# THE CHURCH OF ANIMAL LIBERATION: ANIMAL RIGHTS AS 'RELIGION' UNDER THE FREE EXERCISE CLAUSE

By
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*In this Article, I contend that a belief in animal liberation qualifies as religion under the Free Exercise Clause jurisprudence of the United States Constitution. Thus, every time a prison warden, public school teacher or administrator, or government employer refuses to accommodate the ethical belief of an animal liberationist, they are infringing on that person's religious freedom, and they should have to satisfy the same constitutional or statutory requirements that would adhere were the asserted interest based on more traditional religious exercise. One possible solution to the widespread violations of the First Amendment rights of animal liberationists would be the incorporation of a 'Church of Animal Liberation' under the Internal Revenue Code (as a proper church or as a religious organization). This would help to protect the free exercise rights of those who believe in animal rights because it would give them a religious organization to reference—with articles of incorporation that align with the jurisprudential definition of religion—in making their requests for religious accommodation. First, this Article discusses the constitutional definition of religion, what it means to believe in animal liberation, and animal liberation beliefs that circuit court precedent already recognizes as religious. Then, it discusses how animal liberation-based free exercise conflicts would play out in practice (e.g., identifying when infringing on the rights of animal liberationists would require strict scrutiny and when it would not). Lastly, this Article suggests that incorporating a group (e.g., a 'Church of Animal Liberation') as a religious organization under the Internal Revenue Code might help to secure constitutional rights for animal liberationists, and explains what would be required to incorporate such an organization.*



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## I. INTRODUCTION

*The man who eats meat or the hunter agrees with the cruelties of Nature, upholds with every bite of meat or fish that might is right. Vegetarianism is my religion, my protest.*

—Issac Bashevis Singer,
*Conversations with Isaac Bashevis Singer*[1]

[1] ISAAC BASHEVIS SINGER & RICHARD BURGIN, CONVERSATIONS WITH ISAAC BASHEVIS SINGER 178 (1985). *See also* Isaac Bashevis Singer, *Preface* to STEVEN ROSEN, FOOD FOR THE SPIRIT: VEGETARIANISM AND THE WORLD RELIGIONS, at i (1987) ("Sometimes they say [God] wants sacrifice and the killing of animals. . . . But I think God is wiser and more merciful than that. And there are interpretations of religious scriptures which support this, saying that vegetarianism is a very high ideal.").

*The constitutional freedom of religion [is] the most inalienable and sacred of all human rights.*

—Thomas Jefferson,
*Freedom of Religion at the University of Virginia*[2]

At this very moment, a prisoner somewhere in America is being told by a prison warden that the prison will not grant his request for a vegan meal, even though the prisoner has a deeply held moral opposition to killing animals.[3] A parent is being told that her child's school will not allow her family to decline the milk that is required on all lunch trays, regardless of the parent's explanation that her family is morally opposed to the dairy industry because of the harm done to dairy cows and their calves.[4] A student is being told that he will either dissect an animal for biology class or fail that assignment, despite his stated opposition to the dissection industry's breeding and killing methods.[5] A public school teacher is being told that she is required to

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[2] THOMAS JEFFERSON, *Freedom of Religion at the University of Virginia (Oct. 7, 1822)*, *in* THE COMPLETE JEFFERSON 957–58 (Saul K. Padover ed., 1943).

[3] According to Kathy Hessler, Director of the Lewis & Clark Animal Law Clinic—which advocates on behalf of prisoners who are trying to obtain vegan or vegetarian diets on animal rights grounds—prisoners nationwide frequently face jail administrators who refuse to accommodate requests for vegan diets. E-mail from Kathy Hessler, Dir., Lewis & Clark Animal Law Clinic, to author (May 4, 2014, 8:59 p.m.) (on file with *Animal Law*).

[4] Federal laws only require schools to offer a milk substitute to students for medical reasons. *See* 42 U.S.C § 1758(a)(2)(A) (2012) ("[Schools] shall provide a substitute for fluid milk for students whose disability restricts their diet, on receipt of a written statement from a licensed physician that identifies the disability that restricts the student's diet and that specifies the substitute for fluid milk."). *See also* 7 C.F.R. § 210.2 (2013) ("Meals offered to preschoolers must consist of: Meats/meat alternates, grains, vegetables/fruits, and fluid milk."); 7 C.F.R. § 210.10(m)(2) (2014) ("Schools may make substitutions for students without disabilities who cannot consume the regular lunch or afterschool snack . . . . [W]ith respect to substitutions for fluid milk, such a statement must be signed by a recognized medical authority."); Alisa Fleming, *Does the School Lunch Program Have the Right to Require Kids to Take Milk?*, GO DAIRY FREE, http://www.godairyfree.org/ask-alisa/ask-alisa-does-the-school-lunch-program-have-the-right-to-require-kids-to-take-milk (Aug. 16, 2010) (accessed Nov. 14, 2014) ("Not all school districts and schools enforce this issue, but many do require a doctor's note for a child to turn down the milk provided in the school lunch.") [http://perma.cc/6TQF-KK6R]; *Offer Nondairy Milk in Schools*, PHYSICIANS COMM. FOR RESPONSIBLE MED., http://www.pcrm.org/health/healthy-school-lunches/nslp/offer-nondairy-milk-in-schools (accessed Nov. 21, 2014) ("Because of the widespread but incorrect belief that milk is essential for good health, food service staff will often require that elementary school children take milk.") [http://perma.cc/DJ3J-B2R7].

[5] *See* Jan Oakley, *"I Didn't Feel Right about Animal Dissection": Dissection Objectors Share Their Science Class Experiences*, 21 SOC'Y & ANIMALS 360, 368 tbl. 2 (2013) (finding that more than 10% of polled students who objected to dissection were given a failing grade by their teacher); E-mail from Samantha Suiter, Sci. Educ. Specialist, PETA, to author (Apr. 28, 2014, 4:23 p.m.) (on file with *Animal Law*) (stating that PETA "encounter[s] cases all the time where students are seeking help dealing with teachers who are forcing them to dissect or risk receiving a failing grade"); *see generally Dissection Campaign Packet*, HUMANE SOC'Y OF THE U.S., http://www.humanesociety.org/parents_educators/dissection_campaign_packet.html (accessed Nov. 21, 2014) (not-

pass out fliers for the circus, despite her opposition to the brutal methods employed by the circus industry in the training of the animals in their care.[6] In myriad ways, the moral convictions of animal liberation-

