# Towards a Modern Definition of Religion

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## INTRODUCTION

The Supreme Court has held that a poster of the Ten Commandments displayed in the courtroom violates the Establishment Clause,[1] yet a Ten Commandments monument on the grounds of the Texas State Capitol does not.[2] A graduating student, elected by her peers, may deliver a religious message at graduation,[3] but a student-led invocation at graduation is not permissible.[4] A crèche displayed on governmental property is unconstitutional, and yet a Christmas tree, a sign saluting liberty, and a Jewish Menorah pass muster under the Constitution.[5] And finally, a prayer in a classroom is prohibited,[6] but a prayer in the Legislature is not.[7] The above inconsistencies are all examples of the "mess" that the Supreme Court has created with regards to Establishment Clause jurisprudence.[8] To further complicate religious constitutional jurisprudence, courts have now caused the Free Exercise Clause to become little more than an "empty textual platitude,"[9] because many times they do not address Free Exercise Clause considerations when addressing the Establishment Clause.[10] No wonder why scholars are describing this area of law as "a maze, in significant disarray, a conceptual disaster area, inconsistent and unprincipled, and resembling in several aspects the more surreal portions of Alice in Wonderland."[11]

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1. *See* McCreary County v. ACLU, 545 U.S. 844, 881 (2005).
2. *See* Van Orden v. Perry, 545 U.S. 677, 691-92 (2005).
3. *See* Adler v. Duval County Sch. Bd., 250 F.3d 1330, 1342 (11th Cir. 2001).
4. *See* Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 317 (2000).
5. *See* County of Allegheny v. ACLU, 492 U.S. 573, 620-21 (1989).
6. *See* Wallace v. Jaffree, 472 U.S. 38, 60-61 (1985).
7. *See* Marsh v. Chambers, 463 U.S. 783, 795 (1983).
8. *See* Steven G. Gey, *Reconciling the Supreme Court's Four Establishment Clauses*, 8 U. PA. J. CONST. L. 725, 725 (2006) [hereinafter Gey, *Reconciling the Establishment Clauses*].
9. Andrew A. Beerworth, *Religion in the Marketplace: Establishments, Pluralisms, and the Doctrinal Eclipse of Free Exercise*, 26 T. JEFFERSON L. REV. 333, 337 (2004).
10. Carolyn A. Deverich, *Establishment Clause Jurisprudence and the Free Exercise Dilemma: A Structural Unitary-Accommodationist Argument for the Constitutionality of God in the Public Square*, 2006 BYU L. REV. 211, 216 (2006).
11. Steven G. Gey, *Why is Religion Special?: Reconsidering the Accommodation of Religion Under the Religion Clauses of the First Amendment*, 52 U. PITT. L. REV. 75, 75 (1991) (internal quotation marks omitted) (quoting Edwards v. Aguillard, 482 U.S. 578, 636 (1987) (Scalia, J., dissenting); Stephen L. Pepper, *The Conundrum of the Free Exercise*

Although the Supreme Court's inconsistencies have been attributed to the "serious internal conflicts over the essential meaning of the Establishment Clause,"[12] I argue here that there is a more fundamental misunderstanding occurring in the Court. The inconsistencies begin with the Court's understanding and application of the word "religion" in the First Amendment ("Congress shall make no law respecting an establishment of *religion*, or prohibiting the free exercise thereof . . . ."[13]). The difficulty in reaching a definition is that the term "religion" must apply to both of the Religion Clauses. With the Court applying a narrow definition of religion in the Establishment Clause cases (one that focuses on the theistic or traditional institutional religion),[14] and a broad definition of religion in the Free Exercise Clause cases (one that includes non-traditional religions such as Ethical Culture and Secular Humanism),[15] there are several scholars who believe that the definition of religion should be bifurcated to match these narrow and broad definitions.[16] Yet from a simple textual analysis, this cannot be the true intention of the Founders, as the word "religion" is used once to refer to both clauses.

Another difficulty and reason for the various interpretations of the Establishment Clause is that some decisions have taken a "separationist" approach, while others take an "accommodationist" approach.[17] This again comes down to a more fundamental misunderstanding: what are the purposes of the Religion Clauses? Should we be concerned about preserving individual rights ("rights-based" interpretation), or rather, be concerned about the government having proper structural restraints on its power ("structural" interpretation)?[18] Without a simple understanding of what "religion" means, these questions cannot be fully answered.

Hence, I argue for the adoption of a single, broad definition of religion, one that is applicable to our modern day society, and one that can

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*Clause–Some Reflections on Recent Cases*, 9 N. KY. L. REV. 265, 303 (1982); Jesse H. Choper, *The Establishment Clause and Aid to Parochial Schools–An Update*, 75 CA. L. REV. 5, 6 (1987); William J. Cornelius, *Church and State–The Mandate of the Establishment Clause: Wall of Separation or Benign Neutrality?*, 16 ST. MARY'S L.J. 1, 8 (1984); Steven D. Smith, *Symbols, Perceptions, and Doctrinal Illusions: Establishment Neutrality and the "No Endorsement" Test*, 86 MICH. L. REV. 266, 269 & n.11 (1987)).

12. Gey, *Reconciling the Establishment Clauses*, *supra* note 8, at 726-27.

13. U.S. CONST. amend. I (emphasis added).

14. *See, e.g.*, Everson v. Bd. of Educ., 330 U.S. 1 (1947).

15. This is especially noticeable in the conscientious objector cases. *See, e.g.*, United States v. Seeger, 380 U.S. 163 (1965); Welsh v. United States, 398 U.S. 333 (1970).

16. *See, e.g.*, LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 826 (1st ed. 1978); Paul A. Freund, *Public Aid to Parochial Schools*, 82 HARV. L. REV. 1680, 1686-87 n.14 (1969); Marc Galanter, *Religious Freedom in the United States: A Turning Point?*, 1966 WIS. L. REV. 217, 266 (1966); Paul James Toscano, *A Dubious Neutrality: The Establishment of Secularism in the Public Schools*, 1979 BYU L. REV. 177, 180-83 (1979).

17. *See* Deverich, *supra* note 10, at 215.

18. *See id.* at 211.

further adapt for years to come. In short, religion has one function, "to give man access to the powers which seem to control his destiny," with one purpose, "to induce those powers to be friendly to him."[19] For convenience, I will call this the Mencken definition or the modern definition.

Part I will briefly trace the history of the Court's interpretation of religion in general, emphasizing the gradual expansion of the definition of religion during the 1960s and 1970s. Part II will then highlight the various definitions that lower courts currently use in their attempts to assess what constitutes "religion" under the Constitution in accordance with the definition and two-part test the Court put forth in *United States v. Seeger*.[20] Part III discusses the modern definition of religion, as espoused by the late H.L. Mencken, and argues that it allows for a more consistent application and, accordingly, more consistent results. This section will also briefly apply the modern definition to cases such as *Seeger*, as well as to a variety of religions in order to demonstrate the depth and boundaries of the definition. Part IV will conclude.

## I. HISTORY OF THE DEFINITION OF RELIGION

The Constitution, drafted by the Convention in 1787 and ratified one year later, did not have a specific provision protecting the freedom of religion. That said, it did have two provisions that reflected "a spirit and purpose similar to that of the free exercise clause: the prohibition on religions tests for office . . . and the allowance of affirmations in lieu of oaths."[21] The purpose of these two provisions in the Constitution was, in essence, to decrease persecution of particular religions and to continue in the promotion of religious liberty.[22] Subsequently, a need for more protections was recognized and thus, the Bill of Rights started to come together.

