concern to qualify—instead, a "meaningful belief"[378] suffices.

C. Sincerity

[375] Cf. Adam J. MacLeod, Resurrecting the Bogeyman: The Curious Forms of the Substantial Burden Test in RLUIPA, 40 **Real Est. L.J**. 115, 130 (2011) (suggesting that it is inappropriate for courts to be making certain judgments about religious beliefs).

[376] Austin, supra note 354, at 28 ("[I]it appears strange to assert that the devotion one pays to a particular belief determines whether or not it is religious. Such a definition results in merely self-interested individuals being considered religious, and intensely dedicated Democrats or Republicans being considered religious.").

[377] Jeffrey L. Oldham, Constitutional "Religion": A Survey of First Amendment Definitions of Religion, 6 **Tex. F. on C.L. & C.R.** 117, 156 (2001) ("[S]ince the definition appears to qualify beliefs as religious based on the strength of convictions—in other words, concerns must be 'ultimate'—then it is possible that a believer from an established church who cannot pinpoint a particular ultimate concern, or even someone whose clearly religious beliefs inherently are not geared to make them zealots, can be excluded from First Amendment protection.") Timothy L. Hall, The Sacred and the Profane: A First Amendment Definition of Religion, 61 **Tex. L. Rev.** 139, 156 (1982) ("Since it defines religion in terms of the intensity of an individual's commitment, individuals practicing even traditional religious faiths for whom that faith is not an 'ultimate concern' would fall outside the protection of the free exercise clause."); Jeffrey Omar Usman, Defining Religion: The Struggle to Define Religion Under the First Amendment and the Contributions and Insights of Other Disciplines of Study Including Theology, Psychology, Sociology, the Arts, and Anthropology, 83 **N.D. L. Rev.** 123, 159 (2007) ("Proponents of narrowing the definition concede that this concept may offend some who regard their practices as religious, but argue that to allow religion to be anything one asserts it to be—i.e., any ultimate concern—will defeat any meaningful protection under the First Amendment.").

[378] Seeger, 380 U.S. at 176.

The Court has repeatedly affirmed that states are permitted to judge the sincerity of belief.[379] However, at least two points might be made about such a criterion. The sincerity that must be shown is simply that the individual holds the belief. Beliefs do not have to form a consistent and coherent creed in order to be considered religious and protected. As the Thomas Court explained: "religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection."[380]

Further, it is important to prevent the trier of fact from imputing insincerity because the underlying belief does not seem credible.[381] While the Court has suggested that "bizarre"[382] beliefs may not "be entitled to protection under the Free Exercise Clause,"[383] the degree to which beliefs must be bizarre in order to be unprotected is rather high, as is illustrated by the protection accorded to the beliefs at issue in Ballard.[384]

One issue is whether an individual sincerely believes something; another is why she believes it. The Court has suggested that some beliefs are "so clearly nonreligious in motivation, as not to be entitled to protection under the Free Exercise Clause."[385] However, the mere presence of a compelling non-religious reason does not establish that the individual's motivation is in fact nonreligious.

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[379] Garrett Epps, What We Talk About When We Talk About Free Exercise, 30 **Ariz. St. L.J.** 563, 570 (1998) ("[O]ne concern that the Court has inherited from the Framers is the concern for false claimants-citizens who will opportunistically designate a seemingly secular practice as religious in order to obtain the state's protection and thus an advantage over others who seek to do the same thing for non-religious reasons.").
[380] Thomas, 450 U.S. at 714.
[381] See supra notes 138-39 and accompanying text (discussing the difficulties the Ballard jury members might have faced).
[382] Thomas., 450 U.S. at 715.
[383] Id.
[384] For a discussion of Ballard, see supra notes 97-140 and accompanying text.
[385] Thomas, 450 U.S. at 715.

Consider the conscientious objector cases.[386] The motivations of the individuals claiming that status were accepted as sincerely religious, even though there was a very compelling non-religious reason (survival) that no doubt might have motivated others to seek that protected status. When affirming the denial of the requested conscientious objector status, the Gillette Court accepted that the challengers were sincere and that their claims were based on religious convictions,[387] but believed that the state's interests justified the refusal to grant the requested status.[388] Those state interests included the difficulty in distinguishing between religious and nonreligious motivations among those objecting to participating in a particular war.[389] Thus, the Court recognized the difficulties in ascertaining why people hold their beliefs and that a particular belief might be held for religious reasons, thus possibly triggering free exercise review, or for non-religious reasons and not triggering that review. Regrettably, the Court offered no special insights about how to identify an individual's motivation for holding a particular belief.

IV. Conclusion

The Court has offered some very broad parameters about what counts as religion. The views cannot be "purely secular,"[390] which means that the views cannot be purely non-religious.[391] However, that does not provide much of a limitation until it is clear what would count as purely

[386] See supra notes 194-250 and accompanying text (discussing Seeger, Welsh, and Gillette).
[387] See Gillette, 401 U.S. at 447 ("[W]e hold … that persons who object solely to participation in a particular war are not within the purview of the exempting section, even though the latter objection may have such roots in a claimant's conscience and personality that it is 'religious' in character.").
[388] See id. at 461 ("Nonetheless, our analysis of s 6(j) for Establishment Clause purposes has revealed governmental interests of a kind and weight sufficient to justify under the Free Exercise Clause the impact of the conscription laws on those who object to particular wars.").
[389] See id. at 455-56 ("[O]ver the realm of possible situations, opposition to a particular war may more likely be political and nonconscientious, than otherwise.. The difficulties of sorting the two, with a sure hand, are considerable.") (citing Kauten, 133 F.2d at 708).
[390] Yoder, 406 U.S. at 215.
[391] See Welsh, 398 U.S. at 356 (Harlan, J., concurring in the result). (discussing "the line between theistic or nontheistic religious beliefs on the one hand and secular beliefs on the other").

