CHAPTER 1

FREE EXERCISE OF "RELIGION"

The First Amendment to the United States Constitution states that Congress shall "make no law respecting an establishment of religion or prohibiting the free exercise thereof." As you read the following cases, ask yourself what groups, organizations, or beliefs qualify as "religious." Then consider whether and in what circumstances the U.S. Constitution allows Congress or the states to restrict the free exercise of religion.

A. WHAT IS FREE EXERCISE?

Reynolds v. United States*

Supreme Court of the United States, 1878.
98 U.S. 145, 8 Otto 145, 25 L.Ed. 244.

■ MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

. . .

5. Should the accused have been acquitted if he married the second time, because he believed it to be his religious duty? . . .

On the trial, the plaintiff in error, the accused, proved that at the time of his alleged second marriage he was, and for many years before had been, a member of the Church of Jesus Christ of Latter-Day Saints, commonly called the Mormon Church, and a believer in its doctrines; that it was an accepted doctrine of that church "that it was the duty of male members of said church, circumstances permitting, to practise polygamy; . . . that this duty was enjoined by different books which the members of said church believed to be of divine origin, and among others the Holy Bible, and also that the members of the church believed that the practice of polygamy was directly enjoined upon the male members thereof by the Almighty God, in a revelation to Joseph Smith, the founder and prophet of said church; that the failing or refusing to practise polygamy by such male members of said church, when circumstances would admit, would be punished, and that the penalty for such failure and refusal would be damnation in the life to come." He also proved "that he had received permission from the recognized authorities in said church to enter into polygamous marriage; . . . that Daniel H. Wells, one having authority in said church to perform the marriage ceremony, married the said defendant on or about the time the crime is alleged to have been

* Text omissions are indicated by three dots. Editor's added information is indicated by [ ]. There is no indication when footnotes are omitted. When they do appear, footnotes are numbered as in the material quoted.—Eds.

committed, to some woman by the name of Schofield, and that such marriage ceremony was performed under and pursuant to the doctrines of said church."

Upon this proof he asked the court to instruct the jury that if they found from the evidence that he "was married as charged—if he was married—in pursuance of and in conformity with what he believed at the time to be a religious duty, that the verdict must be 'not guilty.' " This request was refused, and the court did charge "that there must have been a criminal intent, but that if the defendant, under the influence of a religious belief that it was right,—under an inspiration, if you please, that it was right,—deliberately married a second time, having a first wife living, the want of consciousness of evil intent—the want of understanding on his part that he was committing a crime—did not excuse him; but the law inexorably in such case implies the criminal intent."

Upon this charge and refusal to charge the question is raised, whether religious belief can be accepted as a justification of an overt act made criminal by the law of the land. The inquiry is not as to the power of Congress to prescribe criminal laws for the Territories, but as to the guilt of one who knowingly violates a law which has been properly enacted, if he entertains a religious belief that the law is wrong.

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. Religious freedom is guaranteed everywhere throughout the United States, so far as congressional interference is concerned. The question to be determined is, whether the law now under consideration comes within this prohibition.

The word "religion" is not defined in the Constitution. We must go elsewhere, therefore, to ascertain its meaning, and nowhere more appropriately, we think, than to the history of the times in the midst of which the provision was adopted. The precise point of the inquiry is, what is the religious freedom which has been guaranteed.

Before the adoption of the Constitution, attempts were made in some of the colonies and States to legislate not only in respect to the establishment of religion, but in respect to its doctrines and precepts as well. The people were taxed, against their will, for the support of religion, and sometimes for the support of particular sects to whose tenets they could not and did not subscribe. Punishments were prescribed for a failure to attend upon public worship, and sometimes for entertaining heretical opinions. The controversy upon this general subject was animated in many of the States, but seemed at last to culminate in Virginia. In 1784, the House of Delegates of that State having under consideration "a bill establishing provision for teachers of the Christian religion," postponed it until the next session, and directed that the bill should be published and distributed, and that the people be requested "to

signify their opinion respecting the adoption of such a bill at the next session of assembly."

This brought out a determined opposition. Amongst others, Mr. Madison prepared a "Memorial and Remonstrance," which was widely circulated and signed, and in which he demonstrated "that religion, or the duty we owe the Creator," was not within the cognizance of civil government. At the next session the proposed bill was not only defeated, but another, "for establishing religious freedom," drafted by Mr. Jefferson, was passed. In the preamble of this act, religious freedom is defined; and after a recital "that to suffer the civil magistrate to intrude his powers into the field of opinion, and to restrain the profession or propagation of principles on supposition of their ill tendency, is a dangerous fallacy which at once destroys all religious liberty," it is declared "that it is time enough for the rightful purposes of civil government for its officers to interfere when principles break out into overt acts against peace and good order." In these two sentences is found the true distinction between what properly belongs to the church and what to the State.

In a little more than a year after the passage of this statute the convention met which prepared the Constitution of the United States. Of this convention Mr. Jefferson was not a member, he being then absent as minister to France. As soon as he saw the draft of the Constitution proposed for adoption, he, in a letter to a friend, expressed his disappointment at the absence of an express declaration insuring the freedom of religion, but was willing to accept it as it was, trusting that the good sense and honest intentions of the people would bring about the necessary alterations. Five of the States, while adopting the Constitution, proposed amendments. Three—New Hampshire, New York, and Virginia—included in one form or another a declaration of religious freedom in the changes they desired to have made, as did also North Carolina, where the convention at first declined to ratify the Constitution until the proposed amendments were acted upon. Accordingly, at the first session of the first Congress the amendment now under consideration was proposed with others by Mr. Madison. It met the views of the advocates of religious freedom, and was adopted. Mr. Jefferson afterwards, in reply to an address to him by a committee of the Danbury Baptist Association, took occasion to say: "Believing with you that religion is a matter which lies solely between man and his god; that he owes account to none other for his faith or his worship; that the legislative powers of the government reach actions only, and not opinions,—I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should 'make no law respecting an establishment of religion or prohibiting the free exercise thereof,' thus building a wall of separation between church and State. Adhering to this expression of the supreme will of the nation in behalf of the rights of conscience, I shall see with sincere satisfaction the

progress of those sentiments which tend to restore man to all his natural rights, convinced he has no natural right in opposition to his social duties." Coming as this does from an acknowledged leader of the advocates of the measure, it may be accepted almost as an authoritative declaration of the scope and effect of the amendment thus secured. Congress was deprived of all legislative power over mere opinion, but was left free to reach actions which were in violation of social duties or subversive of good order.

Polygamy has always been odious among the northern and western nations of Europe, and, until the establishment of the Mormon Church, was almost exclusively a feature of the life of Asiatic and of African people. At common law, the second marriage was always void, and from the earliest history of England polygamy has been treated as an offence against society. After the establishment of the ecclesiastical courts, and until the time of James I., it was punished through the instrumentality of those tribunals, not merely because ecclesiastical rights had been violated, but because upon the separation of the ecclesiastical courts from the civil the ecclesiastical were supposed to be the most appropriate for the trial of matrimonial causes and offences against the rights of marriage, just as they were for testamentary causes and the settlement of the estate of Deceased persons.

By the statute of 1 James I. (c. 11), the offence, if committed in England or Wales, was made punishable in the civil courts, and the penalty was death. As this statute was limited in its operation to England and Wales, it was at a very early period re-enacted, generally with some modifications, in all the colonies. In connection with the case we are now considering, it is a significant fact that on the 8th of December, 1788, after the passage of the act establishing religious freedom, and after the convention of Virginia had recommended as an amendment to the Constitution of the United States the declaration in a bill of rights that "all men have an equal, natural, and unalienable right to the free exercise of religion, according to the dictates of conscience," the legislature of that State substantially enacted the statute of James I., death penalty included, because, as recited in the preamble, "it hath been doubted whether bigamy or poligamy be punishable by the laws of this Commonwealth." From that day to this we think it may safely be said there never has been a time in any State of the Union when polygamy has not been an offence against society, cognizable by the civil courts and punishable with more or less severity. In the face of all this evidence, it is impossible to believe that the constitutional guaranty of religious freedom was intended to prohibit legislation in respect to this most important feature of social life. Marriage, while from its very nature a sacred obligation, is nevertheless, in most civilized nations, a civil contract, and usually regulated by law. Upon it society may be said to be built, and out of its fruits spring social relations and social obligations and duties, with which government is necessarily required to deal. . . .

An exceptional colony of polygamists under an exceptional leadership may sometimes exist for a time without appearing to disturb the social condition of the people who surround it; but there cannot be a doubt that, unless restricted by some form of constitution, it is within the legitimate scope of the power of every civil government to determine whether polygamy or monogamy shall be the law of social life under its dominion.

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. This being so, the only question which remains is, whether those who make polygamy a part of their religion are excepted from the operation of the statute. If they are, then those 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. This would be introducing a new element into criminal law. Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices. Suppose one believed that 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? 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?

So here, as a law of the organization of society under the exclusive dominion of the United States, it is provided that plural marriages shall not be allowed. Can a man excuse his practices to the contrary because of his religious belief? To permit this 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. Government could exist only in name under such circumstances.

NOTES AND QUESTIONS

1. Why did the United States Constitution need an amendment to protect the free exercise of religion? According to the opinion, does the First Amendment prohibit state and federal governments from taxing individuals in order to support religion? Is it the Free Exercise Clause or the Establishment Clause that would bar taxation?

2. If the First Amendment builds a wall of separation between church and state, how can the government criminalize marriage conducted according to a religious ceremony? Is the opinion's distinction between belief and conduct persuasive?

3. Do you agree that legalizing polygamy would have disrupted the social order in 1879? Was the Court correct to consider this factor in reaching its decision? Would polygamy disrupt the social order today? Do you think that polygamy should be legal today? Or should polygamy be illegal, and

Mormons exempt from that law because of their sincere religious belief? Would such an exemption make every citizen a law unto himself?

Is your reasoning about polygamy influenced by the Supreme Court's decision in Obergefell v. Hodges, 576 U.S. 644 (2015), that the Equal Protection and Due Process Clauses of the Fourteenth Amendment prohibit state bans on same-sex marriage?

Rodney Hans Holm married Suzie Stubbs in a legal marriage ceremony and then participated in a religious marriage ceremony with Suzie's sister Ruth when Ruth was 16 years old. By the age of 18, Ruth was the mother of two of Holm's children. Holm was convicted of unlawful sexual conduct with a minor and bigamy. He unsuccessfully appealed his convictions on free exercise grounds under the Utah and U.S. Constitutions, arguing that *Reynolds* was "nothing more than a hollow relic of bygone days of fear, prejudice, and Victorian morality." Do you agree with Holm or the court that upheld his conviction? See State v. Holm, 137 P.3d 726, 742 (Utah 2006). Would his conviction be invalidated today due to *Obergefell*?

4. In Davis v. Beason, 133 U.S. 333 (1890), the Court upheld the conviction of Mormons in the territory of Idaho for falsely swearing the following oath when they registered to vote:

> I do further swear that I am not a bigamist or polygamist; that I am not a member of any order, organization, or association which teaches, advises, counsels, or encourages its members, devotees, or any other person, to commit the crime of bigamy or polygamy, or any other crime defined by law, as a duty arising or resulting from membership in such order, organization, or association, or which practices bigamy, polygamy, or plural or celestial marriage as a doctrinal rite of such organization; that I do not and will not, publicly or privately, or in any manner whatever, teach, advise, counsel, or encourage any person to commit the crime of bigamy or polygamy, or any other crime defined by law, either as a religious duty or otherwise.

Were the convictions defensible under *Reynolds'* reasoning? Do you think the convictions would be upheld today? See 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.").

5. According to Professor Robert Gordon, "From 1860 to 1890, the federal government was mobilized to deploy an extraordinary arsenal of legal resources against Mormon families, churches, economic institutions, and political arrangements. In just a few years, the government disenfranchised polygamists and even those who merely advocated polygamy, repealed women's suffrage in the Utah territory, disqualified polygamists from jury duty, criminalized plural marriage and brought 2,500 prosecutions against polygamists, including 200 against pregnant women for 'fornication.' " Robert W. Gordon, The Constitution of Liberal Order at the Troubled Beginnings of the Modern State, 58 U. Miami L. Rev. 373, 382 (2003) (citing Sarah Barringer Gordon, The Mormon Question: Polygamy and Constitutional Conflict in Nineteenth Century America (2002)). Under such

pressure, the church officially ended the practice of polygamy in 1890, although some Mormon groups such as the Fundamentalist Church of Jesus Christ of Latter-day Saints (FLDS) continue to practice it. Is the First Amendment violated when religious groups change their teachings under pressure from the state? If so, is the reverse true? If a religious group pressures a state to change the law based on its teachings, as the Mormon church did with Proposition 8 in California, is the First Amendment violated?