Influenced by Roger Williams, who advocated for the separation of church and state due to the need for religious protection from the intrusive government, and Thomas Jefferson, who wished to completely separate church and state so they would not be able to influence one another,[23]

19. H.L. MENCKEN, TREATISE ON THE GODS 4 (2d ed. 1946).

20. 380 U.S. 163 (1965).

21. Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1473 (1990).

22. *Id.* at 1474. Noteworthy here is that the Federalists, who were the supporters of the new Constitution, felt that additional provisions guarantying religions freedom were unnecessary. *Id. See also* Oliver Ellsworth, *A Landholder VII*, *in* 14 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 448, 449 (J. Kaminski & G. Saladino eds. 1983) (originally published in the *Connecticut Courant*, Dec. 17, 1787).

23. *See* Note, *Toward a Constitutional Definition of Religion*, 91 HARV. L. REV. 1056, 1057 (1978) (citing Robley Edward Whitson, *American Pluralism*, 37 THOUGHT 492, 497-500 (1962); Everson v. Bd. of Educ., 330 U.S. 1, 16 (1947)).

James Madison took the middle approach in his proposed first draft of the Free Exercise Clause. It read, "[t]he civil rights of none shall be abridged on account of religious belief or worship, [n]or shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, nor on any pretext, infringed."[24] Modified several times by the House and Senate, the final language as it stands today reads, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."[25] Although the Framers of the Bill of Rights offered guidance on the purpose of the Religion Clauses, very little guidance was offered with regards to the definition of religion except the vague notion of a relationship between man and a "creator."[26]

### *A. The Court's Early Efforts at Defining Religion*

In 1890, the Supreme Court stated in *Davis v. Beason*[27] that "[t]he term 'religion' has reference to one's views of his relations to his Creator, and to the obligations they impose of reverence for his being and character, and of obedience to his will."[28] This definition of religion reflects the traditional narrow definition, where "religion" stemmed from a theistic perspective. This continued to be the definition of religion in the 1930s, where the Court stated in *United States v. Macintosh*[29] that "[t]he essence of religion is belief in a relation to God involving duties superior to those arising from any human relation."[30] Again, this is the traditional narrow definition of religion and reflects the overwhelming majority of the Nation's outlook on religion.[31] For, as stated by Justice Sutherland, "[w]e

24. McConnell, *supra* note 21, at 1481 (quoting I ANNALS OF CONG. 451 (proposal of James Madison, June 8, 1789)).

25. U.S. CONST. amend. I.

26. Note, *supra* note 23, at 1060. James Madison called religion "the duty which we owe to our creator, and the manner of discharging it." *Id.* at 1060 n.26 (citing James Madison, *A Memorial and Remonstrance on the Religious Rights of Man*, *in* CORNERSTONES OF RELIGIOUS FREEDOM IN AMERICA 84 (J. Blau ed. 1964)).

27. 133 U.S. 333 (1890).

28. *Id.* at 342.

29. 283 U.S. 605 (1931).

30. *Id.* at 633-34.

31. While certainly the Nation's majority was of the Protestant faith, it is interesting to note that some polls today still indicate that "approximately ninety percent of Americans believe in the existence of a god, seventy percent pray, and forty percent read the Bible every week." Deverich, *supra* note 10, at 212 (citations omitted) (quoting BARRY A. KOSMIN & SEYMOUR P. LACHMAN, ONE NATION UNDER GOD: RELIGION IN CONTEMPORARY AMERICAN SOCIETY 9 (1993); WARREN A. NORD & CHARLES C. HAYNES, TAKING RELIGIOUS SERIOUSLY ACROSS THE CURRICULUM 1 (1998)). Can you imagine what the percentages would have been had similar polls been conducted in the 1800s? Although it is outside the range of this article, it is interesting that several of the main Founders of the Bill of Rights themselves did not believe in God or follow the traditional religion of the day. Yet, I assume, due to the novelty of the Nation and uncertainty of the strength and power balance

are a Christian people, according to one another the equal right of religious freedom, and acknowledging with reverence the duty of obedience to the will of God."[32]

Just ten years later, Judge Hand articulated the first notable challenge to the traditional definition of religion. Although Judge Hand felt it was "unnecessary to attempt a definition of religion," he nevertheless stated in *United States v. Kauten*[33] the following:

> Religious belief arises from a sense of the inadequacy of reason as a means of relating the individual to his fellow-men . . . in the most primitive and in the most highly civilized societies. It accepts the aid of logic but refuses to be limited by it. It is a belief finding expression in a conscience which categorically requires the believer to disregard elementary self-interest and to accept martyrdom in preference to transgressing its tenets.[34]

In this definition of religion, Judge Hand challenged the commonly held notion that religion only involved the relationship between man and his creator.[35] Instead, he proposed that what defines religion is our relationship with other humans and with the universe as a whole.[36] Quoting Judge Hand's definition verbatim, the Court first took note of Judge Hand's decision in a dissent filed by Justice Frankfurter in *West Virginia State Board of Education v. Barnette.*[37] A year later, the majority held in *United States v. Ballard*[38] that religious freedom

> [E]mbraces the right to maintain theories of life and of death and of the hereafter which are rank heresy to followers of the orthodox faiths. . . . Men may believe what they cannot prove. They may not be put to the proof of their religions doctrines or beliefs. Religious experiences which are as real as life to some may be incomprehensible to others. Yet the fact that they may be beyond the ken of mortals does not mean that they can be made suspect before the law.[39]

This opinion illustrates that the Court was in the process of rethinking and redefining the working term "religion," and, in particular, accepting

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of each branch of the government, the Framers wisely knew that they must get the support of the Nation, and thus espouse what the public wanted to hear.

32. *Macintosh,* 283 U.S. at 625 (internal citations omitted) (quoting Holy Trinity Church v. United States, 143 U.S. 457, 470-71 (1892)).

33. 133 F.2d 703 (2d Cir. 1943).

34. *Id.* at 708.

35. *See* Note, *supra* note 23, at 1061.

36. *Id.* at 1061.

37. 319 U.S. 624, 658-59 (1943) (Frankfurter, J., dissenting).

38. 322 U.S. 78 (1944).

39. *Id.* at 86-87.

that the term should include those beliefs which are not traditional—those that are unorthodox and incomprehensible to others.

*B. The Court Makes it Apparent*

In 1961, the Court unanimously found in *Torcaso v. Watkins*[40] that Roy Torcaso, who was appointed as Notary Public by the Governor of Maryland, could not be required to profess that he believed in the existence of God in order to take office.[41] This clear violation of Article VI of the Constitution and of the First Amendment opened the door for the Court to explicitly state, albeit in a footnote, that there are many recognized religions that do not adhere to the traditional belief in or of God, such as "Buddhism, Taoism, Ethical Culture, Secular Humanism, and others."[42]

The next two Supreme Court decisions, *United States v. Seeger*[43] and *Welsh v. United States*[44] involve the interpretation of section 6(j) of the Universal Military Training and Service Act of 1948,[45] otherwise commonly known as the conscientious objector exemption. Section 6(j) allows persons to be exempt from combatant training and service if, by way of their "religious training and belief," they object to their participation in war of any form.[46]

In *Seeger*, the Court stated that the fact finder simply had to answer one question in order to determine whether the objector should fall under the exemption: "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?"[47] Yet, of course, this is easier said than done. Attempting to make it as objective an inquiry as possible, the Court further broke this test down into the two real issues present: "whether the beliefs professed by a registrant are sincerely held and whether they are, in his own scheme of things, religious."[48]

The first part of the test—sincerity—is to be determined on a case-by-case basis, dependent on the facts at bar.[49] In both *Seeger* and *Welsh*, the Court found that the objectors had sincerely held beliefs because all of the men were convicted on charges of refusing to submit to induction, and accordingly, sentenced to jail because of their beliefs. Clearly, every case may not be so easy to determine, but it does shed light on the major factor

40. 367 U.S. 488 (1961).
41. *Id.* at 489.
42. *Id.* at 495, n.11.
43. 380 U.S. 163 (1965).
44. 398 U.S. 333 (1970).
45. 50 U.S.C. app. § 456(j) 1970 (successor of similar provision in the 1940 Selection Service Act).
46. *Seeger*, 380 U.S. at 164-65.
47. *Id.* at 184.
48. *Id.* at 185.
49. *Id.*

of this first part of the inquiry, and that is to evaluate the consequences, or what the person(s) will be giving up, in order to adhere to their personal faith.