secular, which is more difficult to determine than might be supposed. For example, if secular humanism is considered a religion for free exercise purposes,[392] then it will be necessary to establish the respects in which secular humanism is not purely secular, e.g., by suggesting that it incorporates a particular set of moral values or beliefs about transcendent issues,[393] or, perhaps, because there are certified counselors analogous to members of the clergy[394] or weekly meetings.[395]

The Yoder Court has suggested that religious beliefs cannot simply be "subjective"[396] or "merely a matter of personal preference."[397] The Amish beliefs were protected because they were "of deep religious conviction, shared by an organized group, and intimately related to daily living."[398] But the Yoder Court was not thereby setting out the necessary conditions for triggering free exercise guarantees, as was made clear in Frazee almost two decades later.[399]

The Frazee Court held that a "personal professed religious belief"[400] qualified for free exercise protection. When again affirming that "[o]nly beliefs rooted in religion are protected by

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[392] See Torcaso, 367 U.S. at 495 n.11 ("Among religions in this country which do not teach what would generally be considered a belief in the existence of God are Buddhism, Taoism, Ethical Culture, Secular Humanism and others."); Grove v. Mead Sch. Dist. No. 354, 753 F.2d 1528, 1534 (9th Cir. 1985) ("Secular humanism may be a religion.").

[393] See Smith v. Bd. of Sch. Comm'rs of Mobile Cnty. 655 F. Supp. 939, 982 (S.D. Ala.), rev'd on other grounds, 827 F.2d 684 (11th Cir. 1987) ("A statement that there is no transcendent or supernatural reality is a religious statement. A statement that there is no scientific proof of supernatural or transcendent reality is irrelevant and nonsensical, because inquiry into the fundamental nature of man and reality itself may not be confined solely within the sphere of physical, tangible, observable science.").

[394] Id. at 970 ("The American Humanist Association certifies humanist counselors who enjoy the legal status of ordained priests, pastors, and rabbis.").

[395] See Kalka v. Hawk, 215 F.3d 90, 99 (D.C. Cir. 2000) ("[A]n organization of Secular Humanists sought a tax exemption on the ground that they used their property 'solely and exclusively for religious worship.' Despite the group's non-theistic beliefs, the court determined that the activities of the Fellowship of Humanity, which included weekly Sunday meetings, were analogous to the activities of theistic churches and thus entitled to an exemption.") (citing Fellowship of Humanity v. County of Alameda, 315 P.2d 394, 409 (Cal. App. 1957)).

[396] Yoder, 406 U.S. 216.

[397] Id.

[398] Id..

[399] Frazee was decided in 1989. See 489 U.S 829 (1989), whereas Yoder was decided in 1972. See 406 U.S. 205 (1972).

[400] Frazee, 489 U.S. at 831 (citing Frazee, 512 N.E.2d at 790).

the Free Exercise Clause"[401] and "[p]urely secular views" do not suffice,[402] the Frazee Court was not suggesting that purely personal views could not be entitled to protection—the Court expressly rejected that "one must be responding to the commands of a particular religious organization"[403] to trigger free exercise guarantees. So, too, the Gillette Court explained that "while the objection must have roots in conscience and personality that are 'religious' in nature, this requirement has never been construed to elevate conventional piety or religiosity of any kind above the imperatives of a personal faith."[404]

When the Frazee Court stated that "States are clearly entitled to assure themselves that there is an ample predicate for invoking the Free Exercise Clause,"[405] the Court presumably meant that states can consider the individual's sincerity of belief, the importance of the belief to the individual so that it is not a mere personal preference, and the content of the belief to assure that it is not utterly bizarre. In addition, the State can assure itself that the beliefs involve some moral rather than merely descriptive elements and that the commitment to that normative view is not a mere preference but involves more "deeply held moral, ethical, or religious beliefs."[406] Nonetheless, religion for free exercise purposes includes a whole host of beliefs that would not qualify as religious using a more conventional definition of that term.

The definition of religion in free exercise jurisprudence will be both heartening and disheartening to individuals on each side of the Culture Wars. Religion is privileged over non-religion (which should cheer traditionalists), although that definition is broad enough to include a great variety of minority and nontraditional views (which should cheer nontraditionalists). Courts

[401] Id. at 833 (citing Thomas, 450 U.S., at 713)
[402] Id. (citing United States v. Seeger, 380 U.S. 163 (1965); Wisconsin v. Yoder, 406 U.S. 205, 215-16 (1972)).
[403] Id. at 834.
[404] Gillette, 401 U.S. at 454.
[405] Frazee, 489 U.S. at 833.
[406] Id. at 344.

can look at the content of religious beliefs when assessing whether beliefs and practices are protected. However, that assessment cannot involve a determination of truth or falsity, and is quite limited in the kinds of judgments that can be offered—whether the belief is utterly bizarre or whether the belief is purely secular.

Much of the jurisprudence attempts to steer courts away from the wrong path in a case involving free exercise—they are not to judge religious beliefs in terms of consistency or plausibility. As long as the beliefs are sincerely held, have some normative element, and do not seem to involve a mere personal preference, they are the kind of beliefs that can trigger free exercise guarantees. A separate question involves the strength of protections that free exercise guarantees afford, although any analysis of those protections must take into account the utter breadth of beliefs and practices that would thereby be covered.