ing that "[a]lthough most students believe they should have a choice or alternative when it comes to animal dissection, only 11 states have laws requiring student choice") [http://perma.cc/NC6N-QL62]. Although seventeen states and the District of Columbia have dissection choice or Board of Education policies (giving public school students the right to substitute a non-dissection alternative without penalty), whether teachers throughout those school systems are aware of legal requirements is certainly an open question. *Student Choice Laws*, AM. ANTI-VIVISECTION SOC'Y, http://aavs.org/animals-science/laws/student-choice-laws/ (accessed Nov. 29, 2014) [http://perma.cc/ZW9X-KXS3]. The eleven states with student-choice laws are California, Connecticut, Florida, Illinois, New Jersey, New York, Oregon, Pennsylvania, Rhode Island, Vermont, and Virginia. CAL. EDUC. CODE § 32255.1(b) (West 2002); CONN. GEN. STAT. ANN. § 10-18d (West 2014); FLA. STAT. ANN. § 1003.47(1)(a) (West 2012); 105 ILL. COMP. STAT. ANN. 112/5(d) (West 2006); N.J. STAT. ANN. § 18A:35–4.24 (West 2013); N.Y. EDUC. LAW § 809(4) (McKinney 2009); OR. REV. STAT. § 337.300 (2013); 24 PA. CONS. STAT. ANN. § 15-1523 (West 2006); R.I. GEN. LAWS §16-22-20 (2013); VT. STAT. ANN. tit. 16, § 912 (2013); VA. CODE ANN. § 22.1-200.01 (2011). Four states—Maine, Massachusetts, Michigan, and New Hampshire—and the District of Columbia have adopted student-choice policies. *See* Letter from Eve M. Bither, Educ. Comm'r, Dep't of Educ. & Cultural Serv., to Superintendents of Schools (Jan. 30, 1990) (available at http://www.navs.org/file/staff-documents-and-publications-body/Maine-1990-Dissection-Advisory-letter-to-Superintendents.pdf (accessed Nov. 21, 2014)) (Maine Education Commissioner advised every Superintendent of Maine to provide an alternative to dissection in their schools) [http://perma.cc/Q8TH-TNUG]; Memorandum from David P. Driscoll, Comm'r of Educ., Dep't of Elementary & Secondary Educ., to Superintendents, Charter School Leaders, Principals & Curriculum Coordinators (Nov. 14, 2005) (available at http://www.doe.mass.edu/news/news.aspx?id=5621 (accessed Nov. 21, 2014)) (stating that Massachusetts Commissioner of Education advised schools to provide an alternative to dissection) [http://perma.cc/855V-NUGS]; MICH. ST. BD. OF EDUC. POLICY, STUDENT OPTIONS FOR ANIMAL DISSECTION COURSEWORK (May 13, 2014) (available at http://www.michigan.gov/documents/mde/FINAL_Policy_Dissection_Choice_456675_7.pdf (accessed Nov. 21, 2014)) [http://perma.cc/D3GN-TSHT]; N.H. DEP'T OF EDUC., NEW HAMPSHIRE STUDENT CHOICE POLICY (2014) (available at http://www.education.nh.gov/instruction/curriculum/science/documents/student-choice.pdf (accessed Nov. 21, 2014)) [http://perma.cc/9JPK-QSDT]; OFFICE OF THE ST. SUPERINTENDENT OF EDUC., NON-REGULATORY GUIDANCE FOR LOCAL EDUCATORS: ANIMAL DISSECTION OPT-OUT CHOICE FOR DISTRICT STUDENTS (2012) (available at http://osse.dc.gov/release/notice-non-regulatory-guidance-leas-animal-dissection (accessed Nov. 29, 2014)) (recommending that local education agencies create an opt-out policy and outlining minimum requirements of the opt-out choice) [http://perma.cc/7CGS-XZ2K]. Other states have adopted resolutions encouraging schools to provide dissection alternatives. *See* H.J. Memorial 8, 46th Legis., 2d Reg. Sess. (N.M. 2004) (providing that all schools should offer virtual dissection techniques for students opposed to real dissections); H. Con. Res. 153, 1992 Reg. Sess. (La. 1992) (urging public schools to provide students with alternative dissection choices).

[6] Ringling Brothers and Barnum & Bailey Circus works with schools all over the country to promote the circus. *See e.g.*, Patrick O'Donnell, *Circus to Give Free Tickets to Cleveland Students with Perfect School Attendance*, CLEVELAND.COM, http://www.cleveland.com/metro/index.ssf/2013/09/circus_to_give_free_tickets_to.html (Sept. 7, 2013) (accessed Dec. 22, 2014) (describing Ringling Brothers' offer to give a free ticket to up to 20,000 K-6 students in the Cleveland School District) [http://perma.cc/MB4W-EVA3]. The author of this Article called in sick in order to avoid having to participate in the Ringling Brothers promotion when he was a teacher in Baltimore, Maryland.

ists[7] are violated by prison wardens, schools, and employers every single day.

Consider a few slightly different scenarios: What if a prison warden refused to honor a Jewish inmate's request for a kosher meal? What if a Hindu parent was told by the public school administrator that her child would be served a hamburger each day, in violation of her belief in the sacredness of cattle? What if the public school forced a student to pray to Jesus, in violation of his Islamic faith? What if a public school teacher, an atheist, was forced to lead the prayer?

In this Article, I do two things: First, I argue that there is no constitutional difference between the two sets of scenarios, because a belief in animal liberation constitutes a religious belief under constitutional jurisprudence interpreting the Free Exercise Clause of the United States (U.S.) Constitution.[8] Thus, every time a prison warden, public school teacher or administrator, or government employer refuses to accommodate the ethical belief of an animal liberationist, they infringe on that person's religious freedom. Therefore, they should have to satisfy the same constitutional or statutory requirements that would adhere were the asserted interest based on more traditional religious exercise.[9] Second, I suggest that one possible solution to the widespread violations of the First Amendment rights of animal liberationists would be the incorporation of an explicitly religious animal liberation organization under the Internal Revenue Code, which would help to protect the free exercise rights of those who believe in animal rights, because it would give them a religious organization to reference—with articles of incorporation that align with the jurisprudential definition of religion—in making their requests for religious accommodation.

In Part II of this Article, I discuss the constitutional definition of religion. In Part III, I discuss what it means to believe in animal liberation. In Part IV, I argue the belief in animal liberation is clearly a religion according to Supreme Court and circuit court precedent. In Part V, I discuss how animal rights free exercise conflicts would play out in practice—e.g., where strict scrutiny would be required for infringement on rights and where it would not. In Part VI, I suggest that incorporating a 'Church of Animal Liberation' under the Internal Revenue Code (as a religious organization or as a proper 'Church') would be helpful in securing constitutional rights for animal liberationists, and discuss what would be required to incorporate such an organization.

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[7] I use animal rights and animal liberation interchangeably.

[8] U.S. CONST. amend. I.

[9] *See infra* Part V (discussing constitutional free exercise analysis and its practical applications).

## II. DEFINING RELIGION

> *An analysis of the First Amendment to the Constitution of the United States indicates that it is logically impossible to define 'religion'. . . . An attempt to define religion, even for purposes of statutory construction, violates the 'establishment' clause since it necessarily delineates and, therefore, limits what can and cannot be a religion. The judicial system has struggled with this philosophic problem throughout the years in a variety of contexts.*
>
> —I.R.S. General Counsel Memo[10]

### *A. "Or Prohibiting the Free Exercise Thereof"*

The Establishment Clause of the First Amendment declares, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."[11] As a preliminary matter of constitutional interpretation, understanding the jurisprudential definition of religion will be important since we need to understand what it is that we are all free to exercise and what the government cannot establish. However, one will search in vain for a clear definition of religion in Supreme Court or circuit court jurisprudence.[12] The Supreme Court has chosen instead to issue pronouncements in dicta that give a more general sense of what religion looks like, and a few circuit courts have offered ad hoc tests that attempt to compare an asserted religion to beliefs that are indisputably religious.[13] The issue is further convoluted by the fact that, although the term 'religion' is only used once in the Constitution,[14] there is broad disagreement over whether the concept of religion should be understood differently depending on whether the issue under discussion is the government's obligation not to promote religion or, alternatively, not to inhibit a citizen's free exercise of it.[15]

There can be no doubt that the issue has been of critical importance since the founding of our nation. Thomas Jefferson declared that "[t]he constitutional freedom of religion [is] the most inalienable and sacred of all human rights,"[16] and both Thomas Jefferson and James

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10 I.R.S. Gen. Couns. Mem. 36,993 (Feb. 3, 1977).