Did the *Reynolds* Court need to "sav[e] women and children from polygamy"? Were women victimized by the Court's holding and language? Are women victimized by polygamy? Is your answer affected by the fact that Mormons extended the right to vote to women in Utah in 1870, fifty years before the passage of the Nineteenth Amendment? See Marie Ashe, Women's Wrongs, Religions' Rights: Women, Free Exercise, and Establishment in American Law, 21 Temple Pol. & Civ. Rts. L. Rev. 163, 166, 172, 173 (2011).

After receiving a telephone tip that a 16-year-old girl was sexually abused at the Yearning for Zion Ranch, an FLDS community in El Dorado, Texas, the Texas Department of Family and Protective Services took possession of all 468 children at the ranch, removing them to foster care across the state in order to protect them from the ranch's culture of polygamy, which encouraged spiritual marriages of girls under age 18. The Supreme Court of Texas ruled that the state should have pursued less drastic measures than removing all the children from their families. See In re Texas Dept. of Family and Protective Services, 255 S.W.3d 613 (Tex. 2008). A state report later concluded that 12 girls at the ranch were married between the ages of 12 and 15. The state prosecuted the husbands of those girls for sexual assault. Does the seizure of the children indicate that Mormons face discrimination because of their religious beliefs? Does it persuade you that polygamy should be legal? Raymond Jessop was convicted of sexual assault of a child and sentenced to ten years in prison in the first trial arising from the raid. See Michelle Roberts, AG Sits in on Child Sex Assault Trial, Houston Chron., Dec. 9, 2009, at A03.

If consent is the central issue, how should the law account for the pressure and coercion religious groups can exert over followers, especially the younger, impressionable members who have been raised in the faith?

6. Does the following case adhere to the rule of *Reynolds*, as Justice Scalia argues?

Employment Div., Dept. of Human Resources of Oregon v. Smith

Supreme Court of the United States, 1990.
494 U.S. 872, 110 S.Ct. 1595, 108 L.Ed.2d 876.

■ JUSTICE SCALIA delivered the opinion of the Court, in which REHNQUIST, C.J., and WHITE, STEVENS and KENNEDY, joined.

This case requires us to decide whether the Free Exercise Clause of the First Amendment permits the State of Oregon to include religiously

inspired peyote use within the reach of its general criminal prohibition on use of that drug, and thus permits the State to deny unemployment benefits to persons dismissed from their jobs because of such religiously inspired use.

I

Oregon law prohibits the knowing or intentional possession of a "controlled substance" unless the substance has been prescribed by a medical practitioner. The law defines "controlled substance" as a drug classified in Schedules I through V of the Federal Controlled Substances Act, as modified by the State Board of Pharmacy. Persons who violate this provision by possessing a controlled substance listed on Schedule I are "guilty of a Class B felony." As compiled by the State Board of Pharmacy under its statutory authority, Schedule I contains the drug peyote, a hallucinogen derived from the plant *Lophophora williamsii Lemaire*.

Respondents 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. 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."

Citing our decisions in *Sherbert v. Verner*, 374 U.S. 398 (1963), and *Thomas v. Review Bd. of Indiana Employment Sec. Division*, 450 U.S. 707 (1981), the Oregon Supreme Court concluded that respondents were entitled to payment of unemployment benefits.

II

A

The Free Exercise Clause of the First Amendment, which has been made applicable to the States by incorporation into the Fourteenth Amendment, see *Cantwell v. Connecticut*, 310 U.S. 296, 303, 60 S.Ct. 900, 903, 84 L.Ed. 1213 (1940), provides that "Congress shall make no law respecting an establishment of religion, or *prohibiting the free exercise thereof*. . . ." U.S. Const., Amdt. 1 (emphasis added.) The free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires. Thus, the First Amendment obviously excludes all "governmental regulation of religious *beliefs* as such." *Sherbert v. Verner*, *supra*, 374 U.S., at 402, 83 S.Ct., at 1793. The government may not compel affirmation of religious belief, see *Torcaso v. Watkins*, 367 U.S. 488, 81 S.Ct. 1680, 6 L.Ed.2d 982 (1961), punish the expression of religious doctrines it believes to be false, *United States v. Ballard*, 322 U.S. 78, 86–88, 64 S.Ct. 882, 886–87, 88 L.Ed. 1148 (1944), impose special disabilities on the basis of religious views or religious status, see *McDaniel v. Paty*, 435 U.S. 618, 98 S.Ct. 1322, 55 L.Ed.2d 593

(1978); *Fowler v. Rhode Island*, 345 U.S. 67, 69, 73 S.Ct. 526, 527, 97 L.Ed. 828 (1953); cf. *Larson v. Valente*, 456 U.S. 228, 245, 102 S.Ct. 1673, 1683–84, 72 L.Ed.2d 33 (1982), or lend its power to one or the other side in controversies over religious authority or dogma, see *Presbyterian Church in U.S. v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440, 445 452, 89 S.Ct. 601, 604–608, 21 L.Ed.2d 658 (1969); *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94, 95–119, 73 S.Ct. 143, 143–56, 97 L.Ed. 120 (1952); *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 708–725, 96 S.Ct. 2372, 2380–2388, 49 L.Ed.2d 151 (1976).

But the "exercise of religion" often involves not only belief and profession but the performance of (or abstention from) physical acts: assembling with others for a worship service, participating in sacramental use of bread and wine, proselytizing, abstaining from certain foods or certain modes of transportation. It would be true, we think (though no case of ours has involved the point), that a State would be "prohibiting the free exercise [of religion]" if it sought to ban such acts or abstentions only when they are engaged in for religious reasons, or only because of the religious belief that they display. It would doubtless be unconstitutional, for example, to ban the casting of "statues that are to be used for worship purposes," or to prohibit bowing down before a golden calf.

Respondents in the present case, however, seek to carry the meaning of "prohibiting the free exercise [of religion]" one large step further. They contend 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 concededly constitutional as applied to those who use the drug for other reasons. They assert, in other words, that "prohibiting the free exercise [of religion]" includes requiring any individual to observe a generally applicable law that requires (or forbids) the performance of an act that his religious belief forbids (or requires). As a textual matter, we do not think the words must be given that meaning. It is no more necessary to regard the collection of a general tax, for example, as "prohibiting the free exercise [of religion]" by those citizens who believe support of organized government to be sinful, than it is to regard the same tax as "abridging the freedom . . . of the press" of those publishing companies that must pay the tax as a condition of staying in business. It is a permissible reading of the text, in the one case as in the other, to say that if prohibiting the exercise of religion (or burdening the activity of printing) is not the object of the tax but merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended.

Our decisions reveal that the latter reading is the correct one. We have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate. On the contrary, the record of more than a

century of our free exercise jurisprudence contradicts that proposition. As described succinctly by Justice Frankfurter in *Minersville School Dist. v. Gobitis*, 310 U.S. 586, 594–595 (1940): "Conscientious scruples have not, in the course of the long struggle for religious toleration, relieved the individual from obedience to a general law not aimed at the promotion or restriction of religious beliefs. The mere possession of religious convictions which contradict the relevant concerns of a political society does not relieve the citizen from the discharge of political responsibilities." We first had occasion to assert that principle in *Reynolds v. United States*, 98 U.S. 145 (1879), where we rejected the claim that criminal laws against polygamy could not be constitutionally applied to those whose religion commanded the practice.

Subsequent decisions have consistently held that 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)."

The only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press, see *Cantwell v. Connecticut*, 310 U.S., at 304–307, 60 S.Ct., at 903–905 (invalidating a licensing system for religious and charitable solicitations under which the administrator had discretion to deny a license to any cause he deemed nonreligious); *Murdock v. Commonwealth of Pennsylvania*, 319 U.S. 105, 63 S.Ct. 870, 87 L.Ed. 1292 (1943) (invalidating a flat tax on solicitation as applied to the dissemination of religious ideas); *Follett v. McCormick*, 321 U.S. 573, 64 S.Ct. 717, 88 L.Ed. 938 (1944) (same), or the right of parents, acknowledged in *Pierce v. Society of the Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070 (1925), to direct the education of their children, see *Wisconsin v. Yoder*, 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972) (invalidating compulsory school-attendance laws as applied to Amish parents who refused on religious grounds to send their children to school). Some of our cases prohibiting compelled expression, decided exclusively upon free speech grounds, have also involved freedom of religion, cf. *Wooley v. Maynard*, 430 U.S. 705, 97 S.Ct. 1428, 51 L.Ed.2d 752 (1977) (invalidating compelled display of a license plate slogan that offended individual religious beliefs); *West Virginia Bd. of Education v. Barnette*, 319 U.S. 624, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943) (invalidating compulsory flag salute statute challenged by religious objectors). And it is easy to envision a case in which a challenge on freedom of association grounds would likewise be reinforced by Free Exercise Clause concerns. Cf. *Roberts v. United States Jaycees*, 468 U.S. 609, 622, 104 S.Ct. 3244, 3251–52, 82 L.Ed.2d 462 (1984) ("An individual's freedom to speak, to

worship, and to petition the government for the redress of grievances could not be vigorously protected from interference by the State [if] a correlative freedom to engage in group effort toward those ends were not also guaranteed").

The present case does not present such a hybrid situation, but a free exercise claim unconnected with any communicative activity or parental right. Respondents urge us to hold, quite simply, that when otherwise prohibitable conduct is accompanied by religious convictions, not only the convictions but the conduct itself must be free from governmental regulation. We have never held that, and decline to do so now. There being no contention that Oregon's drug law represents an attempt to regulate religious beliefs, the communication of religious beliefs, or the raising of one's children in those beliefs, the rule to which we have adhered ever since *Reynolds* plainly controls.

■ JUSTICE BLACKMUN, with whom JUSTICE BRENNAN and JUSTICE MARSHALL join, dissenting.

This Court over the years painstakingly has developed a consistent and exacting standard to test the constitutionality of a state statute that burdens the free exercise of religion. Such a statute may stand only if the law in general, and the State's refusal to allow a religious exemption in particular, are justified by a compelling interest that cannot be served by less restrictive means.

Until today, I thought this was a settled and inviolate principle of this Court's First Amendment jurisprudence. . . .

The carefully circumscribed ritual context in which respondents used peyote is far removed from the irresponsible and unrestricted recreational use of unlawful drugs.[6] The Native American Church's internal restrictions on, and supervision of, its members' use of peyote substantially obviate the State's health and safety concerns.[7]

II

Respondents believe, and their sincerity has *never* been at issue, that the peyote plant embodies their deity, and eating it is an act of worship

[6] In this respect, respondents' use of peyote seems closely analogous to the sacramental use of wine by the Roman Catholic Church. During Prohibition, the Federal Government exempted such use of wine from its general ban on possession and use of alcohol. 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.

[7] The use of peyote is, to some degree, self-limiting. The peyote plant is extremely bitter, and eating it is an unpleasant experience, which would tend to discourage casual or recreational use. Not only does the church's doctrine forbid nonreligious use of peyote; it also generally advocates self-reliance, familial responsibility, and abstinence from alcohol. There is considerable evidence that the spiritual and social support provided by the church has been effective in combating the tragic effects of alcoholism on the Native American population. Far from promoting the lawless and irresponsible use of drugs, Native American Church members' spiritual code exemplifies values that Oregon's drug laws are presumably intended to foster.

and communion. Without peyote, they could not enact the essential ritual of their religion.

If Oregon can constitutionally prosecute them for this act of worship, they, like the Amish, may be "forced to migrate to some other and more tolerant region." This potentially devastating impact must be viewed in light of the federal policy—reached in reaction to many years of religious persecution and intolerance—of protecting the religious freedom of Native Americans.

NOTES AND QUESTIONS

1. Distinguish *Smith* from *Reynolds*. Is Justice Scalia correct that *Smith* follows the rule enunciated in *Reynolds*? Did both decisions protect religious freedom?

A Muslim wife complained that her husband had beaten her and forced her to have sexual intercourse against her will due to his dissatisfaction with her inability to cook acceptable meals for his houseguests. The trial judge ruled that criminal restraint, sexual assault and criminal sexual contact were not established under New Jersey's domestic violence laws. The husband had not met the requirements of criminal intent, the judge ruled, because "he was operating under his [Muslim] belief that it is, as the husband, his desire to have sex when and whether he wanted to, was something that was consistent with his practices and it was something that was not prohibited." Because of the husband's religious beliefs, therefore, the judge "found that defendant did not act with a criminal intent when he repeatedly insisted upon intercourse, despite plaintiff's contrary wishes." Is this ruling consistent with *Reynolds* and *Smith*? See S.D. v. M.J.R., 2 A.3d 412 (N.J.Super.A.D. 2010) (*Reynolds* and *Smith* hold that husband must be held to the standards of the criminal law even if his religious beliefs contradict it; judge was in error not to enforce domestic violence law).