The second part of the test was clarified in *Welsh* where the Court stated that the "reference to the registrant's 'own scheme of things' was intended to indicate that the central consideration in determining whether the registrant's beliefs are religious is whether these beliefs play the role of a religion and function as a religion in the registrant's life."[50] These beliefs can be external or internal, and hence, can be extremely personal or entirely orthodox.[51] Ultimately, the decisions in both *Seeger* and *Welsh* rested on this principle because the beliefs of the objectors did not reflect traditional religions or beliefs. For example, Seeger could not participate in the war because it was the compulsion of "goodness" that would not allow him to do so.[52]

Overall, *Torcaso, Seeger,* and *Welsh* illustrate the Court's willingness to abandon the traditional definition of religion, a relationship between man and God, in favor of a broader definition of religion where such a relationship may or may not exist. This broader understanding of religion has not since been expounded upon by the Court;[53] thus, we are left with a two-part inquiry: First, whether the professed beliefs are sincerely held, and if so, whether such beliefs "play the role of a religion and function as a religion."[54] Yet, what is the role of a religion and how does it function? The Court is still lacking a modern definition of the term "religion," which is apparent from the exemplary cases below where circuit courts have struggled to determine how to apply this second part of the inquiry.

### *C. Lower Courts' Definitions of Religion*

As just stated above, the Court has not taken a case since *Welsh* that expounds its view of the definition of religion even though lower courts have been inundated with such cases.[55] Two of the most notable cases are from the Third Circuit, where Judge Adams' "three indicia" of religion have been adopted. Likewise, the Tenth Circuit has adopted a five factor

50. Welsh v. United States, 398 U.S. 333, 339 (1970).

51. *Id.*

52. *Id.* at 340.

53. The Court did hear a similar case in 1972, *Wisconsin v. Yoder*, yet in that case the Court was not faced with determining whether being Amish constitutes a religion. *See* 406 U.S. 205, 216 (1972). For a more detailed discussion, see Note, *supra* note 23, at 1066.

54. *Welsh,* 398 U.S. at 339.

55. *See, e.g.*, Malnak v. Yogi, 592 F.2d 197 (3d Cir. 1979) (holding that SCI/TM was a religion and the teaching of such religion in public schools is a violation of the First Amendment); Africa v. Pennsylvania, 662 F.2d 1025 (3d Cir. 1981) (holding MOVE is not a religion for purposes of the First Amendment); United States v. Meyers, 95 F.3d 1475 (10th Cir. 1996) (holding that the Church of Marijuana is not a religion); Brown v. Woodland Joint Unified Sch. Dist., 27 F.3d 1373 (9th Cir. 1994) (stating that witchcraft/Wicca is a religion).

standard that is applied by district courts when they are asked to determine if a particular group or individual should be cloaked with First Amendment (or Religious Freedom Restoration Act ("RFRA")) protection based on their religion. These cases result in varying, and often ill-reasoned decisions, which demonstrate the need for a new definition of religion.

*1. Third Circuit*

The first case is *Malnak v. Yogi*,[56] which was brought by parents of public high school students to enjoin a course being offered at the school—the Science of Creative Intelligence Transcendental Mediation (SCI/TM)—under the argument that it constituted an establishment of religion proscribed by the First Amendment. The district court found that in this course students were taught that the basis of life is "pure creative intelligence," and that they can reach their full potential via Transcendental Meditation.[57] Each student was required to attend a ceremony called the "puja," where the student would learn to develop her own "mantra" (personal sound aid used during meditation).[58] Performed at the direction of Hindu monk Maheshi Yogi, the puja was conducted off-campus on a Sunday.[59] At this ceremony, the student was required to bring specific offerings, which the teacher made to a deified "Guru Dev."[60] While making such offerings, the teacher would sing a chant in front of the student in order to "invoke the deified teacher."[61] Although the defendants contended that the ceremony was not religious, and that neither the teacher nor student knew what was being chanted, the Third Circuit affirmed the decision of the district court in finding that Hinduism does not "constitute a dead religion," and hence, teaching a course in such a manner is a clear violation of the First Amendment.[62]

Judge Adams, in a concurring opinion, discussed the traditional definition of religion and traced the recent cases that might control given the facts at hand; however, he found that this particular case presented a novel question that did not have precise precedent to follow.[63] Stating that the "[t]heistic formulation presumed to be applicable in the late nineteenth century cases is no longer sustainable," Judge Adams looked to *Seeger* and *Welsh* for the Court's more recent definition of religion. Noting the two-part inquiry outlined in *Seeger*, Judge Adams found that the definition was

56. 592 F.2d 197 (3d Cir. 1979).

57. *Id.* at 198.

58. *Id.*

59. *Id.*

60. *Id.* The teacher would make fifteen offerings to Guru Dev and fourteen obeisances as well.

61. *Id.*

62. *Id.* at 198-200. This was the extent of the majority's analysis of whether SCI/TM constituted a "religion" under the First Amendment.

63. *Id.* at 200 (Adams, J., concurring).

still wanting in details, and therefore articulated his "three useful indicia that are basic to . . . [the] traditional religions and that are themselves related to the values that undergird the first amendment."[64]

> First, a religion addresses fundamental and ultimate questions having to do with deep and imponderable matters. Second, a religion is comprehensive in nature; it consists of a belief-system as opposed to an isolated teaching. Third, a religion often can be recognized by the presence of certain formal and external signs.[65]

Thus, the three guide posts are ultimate questions, comprehensiveness, and formalities. Proceeding to analyze SCI/TM under these factors, Judge Adams found that, in regards to fundamental questions that deal with ultimate truths, the goal of SCI/TM was to contact the "impelling life force" in order to achieve "inner contentment," and that such a finding was the "ultimate concern" of the meditation.[66] Likewise, although SCI/TM may not be "as comprehensive as some religions," Judge Adams found that it does attempt to answer questions ranging from the nature of man and the world as a whole, to the path to unlimited happiness.[67] Finally, the trained teachers, formal ceremonies, and the efforts at propagation of the faith, led to Judge Adams' conclusion that under these three factors, SCI/TM is a religion under the Constitution.[68]

Two years later, in *Africa v. Pennsylvania*,[69] Judge Adams' "three indicia" were adopted by the Third Circuit. This case involved Frank Africa, a "Naturalist Minister" for the "revolutionary" organization titled MOVE.[70] During his sentencing, Africa was an inmate in the Holmesburg Prison, which was accommodating his special request for a diet consisting only of raw foods. Upon his conviction (for several state offenses culminating in a sentence of up to seven years), Africa filed a temporary restraining order to remain at Holmesburg until arrangements were made at the new facility to continue meeting his special diet requests. As Africa stated, "to eat anything other than raw foods would be a violation of his 'religion.'"[71] In order to meet this special dietary request, Africa needed to prove that MOVE was a religion under the First Amendment and thus, he would be entitled to accommodation akin to other religions.[72]

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64. *Id.* at 207-08.