11 U.S. CONST. amend. I.

12 Note that the Internal Revenue Service (IRS), charged with interpreting the term for religious exemption under the Internal Revenue Code, simply refuses to do so. *See infra* Part VI.C (discussing the IRS's lack of guidance as to what constitutes a "religious organization" under the Internal Revenue Code); *see also* I.R.S. Gen. Couns. Mem., *supra* note 10 (declining to define religion).

13 *See infra* Part II.C (discussing how some circuit courts have altered the Supreme Court's analysis by adding objective prongs to it).

14 U.S. CONST. amend. I.

15 *See e.g.*, LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 828 (1978) (arguing that the Free Exercise Clause should be interpreted broadly to protect anything "arguably religious" but that the Establishment Clause should be interpreted narrowly so that the government is not prohibited from doing something as long as it is "arguably non-religious").

16 JEFFERSON, *supra* note 2, at 958.

Madison came to the Constitutional Convention having laid out their views of both the freedom of individuals to practice whatever religion they might wish and the prohibition against government establishment of any particular state-mandated faith.[17] Madison wrote that

> [t]he Religion then of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate. This right is in its nature an unalienable right. . . . We maintain therefore that in matters of Religion, no man's right is abridged by the institution of Civil Society and that Religion is wholly exempt from its cognizance.[18]

Of course, the Founders thought they were protecting monotheism.[19] But, just like equal protection has come to protect classes that might be surprising to the men who wrote and signed the Constitution, so too the spirit of 'free exercise' has been extended to protect 'religions' that would not have been anticipated by Jefferson, Madison, or any of the others who founded our nation with a commitment to a broad free exercise.

The landscape of modern religion case law can be confusing, encouraging, or amusing—depending on your perspective. A brief canvassing of circuit court jurisprudence finds that constitutionally, atheists are religious.[20] So too are agnostics.[21] The sole member of the 'Church of Marijuana' is not religious.[22] Neither is a commitment to eating only raw foods.[23] But white supremacists associated with the

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[17] *Id. See* JAMES MADISON, *Memorial and Remonstrance against Religious Assessments* (1785), *reprinted in* 8 THE PAPERS OF JAMES MADISON 295, 299 (Robert A. Rutland et al. eds., 1973) (stating that the government would be abusing its power if it established a particular state religion).

[18] MADISON, *supra* note 17, at 299.

[19] For discussion of the Founders' understanding of religion, see Jeffrey Omar Usman, *Defining Religion: The Struggle to Define Religion under the First Amendment and the Contributions and Insights of Other Disciplines of Study Including Theology, Psychology, Sociology, the Arts, and Anthropology*, 83 N.D. L. REV. 123, 160–65 (2007). *See also* Lee J. Strang, *The Meaning of "Religion" in the First Amendment*, 40 DUQ. L. REV. 181, 210–37 (2002) (arguing the First Amendment's ratifiers understood religion as theism, if not monotheism).

[20] *See* Kaufman v. McCaughtry, 419 F.3d 678, 682 (7th Cir. 2005) ("The Supreme Court has recognized atheism as equivalent to a 'religion' on numerous occasions . . . . Atheism is . . . a school of thought that takes a position on religion, the existence and importance of a supreme being, and a code of ethics. As such, we are satisfied that it qualifies as Kaufman's religion for the purposes of the First Amendment claims he is attempting to raise.").

[21] *See* Theriault v. Silber, 547 F.2d 1279, 1281 (5th Cir. 1977) (per curiam) (recognizing that a standard that would exclude agnosticism as a religion for purposes of the Free Exercise Clause would be too narrow).

[22] U.S. v. Meyers (*Meyers II*), 95 F.3d 1475, 1484 (10th Cir. 1996).

[23] *See* Africa v. Pennsylvania, 662 F.2d 1025, 1032 (3d Cir. 1981) (holding that the plaintiff's political organization, which required a special raw food diet, was not a religion under the terms of the First Amendment).

Aryan Nation almost certainly are.[24] Obviously Hare Krishnas[25] and Wiccans[26] are religious. So too are believers in the Science of Creative Intelligence.[27] A belief that social security numbers are a "mark of the beast" is "plainly religious within the meaning of the First Amendment."[28] The marijuana smoker who founded the 'Church of Marijuana' could have proved that his faith in marijuana was religious by claiming it was an interpretation of his Catholic faith.[29] Similarly, a religious requirement can apply to only one person on the entire planet as long as it is sincerely held.[30] Clearly, a constitutional definition of 'religion' will require analysis beyond a denotative understanding of the term.[31]

Although not strictly applicable to the tests created by the Supreme Court and circuit courts, it seems important in an article about whether animal rights constitutes a religion to mention that while some scholarly suggestions for a definition of religion would clearly not include animal rights, current jurisprudence does. It is beyond the scope of this Article to examine the extensive scholarship that focuses on creating a more coherent test than that actually applied by the courts. Instead, I will merely note that scholars run the gamut in their suggestions, from arguing for an originalist definition,[32] to suggesting an 'anything goes' definition,[33] to a functionalist defini-

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[24] *See* Wiggins v. Sargent, 753 F.2d 663, 667 (8th Cir. 1985) ("We believe that in this case the fact that the notion of white supremacy may be, and perhaps usually is, secular, in the sense that it is a racist idea, does not necessarily preclude it from also being religious in nature . . . .").

[25] The International Society for Krishna Consciousness—whose members are colloquially known as Hare Krishnas—derives from Bhakti Hinduism. Int'l Soc'y for Krishna Consciousness, Inc. v. Barber, 650 F.2d 430, 440,433 (2d Cir.1981).

[26] Dettmer v. Landon, 799 F.2d 929, 932 (4th Cir. 1986).

[27] Malnak v. Yogi, 592 F.2d 197, 199 (3d Cir. 1979).

[28] Callahan v. Woods, 658 F.2d 679, 686 (9th Cir. 1981).

[29] *See infra* Part IV.B (discussing the Tenth Circuit's low threshold for establishing a religion based on beliefs).

[30] *See* Jolly v. Coughlin, 76 F.3d 468 (2d Cir. 1996) ("Our scrutiny extends only to whether a claimant sincerely holds a particular belief and whether the belief is religious in nature."); Vinning-El v. Evans, 657 F.3d 591, 593 (7th Cir. 2011) ("A personal religious faith is entitled to as much protection as one espoused by an organized group.").

[31] WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1918 (3d ed. 1993) (defining religion as "the personal commitment to and serving of God or a god with worshipful devotion, conduct in accord with divine commands esp[ecially] as found in accepted sacred writings or declared by authoritative teachers, a way of life recognized as incumbent on true believers, and typically the relating of oneself to an organized body of believers").

[32] *See e.g.*, Strang, *supra* note 19, at 205 ("[A] principled definition of religion, divorced from the original meaning, is unattainable.").

[33] *See e.g.*, Val D. Ricks, *To God God's, to Caesar Caesar's, and to Both the Defining of Religion*, 26 CREIGHTON L. REV. 1053, 1054 (1993) ("There is no consistent rationale for all the cases. If anything, the bulk of scholarship and case law leads to the conclusion that the task of defining religion is impossible. It is from the impossibility of this task that the central subject of this Article, the notion that those involved in allegedly religious activity, rather than courts, ought to define religion, gains strength.").

tion,[34] to arguing that attempting any definition is unnecessary and, perhaps, constitutionally impossible.[35] While animal rights would clearly not qualify as religion under some of the proffered definitions—e.g., the originalist definition would require belief in a deity—under the guidance offered by the Supreme Court and circuit courts, it clearly qualifies.