2. Does the sacramental wine exception to Prohibition mentioned in footnote 6 of Justice Blackmun's dissent suggest that the legislatures and the courts may be more willing to protect majority or mainstream religions than minority or unusual religions? Do you agree with the suggestion in footnote 7 and accompanying text that the Native American Church's own restrictions on the use of peyote should override the State's health concerns?

3. How different is the dissent's "compelling interest" test from Justice Scalia's "neutral laws of general applicability" standard? Can you think of a scenario in which these two tests would yield widely different results? What about similar outcomes? We examine the application of these tests in Chapter 4.

4. What are some criticisms of the *Smith* case? How can these be countered? See Nelson Tebbe, Free Exercise and the Problem of Symmetry, 56 Hastings L.J. 699, 700 (2005) (Asserting that the two main criticisms of *Smith* were: 1) it could lead to too much government regulation and 2) "religious minorities . . . can suffer disproportionately from laws that enact majoritarian mores."). For a comprehensive discussion of how Congress responded after the *Smith* decision, see City of Boerne v. Flores, 521 U.S.

507 (1997). The casebook examines *Smith* and free exercise in more detail in Chapter 4.

5. The justices focused much of their opinion on the legality of peyote use, but does that answer the question of unemployment benefits? Imagine these two men, self-described alcoholics in recovery, got drunk instead. They broke no law, but transgressed the employers' rules, which they agreed to and are central to the organization's mission, and would have been fired. The employer claimed it "would have taken the same action had the claimant consumed wine at a Catholic ceremony or any drug anywhere. It would be the same result," according to a lower court. See Black v. Employment Division, 301 Or. 221, 223 (Or. 1986). The justices discussed this at oral argument. Justice Harry Blackmun, who dissented in the final opinion, asked Oregon Attorney General David Frohnmayer, "Mr. Attorney General, why were these people fired?" Frohnmayer responded, "They were fired because they were drug counselors . . . at a drug and alcohol treatment center."

> Blackmun: So they were fired because they violated the employer's policy.
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> Frohnmayer: That is right.
>
> Blackmun: They were not fired because the use of peyote was illegal.
>
> Frohnmayer: That is correct.

"Employment Division, Department of Human Resources of Oregon v. Smith." Oyez, www.oyez.org/cases/1989/88-1213. Accessed 13 Oct. 2020. Exchange begins at 21:11.

The state even explained that, under Oregon law, illegal conduct was not necessarily enough to fire them, but that violating a valid job-related requirement—drug counselors cannot take drugs—was sufficient. The criminal laws around peyote and any possible religious exemptions to those laws were a massive distraction. Oregon even exempted religious uses of peyote from the criminal statutes after the case, but that would not have changed anything in this case. Oregon Revised Statutes 475.992 (1993).

6. As you read the following case, consider why the Court found a free exercise violation. What distinguishes *Lukumi* from *Reynolds* and *Smith*?

Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah

Supreme Court of the United States, 1993.
508 U.S. 520, 113 S.Ct. 2217, 124 L.Ed.2d 472.

■ JUSTICE KENNEDY delivered the opinion of the Court.

The principle that government may not enact laws that suppress religious belief or practice is so well understood that few violations are recorded in our opinions. Cf. *McDaniel v. Paty*, 435 U.S. 618 (1978); *Fowler v. Rhode Island*, 345 U.S. 67 (1953). Concerned that this

fundamental nonpersecution principle of the First Amendment was implicated here, however, we granted certiorari.

I

A

This case involves practices of the Santeria religion, which originated in the 19th century. When hundreds of thousands of members of the Yoruba people were brought as slaves from western Africa to Cuba, their traditional African religion absorbed significant elements of Roman Catholicism. The resulting syncretion, or fusion, is Santeria, "the way of the saints." The Cuban Yoruba express their devotion to spirits, called *orishas*, through the iconography of Catholic saints, Catholic symbols are often present at Santeria rites, and Santeria devotees attend the Catholic sacraments.

The Santeria faith teaches that every individual has a destiny from God, a destiny fulfilled with the aid and energy of the *orishas*. The basis of the Santeria religion is the nurture of a personal relation with the *orishas*, and one of the principal forms of devotion is an animal sacrifice. The sacrifice of animals as part of religious rituals has ancient roots. Animal sacrifice is mentioned throughout the Old Testament, and it played an important role in the practice of Judaism before destruction of the second Temple in Jerusalem. In modern Islam, there is an annual sacrifice commemorating Abraham's sacrifice of a ram in the stead of his son.

According to Santeria teaching, the *orishas* are powerful but not immortal. They depend for survival on the sacrifice. Sacrifices are performed at birth, marriage, and death rites, for the cure of the sick, for the initiation of new members and priests, and during an annual celebration. Animals sacrificed in Santeria rituals include chickens, pigeons, doves, ducks, guinea pigs, goats, sheep, and turtles. The animals are killed by the cutting of the carotid arteries in the neck. The sacrificed animal is cooked and eaten, except after healing and death rituals.

Santeria adherents faced widespread persecution in Cuba, so the religion and its rituals were practiced in secret. The open practice of Santeria and its rites remains infrequent. The religion was brought to this Nation most often by exiles from the Cuban revolution. The District Court estimated that there are at least 50,000 practitioners in South Florida today.

B

Petitioner Church of the Lukumi Babalu Aye, Inc. (Church) and its congregants practice the Santeria religion. The president of the Church is petitioner Ernesto Pichardo, who is also the Church's priest and holds the religious title of *Italero*, the second highest in the Santeria faith. In April 1987, the Church leased land in the city of Hialeah, Florida, and announced plans to establish a house of worship as well as a school, cultural center, and museum.

The prospect of a Santeria church in their midst was distressing to many members of the Hialeah community, and prompted the city council to hold an emergency public session on June 9, 1987.

[At that meeting], the city council adopted Resolution 87–66, which noted the "concern" expressed by residents of the city "that certain religions may propose to engage in practices which are inconsistent with public morals, peace or safety," and declared that "the City reiterates its commitment to a prohibition against any and all acts of any and all religious groups which are inconsistent with public morals, peace or safety." Next, the council approved an emergency ordinance, Ordinance 87–40, which incorporated in full, except as to penalty, Florida's animal cruelty laws. Among other things, the incorporated state law subjected to criminal punishment "whoever . . . unnecessarily or cruelly . . . kills any animal."

In September 1987, the city council adopted three substantive ordinances addressing the issue of religious animal sacrifice. Ordinance 87–52 defined "sacrifice" as "to unnecessarily kill, torment, torture, or mutilate an animal in a public or private ritual or ceremony not for the primary purpose of food consumption," and prohibited owning or possessing an animal "intending to use such animal for food purposes." It restricted application of this prohibition, however, to any individual or group that "kills, slaughters or sacrifices animals for any type of ritual, regardless of whether or not the flesh or blood of the animal is to be consumed." The ordinance contained an exemption for slaughtering by "licensed establishment[s]" of animals "specifically raised for food purposes." . . . [Ordinance 87–71] provided that "it shall be unlawful for any person, persons, corporations or associations to sacrifice any animal within the corporate limits of the City of Hialeah, Florida." The final Ordinance, 87–72, defined "slaughter" as "the killing of animals for food" and prohibited slaughter outside of areas zoned for slaughterhouse use. The ordinance provided an exemption, however, for the slaughter or processing for sale of "small numbers of hogs and/or cattle per week in accordance with an exemption provided by state law." All ordinances and resolutions passed by unanimous vote. Violations of each of the four ordinances were punishable by fines not exceeding $500 or imprisonment not exceeding 60 days, or both.

Following enactment of these ordinances, the Church and Pichardo filed this action pursuant to 42 U.S.C. § 1983 in the United States District Court for the Southern District of Florida. Named as defendants were the city of Hialeah and its mayor and members of its city council in their individual capacities. . . . The District Court granted summary judgment to the individual defendants, finding that they had absolute immunity for their legislative acts and that the ordinances and resolutions adopted by the council did not constitute an official policy of harassment, as alleged by petitioners.

After a 9-day bench trial on the remaining claims, the District Court ruled for the city, finding no violation of petitioners' rights under the Free Exercise Clause. The Court of Appeals for the Eleventh Circuit affirmed in a one-paragraph *per curiam* opinion, stat[ing] simply that it concluded the ordinances were consistent with the Constitution.

II

The Free Exercise Clause of the First Amendment, which has been applied to the States through the Fourteenth Amendment, provides that "Congress shall make no law respecting an establishment of religion, or *prohibiting the free exercise thereof* . . ." (Emphasis added.) The city does not argue that Santeria is not a "religion" within the meaning of the First Amendment. Nor could it. Although the practice of animal sacrifice may seem abhorrent to some, "religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection." Given the historical association between animal sacrifice and religious worship, petitioners' assertion that animal sacrifice is an integral part of their religion "cannot be deemed bizarre or incredible." Neither the city nor the courts below have questioned the sincerity of petitioners' professed desire to conduct animal sacrifices for religious reasons.

The record in this case compels the conclusion that suppression of the central element of the Santeria worship service was the object of the ordinances. First, though use of the words "sacrifice" and "ritual" does not compel a finding of improper targeting of the Santeria religion, the choice of these words is support for our conclusion. There are further respects in which the text of the city council's enactments discloses the improper attempt to target Santeria. Resolution 87–66 recited that "residents and citizens of the City of Hialeah have expressed their concern that certain religions may propose to engage in practices which are inconsistent with public morals, peace or safety," and "reiterate[d]" the city's commitment to prohibit "any and all [such] acts of any and all religious groups." No one suggests, and on this record it cannot be maintained, that city officials had in mind a religion other than Santeria.

It becomes evident that these ordinances target Santeria sacrifice when the ordinances' operation is considered. Apart from the text, the effect of a law in its real operation is strong evidence of its object. To be sure, adverse impact will not always lead to a finding of impermissible targeting. For example, a social harm may have been a legitimate concern of government for reasons quite apart from discrimination. The subject at hand does implicate, of course, multiple concerns unrelated to religious animosity, for example, the suffering or mistreatment visited upon the sacrificed animals and health hazards from improper disposal. But the ordinances when considered together disclose an object remote from these legitimate concerns. The design of these laws accomplishes instead a "religious gerrymander," an impermissible attempt to target petitioners and their religious practices.

IV

The Free Exercise Clause commits government itself to religious tolerance, and upon even slight suspicion that proposals for state intervention stem from animosity to religion or distrust of its practices, all officials must pause to remember their own high duty to the Constitution and to the rights it secures. Those in office must be resolute in resisting importunate demands and must ensure that the sole reasons for imposing the burdens of law and regulation are secular. Legislators may not devise mechanisms, overt or disguised, designed to persecute or oppress a religion or its practices. The laws here in question were enacted contrary to these constitutional principles, and they are void.

Reversed.

NOTES AND QUESTIONS

1. *Lukumi* holds that the government may not improperly target a religion. Is that the *only* limitation that the Free Exercise Clause places on the government? Does *Lukumi* follow the rule of *Smith* or add a new rule to Free Exercise jurisprudence?

2. Why should animal sacrifice deserve constitutional protection while peyote use and polygamy do not? Does that practice seem less abhorrent or disruptive of the social order than polygamy or peyote use? Is animal sacrifice respected because of its ancient roots in Judaism and Islam? Is animal sacrifice comparable to the use of wine in communion?

Jose Merced is a Santerian Oba Oriate (priest) from Euless, Texas. His religion's priestly initiation rituals require the sacrifice of four-legged animals. Merced usually sacrifices goats during those ceremonies. A city law prohibits the domestic slaughter of animals (except chickens and turkeys) and allows four-legged animals to be kept only on properties that are much larger than Merced's home, where he conducts the rituals. Home shrines are the norm for the Santeria religion. Should Merced win or lose his lawsuit against Euless for violations of his religious freedom? See Merced v. Kasson, 577 F.3d 578 (5th Cir. 2009) (upholding Merced's claim). Why isn't public health a sufficiently compelling government interest to override Merced's claim?

3. Most states, including Kentucky, restrict the possession of venomous snakes in their health laws. Kentucky also has a law prohibiting use of "any kind of reptile in connection with any religious service." Jamie Coots, a Kentucky Pentecostal pastor and co-star of the *Snake Salvatio*n reality television program, wrote an op-ed in *The Wall Street Journal* complaining about his prosecutions for possessing snakes. He and his congregants handled snakes during their church services. They cited biblical texts that Jesus tells disciples to "take up serpents" without fear and gives them the power to "tread on serpents." Their handling of venomous snakes is part of their religious ritual. See Jamie Coots, The Constitution Protects My Snake-Handling, Wall St. J., Oct. 3, 2013, at A21. Is Coots' religious freedom violated by prosecutions for possessing and transporting snakes?