65. Africa v. Pennsylvania, 662 F.2d 1025, 1032 (3d Cir. 1981) (quoting *Malnak*, 592 F.2d at 207-10 (Adams, J., concurring)). This is the second case that will be discussed in this section, also written by Judge Adams.

66. *Malnak*, 592 F.2d at 213.

67. *Id.*

68. *Id.* at 214-15.

69. 662 F.2d 1025 (3d Cir. 1981).

70. *Id.*

71. *Id.*

72. For example, a Jewish inmate can request a diet that does not contain pork.

The district court found that MOVE was founded by another member of the Africa family, who at the time of this action was serving as the "coordinator."[73] Africa stated the group's purpose was to "bring about absolute peace" and that all members were committed to a "natural" and "active" way of life.[74] Included in this natural and peaceful way of life was Africa's personal conviction that he must only eat raw foods, as "the food's purpose is to be eaten and not distorted."[75] Instead of formal ceremonies, MOVE believes that every day is a religious holiday because every act of life, every move and thought, is invested with religious significance and meaning.[76]

Writing for the majority, Judge Adams found that Africa's ideas were sincerely held, as required by *Seeger*, and hence, focused on analyzing the second requirement (claimant's scheme of things must be religious in nature) using the three indicia from *Malnak*.[77] First, the Third Circuit found that MOVE did not address any questions of "ultimate" concerns, such as "personal morality, human mortality, or the meaning and purpose of life."[78] Second, no comprehensiveness was found because the MOVE members did not "share a comparable 'world view'" and the court was not willing to accept Africa's "self-defining approach."[79] Third, MOVE again failed to meet the guiding indicia in that there were not sufficient formalities or structures, such as a hierarchy or a set day of worship, akin to those in accepted religions.[80] Concluding that Africa's sincerely held beliefs did not fall within the ambit of the definition as previously defined by the courts, the court found that his long term prison did not have to accommodate his special diet of all raw foods.[81]

These two cases illustrate the need for a new definition of religion, and I argue a broad one, to avoid inconsistent and arbitrary results. Although Judge Adams should certainly be credited for his ideas and passion to provide proper guidance for lower courts to follow, he falls short of providing such guidance. Simply put, these three factors are too malleable and too subjective to a court's opinion and an attorney's word crafting.

In *Malnak*, Judge Adams ultimately found that SCI/TM was a religion under the First Amendment because of the results obtained when the three

73. *Africa*, 662 F.2d at 1026.

74. *Id.*

75. *Id.* (emphasis omitted).

76. *Id.* at 1027. As Africa stated, "'[w]e are practicing our religious beliefs all the time: when I run, when I put out information like I am doing now, when I eat, when I breathe. All of these things are in accordance to our religious belief.'" *Id.*

77. *Id.* at 1032.

78. *Id.* at 1033.

79. *Id.* at 1035.

80. *Id.* at 1035-36.

81. *Id.* at 1036-37.

factors were employed. Due to SCI/TM's goal of finding a personal mantra and its aspiration of consequently finding "inner contentment," the court concluded that ultimate questions were addressed.[82] Similarly, Africa and others testified that the ultimate goal was to live in peace and with nature, and in order to do so one must live actively and, in essence, be kind to the earth (by not eating processed foods, for example). Further, according to Africa "[t]he abuse that life suffers[,] MOVE [followers] suffer[] the same."[83] However, the court stated that MOVE had no declared meaning and/or purpose of life.[84] Did the proponents of MOVE not articulate that their purpose of life was to live in peace, to abolish all violence? Certainly, if finding one's inner contentment addresses an ultimate concern as in SCI/TM, then having the goal in life to live in peace, and to live naturally so that "life suffers" less, is an ultimate concern.

Furthermore, as to the second indicia—comprehensiveness—is anything in life truly comprehensive? Judge Adams notably realizes this and so, gave this factor little weight in *Malnak* where he stated that SCI/TM was sufficiently comprehensive in that the followers purportedly knew their path to inner contentment. Can not the same be said of MOVE? If the members eat only the products of the earth, live peacefully, and treat everyday as a religious experience or holiday, do they not contend that they will suffer less?

Finally, while MOVE does not have a specific ceremony as SCI/TM has, it nevertheless does have a structure. There is a hierarchy (although Africa contends all members are equal), as John Africa carries the title of coordinator and Frank Africa serves as the Naturalist Minister; concomitantly, there are dietary restrictions that members are suggested to accept in order to live closer to nature.

Overall, if SCI/TM is a religion for purposes of the First Amendment, then MOVE, as untraditional and unconventional as it may sound, also should be a religion under the Constitution. Important to note here is that this would not necessarily mean that the prison must *accommodate* Africa as he completes his sentence. If one simple definition was adopted, results would be consistent, and would prevent cases like *Africa*, where one wonders if he lost merely because he was in prison (and asking to have special needs met while in prison).

*2. Tenth Circuit*

Similar to the Third Circuit, the Tenth Circuit felt that the Supreme Court left much to be desired with regards to a fully fleshed out definition of religion. In *United States v. Meyers*,[85] the Tenth Circuit found that there

82. Malnak v. Yogi, 592 F.2d 197, 213-14 (3d Cir. 1979) (Adams, J., concurring).
83. *Africa*, 662 F.2d 1027.
84. *Id.* at 1033.
85. 95 F.3d 1475 (10th Cir. 1996).

were five standards that should be applied when determining what constitutes "religion," (this time under both the First Amendment and the RFRA). David Meyers claimed to be the founder and Reverend of the Church of Marijuana, and it was his conviction that he should "use, possess, grow and distribute marijuana for the good of mankind and the planet earth."[86] The district court found that Meyers' co-defendants had an agreement whereby they would blame everything on Meyers so that he could "'try out' his religious freedom defense."[87] The district court did not make any other findings with regard to the specific details of Meyers' "religion."

Ultimately finding that Meyers had a sincerely held belief as the Reverend of the Church of Marijuana, but that such beliefs did not meet the definition of religion, the court articulated the following factors to use in such a determination: "Ultimate Ideas,"[88] "Metaphysical Beliefs,"[89] "Moral or Ethical System,"[90] "Comprehensiveness of Beliefs,"[91] and "Accoutrements of Religion."[92] Although the Tenth Circuit did little analysis of Meyers' beliefs based on these factors, the court did state that a district court "cannot rely solely on established or recognized religions to guide it in determining whether a new and unique set of beliefs warrants inclusion."[93] Furthermore, and analogous to Judge Adams' three indicia adopted in *Africa*, the Tenth Circuit stated that none of the factors are dispositive, and that if the factors are "minimally satisfied," then the beliefs at issue should be within the definition of religion.[94] Of course, the question that naturally follows is what constitutes "minimally satisfied?"

In *United States v. Quaintance*,[95] the District Court of New Mexico followed the standard set forth in *Meyers*, and arrived at a similar result. Danuel Dean Quaintance claimed to be the founder of the Church of

86. *Id.* at 1479.

87. *Id.*

88. *Id.* at 1483. Almost identical to Judge Adam's first indicia, the Tenth Circuit found that beliefs most often address questions about life and death, and the purpose in a man's life or place in the universe. *Id.*

89. *Id.* This factor goes towards the idea that many religious contemplate that there "is another dimension, place, mode, or temporality, and they often believe that these places are inhabited by spirits, souls, forces, deities, and other sorts of inchoate or intangible entities." *Id.*

90. *Id.* This factor encompasses the notion that there may be a "'right and wrong,'" "'just and unjust,'" and "'good and evil'" according to one's belief. *Id.*

91. *Id.* Another characteristic of most religions is that it gives the follower a way to handle the concerns and problems that humans encounter. *Id.*

92. *Id.* The third indicia of Judge Adam's standard may include any of the following: a founder, prophet, or teacher; important writings; gathering places; keepers of knowledge; ceremonies and rituals; structure or organization; holidays; diet or fasting; appearance and clothing; and propagation. *Id.* at 1483-84.