### *B. The Supreme Court's Evolving Understanding of Religion*

As the Office of the General Counsel of the IRS has explained,

> [a]n analysis of the First Amendment to the Constitution of the United States indicates that it is logically impossible to define 'religion'. . . . An attempt to define religion, even for purposes of statutory construction, violates the 'establishment' clause since it necessarily delineates and, therefore, limits what can and cannot be a religion. The judicial system has struggled with this philosophic problem throughout the years in a variety of contexts.[36]

Similarly, the authors of the well-respected *Religious Liberty in a Pluralistic Society* explain: "Despite more than half a century of intensive Supreme Court interpretation of the language of the First Amendment, the Court has not offered a constitutional definition of religion."[37] The lack of clear Supreme Court guidance leaves us with discussions in dicta in which the definition of religion is not at issue, as well as two critical cases where a statutory definition is established, with significant constitutional ramifications.

#### *1. The Supreme Court's Previous Theistic Definition of Religion*

Until the 1960s, the Supreme Court discussed religion in ways that aligned with the theistic understanding of the Founding Fathers. For example, in *Reynolds v. U.S.*, a unanimous Court ruled that polygamy is not protected by the Free Exercise Clause.[38] The Court noted that while "[t]he word 'religion' is not defined in the Constitution," the

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[34] *See e.g.*, Steven D. Collier, *Beyond* Seeger/Welsh*: Redefining Religion under the Constitution*, 31 EMORY L.J. 973, 1000 (1982) ("By thus basing the constitutional definition of religion on functions that religion normally serves in society, the courts can provide an opportunity for new or unusual religions to show that they actually serve the functions of religion, and, at the same time, avoid the overinclusiveness of the broad reading of the *Seeger/Welsh* definition.").

[35] *See e.g.*, George C. Freeman, III, *The Misguided Search for the Constitutional Definition of "Religion"*, 71 GEO. L. J. 1519, 1565 (1983) ("The primary aim of this article has been to show that the search for the constitutional definition of 'religion' is misguided. There simply is no essence of religion, no single feature or set of features that all religions have in common. . . ."); Jesse H. Choper, *Defining "Religion" in the First Amendment*, 1982 U. ILL. L. REV. 579, 612 (1982) ("[T]he seemingly intractable abstract question of what constitutes a 'religion' need be answered in only a very limited way for constitutional purposes.").

[36] I.R.S. Gen. Couns. Mem. 36,993.

[37] MICHAEL S. ARIENS & ROBERT A. DESTRO, RELIGIOUS LIBERTY IN A PLURALISTIC SOCIETY 985 (2d ed. 2002).

[38] Reynolds v. U.S., 98 U.S. 145, 162 (1878).

most appropriate place to go for a definition is "to the history of the times in the midst of which the provision was adopted."[39] The Court cited Madison and Jefferson approvingly and quoted Jefferson as having said "religion is a matter which lies solely between man and his God."[40] The Court did not, however, explicitly suggest a definition, simply stating that since polygamy was illegal at the time the Constitution was adopted, "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."[41] The Court's statement could be read as suggesting that polygamy cannot be a religious practice; however, a more likely reading is that religious belief will not be allowed to justify actions that violate the collective morality of society, regardless of whether such actions are religious.[42]

In *Davis v. Beason*, the Court again took up the issue of polygamy.[43] The holding clearly indicates that religion cannot justify illegality,[44] and it also appears to suggest that a religion that advocates what the Court sees as nefarious behavior is, by definition, not a religion:

> To call [the advocacy of polygamy and bigamy] a tenet of religion is to offend the common sense of mankind. . . . The term 'religion' has reference to one's views of his relations to his Creator, and to the obligations they impose of reverence for his being and character, and of obedience to his will. It is often confounded with the *cultus* or form of worship of a particular sect, but is distinguishable from the latter.[45]

The Court offers no guidance for distinguishing between religion and cult, beyond its full-throated denunciation of polygamy, bigamy, "promiscuous intercourse of the sexes," and "human sacrifices."[46] The decision also refers repeatedly to religion in monotheistic terms, referencing "man's relations to his Maker and the obligations he may think they impose."[47]

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[39] *Id.* at 162.

[40] *Id.* at 164 (quoting Jefferson's reply to "an address to him by a committee of the Danbury Baptist Association").

[41] *Id.* at 165.

[42] *See infra* Part V.A (discussing *Employment Division v. Smith*).

[43] Davis v. Beason, 133 U.S. 333 (1890).

[44] *Id.* at 342–43 ("However free the exercise of religion may be, it must be subordinate to the criminal laws of the country . . . .").

[45] *Id.* at 341–42.

[46] *Id.*

[47] *Id.* at 342. *See also* U.S. v. Ballard, 322 U.S. 78, 87 (1944) (The Court opened up space for tolerance of a broader range of views than had been previously indicated, but that still focused on monotheism as a requirement for religious belief under the Constitution: "The Fathers of the Constitution . . . fashioned a charter of government which envisaged the widest possible toleration of conflicting views. Man's relation to his God was made no concern of the state. He was granted the right to worship as he pleased and to answer to no man for the verity of his religious views.").

*2. The Supreme Court Walks Back the Theism*

In 1961, the Supreme Court began to walk back its theistic understanding of religion.[48] In *Torcaso v. Watkins*, a unanimous Court invalidated a Maryland state constitutional requirement that notaries declare their belief in God.[49] The Court held that no state could "aid those religions based on a belief in the existence of God as against those religions founded on different beliefs" without violating the Establishment Clause.[50] So although the case did not set out a definition of religion per se, the Court made clear that a constitutional definition of religion could not require belief in a supreme being.[51] In a footnote, the Court referred to non-theistic beliefs that are clearly religions, including "Buddhism, Taoism, Ethical Culture, Secular Humanism and others."[52]

In *Thomas v. Review Board*, the Court upheld a plaintiff's right to refuse to work in an armaments factory because of his religious beliefs.[53] The plaintiff, a Jehovah's Witness, terminated his employment because he claimed that his religious beliefs prevented him from participating in the production of war materials.[54] Although the plaintiff had difficulty articulating his beliefs,[55] the Court stated:

> [R]eligious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection. . . . Courts should not undertake to dissect religious beliefs because the believer admits that he is 'struggling' with his position or because his beliefs are not articulated with the clarity and precision that a more sophisticated person might employ.[56]

Again, the Court did not define religion—no one disagreed with the fact that the plaintiff's faith as a Jehovah's Witness constituted

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[48] *Davis*, 133 U.S. at 342 ("The term 'religion' has reference to one's views of his relations to his Creator, and to the obligations they impose of reverence for his being and character, and of obedience to his will. . . . The First Amendment to the Constitution, in declaring that Congress shall make no law respecting the establishment of religion or forbidding the free exercise thereof, was intended to allow every one under the jurisdiction of the United States to entertain such notions respecting his relations to his Maker and the duties they impose as may be approved by his judgment and conscience . . . .").

[49] Torcaso v. Watkins, 367 U.S. 488, 495 (1961).

[50] *Id.*

[51] *Id.* (noting that religions can be based either on a belief in the existence of God or on "different beliefs" that presumably do not believe in the existence of a god).

[52] *Id.* at n.11.

[53] Thomas v. Review Bd. of the Ind. Emp't Sec. Div., 450 U.S. 707, 709 (1981).

[54] *Id.* at 709.