What outcome for a Kentucky prosecution under *Smith* and *Lukumi*? See Calvin Massey, Venomous Snakes, Religious Services and the Constitution, The Faculty Lounge, Oct. 4, 2013, at http://www.thefacultylounge.org/2013/10/venomous-snakes-religious-services-and-the-constitution.html (health law is constitutional under *Smith*, but religious service law is unconstitutional under *Lukumi*).

4. Does *Lukumi* prove that the courts, not the legislatures, are best equipped to protect unpopular minority religions? See Thomas C. Berg, Minority Religions and the Religion Clauses, 82 Wash. U. L.Q. 919, 965 (2004) (asserting that because "laws tend to reflect the majority's values, rules that on their face treat all faiths equally, and reflect no intent to discriminate, will nevertheless have an unequal impact on different faiths"); Gregory C. Sisk, How Traditional and Minority Religions Fare in the Courts: Empirical Evidence from Religious Liberty Cases, 76 U. Colo. L. Rev. 1021 (2005) (arguing that mainstream faiths face more difficulty in the courts than minority religions do).

5. Before Japanese forces bombed Pearl Harbor on December 7, 1941, the FBI investigated Japanese-American Buddhists to verify their loyalty to the United States. They compiled a list of Buddhist priests who were arrested immediately after the Pearl Harbor attacks, before the later internment of non-priest individuals of Japanese ancestry. The FBI had concluded that Japanese Christians were more likely to be loyal American citizens than Japanese Buddhists. Was *Lukumi* violated by these actions? Did banning Shinto and Buddhist practice in the internment camps violate free exercise? See Duncan Ryûken Williams, Camp Dharma: Japanese-American Buddhist Identity and the Internment Experience of World War II, in Charles Prebish and Martin Baumann, eds., Westward Dharma: Buddhism Beyond Asia 191–200 (2002).

B. WHAT IS RELIGION?

In *Reynolds*, *Smith*, and *Lukumi* the Court agreed that the cases involved individuals' *religious* beliefs that were protected by the First Amendment. The following notes identify different rituals, practices, and belief systems. As you read each note, decide whether the beliefs and conduct described qualify as a religion and deserve First Amendment protection.

1. THE CHURCHES OF MARIJUANA

Does any one of these marijuana churches deserve more First Amendment protection than the others? How do you compare the claims of the marijuana users with the Native American peyote rituals in *Smith*? Does the legalization of recreational marijuana use in a number of states affect your answer?

a. According to the district court, "David Meyers stated that he began worshipping marijuana because it brought peace into his life. Meyers founded the 'Church of Marijuana' in 1973. The

church allegedly has 800 members and one designated meeting spot. The church's 'religion' is to grow, possess, and distribute marijuana. The church's 'bible' is a ponderously titled book: *Hemp & the Marijuana Conspiracy: The Emperor Wears No Clothes—The Authoritative Historical Record of the Cannabis Plant, Marijuana Prohibition, & How Hemp Can Still Save the World ('Hemp')*. The church does not have a formal clergy, but does have approximately 20 'teachers.' Meyers did not explain what the teachers do. Although there are teachers, the church has no hierarchy or governing body. The church does not attempt to propagate its beliefs in any way, and does not assert that everyone should smoke marijuana. Nonetheless, part of the 'religion' is to work towards the legalization of marijuana. Meyers testified that he (and presumably other church members) pray to the marijuana plant. The church's only ceremony revolves around one act: the smoking and passing of joints. Joint smoking apparently results in a sort of 'peaceful awareness.' Meyers did not assert that this 'peaceful awareness' is a religious state. While 'peacefully aware' (vulgarly known as being 'high'), church members 'talk to one another.' Meyers did not divulge the nature of their discussions. There are no formal church services." United States v. Meyers, 906 F.Supp. 1494, 1504 (D. Wyo. 1995); see also United States v. Meyers, 95 F.3d 1475 (10th Cir. 1996). Is the court's description of the Church of Marijuana too sarcastic, suggesting the animosity prohibited by *Lukumi*?

b. The McBrides are members of the Rastafarian faith, which began in Jamaica in the 1930s and regards the Ethiopian Emperor Haile Selassie as a god. Rastafarians believe that marijuana, or "ganja," is a sacrament and that when one inhales and smokes it, he achieves a spiritual self-consciousness that cannot be achieved without the use of marijuana. One religious studies expert testified that Rastafarians cannot practice their religion without the use of marijuana. See Kansas v. McBride, 24 Kan.App.2d 909, 955 P.2d 133 (1998).

c. The First Church of Cannabis, Inc.'s mission statement, according to its website, is: "Cannabis, 'The Healing Plant' is our sacrament. It brings us closer to ourselves and others. It is our fountain of health, our love, curing us from illness and depression. We embrace it with our whole heart and spirit, individually and as a group." When "Cannaterians" take their sacrament, they recite the following prayer: "Be nice to as many people as you can. It's Absolutely Free. I'll be nice to you and you'll be nice to me. Just like Tag. If we start tonight, Tomorrow will be a better world." First Church of Cannabis, http://www.cannaterian.org/.

2. VEGANISM

Should the Free Exercise Clause protect the animal sacrifice of Santeria but not Veganism's commitment to animal rights, or should Vegan Jerold Friedman succeed on the following religious freedom claim:

> As a strict Vegan, [Friedman] fervently believes that all living beings must be valued equally and that it is immoral and unethical for humans to kill and exploit animals, even for food, clothing and the testing of product safety for humans, and that such use is a violation of natural law and the personal religious tenets on which [he] bases his foundational creeds. He lives each aspect of his life in accordance with this system of spiritual beliefs. As a Vegan, . . . [he] cannot eat meat, dairy, eggs, honey or any other food which contains ingredients derived from animals. Additionally, [he] cannot wear leather, silk or any other material which comes from animals, and cannot use any products such as household cleansers, soap or toothpaste which have been tested for human safety on animals or derive any of their ingredients from animals. . . . [he] has even been arrested for civil disobedience at animal rights demonstrations.

Friedman was required to get a mumps vaccine at his workplace. The mumps vaccine was grown in chicken embryos and Friedman argued vaccination would violate his religious beliefs. See Friedman v. Southern California Permanente Medical Group, 102 Cal.App.4th 39, 44, 125 Cal.Rptr.2d 663 (2002).

3. QANON SHAMAN

Jacob Chansely, the self-proclaimed "QAnon Shaman," the man who wore horns and animal fur and carried a spear during the insurrection on January 6, 2021, was arrested and charged for his role in that attack. Chansely is a believer in the QAnon conspiracy theory and led the insurrectionists in a prayer to Jesus Christ in the Senate. While in custody, he requested organic food "without genetically modified organisms ('GMOs'), herbicides, pesticides, artificial preservatives, or artificial colors." Chansely claimed he had "not eaten food in over one week and reiterates that because of his Shamanic beliefs, eating non-organic food would cause him serious illness." The prison chaplain denied the request because it was "unable to find any religious merit pertaining to organic food or diet under Shamanism Practitioner." The court reversed and awarded the "religious dietary accommodation" and he was later sentenced to 41 months for his crimes. U.S. v. Chansely, 518 F.Supp.3d 36 (2021). Should Chansely's strange syncretism—praying to Jesus, QAnon, and a new age version of shamanism rejected by Native Americans—be considered a religion?

4. MOVE

Is MOVE any different from Veganism?

John Africa founded MOVE, "a 'revolutionary' organization 'absolutely opposed to all that is wrong.' " MOVE has no hierarchy. MOVE's goals are "to bring about absolute peace, . . . to stop violence altogether, to put a stop to all that is corrupt." Toward that end, Africa and other MOVE adherents are committed to a "natural," "moving," "active," and "generating" way of life. By contrast, what they alternatively refer to as "this system" or "civilization" is "degenerating": its air and water are "perverted"; its food, education, and governments are "artificial"; its words are "gibberish."

Central to this conception of an unadulterated existence is MOVE's religious diet. "That diet is comprised largely of raw vegetables and fruits; MOVE members who fully adhere to the diet decline to eat any foods that have been processed or cooked. . . . Failure to follow the diet constitutes deviation from the 'direct, straight, and true' and results in 'confusion and disease.' . . . Africa contends that the diet, in conjunction with 'our founder's wisdom,' transformed him from a weak, timid, and ailing being to a strong, confident, and healthy individual. 'Our religious diet is work, hard work, simple consistent unmechanized unscientific self-dependent work,' he concludes; 'our religious diet is family, unity, consistency, (and) uncompromising togetherness.' " Africa v. Pennsylvania, 662 F.2d 1025, 1027–28 (3d Cir. 1981).

5. KOZY KITTEN CAT FOOD

Stanley Oscar Brown has a "personal religious creed" that "Kozy Kitten People/Cat Food . . . is contributing significantly to [his] state of well being . . . (and therefore) to (his) overall work performance by increasing his energy." Brown filed a religious discrimination claim with the E.E.O.C. Should his "belief in pet food" qualify as a religion? Brown v. Pena, 441 F.Supp. 1382, 1384 (S.D. Fla. 1977).

6. HUMANISM

"The Center for Inquiry is a nonprofit corporation that describes itself as a humanist group that promotes ethical living without belief in a deity. The Center seeks to show, among other things, that it is possible to have strong ethical values based on critical reason and scientific inquiry rather than theism and faith. The Center maintains that its methods and values play the same role in its members' lives as religious methods and values play in the lives of adherents." Center members, however, refuse to call their Center for Inquiry a religion because "they are unwilling to pretend to be something they are not, or pretend to believe something they do not." Ctr. for Inquiry, Inc. v. Marion Circuit Court Clerk, 758 F.3d 869, 871–72 (7th Cir. Ind. 2014). Is humanism as

described by the Center for Inquiry a religion for First Amendment purposes even though the members do not call it a religion?

7. CREATIVE INTELLIGENCE AND TRANSCENDENTAL MEDITATION

The Science of Creative Intelligence was founded by Maharishi Mahesh Yogi. "It teaches that 'pure creative intelligence' is the basis of life, and that through the process of Transcendental Meditation students can perceive the full potential of their lives. Essential to the practice of Transcendental Meditation is the 'mantra'; a mantra is the sound aid used while meditating. Each meditator has his own personal mantra which is never to be revealed to any other person. It is by concentrating on the mantra that one receives the beneficial effects said to result from Transcendental Meditation." See Malnak v. Yogi, 592 F.2d 197, 198 (3d Cir. 1979).

"To acquire his mantra, a meditator must attend a ceremony called a 'puja.' . . . During the puja the student [stands or sits] in front of a table while the teacher [sings] a chant and ma[kes] offerings to a deified 'Guru Dev.' The chanter . . . makes fifteen offerings to Guru Dev and fourteen obeisances to Guru Dev. The chant then describes Guru Dev as a personification of 'kindness' and of 'the creative impulse of cosmic life,' and the personification of 'the essence of creation,' . . . The chanter then makes three more offerings to Guru Dev and three additional obeisances to Guru Dev. The chant then moves to a passage in which a string of divine epithets are applied to Guru Dev. Guru Dev is called 'The Unbounded,' 'the omnipresent in all creation,' 'bliss of the Absolute,' 'transcendental joy,' 'the Self-Sufficient,' 'the embodiment of pure knowledge which is beyond and above the universe like the sky,' 'the One,' 'the Eternal,' 'the Pure,' 'the Immovable,' 'the Witness of all intellects, whose status transcends thought,' 'the Transcendent along with the three gunas,' and 'the true preceptor.' " Id.

A Hindu monk directs the puja, but the teachers "unwaveringly insist that the Puja chant has no religious meaning whatsoever and is, in fact, a 'secular Puja,' quite common in Eastern cultures." They also insist "Transcendental Meditation is primarily a relaxation or concentration technique with no 'ultimate' significance." Id. at 203, 213.

Why would the teachers dispute the claim that their rituals are religious? Would it violate free exercise if a court ruled that they are a religion? Are the teachers atheists?

8. THE RELIGIOUSLY-UNAFFILIATED NONES

The "Nones" refers to the growing group of Americans who self-identify as atheist, agnostic, or "nothing in particular," and are not affiliated with any specific religion. A Pew Forum report found that nearly one in three Americans are "Nones", and that the numbers are

significantly higher for people under 30. There are more than 96 million religiously-unaffiliated persons in the United States. Atheists and agnostics are now 9% of the population, more than Mormons, Jews, Hindus, Muslims, Jehovah's Witnesses, and Buddhists combined. See Pew Research Center, About Three-in-Ten U.S. Adults Are Now Religiously Unaffiliated, Dec. 14, 2021, at https://www.pewforum.org/2021/12/14/about-three-in-ten-u-s-adults-are-now-religiously-unaffiliated/.