93. *Id.* at 1484.

94. *Id.*

95. 471 F. Supp. 2d 1153 (D.N.M. 2006).

Cognizance, with the other defendants being members of the said church.[96] Like in *Meyers*, this case involved the issue of whether the defendants could use the RFRA for protection in response to the charges of possession (and trafficking in *Meyers*) of marijuana. Stating only that the use of marijuana was a "sacrament and deity and that the consumption . . . is a means of worship,"[97] the district court had little trouble walking through the five factors and dismissing the complaint on the grounds that the Church of Cognizance does not qualify as a religion under the First Amendment or the RFRA.

While these two cases are seemingly consistent with each other, they were also much easier cases than what the Third Circuit was confronted with in *Malnak* and *Africa*. Here, the proponents of the religious practices articulated little in terms of what their beliefs were based on, which leads to the natural conclusion that these cases involved persons who had a way of life, and wanted to have that way of life legalized. Yet, these five factors are likely to lead to inconsistent and policy driven results like has happened in the Third Circuit.

## II. MODERN DEFINITION OF RELIGION

These inconsistencies will continue in the courts until a broad, yet clearly defined, definition of religion is adopted. I believe I propose such a definition here, which is borrowed from Mencken's *Treatise on the Gods*.[98]

### *A. H.L. Mencken*

Henry Louis Mencken (1880-1956) was the most prominent newspaperman, political and religious commentator, and book reviewer in his day. He has been described as "a compound of brilliance, wit, grit, gumption, and humor"[99] and "achieved his greatest fame—and notoriety—as a religious commentator through his reporting of the Scopes trial of 1925."[100]

A libertarian before the word was coined, Mencken's personal views are most easily captured in his creed:

> I believe that religion, generally speaking, has been a curse to mankind—that its modest and greatly overestimated services on the ethical side have been more than overcome by the damage it has done to clear and honest thinking.

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96. *Id.* at 1155.

97. *Id.*

98. MENCKEN, *supra* note 19.

99. John Patrick Michael Murphy, Murphy's Law: H.L. Mencken, http://www.infidels.org/library/modern/john_murphy/mencken.html (last visited July 10, 2008).

100. H.L. MENCKEN ON RELIGION (S.T. Joshi ed., 2002).

. . . .

I believe that all government is evil, in that all government must necessarily make war upon liberty . . .

. . . .

I believe in the complete freedom of thought and speech. . . .

I believe in the capacity of man to conquer his world, and to find out what it is made of, and how it is run.

. . . .

But the whole thing, after all, may be put very simply. I believe that it is better to tell the truth than to lie. I believe that it is better to be free than to be a slave. And I believe that it is better to know than be ignorant.[101]

This personal creed is merely a glimpse into Mencken's often controversial beliefs and thoughts on life and mankind, which are for the most part outside the scope of this paper (and therefore, I will neither address nor endorse the majority of such beliefs). Yet one thing is for sure, Mencken lived his life testing the limits of what he found most sacred—the right to free speech, especially when it came to religion.

Raised by an agnostic father and Lutheran mother, Mencken was sent to Sunday school for several years when he was a young boy, but quit attending when he "'got a firm conviction that the Christian faith was full of palpable absurdities, and the Christian God preposterous.'"[102] Some of his most quoted words are: "'Sunday school: A prison in which children do penance for the evil conscience of their parents.'"[103] Although Mencken became a recognized biblical scholar, he himself was never "enlightened"[104] and found that the "religious attitude was incomprehensible."[105] Moreover, Mencken never felt the need or force of a supreme being, and as established in his personal creed, he believed that every man had the ability to "conquer his world."[106] It is not surprising then that Mencken regarded religion as "a curse to mankind," and once stated that "'[r]eligion is fundamentally opposed to everything I hold in veneration—courage, clear thinking, honesty, fairness, and, above all, love

101. GEORGE SELDES, THE GREAT THOUGHTS 312-13 (rev. ed., 1996).

102. Murphy, *supra* note 99 (emphasis omitted).

103. *Id.* (emphasis omitted).

104. By "enlightened," I mean an individual who believes she knows the one true religion, and it is because of this strong conviction of that she knows the truth that she worships and has faith (i.e., she does not worship or have faith to obtain any worldly benefits).

105. MENCKEN ON RELIGION, *supra* note 100, at foreword.

106. *Id.*

of truth.'"[107] It may seem odd, given this background information about Mencken and his personal views on religion, that I would endorse such a man's definition of religion.

For many, religion represents something that is special, that words and reason cannot quite grasp or express; and yet for others, religion is just another right enumerated in the Constitution. For those in the first group, where many would consider themselves enlightened, a definition of religion is going to be extremely narrow and focused. This is because these individuals view their specific religion as the ultimate truth and consequently, their definition will only encapsulate such beliefs. One clear example of this is the definition of religion that the Court used into the 1930s, where "religion" necessarily included God, or the mention of a supreme being.[108]

This leads to why I argue Mencken's definition of religion is more appropriate and workable under our Nation's laws where every religion is always to be respected and to be protected when necessary. The second group, of which Mencken is a part of, does not hold religion as dearly and thus, does not believe that religion is so "special" that it cannot be expressed sufficiently in words. This view of religion allowed Mencken to take a step back, to not involve personal emotions, and to put what he saw and experienced throughout his life into words.

With regard to religion, Mencken states in his *Treatise on the Gods* that "[i]ts single function is to give man access to the powers which seem to control his destiny, and its single purpose is to induce those powers to be friendly to him."[109] Under such a description, everything from "the artless mumbo-jumbo of a Winnebago Indian . . . [to] the elaborately refined and metaphysical rites of a Christian archbishop" is religion.[110]

This untraditional, broad definition of religion should likewise be read and interpreted broadly, as I believe Mencken intended. Adopting a strict and narrow interpretation of Mencken's words results in only an emphasis on the concrete, worldly consequences of faith, but there is more depth to this definition of religion. Mencken encountered many people who considered themselves enlightened, and respected them enough to consider some of them his friends.[111] Mencken, through his own learning of various religions (although he clearly did not adopt any as the ultimate truth), understood that being granted "access to the powers" that control one's life

107. Murphy, *supra* note 99 (emphasis omitted).

108. *See supra* Part I.A.

109. MENCKEN, *supra* note 19, at 4.

110. *Id.*

111. As Mencken did not have many positive things to say about his fellow countrymen, the fact that some of his closest friends were enlightened Catholics spoke measures. He even asked for a Catholic priest to read to him while in the hospital later in his life. *See* MARION ELIZABETH RODGERS, MENCKEN: THE AMERICAN ICONOCLAST 537 (2005).

so to speak, does not mean that the individual must *control* such "powers." Noteworthy here is that "destiny" is not just what happens to an individual in one hour or one day, but rather Mencken is referring to something more significant, to one's lot in life, his future. This concept will be further fleshed out in the coming sections.

What this definition of religion does do immediately, without any explanation, is that it gets rid of the game that courts are playing with factors to evaluate whether a group fits the mold of a religion. Simply put, religion cannot fit such a mold. Every sort of moral idea or aim can be repudiated, every practice broken down so no logical content exists, the focus extended to animals, nature, inanimate objects, or some unknown or imaginable gods, and a religion can still exist.[112] Undoubtedly, however, as with most everything in life, there must proper limitations to guard against abuse. I find only one necessary limitation with Mencken's definition, and that is that the belief is sincerely held, which has been established as an essential inquiry since at least 1944.[113] Although it is a case-by-case analysis,[114] a court can feel confident that if the person at issue is giving up something substantial, like freedom,[115] food,[116] or a job,[117] then the beliefs are sincerely held.