[55] *See id.* at 715 (discussing the Indiana Supreme Court's findings that the plaintiff was "struggling" to describe his beliefs and that "another Jehovah's Witness had no scruples about working on tank turrets; for that other Witness, at least, such work was 'scripturally' acceptable"). The plaintiff's inability to articulate his beliefs caused the Indiana Supreme Court to feel that "it was unclear what his belief was, and what the religious basis of his belief was." *Id.* at 714.

[56] *Id.*

religion. However, the Court's finding is instructive for its liberal interpretation of what and how faith can be expressed and still constitute religion.

Finally, in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, the Court appears to have reversed its *Davis* perspective that offending social mores is a sign of cult-status, precluding religious status.[57] The question before the Court was whether the city's passage of laws specifically designed to stop the sacrificing of animals in religious rituals violated the plaintiffs' rights under the Free Exercise Clause.[58] The city passed laws against sacrificing animals, owning animals for sacrifice, and slaughtering animals outside of a proper slaughterhouse.[59] The laws probably would have passed constitutional muster, except that they were enacted with the specific and sole intent of inhibiting the religious practice of the plaintiffs.[60] On the issue of whether animal sacrifice qualified as religious practice, the Court noted without analysis that

> [t]he 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."[61]

Thus the Court appears to have abandoned its view from *Reynolds* and *Davis* that disavowed as religion any practice that violates society's collective morals.

Since the definition of religion was not a central issue in any of these cases, it was unnecessary for the Court to attempt to lay down anything approximating a precise test of what does and does not qualify as religion for First Amendment purposes. Fortunately, we are not forced to wander in the jurisprudential desert. The Court has discussed the question of what constitutes religion in some detail in two cases focused ostensibly on statutory interpretation, but which clearly offer constitutional guidance.

### *3. The Supreme Court's Current Definition: The Subjective Test of* Seeger/Welsh

In *U.S. v. Seeger*[62] and *Welsh v. U.S.*,[63] the Court considered the definition of 'religion' in the Selective Service Act (SSA), which exempted from military service those who, "by reason of religious training and belief, [are] conscientiously opposed to participation in war in

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[57] Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993).
[58] *Id.* at 527–28.
[59] *Id.*
[60] *Id.* at 546–47.
[61] *Id.* at 531.
[62] U.S. v. Seeger, 380 U.S. 163 (1965).
[63] Welsh v. U.S., 398 U.S. 333 (1970).

any form."[64] The statute defined religion as "an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code."[65] Although both cases ostensibly involved statutory interpretation,[66] they were actually—both practically and as interpreted by the Supreme Court and circuit courts subsequently—constitutional holdings.

In *Seeger*, the Court considered the cases of three conscientious objectors whose applications for objector status were denied. Plaintiff Seeger was denied because his objection to war was not centered on a Supreme Being, as required by the Act.[67] Mr. Seeger explained 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."[68]

Plaintiff Jakobson wrote a treatise on his opposition to serving in the war, in which he defined God as, essentially, "Godness."[69] The reason for his denial—whether lack of belief in a Supreme Being or lack of sincerity—was unclear to the court of appeals.[70] Plaintiff Peter's declaration was similarly lacking in anything commonly understood as religion or belief in a Supreme Being.[71]

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64 Selective Service Act of 1948, ch. 625, § 6(j), 62 Stat. 604, 612 (1948) (current version at 50 U.S.C.A. app. § 456(j) (2012)). Note that since enactment the Act has seen a number of name changes: Universal Military Training and Service Act, Pub. L. No. 82-51, 65 Stat. 75 (1951); Military Selective Service Act of 1967, Pub. L. No. 90-40, 81 Stat. 100 (1967); Selective Service Amendment Act of 1969, Pub. L. No. 91-124, 83 Stat. 220 (1969); Military Selective Service Act, Pub. L. No. 92-129, 85 Stat. 348 (1971).

65 §6(j), 62 Stat. at 613.

66 *See Seeger*, 380 U.S. at 173–76 (exhibiting the Court's statutory analysis of the phrase "religious training and belief"); *see also Welsh*, 398 U.S. at 344–45 (Harlan, J., concurring) (criticizing the Court's manner of statutory interpretation in *Seeger* and *Welsh*).

67 *Seeger*, 380 U.S. at 167. This requirement was eliminated when the Act was amended in 1967. Military Selective Service Act of 1967, Pub. L. 90-40, § 7, 81 Stat. 101, 104 (1967).

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

69 *Id.* at 168 ("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.'" (citation omitted)).

70 *Id.* at 167.

71 *See id.* at 169 ("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 Su-

The *Seeger* Court ruled unanimously in favor of all three plaintiffs. In doing so, the Court expounded on "the ever-broadening understanding of the modern religious community,"[72] including a substantial discussion of writings on religion from "the eminent Protestant theologian Dr. Paul Tillich,"[73] "[a]nother eminent cleric, the Bishop of Woolrich, John A. T. Robinson,"[74] Vatican II's Ecumenical Council,[75] and "Dr. David Saville Muzzey, a leader in the Ethical Culture Movement."[76] The Court completed its canvassing of the religious literature by noting that its findings on the matter represent just "a few of the views that comprise the broad spectrum of religious beliefs found among us."[77]

In order to test whether an applicant's belief is religious under this expansive definition, the Court set up a test, which it called "simple of application" and "essentially . . . objective"[78]:

> [D]oes 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*. . . . 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*. . . . [W]hile 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.[79]

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preme Being or God. These just do not happen to be the words I use.'" (citations omitted)).

[72] *Id.* at 180.

[73] *Id.* (speaking of a "'God above God,' the power of being, which works through those who have no name for it, not even the name God" (quoting PAUL TILLICH, SYSTEMATIC THEOLOGY 12 (1957))).

[74] *Seeger*, 380 U.S. at 181 ("[W]e are reaching the point at which the whole conception of a God 'out there,' which has served us so well since the collapse of the three-decker universe, is itself becoming more of a hindrance than a help." (quoting JOHN A. T. ROBINSON, HONEST TO GOD 15-16 (1963))).

[75] *Id.* at 182 ("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." (quoting *Draft Declaration on the Church's Relations with Non-Christians, in* COUNCIL DAYBOOK 282 (Vatican II, 3d Sess., 1965))).

[76] *Id.* at 183 ("'Instead of positing a personal God, whose existence man can neither prove nor disprove, the ethical concept is founded on human experience. . . . Religion, for all the various definitions that have been given of it, must surely mean the devotion of man to the highest ideal that he can conceive. . . . What ultimate reality is we do not know; but we have the faith that it expresses itself in the human world as the power which inspires in men moral purpose.'" (quoting DAVID SAVILLE MUZZEY, ETHICS AS A RELIGION 86–87 (1951))).

[77] *Id.* at 183.

[78] *Id.* at 184.

[79] *Id.* at 184–85 (emphasis added).