Two-thirds of the religiously-unaffiliated Nones say they believe in God, more than half say they often feel a deep connection with nature and the earth, more than a third classify themselves as "spiritual" but not "religious," and one-fifth say they pray every day. See The Pew Forum on Religion & Public Life, America's Changing Religious Landscape, May 12, 2015, http://www.pewforum.org/2015/05/12/americas-changing-religious-landscape/.

9. SUN WORSHIPPING ATHEISM

Marshel Copple was a corrections officer at Ironwood State Prison who created a website and then posted on it about his religion, Sun Worshipping Atheism. A Sun Worshipping Atheist "does not believe in god, but believes that the demands of nature are like a higher power that must be answered to avoid disease and unhappiness and to be morally responsible. The name point of [Sun Worshipping Atheism] is rational worship of the sun. As beings that evolved in the sunlight there are many benefits to our health and well-being that come from sunlight and so we honor it." Copple told his employer that he couldn't work overtime or longer than 12-hour shifts because it violated his religious beliefs. Copple v. California Dep't of Corr. & Rehab., No. G050690, 2015 WL 1383578, at *1 (Cal. Ct. App. Mar. 24, 2015), reh'g denied (Apr. 10, 2015), review denied (June 10, 2015).

Sun Worshipping Atheism's beliefs are: "Identifying a scientific reality of the existence of the universe and that human needs are evolved, that the mind, body and soul, they're all one thing. They're the body, so taking care of the body is the way to take care of the soul. And then specific things from there, sunlight, rest, stimulation, rest, [sic] the things that humans evolved to need and that have a significant effect on mood and brain function." Sun Worshiping Atheism's practices, done to "maintain mind-body well-being," are: "(1) Pray in the sun." "(2) Take natural fresh air daily." "(3) Sleep eight hours or more." "(4) Eat and drink when you need to." "(5) Exercise frequently." "(6) Rest each day." "(7) Have a job." "(8) Be social frequently." "(9) Respect the integrity of the independent mind." "(10) Be skeptical in all things."

Sun Worshipping Atheism's "structure is very loose and grass roots," without any hierarchy. It has no church, temple, synagogue, or any other physical structure for practice of its beliefs. There are no rituals for birth, death, or marriage, nor are there holidays, religious days, or days of rest.

Sun Worshipping Atheism has no required ceremonies or services, although meditating in the sun may be "helpful." Copple is the only Sun Worshipping Atheist.

10. THE SATANIC TEMPLE

The Satanic Temple (TST) is a nontheistic religious organization that is increasingly litigating cases across the country. It "explained the religious nature of its beliefs: 'Satanism provides all that a religion should be without a compulsory attachment to untenable items of faith-based belief. It provides a narrative structure by which we contextualize our lives and works. It also provides a body of symbolism and religious practice—a sense of identity, culture, community, and shared values.' " Satanic Temple, Inc. v. City of Scottsdale, 423 F. Supp. 3d 766, 777 (D. Ariz. 2019).

The organization refers to its local groups as "congregations" and does not believe in a literal devil: "Satan is a symbol of the Eternal Rebel in opposition to arbitrary authority, forever defending personal sovereignty even in the face of insurmountable odds. Satan is an icon for the unbowed will of the unsilenced inquirer—the heretic who questions sacred laws and rejects all tyrannical impositions. Our metaphoric representation is the literary Satan best exemplified by Milton and the Romantic Satanists from Blake to Shelley to Anatole France." TST FAQ, at https://thesatanictemple.com/pages/faq#:~:text=WHAT%20DOES%20SATAN,toÄnatole%20France.

The group specifically rejects that idea that religion requires supernatural elements. "The idea that religion belongs to supernaturalists is ignorant, backward, and offensive. The metaphorical Satanic construct is no more arbitrary to us than are the deeply held beliefs that we actively advocate. Are we supposed to believe that those who pledge submission to an ethereal supernatural deity hold to their values more deeply than we? Are we supposed to concede that only the superstitious are rightful recipients of religious exemption and privilege? Satanism provides all that a religion should be without a compulsory attachment to untenable items of faith-based belief. It provides a narrative structure by which we contextualize our lives and works. It also provides a body of symbolism and religious practice—a sense of identity, culture, community, and shared values." Id. at https://thesatanictemple.com/pages/faq#:~:text=IFŸOU%20DO,and%20shared%20values.

Is TST correct? Must a religion include elements of the supernatural?

11. SCIENTOLOGY

The Church of Scientology was founded in 1954 by L. Ron Hubbard. According to Hubbard's system of Dianetics, humans possess both an analytical mind and a reactive mind. The reactive mind stores emotions

in the form of engrams. The analytical mind is freed to act more fully when humans release their engrams and reach the state of "clear." Scientology counselors use electrical e-meters to audit the reactive mind and to help believers attain the state of clear. See J. Gordon Melton, Scientology, in Catharine Cookson, ed., Encyclopedia of Religious Freedom 430–33 (2003). In 1963, the Food and Drug Administration seized some of the church's e-meters, alleging "false and misleading labeling" under the Food, Drug and Cosmetic Act as well as false healing. See Founding Church of Scientology v. United States (D.C. Cir.), cert. denied, Founding Church of Scientology of Washington, D.C. v. United States. Is Scientology a religion? Does the government violate free exercise when it pursues Scientology for false labeling and false healing for these religious activities?

France has an anti-sect law that allows the state to take action against sects or cults that practice mental manipulation, false claims of healing or fraud. Sects are distinguished from traditional religions like Catholicism or Islam. According to French law, Scientology is a sect. French judges fined Scientology 600,000 euros for fraud after a woman complained that she paid 20,000 euros for an e-meter and other equipment under pressure from Scientologist officials. French prosecutors were unsuccessful in their efforts to have Scientology banned in France. See Gordon H. Smith, Religious Freedom and the Challenge of Terrorism, 2002 B.Y.U. L. Rev. 205; N.A., Scientology Fraud Case, Townsville Bulletin (Australia), Oct. 29, 2009. Should the government be allowed to define groups as sects rather than religions and to monitor the sects' behavior more strictly?

12. UTILITARIANISM

Utilitarianism is "the moral theory that an action is morally right if and only if it produces at least as much good (utility) for all people affected by the action as any alternative action the person could do instead. Its best-known proponent is John Stuart Mill, who formulated the greatest happiness principle: always act so as to produce the greatest happiness." Utilitarians debate "whether the utilitarian principle should be applied to individual actions or to some form of moral rule. According to *act utilitarianism*, each action's rightness or wrongness depends on the utility *it* produces in comparison with possible alternatives. Even act utilitarians agree, however, that rules of thumb like 'keep your promises' can be used for the most part in practice because following them tends to maximize utility. According to *rule utilitarianism*, on the other hand, individual actions are evaluated, in theory not just in practice, by whether they conform to a justified moral rule, and the utilitarian standard is applied only to general rules." Dan W. Brock, Utilitarianism, in R. Audi, ed., The Cambridge Dictionary of Philosophy 824 (1995).

13. CHURCH OF THE NEW SONG

The Church of the New Song, the Eclatarian faith, was founded by Harry Theriault and Jerry M. Dorrough at a federal penitentiary in Atlanta. The Church of the New Song can be found only at three federal penitentiaries. The Eclatarians worship a divine spirit known as Eclat. The Church of the New Song does not promote a particular philosophy of life, but rather encourages free-form philosophy. The group's attempt to hold a paschal-type feast included a request for prison officials to provide steak and wine. See Theriault v. Silber, 391 F.Supp. 578 (D.C. Tex. 1975), vacated by Theriault v. Silber, 547 F.2d 1279 (5th Cir. 1977).

14. WICCA

Wiccans are sometimes called Witches. "The Wiccan faith is a matriarchal religion which originated in Europe. In this faith, there is a belief in a deity, but not in the sense of an anthropomorphic God. Rather, the Wiccan belief is that there is a primordial, supernatural force which is the creator of the world and universe and which permeates everything therein. . . . [T]here is a deification of this force, and all individuals are seen as divine sparks from this divinity with a concomitant moral and ethical responsibility to themselves and to everything in nature. This responsibility arises from the fact that each individual is connected to all things in the universe in what is known as the 'karmic circle,' and each individual both causes the events occurring within the circle and is affected thereby.

"The Wiccan church is not Christian, but it does believe in the teachings of Christ. It does not believe in the devil. In the Wiccan faith, there are eight Sabbaths per year, which are major festivals celebrating changes of seasons. . . . The sacraments and ceremonies of the Wiccan doctrinal theology include: honoring the deity through reverence and homage, communion, marriages (referred to as 'hand fastings'), funeral ceremonies, and ceremonies for naming babies." See Roberts v. Ravenwood Church of Wicca, 249 Ga. 348, 292 S.E.2d 657, 658 (1982).

15. KU KLUX KLAN

At a hearing, a state chaplain for the area Ku Klux Klan testified "that the cross-lighting ceremony is a necessary and integral part of the religious rituals of the Ku Klux Klan" because Christ was the light of the world. He also stated,

> It is the belief of the Klan that the cross as a burning fire be lifted upon a hill where all people can see it as a light unto the world pursuant to the religious traditions of the Klan as a Christian organization.

He described the cross burning as representing

> the circle, the inner and outer circle of people that gather around the cross and, as you mentioned, were around the cross to protect it from the fire . . . from spreading, also represent the inner and outer circle which is representative of the white race, whose invention was the wheel, and it's further stated in the book of Ezekiel of the wheel within a wheel that represented the race of God.

He also testified to the KKK's reliance on the Bible as their "religious charter," and stated the group did not have "ordained ministers but everyone is ordained by God to speak the word of God." See Commonwealth v. Lower, 2 Pa. D. & C. 4th 107 (1989).

16. PAGANS

Bertram Dahl is a self-described high priest of Paganism, which he says is dedicated to seeking "the truth of what came before the idea of monotheism." When Dahl moved to Beebe, Indiana, he introduced himself to the mayor and announced his plan to open a Pagan house of worship on his property. Dahl and his wife had previously operated their "Seekers Temple" out of a trailer in El Paso, Arkansas, teaching that gods are not omnipresent but rather "must be approached and called upon if one is to have a working relationship with them." Seekers Temple taught that "the very definition of 'god,' among other words, has been changed by the Church and we simply do not accept this false definition. Rather we choose the definition of the old days when a god was simply someone who came from the heavens." Richard Fausset, Pagan High Priest Finds Few Believers Inside an Arkansas City Hall, N.Y. Times, Jul. 28, 2014, at A11.

17. THE CHURCH OF THE FLYING SPAGHETTI MONSTER

Members of the Church of the Flying Spaghetti Monster, known as Pastafarians, believe that the Spaghetti Monster created the universe. Church members across the country have fought to be pictured in their drivers' license photos wearing a spaghetti strainer on their heads. Wisconsin resident Michael Schumacher, who won the right to be pictured wearing a colander, said that "the only dogma we believe is that there is no dogma. [We] worship the Flying Spaghetti Monster who was boiled alive for our sins." Samara Kalk Derby, DMV Honors Pasta Church, Wisconsin State Journal, Feb. 29, 2016, at A3. Can a spoof be a religion?

FSM's catechism reads:

Can I get a "Ramen" from the congregation?!

> Behold the Church of the Flying Spaghetti Monster (FSM), today's fastest-growing carbohydrate-based religion. According to church founder Bobby Henderson, the universe and all life

> within it were created by a mystical and divine being: the Flying Spaghetti Monster. What drives the FSM's devout followers, aka Pastafarians? Some say it's the assuring touch from the FSM's Noodly Appendage. There are those who love the worship service, which is conducted in Pirate-Speak and attended by congregants in dashing buccaneer garb. Still others are drawn to the Church's flimsy moral standards, religious holidays every Friday, and the fact that Pastafarian Heaven is way cooler. Does your Heaven have a Stripper Factory and a Beer Volcano? Intelligent Design has finally met its match—and it has nothing to do with apes or the Olive Garden of Eden.

Can FSM be both a parody and a religion? See Cavanaugh v. Bartelt, 178 F.Supp.3d 819 (D. Neb., April 12, 2016).

18. JEDIISM

Jediism is based on the Star Wars movies. The Temple of the Jedi Order was formed in the United States and similar groups all over the world. In 2015 in the UK it was the seventh largest religion according to census data. See Patrick Foster, Jedi church, at https://www.telegraph.co.uk/news/celebritynews/12048428/Jedi-church-says-new-Star-Wars-film-leading-to-boom-in-followers.html.

Members of the Temple of the Jedi Order adhere to 21 maxims that include "Justice: To always seek the path of 'right,' " Meditation: To exercise the mind," and "Faith: To trust in the ways of the Force." See Temple of the Jedi Order, at https://www.templeofthejediorder.org/40-information/38-21-maxims-of-jediism. Can a religion grow out of a deliberate work of fiction? Is there danger that courts will judge new religions more harshly on the legitimacy question than older, more established religion? If so, how should judges account for this disparity in their decisionmaking?