### *B. Modern Definition Under* Seeger, Africa, *and* Meyers

Taking Mencken's definition of religion—beliefs where one can access the powers that control her fate and condition such powers to react positively to her—and applying it to the cases just discussed above will illustrate how such a definition will produce consistent and fair results.

Recall that Seeger refused to serve in the Armed Services pursuant to his "belief in and devotion to goodness and virtue."[118] Moreover, he was a theist in the sense that he believed in gods or supernatural powers, but did not claim a belief in the traditional sense of God.[119] Following the two-part inquiry the Court stated in this case, Seeger's beliefs were sincerely held, evidenced by the fact that he would rather be charged with refusing to

112. MENCKEN, *supra* note 19, at 4-5.

113. *See* United States v. Ballard, 322 U.S. 78, 84 (1944) (inference that sincerity is required).

114. *See* United States v. Seeger, 380 U.S. 163, 185 (1965); *see also supra* Part I.B.

115. In *Seeger* and *Welsh*, the men gave up freedom by subjecting themselves to possible incarceration for their beliefs.

116. In *Africa,* Africa gave up food while his diet was not accommodated in the second prison. *See generally* Africa v. Pennsylvania, 662 F.2d 1025 (3d Cir. 1981).

117. A district court stated in *McGinnis v. United States Postal Service*, that "since Petitioner is willing to jeopardize her job in support of that belief, this Court has little occasion to question her assertion." 512 F. Supp. 517, 520 (N.D. Cal. 1980).

118. *Seeger*, 380 U.S. at 166.

119. *Id.* at 166-167.

submit to induction and serve jail time than go against his beliefs.[120] The next part of the inquiry, as espoused in *Seeger*, is whether such beliefs function and look like a religion. Employing the modern definition to fill in the previous gaps, do Seeger's beliefs involve his ability to access the powers that control his future lot in life in the sense that he can make his life better? The answer here is a firm yes.

Seeger believed that if he fought in the war, he would be violating an aspect of his religion that would subject him to harsher consequences than going to jail.[121] Thus, Seeger's actions illustrate that the powers that controlled him could be induced to be friendlier towards him if he did not partake in a war that was against all goodness and virtue as he interpreted it.

Likewise, Africa contended that MOVE members suffered with the abuse that life suffered, and the way to minimize such suffering was to live in peace and with nature.[122] The *Africa* Court found that there was no question about the sincerity of Frank Africa's beliefs. In fact, there was testimony that he refused to eat while at the new facility and before this case was decided.[123] The second part of the inquiry here is answered by looking to the district court's findings that Africa stated, in essence, that if he ate only raw foods and lived in peace with others and generally with the world, then he would consequently suffer less because life would be abused less.

Overall, given the above, there is no question that MOVE should have been considered a religion for purposes of the First Amendment. Africa's "powers" was earth/nature, and because his pain and suffering was directly linked to the powers' suffering, then he would have a better life if he treated earth/nature better by only eating raw foods and living in peace with others. This conclusion would change the policy-driven result reached by the Third Circuit, and recast the issue of whether MOVE is a religion under the Constitution and therefore diet requests should be accommodated, to the real issue of whether the state should be forced to accommodate such a request given the burden of doing so.

Perhaps the harder question is with cases like *Meyers* and *Quaintance*. Both courts quickly reached the conclusion that beliefs which required the use of marijuana were not "religions." The Tenth Circuit in *Meyers* conducted little to no actual (at least as documented in the opinion) analysis, while the district court in *Quaintance* did compare the factors as given by the Tenth Circuit to the facts at hand.[124]

120. *Id.* at 187.
121. *Id.* at 166-167.
122. Africa v. Pennsylvania, 662 F.2d 1025, 1026-27 (3d Cir. 1981).
123. *Id.* at 1028.
124. United States v. Quaintance, 471 F. Supp. 2d 1153, 1156-64 (D.N.M. 2006).

Had the courts undertaken the inquiry provided in *Seeger*, there would have been no doubt that the defendants' beliefs were sincerely held.[125] This is perhaps a little troubling in *Meyers* given the testimony of one of the co-defendants that the plan was if they got caught trafficking the marijuana (as they clearly did), they would blame everything on Meyers so that he could "try out the religious freedom defense."[126] It is reasonable to question the sincerity of these beliefs. Is this truly a "religion," or is this just the lifestyle of a few persons where there happens to be one constitutional law guru who wants to try a less traveled path to legalize the use of marijuana? Nevertheless, the Tenth Circuit moved on to the second inquiry and quickly affirmed the district court's conclusion that Meyers' beliefs did not constitute a religion under the First Amendment or under the RFRA.

Perhaps surprising here, given the broadness of the new definition, is that the results are the same. With regard to his sincerely held beliefs, the district court only noted that Meyers testified that "he is the founder and Reverend of the Church of Marijuana and that it is his sincere belief that his religion commands him to use, possess, grow, and distribute marijuana for the good of mankind and the planet earth."[127] There is no evidence that Meyers can make the powers, which control his destiny, treat him more favorably. That is, how does the use and distribution of marijuana, which is for the good of man and earth, affect him personally?

Like Meyers, the defendants in *Quaintance* failed to allege the specifics of their sincerely held beliefs.[128] As stated above, the defendants argued that marijuana was a "sacrament and deity and that the consumption of marijuana is a means of worship."[129] Due to this sparse understanding of the beliefs, the result here is the same as in *Meyers*. With that said, it is not difficult to envision how the use of marijuana, if incorporated with other beliefs, would meet the requirement of the modern definition: specifically, that the powers which control one's future can be manipulated or changed by one's personal course of action, which would fall under Mencken's definition of religion.[130]

### *C. What is "Religion" Under the Modern Definition?*

It is important to flesh out the details of Mencken's definition of religion, using both traditional and non-traditional notions of religion, in order to illustrate the boundaries of the definition. Something to keep in

125. *See* United States v. Meyers, 95 F.3d 1475 (10th Cir. 1996); *Quaintance*, 471 F. Supp. 2d 1153.

126. *Meyers*, 95 F.3d 1479.

127. *Id.*

128. *Quaintance*, 471 F. Supp. 2d at 1171-72.

129. *Id.* at 1155.

130. See the following section for such an example.

mind here is the one additional safeguard as mentioned above: a court must find the individual's beliefs to be sincerely held. Other than that, the individual will simply need to show that they have access to the powers that control their destiny in such a way that they know the key to make such powers be kinder to them.

### *1. Personal Philosophy or Religion? Confucianism and Rastafarianism*

Confucianism, or the Way of Confucius, is essentially moralistic or ethical in tone, emphasizing tradition, human relationships, rituals, and reason.[131] The founder of Confucianism is K'ung Fu Tzu, known as Master K'ung, and commonly pronounced "Confucius" in English.[132] Born in 551 B.C. and living during the Chou dynasty, "an era known for its moral laxity,"[133] Confucius traveled throughout the states of China giving advice to the rulers of the states. His efforts were hampered, however, by his allegiance and loyalty to the king, which did not bode well with many of the states' rulers.[134] After imposing a twelve-year exile to find a feudal state that would believe and adopt his policies, Confucius returned home and devoted his final years to teaching his small band of students about individual morality and ethics.[135]

Moreover, "[t]he main principle of Confucianism is *ren* ('humaneness' or 'benevolence'), signifying excellent character in accord with *li* (ritual norms), *zhong* (loyalty to one's true nature), *shu* (reciprocity), and *xiao* (filial piety). Together [they] constitute *de* (virtue)."[136]

It follows then that generally speaking, Confucianism is viewed as more of a way of life or philosophy rather than a religion. Yet under the Mencken definition, this is not so. The Confucian strives to achieve harmony with Heaven's will or mandate, which is done through attaining an education, serving the state, and achieving the status of the "Gentleman" (person of noble character) or "Sage" (person who puts the *Tao* into practice).[137] Thus, it appears that a Confucian has access to the powers that control her destiny by striving to achieve harmony with Heaven's will by living her life in accordance with the Confucius way.