The Court noted that although "the statutory definition excepts those registrants whose beliefs are based on a 'merely personal moral code[,]' [t]he records in these cases . . . show that at no time did any one of the applicants suggest that his objection was based on a 'merely personal moral code.'"[80] Essentially, the Court was willing to err on the side of caution, finding religion absent a specific affirmation by the plaintiff that his belief was purely personal. With regard to Mr. Seeger, who all but denounced religion as a normative concept, the Court wrote:

> We are reminded once more of Dr. Tillich's thoughts: "And if that word [God] has not much meaning for you, translate it, and speak of the depths of your life, of the source of your being, or your ultimate concern, *of what you take seriously without any reservation*. Perhaps, in order to do so, you must forget everything traditional that you have learned about God."[81]

In *Welsh*, the 4–3 Court[82] went a step further, extending the *Seeger* holding to cover an objector who "struck the word 'religious' entirely [from his application] and later characterized his beliefs as having been formed 'by reading in the fields of history and sociology.'"[83] As the Court noted, Mr. Welsh's opposition to war "was undeniably based in part on his perception of world politics."[84] However, that was not the end of the matter, because in his application, Welsh also wrote: "'I believe that human life is valuable in and of itself; in its living; therefore I will not injure or kill another human being. . . . I cannot, therefore, conscientiously comply with the Government's insistence that I assume duties which I feel are immoral and totally repugnant.'"[85] In extending its statutory definition of 'religion' under the SSA to Mr. Welsh, the majority stressed its belief that the plaintiffs in *Seeger* and *Welsh* were not meaningfully different in their 'religious' opposition to war. For example, both Seeger and Welsh "strongly believed that killing in war was wrong, unethical, and immoral, and their consciences forbade them to take part in such an evil practice."[86]

Discussing the *Seeger* Court's "reference to the registrant's 'own scheme of things'" as it pertained to religion, the *Welsh* Court noted

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[80] *Seeger*, 380 U.S. at 185–86.

[81] *Id.* at 187. (emphasis in original) (quoting PAUL TILLICH, SYSTEMATIC THEOLOGY 12 (1957)).

[82] Justice Blackmun did not participate in the decision. Justice Harlan concurred in the result but felt that the Court should strike down the statute as violating the religion clauses of the First Amendment. *Welsh*, 398 U.S. at 344, 359 (Harlan, J. concurring).

[83] *Id.* at 341 (majority opinion).

[84] *Id.* at 343 (Welsh explained his objection to war by stating, "I can only act according to what I am and what I see. And I see that the military complex wastes both human and material resources, that it fosters disregard for (what I consider a paramount concern) human needs and ends; I see that the means we employ to 'defend' our 'way of life' profoundly change that way of life. I see that in our failure to recognize the political, social, and economic realities of the world, we, as a nation, fail our responsibility as a nation.").

[85] *Id.*

[86] *Id.* at 337.

that it "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."[87] Thus, even if beliefs are "purely ethical or moral in source and content," they will be found to be "religious" if they

> impose upon him a duty of conscience . . . "parallel to that filled by . . . God" in traditionally religious persons. Because his beliefs function as a religion in his life, such an individual is as much entitled to a "religious" conscientious objector exemption under § 6(j) as is someone who derives his conscientious opposition to war from traditional religious convictions.[88]

Most readers who are new to the topic are likely surprised by the Supreme Court's capacious understanding of religion as encompassing, basically, any belief system at all as long as it involves a duty of conscience. And in fact, the holdings are even more remarkable, since they do not just equate religion with something as vague as a 'duty of conscience'; they also expansively interpret Congress's definition of a Supreme Being to satisfy Congress's "long-established policy of not picking and choosing among religious beliefs."[89] While granting that the reference to a Supreme Being was added by Congress to an earlier version of the statute,[90] the *Seeger* Court nevertheless concludes that Congress chose the concept of a "Supreme Being" rather than "God" in order "to embrace all religions and to exclude essentially political, sociological, or philosophical views."[91] Therefore, in the *Seeger* Court's view,

> 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.[92]

Thus, the test of religious belief articulated in *Seeger* essentially ignores the "Supreme Being" concept altogether. In response to the Court's holdings in *Seeger*, Congress later removed the phrase.[93]

The Court's rhetorical gymnastics become intelligible when one considers the concurring opinions of Justices Douglas and Harlan in

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87 *Id.* at 339.

88 *Welsh*, 398 U.S. at 340 (internal ellipses and quotation marks omitted).

89 *Id.* at 338.

90 *Seeger*, 380 U.S. at 172–73 ("[I]n 1948 the Congress amended the language of the statute and declared that 'religious training and belief' was to be defined as 'an individual's belief in a relation to a Supreme Being . . . .' The Court then quoted a report of the Senate Armed Services Committee, which stated that "'This section reenacts substantially the same provisions as were found in subsection 5(g) of the 1940 [A]ct.'"); §6(j), 62 Stat. at 613.

91 *Seeger*, 380 U.S. at 165.

92 *Id.* at 165–66.

93 § 7, 81 Stat. at 104. *See Malnak*, 592 F.2d at 204 n.17 (Adams, J., concurring) (describing congressional response in removing the phrase).

*Seeger* and *Welsh*, respectively. Justice Douglas gets right to the point in the first paragraph of his *Seeger* concurrence, noting that the Court's definition of 'religion' under the First Amendment is the only one that can withstand scrutiny under the Free Exercise and Due Process Clauses of the First and Fifth Amendments to the Constitution.[94] Thus, according to Justice Douglas, the Court is simply applying to its statutory interpretation the common doctrine of statutory construction that counsels avoiding, where possible, interpretations that raise constitutional questions.[95]

Justice Douglas concludes the second paragraph of his *Seeger* concurrence by stating:

> If it is a tour de force so to hold [that 'Supreme Being' can refer to the cosmos, just as well as an anthropomorphic God], it is no more so than other instances where we have gone to extremes to construe an Act of Congress to save it from demise on constitutional grounds. In a more extreme case than the present one we said that the words of a statute may be strained "in the candid service of avoiding a serious constitutional doubt."[96]

He goes on to discuss, as the Court did, a variety of religious beliefs that must be accommodated in order to avoid showing a preference toward a particular religion in violation of the religion clauses of the First Amendment, noting that in addition to Judeo-Christian faiths, we are "a nation of Buddhists, Confucianists, and Taoists."[97]

Five years later, in *Welsh*, Justice Harlan picks up where Justice Douglas left off, reinforcing Justice Douglas's point, but no longer able to countenance the strained reading that ignores the theism inherent in the statutory language. Thus, he opens his *Welsh* concurrence by stating: "Candor requires me to say that I joined the Court's opinion in [*Seeger*] only with the gravest misgivings as to whether it was a legitimate exercise in statutory construction, and today's decision convinces me that in doing so I made a mistake which I should now acknowledge."[98] In both cases, Justice Harlan wrote, the constitutional infirmities in the statute were incurable by any tenable interpretation.[99]

It is important to note that neither Justice Douglas nor Justice Harlan disagreed with the Court's analysis of the word 'religion'—in

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[94] *Seeger*, 380 U.S. at 188 (Douglas, J., concurring).

[95] *Id.* ("If I read the statute differently from the Court, I would have difficulties. For then those who embraced one religious faith rather than another would be subject to penalties; and that kind of discrimination . . . would violate the Free Exercise Clause of the First Amendment. It would also result in a denial of equal protection by preferring some religions over others—an invidious discrimination that would run afoul of the Due Process Clause of the Fifth Amendment." (internal citation omitted)).

[96] *Id.* (internal citation omitted).

[97] *Id.* at 191.

[98] *Welsh,* 398 U.S. at 344 (Harlan, J., concurring).