19. ENVIRONMENTALISM

Randall S. Krause filed charges that the City of Tulsa violated his religion of environmentalism when it failed to establish an adequate recycling program. "Environmentalism teaches that recycling protects the environment." He argued that fake recycling bins violated his religion. Do you think his beliefs are religious or secular? How would First Amendment law be impacted if environmentalism is recognized as a religion? See Krause v. Tulsa City-Cty. Libr. Comm'n, No. 16–CV–643–JHP-TLW, 2017 WL 337996, at *3 (N.D. Okla. Jan. 23, 2017).

20. TRADITIONAL HAWAIIAN RELIGION

Traditional Hawaiian religion was linked to many Polynesian religions. "Believing that supernatural forces filled sea, sky, and earth, the Hawaiians personified them in countless named and individualized

deities, who controlled nature and humankind through their *mana*, or supernatural power. The people retained cosmogonic gods from the homeland, such as Kāne, Kanaloa, Kū, Lono, and goddesses like Hina and Haumea, but they added aspects to these gods and included the deified dead, beings like the volcano goddess Pele, and temperamental local spirits in their pantheon of supernatural beings. This pantheon provided the inherited or acquired guardian gods, or *'aumakua*, of each individual, family, occupation, and profession. A god communicated its will through dreams, images, something in nature such as a shark or thunder, or a human prophet." Hawaiian Religion, https://www.encyclopedia.com/environment/encyclopedias-almanacs-transcripts-and-maps/hawaiian-religion. Compare this Hawaiian pantheon, which is omnipresent in the natural world, with the claimed religion of environmentalism in note 19. First Amendment litigation from both might promote similar challenges, but which do you think will be more successful? Why? How are they different?

21. RELIGION OR PHILOSOPHY?

Are the beliefs labeled or summarized below in notes a–g religions that deserve First Amendment protection, or personal or philosophical beliefs that fall outside the protection of the First Amendment?

a. What about "Judaism, Christianity, Islam, Hinduism, Buddhism, Shintoism, Confucianism, and Taoism. . . . Hare Krishnas, Bantus, Mormons, Seventh Day Adventists, Christian Scientists, Scientologists, Branch Davidians, Unification Church Members, and Native American Church Members (whether Shamanists or Ghost Dancers). . . . Paganism, Zoroastrianism, Pantheism, Animism, Wicca, Druidism, Satanism, and Santeria. . . . [w]hat we now call 'mythology': Greek religion, Norse religion, and Roman religion. . . . Nihilism, anarchism, pacifism, utopianism, socialism, libertarianism, Marxism, vegetism, and humanism." United States v. Meyers, 906 F.Supp. 1494, 1503–04 (D.Wyo. 1995).

b. This group "has no carefully articulated system of doctrine and ethics; rather it participates in traditional rites and festivals in the shrine setting and, by extension, in the household. The typical setting for the practice is the shrine *(jinja)* precinct, which is an enclosed sacred area with a gate, ablution area, and sacred buildings including the main sanctuary which houses the symbol of the kami and a worship area. The natural surroundings are also regarded as permeated with the kami presence; in fact, occasionally a mountain or sacred forest may take the place of the sanctuary. Important in worship at the shrine are rituals which bring about purification from defilements and which foster an integration of human life

with the life-bearing power of the kami. Other rituals center around rites of dedication such as offerings of sprigs of the sacred sasaki tree or offerings of foods to the kami. Priests chant special prayers for the worshippers expressing gratitude to the kami." P.E. Nosco, in John Bowker, ed., The Oxford Dictionary of World Religions 892–93 (1997).

c. "There are four classes of people: priests, nobles, commoners, serfs. These are ranked relative to one another, depending on their perceived proximity to ultimate reality. The priests, who are considered especially close to ultimate reality, are on the top of society, followed by the nobles, the commoners and the serfs. Thus, at birth one is given an identity that specifies his or her relationship to ultimate reality. One is either close to it or far from it, meaning that one's existence is more or less meaningful—more or less real—in comparison with others. Depending on class, an individual is assigned a set of duties that must be performed in order to maintain his or her status relative to others and relative to ultimate reality." Will Deming, Rethinking Religion: A Concise Introduction 25–26 (2004).

d. " 'Avoiding the two extremes (of self-denial and self-indulgence) . . . has realized the Middle Path: it gives vision, it gives knowledge, and it leads to calm, to insight, to awakening, to nirvana.' . . . This teaching presents a path for living—a path that is balanced and oriented toward the cessation of suffering. The Path often is divided into eight categories: right views, right thoughts, right speech, right action, right livelihood, right effort, right mindfulness, and right concentration. . . . The five 'moral precepts' are not to kill, not to steal, not to lie, not to abuse sex, and not to take intoxicants. 'Concentration' has to do with the practice of mental discipline that is commonly called 'meditation.' . . . To practice this form of discipline, one sits down in a stable posture and concentrates on the movement of the breath. As thoughts arise in the mind, one observes them and lets them flow away, returning to concentration on the movement of the breath. Wisdom constitutes the insight that finally frees a person from suffering and from the cycle of death and rebirth." Malcolm David Eckel, in Jonathan Z. Smith, ed., The HarperCollins Dictionary of Religion 140–41 (1995).

e. "But I say to you, 'Love your enemies and pray for those who persecute you, so that you may be children of your Father in heaven; for he makes his sun rise on the evil and on the good, and sends rain on the righteous and on the unrighteous. For if you love those who love you, what reward do you have? Do not even the tax collectors do the same?' " Matthew 5:44–46.

f. "The name of the faith means 'submission to God,' the adherent being therefore 'one who submits himself to God,' i.e.

surrenders himself unconditionally to the divine will." Edmund Bosworth, in John R. Hinnells, ed., A New Dictionary of Religions 238 (1995).

g. This system "is made up of (1) a worldview, which by reference to Torah sets forth the intersection of the supernatural and the natural worlds, accounts for how things are, and puts them together into a cogent and harmonious picture; (2) a way of life explained by that worldview that carries out the concrete laws of the Torah and so expresses the worldview in concrete actions; and (3) a social group . . . for which the worldview accounts and which is defined as an entity and in concrete terms by the way of life." Jacob Neusner, in Jonathan Z. Smith, ed., The HarperCollins Dictionary of Religion 598 (1995).

h. Is it actually necessary for courts to define religion or is there another way? Think back to the chanting monks in #7 or the humanists in #6. For instance, instead of asking, "does this meet the legal criteria to be considered a religion," could courts instead ask, "for the purposes of the First Amendment, does this system deserve the same legal protection as religion?"

C. HOW SHALL COURTS DEFINE RELIGION?

Following are two extensive definitions of religion, the first by a prominent scholar of religious studies, and the second by the Supreme Court of the United States in *United States v. Seeger*. *Seeger* is the only case in which the Court has defined religion, and the definition occurred in a case of statutory, not constitutional, interpretation. Do these definitions of "religion" help you to decide what is and is not a religion in the materials above? Do these readings take account of the age of a religion, whether it is new or whether it is old? Are religions discriminated against because of their age?

Ninian Smart, The World's Religions

11–12, 13–22 (2d ed. 1998).

THE NATURE OF A RELIGION

In thinking about religion, it is easy to be confused about what it is. Is there some essence which is common to all religions? And cannot a person be religious without belonging to any of the religions? The search for an essence ends up in vagueness—for instance in the statement that religion is some system of worship or other practice recognizing a transcendent Being or goal. Our problems break out again in trying to define the key term "transcendent." And in answer to the second question, why yes: there are plenty of people with deep spiritual concerns who do not ally themselves to any formal religious movement, and who may not

themselves recognize anything as transcendent. They may see ultimate spiritual meaning in unity with nature or in relationships to other persons.

It is more practical to come to terms first of all not with what religion is in general but with what *a* religion is. Can we find some scheme of ideas which will help us to think about and to appreciate the nature of the religions? . . . One approach is to look at the different aspects or dimensions of religion.

The Practical and Ritual Dimension

Every tradition has some practices to which it adheres—for instance regular worship, preaching, prayers, and so on. They are often known as rituals (though they may well be more informal than this word implies). This *practical* and *ritual* dimension is especially important with faiths of a strongly sacramental kind, such as eastern Orthodox Christianity with its long and elaborate service known as the Liturgy. The ancient Jewish tradition of the Temple, before it was destroyed in 70 C.E., was preoccupied with the rituals of the sacrifice, and thereafter with the study of such rites seen as equivalent to their performance, so that study itself becomes almost a ritual activity. Again, sacrificial rituals are important among Brahmin forms of the Hindu tradition.

Also important are other patterns of behavior which, while they may not strictly count as rituals, fulfill a function in developing spiritual awareness or ethical insight: practices such as yoga in the Buddhist and Hindu traditions, methods of stilling the self in Eastern Orthodox mysticism, meditations which can help to increase compassion and love, and so on. Such practices can be combined with rituals of worship, where meditation is directed toward union with God. They can count as a form of prayer. In such ways they overlap with more formal or explicit rites of religion.

The Experiential and Emotional Dimension

We only have to glance at religious history to see the enormous vitality and significance of experience in the formation and development of religious traditions. Consider the visions of the Prophet Muhammad, the conversion of Paul, the enlightenment of the Buddha. These were seminal events in human history. And it is obvious that the *emotions* and *experiences* of men and women are the food on which the other dimensions of religion feed: ritual without feeling is cold, doctrines without awe or compassion are dry, and myths which do not move hearers are feeble. So it is important in understanding a tradition to try to enter into the feelings which it generates—to feel the sacred awe, the calm peace, the rousing inner dynamism, the perception of a brilliant emptiness within, the outpouring of love, the sensations of hope, the gratitude for favors which have been received. One of the main reasons why music is so potent in religion is that it has mysterious powers to express and engender emotions . . .

The Narrative or Mythic Dimension

Often experience is channeled and expressed not only by the ritual but also by sacred narrative or myth. This is the third dimension—the mythic or narrative. It is the story side of religion. It is typical of all faiths to hand down vital stories: some historical; some about that mysterious primordial time when the world was in its timeless dawn; some about things to come at the end of time; some about great heroes and saints; some about great founders, such as Moses, the Buddha, Jesus, and Muhammad; some about assaults by the Evil One; some parables and edifying tales; some about the adventures of the gods; and so on. These stories often are called myths. This term may be a bit misleading, for in the modern study of religion there is no implication that a myth is false.

The seminal stories of a religion may be rooted in history or they may not. Stories of creation are before history, as are myths which indicate how death and suffering came into the world. Others are about historical events—for instance the life of the Prophet Muhammad, or the execution of Jesus, and the enlightenment of the Buddha. Historians have sometimes cast doubt on some aspects of these historical stories, but from the standpoint of the student of religion this question is secondary to the meaning and function of the myth; and to the believer, very often, these narratives *are* history . . .

The Doctrinal and Philosophical Dimension

Underpinning the narrative dimension is the *doctrinal* dimension. Thus, in the Christian tradition, the story of Jesus' life and the ritual of the communion service led to attempts to provide an analysis of the nature of the Divine Being which would preserve both the idea of the Incarnation (Jesus as God) and the belief in one God. The result was the doctrine of the Trinity, which sees God as three persons in one substance. Similarly, with the meeting between early Christianity and the great Graeco-Roman philosophical and intellectual heritage it became necessary to face questions about the ultimate meaning of creation, the inner nature of God, the notion of grace, the analysis of how Christ could be both God and human being, and so on. These concerns led to the elaboration of Christian doctrine. In the case of Buddhism, to take another example, doctrinal ideas were more crucial right from the start, for the Buddha presented a philosophical vision of the world which itself was an aid to salvation.

In any event, doctrines come to play a significant part in all the major religions, partly because sooner or later a faith has to adapt to social reality and so to the fact that much of the leadership is well educated and seeks some kinds of intellectual statement of the basis of the faith. . . .

The Ethical and Legal Dimension

Both narrative and doctrine affect the values of a tradition by laying out the shape of a worldview and addressing the question of ultimate

liberation or salvation. The law which a tradition or subtradition incorporates into its fabric can be called the *ethical* dimension of religion. In Buddhism, for instance, there are certain universally binding precepts, known as the five precepts or virtues, together with a set of further regulations controlling the lives of monks and nuns and monastic communities. In Judaism we have not merely the Ten Commandments but a complex of over six hundred rules imposed upon the community by the Divine Being. All this Law or Torah is a framework for living for the Orthodox Jew. It is also a part of the ritual dimension, because, for instance, the injunction to keep the Sabbath as day of rest is also the injunction to perform certain sacred practices and rituals, such as attending the synagogue and maintaining purity.