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131. BENJAMIN J. HUBBARD, JOHN T. HATFIELD & JAMES A. SANTUCCI, AMERICA'S RELIGIONS: AN EDUCATOR'S GUIDE TO BELIEFS AND PRACTICES 16 (1997).

132. ReligiousTolerence.org, Religions of the World – Confuciansim: Founded by K'ung Fu Tzu, http://www.religioustolerance.org/confuciu.htm (last visited July 10, 2008).

133. *Id.*

134. *See* ReligionFacts.com, Confucianism, http://www.religionfacts.com/a-z-religion-index/confucianism.htm (last visited July 10, 2008).

135. *Id.*

136. *Id.*

137. There are three planes, each having underlying virtues and values, that a Sage must put into practice (*li*, *jen*, and *yi*). *See* HUBBARD, *supra* note 131, at 20.

Next, and as stated in Part II.B, when discussing the use of marijuana as a religion, it is conceivable that when paired with other practices and/or beliefs, the use of marijuana could be deemed by a court to be religious in nature and part of a recognized religion. One such example, I believe, is the Rastafari movement.[138]

Derived from Ras, the title given to Amharic Royalty in Ethiopia, Rastafari was founded in Jamaica during a time of severe depression, racism, and class discrimination—the perfect environment for the rural and poor of Jamaica to embrace a new religion.[139] Marcus Garvey's "Back to Africa" movement was the catalyst for what eventually emerged as Rastafari. Garvey taught that Africans are the true Israelites and had been exiled to Jamaica and other parts of the world as divine punishment. He also famously prophesied in 1927 to "'look to Africa for the crowning of a king to know that your redemption is near.'"[140]

On November 2, 1930, Ras Tafari Mokonnen was crowned emperor of Ethiopia, and at the time of his coronation took the name of His Imperial Majesty (HIM) Emperor Haile Selassie (meaning "Might of the Trinity") of Ethiopia.[141] Believing the prophecy to have been fulfilled, Emperor Haile Selassie was given the ancient title given to all Ethiopian Kings, "The King of Kings, Lord of Lords, the Conquering Lion of Judah."[142] Denying his divine status (as he was an Ethiopian Orthodox Christian), Rastafarians nevertheless believe that Jah (the name they give to the Judeo-Christian God) is a spirit and that this spirit was manifested in Emperor Halie Selassie.[143]

Rastafarians do not believe in an afterlife, but instead look to Africa, called "Zion," as the Promised Land and their heaven on earth (and many believe that Ethiopia is the specific location of Zion).[144] An important concept is "I and I," which is said instead of "you and I."[145] This concept emphasizes the harmony between humanity and God, as well as the equality of all humans. The key to salvation for Rastas is believing that Emperor Haile Selassie was and is the Messiah, as well as following the common practices such as not cutting your hair as commanded by the Holy

138. This is idea is debated here, as some claim that Rastafarianism constitutes a religion, while others claim it is merely a way of living one's life.

139. *See* Kyle Littman, Religious Movements: Rastafarianism, http://etext.lib.virginia.edu/relmove/nrms/rast.html (last visited Dec. 11, 2007).

140. *Id.*

141. *See* Religious Movements: Rastafarianism, http://religiousmovements.lib.virginia.edu/nrms/rast.html (last visited December 11, 2007).

142. *See id.*

143. *Id.*

144. *Id.*

145. *Id.*

Piby (the "black man's Bible"[146]), eating a special diet that consists of raw foods (most Rastas are vegans), and most importantly, using marijuana. Rastafarians are best known for this last practice, believing that it is mandated in Psalm 104:14[147] and helps intellectual discourse among followers.[148]

Applying Mencken's definition, Rastas believe they have access to the powers that control their destiny, Emperor Haile Selassie and Jah, and that through their actions on earth they will reach the Promised Land, Zion. Thus, Rastafari would be recognized by the courts if Mencken's definition of religion was used, despite their use of marijuana.

*2. The Fundamentalist Muslim and the Radical Puritan*

Islam, "the third and final Abrahamic religion,"[149] was founded in 570 CE in Mecca (present day Saudi Arabia),[150] and its followers are called "Muslims," which is derived from the active participle of "Islam."[151] With more than a billion believers, the central Islamic belief is that there is only one God, "Allah" in Arabic.[152] Transcribing the messages received from Allah through the archangel Gabriel, the Prophet Muhammad Ibn Abd Allah is the author of the Qur'an, the holy book of Islam.[153] The other text of Islam is the Shari'a and is "'a sacred law to guide Muslims in all times and places,'" establishing "'the context for Islam as a political force.'"[154]

Although the main tenet of Islam is the complete surrender to Allah, there are five obligations, known as the "Five Pillars of Islam," that must be followed by believers if complete surrender is to be reached:

> 1. Tashahhud: the profession of faith in the Oneness of God and the finality that Muhammad is the messenger of God.
>
> 2. Salat: the prayers that must be said five times a day facing toward the Kaaba, considered the House of God in the Great Mosque in Mecca.

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146. *Id.* (internal quotation marks omitted). This is a version of the Christian Bible with alterations to remove all the deliberate distortions that are believed to have been made by those that translated the Bible in English. *See id.*

147. "He makes grass grow for the cattle, and plants for man to cultivate—bringing forth food from the earth" *Psalm* 104:14 (New International Version).

148. *See* Religious Movements: Rastafarianism, *supra* note 141.

149. Spiritual-Path: Islam, http://www.spiritual-path.com/islam.htm (last visited September 14, 2008). Judaism and Christianity are the other two Abrahamic religions. *Id.*

150. *See id.*

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.* (quoting DANIEL PIPES, IN THE PATH OF GOD: ISLAM AND POLITICAL POWER 36 (1983)).

3. Zakat: the annual payment of a certain percentage of a Muslim's wealth that is distributed to the needy.

4. Sawm: self-purification through fasting every day from dawn to dusk during the holy month of Ramadan.

5. Haji: the pilgrimage, or journey, to Mecca which is obligatory for every able bodied Muslim.[155]

The above represents a brief overview of the traditional Muslim's beliefs—traditional meaning the Sunni or Shiite Muslim—yet the Islamic Fundamentalist differs in several key aspects that are important to highlight and juxtapose with Mencken's definition of religion.

Islamic Fundamentalists, often referred to as Radical Muslims in Western Europe, believe in the eternal validity of the Shari'a, and the influence of Western society is viewed as "a threat and the antithesis of what the Shari'a represents."[156] This conflict of ideals and beliefs, which is not followed by the overwhelming majority of Muslims, has been handled with violence and a pledge to cleanse Islam of all Western influence and thought. To illustrate this principle further consider a fairly recent debate that occurred in England.