[99] *Id.* at 345. *See also id.* at 354 ("I cannot subscribe to a wholly emasculated construction of a statute to avoid facing a latent constitutional question, in purported fidelity to the salutary doctrine of avoiding unnecessary resolution of constitutional issues, a principle to which I fully adhere.").

fact, they both felt that the Court's construction was the only one that could properly align with constitutional requirements.[100] However, Justice Harlan felt that Congress's inclusion of a "Supreme Being" in the statute rendered it unconstitutional and the Court's reasoning entirely irrational.[101] Invoking both *Alice in Wonderland*[102] and Orwellian "Newspeak,"[103] he accused the majority of "distortion to avert an inevitable constitutional collision."[104]

Thus, Justice Harlan thought it entirely clear that Congress intended to protect "only theistic religious beliefs" and also that it could not do that without offending the religion clauses of the First Amendment.[105] Nevertheless, he accepted the Court's test "not as a reflection of congressional statutory intent but as patchwork of judicial making that cures the defect of underinclusion in § 6(j) and can be administered by local boards in the usual course of business."[106]

Looking more closely at the unanimous *Seeger* opinion, one can see the Court coming close to admitting that it is engaging in the specious analysis of which Justice Harlan accuses it. For example, the Court reasons that "[t]his construction avoids imputing to Congress an intent to classify different religious beliefs, exempting some and excluding others . . . ."[107] Later the Court notes that its interpretation "continues the congressional policy of providing exemption from military service for those whose opposition is based on grounds that can

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[100] *Id.* at 358 n.10 ("Without deciding what constitutes a definition of 'religion' for First Amendment purposes it suffices to note that it means, in my view, at least the two conceivable readings of § 6(j) set forth in Part II [of the concurrence], but something less than mere adherence to ethical or moral beliefs in general or a certain belief such as conscientious objection. Thus the prevailing opinion's expansive reading of 'religion' in § 6(j) does not, in my view, create an Establishment Clause problem in that it exempts all sincere objectors but does not exempt others, e.g., those who object to war on pragmatic grounds and contend that pragmatism is their creed.").

[101] *Id.* at 351 ("[I]t is a remarkable feat of judicial surgery to remove, as did *Seeger*, the theistic requirement of § 6(j). The prevailing opinion today, however, in the name of interpreting the will of Congress, has performed a lobotomy and completely transformed the statute by reading out of it any distinction between religiously acquired beliefs and those deriving from 'essentially political, sociological, or philosophical views or a merely personal moral code.'").

[102] *Id.* at 354.

[103] *Id.* at 353 n.7.

[104] *Welsh*, 398 U.S. at 354–55 (Justice Harlan continued by stating: "It must be remembered that '[a]lthough this Court will often strain to construe legislation so as to save it against constitutional attack, it must not and will not carry this to the point of perverting the purpose of a statute or judicially rewriting it. To put the matter another way, this Court will not consider the abstract question of whether Congress might have enacted a valid statute but instead must ask whether the statute that Congress did enact will permissibly bear a construction rendering it free from constitutional defects.'" (internal citation and ellipses omitted)).

[105] *Id.* at 356 ("[H]aving chosen to exempt [those with religious beliefs from military service], it cannot draw the line between theistic or nontheistic religious beliefs on the one hand and secular beliefs on the other.").

[106] *Id.* at 366–67.

[107] *Seeger*, 380 U.S. at 176.

fairly be said to be 'religious.'"[108] Thus, the Court all but admits that limiting the definition based on a "Supreme Being," which Justice Harlan believes to be both congressionally intended and constitutionally fatal,[109] would violate the Constitution.[110]

Since the clear aim of the Court's statutory construction is to ensure that the law complies with the religion clauses of the First Amendment, it seems entirely reasonable that both executive governmental bodies and subsequent courts have cited to *Seeger* and *Welsh* as constitutional interpretations of religion. For example, in *Frazee v. Illinois Department of Employment Security*, a unanimous Supreme Court cited *Seeger* in discussing what is and is not protected under the Free Exercise Clause.[111] Circuit courts have consistently done likewise,[112] as have federal agencies, which believe they are simply following Supreme Court precedent in constitutional interpretation.[113] The Ninth Circuit summed up this application when it noted that "[t]hough it construed a statute rather than the Constitution itself, *Seeger* is often read as addressing constitutional limits inherent in the [Military Selective Service Act]; the case is therefore applicable to First Amendment analysis generally."[114]

### *C. Circuit Court Interpretations of* Seeger/Welsh

Circuit courts have largely followed the Supreme Court's lead by applying the subjective analysis of *Seeger* and *Welsh*, although a few circuit courts have attempted to add some objectivity by applying a three-part test that compares the claimed religion to traditional religions.

#### *1. The Objective Tests of the Third and Tenth Circuits*

The most thorough circuit court treatment of what constitutes religion under the religion clauses of the First Amendment has come from the Third and Tenth Circuits in cases that purport to build on what they appear to see as the rather anemic test announced and applied in *Seeger* and *Welsh*. With these decisions, the Third and Tenth

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108 *Id.* at 179–80.

109 *Welsh*, 398 U.S. at 346–47 (Harlan, J. concurring).

110 *Seeger*, 380 U.S. at 188 (Douglas, J., concurring).

111 Frazee v. Illinois Dep't. of Emp't Sec., 489 U.S. 829, 833 (1989) ("Purely secular views do not suffice[.]").

112 *See e.g.*, *Vinning-El*, 657 F.3d at 593 (citing the *Seeger* decision); *Kaufman*, 419 F.3d at 682 (citing the *Seeger* and *Welsh* decisions); Ford v. McGinnis, 352 F.3d 582, 598 (2d Cir. 2003) (citing the *Seeger* decision); *Dettmer*, 799 F.2d at 931 (same); *Wiggins*, 753 F.2d at 666 (same); Patrick v. LeFevre, 745 F.2d 153, 157 (2d Cir. 1984) (same); *Africa*, 662 F.2d at 1030 (same); *Callahan*, 658 F.2d at 683 (same); *Theriault*, 547 F.2d at 1281 (same); Founding Church of Scientology of Washington, D.C. v. U.S., 409 F.2d 1146, 1160 n. 45 (D.C. Cir. 1969) (same).

113 *See infra* Part V.B (noting that federal agencies have cited *Seeger* and *Welsh* when determining religious definitions).

114 *Callahan*, 658 F.2d at 683 n.4.

Circuits have added a bit of objective and factor-based analysis to the Supreme Court's rather subjective 'sincerely held belief' test.

The first presentation of this new and more rigorous religion test came in Judge Adams's concurrence in *Malnak v. Yogi*.[115] In *Malnak,* the Third Circuit upheld the district court's decision that five New Jersey schools had violated the Establishment Clause by offering an elective course in the Science of Creative Intelligence/Transcendental Meditation (SCI/TM).[116] Although the court offered very little by way of analysis,[117] Judge Adams's concurrence laid out a test of what constitutes religion under the religion clauses of the First Amendment.[118] Since his analysis has been adopted in the Third Circuit with *Africa v. Pennsylvania*, and cited and adapted by other circuits as instructive, it is worth considering in some detail.[119]

After noting that "of course" *Seeger* and *Welsh* "are not constitutional cases," Judge Adams states that "[t]he Supreme Court, in what has been characterized as 'a remarkable feat of linguistic transmutation,' recast the language of section 6(j) in order to give the exemption a much broader scope."[120] He continues by stating that "[t]he Court's willingness to depart so drastically from the plain language of a statute in order to produce an expansive definition almost certainly unintended by Congress, implies, as Justice Harlan observed in *Welsh*, a 'distortion to avert an inevitable constitutional collision.'"[121] Thus, Judge Adams considers *Seeger* and *Welsh* to be constitutional cases and purports to build on them,[122] offering "three useful indicia that are basic to our traditional religions and that are themselves related to the values that undergird the [F]irst [A]mendment."[123]

First, "the 'ultimate' nature of the ideas presented is the most important and convincing evidence that they should be treated as relig-

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115 *Malnak*, 592 F.2d at 208–10 (Adams, J., concurring).