Similarly, Islamic life has traditionally been controlled by the Law or *shar'a*, which shapes society as both a religious and a political society, as well as shaping the moral life of the individual—prescribing that he should pray daily, give alms to the poor, and so on, and that society should have various institutions, such as marriage, modes of banking, etc.

Other traditions can be less tied to a system of law, but still display an ethic which is influenced and indeed controlled by the myth and doctrine of the faith. For instance, the central ethical attitude in the Christian faith is love. This springs not just from Jesus' injunction to his followers to love God and their neighbors: it flows too from the story of Christ himself who gave his life out of love for his fellow human beings. It is also rooted in the very idea of the Trinity, for God from all eternity is a society of three persons, Father, Son, and Holy Spirit, kept together by the bond of love. The Christian joins a community which reflects, it is hoped at any rate, the life of the Divine Being, both as Trinity and as suffering servant of the human race and indeed of all creation.

The Social and Institutional Dimension

The dimensions outlined so far—the experiential, the ritual, the mythic, the doctrinal, and the ethical—can be considered in abstract terms without being embodied in external form. The last two dimensions have to do with the incarnation of religion. First, every religious movement is embodied in a group of people, and that is very often rather formally organized—as Church, or Sangha, or *umma*. The sixth dimension therefore is what may be called the *social* or *institutional* aspect of religion. To understand a faith we need to see how it works among people. This is one reason why such an important tool of the investigator of religion is that subdiscipline which is known as the sociology of religion. Sometimes the social aspect of a worldview is simply identical with society itself, as in small-scale groups such as tribes. But there is a variety of relations between organized religions and a society at large: a faith may be the official religion, or it may just be one denomination among many, or it may be somewhat cut off from social life, as a sect. Within the organization of one religion, moreover, there are many

models—from the relative democratic governance of a radical Protestant congregation, to the hierarchal and monarchical system of the Church of Rome. . . .

The Material Dimension

This social or institutional dimension of religion almost inevitably becomes incarnate in a different way, in *material* form, as buildings, works of art, and other creations. Some movements—such as Calvinist Christianity, especially in the time before the present century—eschew external symbols as being potentially idolatrous; their buildings are often beautiful in their simplicity, but their intention is to be without artistic or other images which might seduce people from the thought that God is a spirit who transcends all representations. However, the material expressions of religion are more often elaborate, moving, and highly important for believers in their approach to the divine. How indeed could we understand Eastern Orthodox Christianity without seeing what ikons are like and knowing that they are regarded as windows onto heaven? How could we get inside the feel of Hinduism without attending to the varied statues of God and the gods?

Also important material expressions of a religion are those natural features of the world which are singled out as being of special sacredness and meaning—the river Ganges, the Jordan, the sacred mountains of China, Mount Fuji in Japan, Ayers Rock in Australia, the Mount of Olives, Mount Sinai, and so forth. Sometimes of course these sacred landmarks combine with more direct human creations, such as the holy city of Jerusalem, the sacred shrines of Banaras, or the temple at Bodh Gaya which commemorates the Buddha's Enlightenment.

Uses of the Seven Dimensions

To sum up: we have surveyed briefly the seven dimensions of religion which help to characterize religions as they exist in the world. The point of the list is so that we can give a balanced description of the movements which have animated the human spirit and taken a place in the shaping of society, without neglecting either ideas or practices.

Naturally, there are religious movements or manifestations where one or other of the dimensions is so weak as to be virtually absent: nonliterate small-scale societies do not have much means of expressing the doctrinal dimension; Buddhist modernists, concentrating on meditation, ethics, and philosophy, pay scant regard to the narrative dimension of Buddhism; some newly formed groups may not have evolved anything much in the way of the material dimension. Also there are so many people who are not formally part of any social religious grouping, but have their own particular worldviews and practices, that we can observe in society atoms of religion which do not possess any well-formed social dimension. But of course in forming a phenomenon within society they reflect certain trends which in a sense form a shadow of the social dimension (just as those who have not yet got themselves a material

dimension are nevertheless implicitly storing one up, for with success come buildings and with rituals ikons, most likely).

NOTES AND QUESTIONS

1. Do you think that Professor Smart's framework applies to secular ideologies? Are "scientific humanism, Marxism, Existentialism, nationalism, and so on" religions?

2. The anthropologist Clifford Geertz defined religion as "(1) a system of symbols which acts to (2) establish powerful, pervasive, and long-lasting moods and motivations in men by (3) formulating conceptions of a general order of existence and (4) clothing these conceptions with such an aura of factuality that (5) the moods and motivations seem uniquely realistic." Do you prefer this concise definition to Smart's?

3. The Supreme Court provided its most extensive definition of religion in a statutory case involving the draft, not in a free exercise case. In the following case, the Court addressed the constitutionality of Section 6(j) of the Universal Military Training and Service Act, which read as follows:

> Nothing in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. Religious training and belief in this connection means an individual's belief in relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophic views or a merely person[al] moral code. [Universal Military Training and Service Act, 50 U.S.C. App. § 456(j), § 6(j) (1958 ed.)].

According to the statute, only individuals who were conscientiously opposed to war "by reason of religious training and belief" were entitled to conscientious objector status. The statute defined religious training and belief to mean "an individual's belief in relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophic views or a merely person[al] moral code." Did the Court do a good job defining religion in the following opinion?

United States v. Seeger

Supreme Court of the United States, 1965.
380 U.S. 163, 85 S.Ct. 850, 13 L.Ed.2d 733.

■ MR. JUSTICE CLARK delivered the opinion of the Court.

The constitutional attack [on § 6(j), above] is launched under the First Amendment's Establishment and Free Exercise Clauses and is twofold: (1) The section does not exempt nonreligious conscientious objectors; and (2) it discriminates between different forms of religious

expression in violation of the Due Process Clause of the Fifth Amendment.

We have concluded that Congress, in using the expression "Supreme Being" rather than the designation "God," was merely clarifying the meaning of religious training and belief so as to embrace all religions and to exclude essentially political, sociological, or philosophical views. We believe that under this construction, the test of belief "in a relation to a Supreme Being" is whether a given belief that is sincere and meaningful occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God of one who clearly qualifies for the exemption. Where such beliefs have parallel positions in the lives of their respective holders we cannot say that one is "in a relation to a Supreme Being" and the other is not. We have concluded that the beliefs of the objectors in these cases meet these criteria, and, accordingly, we affirm the judgments in Nos. 50 and 51 and reverse the judgment in No. 29.

THE FACTS IN THE CASES.

No. 50: Seeger was convicted in the District Court for the Southern District of New York of having refused to submit to induction in the armed forces. He was originally classified 1–A in 1953 by his local board, but this classification was changed in 1955 to 2–S (student) and he remained in this status until 1958 when he was reclassified 1–A. He first claimed exemption as a conscientious objector in 1957 after successive annual renewals of his student classification. Although he did not adopt verbatim the printed Selective Service System form, he declared that he was conscientiously opposed to participation in war in any form by reason of his "religious" belief; that he preferred to leave the question as to his belief in a Supreme Being open, "rather than answer 'yes' or 'no' "; 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." He 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." His belief was found to be sincere, honest, and made in good faith; and his conscientious objection to be based upon individual training and belief, both of which included research in religious and cultural fields. Seeger's claim, however, was denied solely because it was not based upon a "belief in a relation to a Supreme Being" as required by § 6(j) of the Act. At trial Seeger's counsel admitted that Seeger's belief was not in relation to a Supreme Being as commonly understood, but contended that he was entitled to the exemption because "under the present law Mr. Seeger's position would also include definitions of religion which have been stated more recently," and could be "accommodated" under the definition of religious training and belief in the Act. He was convicted.

No. 51: Jakobson was also convicted in the Southern District of New York on a charge of refusing to submit to induction.

Jakobson was originally classified 1–A in 1953 and intermittently enjoyed a student classification until 1956. It was not until April 1958 that he made claim to noncombatant classification (1–A–O) as a conscientious objector. He stated on the Selective Service System form that he believed in a "Supreme Being" who was "Creator of Man" in the sense of being "ultimately responsible for the existence of" man and who was "the Supreme Reality" of which "the existence of man is the *result*." He explained that his religious and social thinking had developed after much meditation and thought. He had concluded that man must be "partly spiritual" and, therefore, "partly akin to the Supreme Reality"; and that his "most important religious law" was that "no man ought ever to wilfully sacrifice another man's life as a means to any other end. . . ." In December 1958 he requested a 1–O classification since he felt that participation in any form of military service would involve him in "too many situations and relationships that would be a strain on [his] conscience that [he felt he] must avoid." He submitted a long memorandum of "notes on religion" in which he defined religion as the "*sum and essence of one's basic attitudes to the fundamental problems of human existence*"; he said that he believed in "Godness" which was "the Ultimate Cause for the fact of the Being of the Universe"; that to deny its existence would but deny the existence of the universe because "anything that Is, has an Ultimate Cause for its Being." There was a relationship to Godness, he stated, in two directions, i.e., "vertically, towards Godness directly," and "horizontally, towards Godness through Mankind and the World." He accepted the latter one. . . .

No. 29: Forest Britt Peter was convicted in the Northern District of California on a charge of refusing to submit to induction. In his Selective Service System form he stated that he was not a member of a religious sect or organization; he failed to execute section VII of the questionnaire but attached to it a quotation expressing opposition to war, in which he stated that he concurred. In a later form he hedged the question as to his belief in a Supreme Being by saying that it depended on the definition and he appended a statement that he felt it a violation of his moral code to take human life and that he considered this belief superior to his obligation to the state. As to whether his conviction was religious, he quoted with approval Reverend John Haynes Holmes' definition of religion as "the consciousness of some power manifest in nature which helps man in the ordering of his life in harmony with its demands . . . [; it] is the supreme expression of human nature; it is man thinking his highest, feeling his deepest, and living his best." The source of his conviction he attributed to reading and meditation "in our democratic American culture, with its values derived from the western religious and philosophical tradition." As to his belief in a Supreme Being, Peter stated that he supposed "you could call that a belief in the Supreme Being or God. These just do not happen to be the words I use."

INTERPRETATION OF § 6(j).

1. The crux of the problem lies in the phrase "religious training and belief" which Congress has defined as "belief in a relation to a Supreme Being involving duties superior to those arising from any human relation." In assigning meaning to this statutory language we may narrow the inquiry by noting briefly those scruples expressly excepted from the definition. The section excludes 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. These judgments have historically been reserved for the Government, and in matters which can be said to fall within these areas the conviction of the individual has never been permitted to override that of the state. The statute further excludes those whose opposition to war stems from a "merely personal moral code," a phrase to which we shall have occasion to turn later in discussing the application of § 6(j) to these cases. We also pause to take note of what is not involved in this litigation. No party claims to be an atheist or attacks the statute on this ground. 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. Nor do the parties claim the monotheistic belief that there is but one God; what they claim (with the possible exception of Seeger who bases his position here not on factual but on purely constitutional grounds) is that they adhere to theism, which is the "Belief in the existence of a god or gods; * * * Belief in superhuman powers or spiritual agencies in one or many gods," as opposed to atheism. Our question, therefore, is the narrow one: Does the term "Supreme Being" as used in § 6(j) mean the orthodox God or 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"? Webster's New International Dictionary (2d ed.) In considering this question we resolve it solely in relation to the language of § 6(j) and not otherwise.

2. . . . Over 250 sects inhabit our land. Some believe in a purely personal God, some in a supernatural deity; others think of religion as a way of life envisioning as its ultimate goal the day when all men can live together in perfect understanding and peace. There are those who think of God as the depth of our being; others, such as the Buddhists, strive for a state of lasting rest through self-denial and inner purification; in Hindu philosophy, the Supreme Being is the transcendental reality which is truth, knowledge and bliss. Even those religious groups which have traditionally opposed war in every form have splintered into various denominations: from 1940 to 1947 there were four denominations using the name "Friends,"; the "Church of the Brethren" was the official name of the oldest and largest church body of four denominations composed of those commonly called Brethren; and the "Mennonite Church" was the largest of 17 denominations, including the Amish and Hutterites, grouped as "Mennonite bodies" in the 1936 report on the Census of

Religious Bodies. This vast panoply of beliefs reveals the magnitude of the problem which faced the Congress when it set about providing an exemption from armed service. It also emphasizes the care that Congress realized was necessary in the fashioning of an exemption which would be in keeping with its long-established policy of not picking and choosing among religious beliefs.

In spite of the elusive nature of the inquiry, we are not without certain guidelines. In amending the 1940 Act, Congress adopted almost intact the language of Chief Justice Hughes in United States v. Macintosh, supra:

> "The essence of religion is belief in a relation to *God* involving duties superior to those arising from any human relation." At 633–634. (Emphasis supplied.)