A Fundamentalist Muslim at the debate, who happened to be British-born, told the crowd that Prophet Mohammad's message to all nonbelievers was "'I come to slaughter all of you.'"[157] One such extremist announced, "'[w]e drink the blood of the enemy . . . [t]hat is Islam and that is jihad.'"[158] Another extremist added "'Muslims have no choice but to take the fight to the West.'"[159] While others at the debate objected to such remarks claiming that "'[t]his is not ideology. It's mental illness.'"[160] Such remarks illustrate that for Fundamentalists, the objective of religion is to bring back the fundamental notions of Islam and the Shari'a, even if it means declaring "Holy War" against the West and taking innocent lives.

I discuss this particular sect of Islam to better explain the depth of Mencken's definition of religion and show how it applies to more beliefs than merely those that have worldly consequences. While members of Islamic Fundamentalism would certainly not claim they *control* the power that is in charge of their destiny (i.e., Allah), they clearly do believe that they have access to Allah and his mercy if they abide by his commands. This violence, notably the recent suicide bombers, is occurring because

155. *See id.* (citing Islam 101, http://islam101.com/dawah/pillars.html (last visited July 10, 2008)).

156. *Id.*

157. CNN.com, Radicals vs. Moderates: British Muslims at Crossroads, http://www.cnn.com/2007/WORLD/europe/01/17/warwithin.overview/index.html (last visited July 10, 2008).

158. *Id.*

159. *Id.*

160. *Id.*

many Fundamentalists believe that if they commit suicide in the name of Allah then they will be allowed to pass by the "Day of Judgment" (akin to the Second Coming of Christianity) and go straight to Heaven.[161] Thus, these Muslims do have the ability through their own actions to have Allah treat them kinder by allowing them to avoid Hell and go, in some cases, straight to Heaven.

A much more difficult religion to reason through is a particular sect of Christianity that follows reformed theology, for example a Puritan or Calvinist, and with that believes in the concept of predestination. From this perspective, predestination is the decree of God by which certain individuals and their souls, if you will, are foreordained to salvation.[162] Because God is omniscient, it can be said with confidence that humans are elected by pre-knowledge due to the fact that time has no rule over God. The immediate objection to this, however, is the free will argument—that is, didn't God give man free will? The answer is yes, but God has made salvation possible for anyone who *wants* it and *chooses* to accept that Jesus is the only way to God.[163] This does not negate one's free will or choice, but rather is confirmation of God's grace that some do choose salvation. That said, this argument concedes that predestination may raise some intellectual problems through inconsistency. However, reformed theologists respond to this by simply stating that this inconsistency occurs because humans try to wrap their finite minds around an infinite God.[164] This is an acceptable resolution because these believers are enlightened and simply trust in God's character as revealed in the Bible, and that he will do as He says: "The Lord is not slow in keeping his promises. . . . He is patient with you, not wanting anyone to perish, but everyone to come to repentance."[165]

Overall, because Mencken does not distinguish between man accessing the powers first and the powers accessing man first,[166] even sects of Christianity such as Puritanism and Calvinism are encapsulated by the modern definition of religion.

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161. DANIEL PIPES, IN THE PATH OF GOD: ISLAM AND POLITICAL POWER 129 (1983). Important to reiterate here is that this does not reflect the overwhelming majority of Muslims. In fact, many find that the taking of a life, whether it be through suicide or terrorist attacks, is not permitted by the Qur'an. ReligiousTolerance.org, Aftermath of the 9-11 Terrorist Attack: Does Islam Allow the Taking of Hostages, Suicide, etc?, http://www.religioustolerance.org/reac_ter14.htm (last visited July 10, 2008).

162. I do not give this long-debated concept justice here, but merely illustrate how predestination is not an issue under Mencken's definition of religion.

163. *See John* 3:16 (New International Version) ("For God so loved the world that he gave his one and only Son, that whoever believes in him shall not perish but have everlasting life.").

164. http://www.allaboutgod.com/predestination.htm.

165. 2 *Peter* 3:9 (New International Version).

166. That is, by drawing one to Him.

*3. "Kozy Kitten Cat Food"*

From the above discussion, one may be wondering if the court imposed limitation of sincerity, and the limitations imposed from the definition itself are merely illusory in the sense that everything is a religion under this definition. One case that demonstrates that these restrictions are not purely illusory is *Brown v. Pena*,[167] from the Southern District of Florida. Stanley Oscar Brown was fired from his job and subsequently filed two complaints with the U.S. Equal Employment Opportunity Commission (EEOC) citing religious discrimination as the cause of his termination. Upon dismissal of his complaints, Brown filed a lawsuit in district court continuing to allege religious discrimination under Title VII.[168] Brown claimed that his "personal religious creed" was to eat "Kozy Kitten People/Cat Food" because it significantly contributed to his "'state of well being . . . [and therefore] to [his] overall work performance' by increasing his energy."[169] There are no other specific details about Brown's "personal religious creed" in the opinion, and so while it is clear that his beliefs may have been sincerely held, it is hard to determine how this one line of detail sufficiently describes a religion.

The court found that the Fifth Circuit had previously employed three major factors to aid in the determination of whether a belief is religious or not: "'(1) whether the belief is based on a theory of man's nature or his place in the Universe, (2) which is not merely a personal preference but has an institutional quality about it, and (3) which is sincere.'"[170] Without much discussion or analysis noted in the opinion, the court concluded that Brown's consumption of cat food was merely a personal preference, and thus could not be considered a religion.[171]

Similar to the court's ultimate finding, the issue that arises under the modern definition is whether Brown has access to the powers that control his destiny, with such access that his actions on earth affect whether the powers are friendly towards him or not. While it is true that Brown stated that eating the cat food "significantly contributed" to his well-being, which included energy levels, there is no claim that higher powers control him and can be manipulated by his actions on earth. Rather, his claim is akin to one eating a healthy diet. If an individual eats well balanced meals, then sure, there will be a higher standard of well-being due to increased energy levels and overall health. Yet, whether this individual prefers to get her protein from chicken, beef, or soy cannot be claimed to be a religious

167. 441 F. Supp. 1382 (S.D. Fla. 1977), *aff'd* 589 F.2d 1113 (unpublished table decision) (5th Cir. 1979).

168. *Id.* at 1383-84.

169. *Id.* at 1384 (alterations in original) (citation omitted).

170. *Id.* at 1385 (quoting Brown v. Dade Christian Sch., Inc., 556 F.2d 310, 324 (5th Cir. 1977) (Roney, J., dissenting) (citations omitted)).

171. *Id.*

conviction. Likewise, Brown does not claim that this cat food controls his destiny, or his future—it just makes him feel better at work.

Another example of what is not a religion under the Mencken definition is where a person makes contrails, man-made clouds, and argues that because she controls her cloud coverage, she controls her destiny.[172] As stated above in Part II.A and demonstrated by the *Brown* case, controlling one's destiny is the functional equivalent to controlling one's future course of life. Having cloud coverage for one day and claiming that you control this power does not mean that your destiny has been modified, or that you have a part in the powers that control your life being more favorable to you. This example simply demonstrates again the significance of the word, "destiny."

## CONCLUSION

Overall, there is a need for a modern definition of religion that is easily applied and that leads to consistent results among the courts with regard to determining what is (and what is not) going to be deemed a "religion" under the Constitution. With the ever-changing scheme of America and its concept of religions, the definition likewise needs to be flexible.

I propose that Mencken's definition of religion fills such a need. With the simple function of giving an individual access to the powers that control her destiny and with the single purpose of making those powers act more benevolently towards her, a religion that is sincerely held will be recognized by the courts as just that—a religion.

172. NASA is currently conducting experiments to see whether contrails damage the environment, for it does know that these clouds add to the coverage of the earth and do not harm humans. NASAExplores.com, Man-Made Clouds, http://media.nasaexplores.com/lessons/02-075/fullarticle.pdf (last visited Aug. 6, 2008).

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