By comparing the statutory definition with those words, however, it becomes readily apparent that the Congress deliberately broadened them by substituting the phrase "Supreme Being" for the appellation "God."

Under the 1940 Act it was necessary only to have a conviction based upon religious training and belief; we believe that is all that is required here. Within that phrase would come all sincere religious beliefs which are based upon a power or being, or upon a faith, to which all else is subordinate or upon which all else is ultimately dependent. The test might be stated in these words: 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. This construction avoids imputing to Congress an intent to classify different religious beliefs, exempting some and excluding others, and is in accord with the well-established congressional policy of equal treatment for those whose opposition to service is grounded in their religious tenets.

3. Section 6(j), then, is no more than a clarification of the 1940 provision involving only certain "technical amendments," to use the words of Senator Gurney. As such it continues the congressional policy of providing exemption from military service for those whose opposition is based on grounds that can fairly be said to be "religious." To hold otherwise would not only fly in the face of Congress' entire action in the past; it would ignore the historic position of our country on this issue since its founding.

4. Moreover, we believe this construction embraces the ever-broadening understanding of the modern religious community. The eminent Protestant theologian, Dr. Paul Tillich, whose views the Government concedes would come within the statute, identifies God not as a projection "out there" or beyond the skies but as the ground of our very being. The Court of Appeals stated in No. 51 that Jakobson's views "parallel [those of] this eminent theologian rather strikingly." In his book, Systematic Theology, Dr. Tillich says:

> "I have written of the God above the God of theism. . . . In such a state [of self-affirmation] the God of both religious and theological language disappears. But something remains, namely, the seriousness of that doubt in which meaning within meaninglessness is affirmed. The source of this affirmation of meaning within meaninglessness, of certitude within doubt, is not the God of traditional theism but the 'God above God.' the power of being, which works through those who have no name for it, not even the name God." II Systematic Theology 12 (1957).

Another eminent cleric, the Bishop of Woolwich, John A. T. Robinson, in his book, Honest To God (1963), states:

> "The Bible speaks of a God 'up there.' No doubt its picture of a three-decker universe, of 'the heaven above, the earth beneath and the waters under the earth,' was once taken quite literally * * *"
>
> "[Later] *in place of a God who is literally or physically 'up there' we have accepted, as part of our mental furniture, a God who is spiritually or metaphysically 'out there.'* . . ."

The Schema of the recent Ecumenical Council included a most significant declaration on religion:[4]

> "The community of all peoples is one. One is their origin, for God made the entire human race live on all the face of the earth. One, too, is their ultimate end, God. Men expect from the various religions answers to the riddles of the human condition: What is man? What is the meaning and purpose of our lives? What is the moral good and what is sin? What are death, judgment, and retribution after death? . . . The Church regards with sincere reverence those ways of action and of life, precepts and teachings which, although they differ from the ones she sets forth, reflect nonetheless a ray of that Truth which enlightens all men." . . .

Dr. David Saville Muzzey, a leader in the Ethical Culture Movement, states in his book, Ethics As a Religion (1951), that "[e]verybody except the avowed atheists (and they are comparatively few) believes in some kind of God," and that "The proper question to ask, therefore, is not the futile one, Do you believe in God? but rather, What *kind* of God do you believe in?"

These are but a few of the views that comprise the broad spectrum of religious beliefs found among us. But they demonstrate very clearly the diverse manners in which beliefs, equally paramount in the lives of their possessors, may be articulated. They further reveal the difficulties inherent in placing too narrow a construction on the provisions of § 6(j)

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[4] Draft declaration on the Church's relations with non-Christians, Council Daybook, Vatican II, 3d Sess., p. 282, N.C.W.C., Washington, D.C., 1965.

and thereby lend conclusive support to the construction which we today find that Congress intended.

5. We recognize the difficulties that have always faced the trier of fact in these cases. We hope that the test that we lay down proves less onerous. The examiner is furnished a standard that permits consideration of criteria with which he has had considerable experience. While the applicant's words may differ, the test is simple of application. It is essentially an objective one, namely, does the claimed belief occupy the same place in the life of the objector as an orthodox belief in God holds in the life of one clearly qualified for exemption?

Moreover, it must be remembered that in resolving these exemption problems one deals with the beliefs of different individuals who will articulate them in a multitude of ways. In such an intensely personal area, of course, the claim of the registrant that his belief is an essential part of a religious faith must be given great weight. . . . The validity of what he believes cannot be questioned. Some theologians, and indeed some examiners, might be tempted to question the existence of the registrant's "Supreme Being" or the truth of his concepts. But these are inquiries foreclosed to Government. As Mr. Justice Douglas stated in United States v. Ballard, 322 U.S. 78, 86, 64 S.Ct. 882, 886, 88 L.Ed. 1148 (1944): "Men may believe what they cannot prove. They may not be put to the proof of their religious doctrines or beliefs. Religious experiences which are as real as life to some may be incomprehensible to others." Local boards and courts in this sense are not free to reject beliefs because they consider them "incomprehensible." Their task is to decide whether the beliefs professed by a registrant are sincerely held and whether they are, in his own scheme of things, religious.

But we hasten to emphasize that while the "truth" of a belief is not open to question, there remains the significant question whether it is "truly held." This is the threshold question of sincerity which must be resolved in every case. It is, of course, a question of fact—a prime consideration to the validity of every claim for exemption as a conscientious objector.

NOTES AND QUESTIONS

1. The Court concluded: "We believe that under this construction, the test of belief 'in a relation to a Supreme Being' is whether a given belief that is sincere and meaningful occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God of one who clearly qualifies for the exemption." Do you agree with the Court that the test is of "simple application" and is "objective"? Is there an alternative test that you think the Court should have used? Is there a definition of religion that would be more appropriate today?

In an important concurrence in *Malnak v. Yogi*, Judge Arlin Adams analyzed *Seeger* as favoring a broad definition of religion, and proposed instead a "modern" definition of religion that would look to familiar religions

as models and then analogize to other candidates for religion. In making the analogy, Adams identified three main "indicia" of a genuine religion. First, the ideas and questions that underlie the religion are the most important—the "ultimate" questions that face humans, including "the meaning of life and death, man's role in the Universe, the proper moral code of right and wrong." Second, the answers to such questions must be comprehensive, "embedded in a system of ideas that connects overarching concerns with deep commitments about the nature of reality." Third, an organizational structure, including any services, rituals, clergy, and so on, would be additional, although not determinative, evidence of religion. See Sarah Barringer Gordon, Malnak v. Yogi: Transcendental Meditation and the Definition of Religion, in L. Griffin, ed., Law and Religion: Cases in Context (Aspen 2010); Malnak v. Yogi, 592 F.2d 197, 207–210 (3d Cir. 1979). Using that standard, Adams concluded that the Science of Creative Intelligence and Transcendental Meditation (infra Section B) was a religion even though its adherents said it was secular. Is the Adams test better than *Seeger* in resolving the questions in Section B about what qualifies as a religion?

2. Did the Court's use of the theologians' views add anything important to the definition of religion? Why were so many of the theologians selected Christian? Did the addition of Dr. Muzzey mean that the Court considered a full range of religious views? What theologians would or should the Court rely on today to figure out a definition of religion? Justice Douglas' concurrence included descriptions of Hinduism and Buddhism. Should Justice Clark have included such materials in his opinion?

3. In the omitted section of the decision, the Court ruled that Seeger, Jakobson and Peter qualified as C.O.s. Do you agree?

4. Why do we protect religion in this way and is it contradictory? Within this protection for religion is an inherent judgment about the relative value of ideas. Faith-based beliefs deeply held, are given greater legal protection than reasoned beliefs deeply held. Does this seem backward? Typically, one who is told, "this is a moral rule because that god said so," has more legal protections for their belief and ability to act on the belief than another who arrives at the moral rule through careful thought and study. For instance, a Hindu or Buddhist prisoner might demand and receive vegetarian meals on religious grounds. The thoughtful vegetarian who has studied the impact of consuming animals on the climate crisis and learned of their capacity to suffer might demand the same and get nothing. Does this make sense?

5. Now, applying everything you learned in this chapter, is Appleism a religion?

David Kuo, Appleism is a New Religion . . .

http://blog.beliefnet.com/jwalking/2007/06/appleism-kuo.html, June 25, 2007.

Welcome to Appleism—the religion that is Apple.

For decades we have heard of the "Cult of Apple" and the "Mac Cult"—the relatively small group of slavishly devoted technology fanatics

obsessed with Apple and its pontiff, Steve Jobs. These "cultists" were typically artsy, creative types, who sneered at anything Microsoft and "Windows" because Windows was a shamelessly pathetic rip off of Mac's operating system and because Microsoft "had no taste"—as Jobs once sermonized. And so people bought into this idea of the Apple cult.

Apple isn't a cult anymore, it has become a full blown religion with scores of millions of followers. The frenzy around the iPhone brings to mind the clamoring throngs that greeted Jesus at the height of his ministry.

There are many, many different tests for what makes something a religion. They range from belief in a higher power to sacred rituals to moral codes to sacred places. In every instance Appleism passes the test.

Religions are based on some belief in a higher or supernatural power. Meet Steve Jobs whose story is supernatural. He started Apple with a friend in his parent's garage and by the time he was 30 was running a multibillion company that had revolutionized computing. Then he was tossed aside, sent to the desert abandoned and despised. Apple slowly sank. At a moment when the company, er, faith, was near its end Jobs returned—the Second Coming—and brought salvation (also known as the iMac, iBook, and iPod). With the introduction of iPhone, however, Appleism may be outgrowing even Jobs with a belief in the power of Apple in and of itself. Apple has become its own deity.

Sacred v. profane objects, places, and times. This one is easy. Sacred: Apple. Profane: Microsoft. Sacred times? MacWorld, Appleism's equivalent of the annual return to Mecca. Then there is this coming Friday where millions will be standing in line to pay homage to the most sacred Apple of all—the iPhone. However, it is unclear whether some will one day move to make June 29th, the date of iPhone's introduction, a national holiday.

Ritual acts focused on sacred objects, places, times. Every time someone with an iPod uses its ubiquitous "click wheel" and every time someone sits before a Mac, or opens a Macbook Pro (like the one I am currently using) they are performing a ritual act of worship, sacred in its own way. The same is true when using iTunes to manage music or iPhoto to manage pictures or iMovie to create films—these are all ritual acts both devoted to Appleism and made possible by the Apple deity.

Characteristically religious feelings (awe, wonder, gratitude, guilt, adoration, etc.). Appleism's followers know of guilt and they experience it every time they use a Windows computer. I have a friend who is a loyal Mac guy but recently finished a big project on an IBM. He emailed me and talked about his guilt. (I'm not joking). More than guilt though, they know of awe, wonder, and gratitude. Every new Apple invention, every time Steve Jobs take a stage to announce something beautiful and wonderful all Appleists tingle with joy and anticipation.

A worldview and morality based on the faith. Appleism espouses a liberal worldview that challenges conventional morality and norms and encourages creativity. It was clearly seen in the famed "Think Different" ad campaign that highlighted everyone from John Lennon and Gandhi to two lesbians kissing in bed. It is, however, most clearly seen in the new "Get a Mac" ads where the casual kid who represents the Mac is constantly poking fun at the tie-wearing guy—the symbol of stodgy conservatism. These ads don't just poke fun at Microsoft but at the kind of boring, humdrum, life that Microsoft empowers. They are jabs at the conventional; jabs at the orthodox and tried and true. They are ads that strike at the heart of older religions while evangelizing Appleism.

Oh, and one more thing.

I am an Appleist. I have a MacBook and an iMac. My wife and I have more than 7,000 photos on iPhoto and more than 15,000 songs (all legal—ok, there may be a few from the old Napster days) on iTunes. We have at least four iPods in the house. I own Apple stock. I have watched every iPhone ad repeatedly. Since my own faith in Jesus requires that I have no God before my God it is clear that something in my life must change. And things will change. Right after I get that iPhone.

British neuroscientists concluded that trips to the Apple Store trigger the same brain reaction as images of a deity for religious people. See Mark Millan, Apple Triggers "Religious" Reaction in Fans' Brains, Report Says, CNN Tech, May 19, 2011, at http://www.cnn.com/2011/TECH/gaming.gadgets/05/19/apple.religion/. Does this confirm Apple is a religion?

In the next chapter, we examine the second Religion Clause of the First Amendment—the Establishment Clause. Do you think the courts should use the same definition of religion for Establishment that they do for Free Exercise? Harvard Law Professor Laurence Tribe once proposed a simple formula: when an activity or belief was *arguably religious*, it should be protected under the Free Exercise Clause; when such activity or belief is *arguably not religious*, government support or encouragement would not violate the Establishment Clause. See Laurence H. Tribe, American Constitutional Law 826–29 (1978). Is that a good idea, or should there be one definition of religion for both clauses?