116 *Id.* at 200 (majority opinion).

117 *Id.* at 197–200. The Court cited the district court's discussion of Supreme Court cases where concededly religious activity was at issue, and concluded perfunctorily that "[c]areful examination of the textbook, the expert testimony elicited, and the uncontested facts concerning the puja convince us that religious activity was involved and that there was no reversible error in the district court's determination." *Id.* at 199.

118 *Id.* at 208–10 (Adams, J., concurring).

119 *Africa*, 662 F.2d at 1032.

120 *Malnak*, 592 F.2d at 204–05 (Adams, J. concurring) (citing *Welsh*, 398 U.S. at 354 (Harlan, J. concurring)).

121 *Id*.

122 *See id.* at 207 ("It would thus appear that the constitutional cases that have actually alluded to the definitional problem, like the selective service cases, strongly support a definition for religion broader than the Theistic formulation of the earlier Supreme Court cases. What this definition is, or should be, has not yet been made entirely clear.").

123 *Id.* at 207–10. Notably, there is no "in his own scheme of things" namby-pambiness in Judge Adams's analysis. *Seeger*, 380 U.S. at 185. Although beyond the scope of this Article, one wonders what the unanimous *Seeger* court would do with the Third Circuit's use of "traditional religions" as a benchmark for protection under the First Amendment.

ious."[124] Judge Adams then discusses the concept of "ultimate concerns" and notes that "[n]ew and different ways of meeting those concerns are entitled to the same sort of treatment as the traditional forms."[125] Second, a religion must have a broad and comprehensive scope; something may answer an ultimate question (e.g., the "'Big Bang' theory") without being religious, because it does not purport to offer "comprehensive 'truth.'"[126] Finally, a religion may have "formal, external, or surface signs that may be analogized to accepted religions."[127] While Judge Adams points out that neither Mr. Seeger nor Mr. Welsh could establish this factor,[128] absence of any formal or ceremonial signs does not automatically negate the existence of religious belief.[129]

Applying his three-factor test to SCI/TM, Judge Adams first reviews the claims of SCI/TM that "Creative Intelligence" is the "basis of everything" and can lead to "inner contentment."[130] These tenets of SCI/TM lead to Adams's conclusion that SCI/TM is focused on matters of "ultimate concern."[131] Second, he finds that although "[SCI/TM] does not appear to include a complete or absolute moral code" and "is not as comprehensive as some religions," it "provides answers to questions concerning the nature both of world and man" and is thus "sufficiently comprehensive to avoid the suggestion of an isolated theory unconnected with any particular world view or basic belief system."[132] Finally, he notes that although there are few trappings of traditional religion, there "are trained teachers and an organization devoted to the propagation of the faith" as well as "a ceremony, the Puja, that is intimately associated with the transmission of the mantra."[133] Thus, according to Adams, SCI/TM is a religion for constitutional purposes, and cannot be taught in schools.[134]

In *Africa v. Pennsylvania*, the Third Circuit adopted Judge Adams's *Malnak* concurrence as its definitional test of religion.[135] The *Africa* court considered the case of an incarcerated member of the black nationalist organization MOVE who petitioned "under the religion clauses of the First Amendment [for] a special diet consisting en-

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[124] *Malnak*, 592 F.2d at 208 (Adams, J., concurring). In a footnote, Judge Adams states that once you have a religion that is concerned with "ultimate concerns," other more mundane elements of the religion "must also be accepted as religious." *Id.* at 208 n.40.

[125] *Id.* at 208.

[126] *Id.* at 209.

[127] *Id.*

[128] *Id.* at 209 n.43.

[129] *Malnak*, 542 F.2d at 209 (Adams, J., concurring).

[130] *Id.* at 213.

[131] *Id.*

[132] *Id*.

[133] *Id.* at 214.

[134] *Id.* at 214–15.

[135] *Africa*, 662 F.2d at 1032.

tirely of raw foods."[136] Africa maintained that "to eat anything other than raw foods would be a violation of his 'religion.'"[137] Judge Adams opined for the court and held that "MOVE does not appear to take a position with respect to matters of personal morality, human mortality, or the meaning and purpose of life."[138] In contrast,

> [t]raditional religions consider and attempt to come to terms with . . . questions having to do with, among other things, life and death, right and wrong, and good and evil. . . . [A]bove all else, religions are characterized by their adherence to and promotion of certain "underlying theories of man's nature or his place in the Universe."[139]

With regard to the second and third indicia, the court also noted "that MOVE cannot lay claim to be a comprehensive, multi-faceted theology"[140] and "that MOVE lacks the defining structural characteristics of a traditional religion."[141] Ultimately, because the organization failed all three indicia of Adams's test, the court concluded that MOVE was not a religion for purposes of the First Amendment.[142]

Judge Adams's invitation has been largely ignored, with most circuits content to apply the subjective *Seeger/Welsh* 'sincerely held belief' test in evaluating whether something constitutes religion under the First Amendment; however, a few other circuits have used the Third Circuit test as a guide in considering what constitutes a religion. For example, in *Alvarado v. City of San Jose*, the Ninth Circuit found that 'New Age' did not constitute a religion and that, consequently, a Plumed Serpent sculpture that the City of San Jose had placed in a city park did not constitute an unconstitutional support of religion in

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136 *Id.* at 1025.

137 *Id.*

138 *Id.* at 1033 ("Africa insists that he has discovered a desirable way to conduct his life; he does not contend, however, that his regimen is somehow morally necessary or required. Given this lack of commitment to overarching principles, the MOVE philosophy is not sufficiently analogous to more 'traditional' theologies.").

139 *Id.* (quoting *Founding Church of Scientology*, 409 F.2d at 1160).

140 *Id.* at 1036. The Court elaborated: "It would not be possible, we believe, on the basis of the record in this case, to place Africa's dietary concerns within the framework of a 'comprehensive belief system.' Expressed somewhat differently, were we to conclude that Africa's views, taken as a whole, satisfied the comprehensiveness criterion, it would be difficult to explain why other single-faceted ideologies—such as economic determinism, Social Darwinism, or even vegetarianism—would not qualify as religions under the [F]irst [A]mendment." *Id.* at 1035. I explain below in Part IV.B why vegetarianism, within the context of an animal liberation philosophy, satisfies the Third Circuit's test.

141 *Africa*, 662 F.2d at 1036. The Court elaborates: "MOVE lacks almost all of the formal identifying characteristics common to most recognized religions. For example . . . although Africa referred to a series of guidelines that supposedly were written by John Africa and that allegedly set forth MOVE's principal tenets, no such documents were made available to the district court; thus, the record contains nothing that arguably might pass for a MOVE scripture book or catechism." *Id.*

142 *Id.*

violation of the Establishment Clause.[143] The court concluded that 'New Age' was not a religion under *Malnak* and *Africa*, because "there is no New Age organization, church-like or otherwise; no membership; no moral or behavioral obligations; no comprehensive creed; no particular text, rituals, or guidelines; no particular object or objects of worship . . . . In other words, anyone's in and 'anything goes.'"[144]

In *U.S. v. Meyers*, the Tenth Circuit considered a plaintiff's claim that his constitutional rights as a member of the 'Church of Marijuana' were burdened when he was arrested and convicted for dealing in the drug.[145] The court dismissed the plaintiff's constitutional claim based on the principle that "the right to free exercise of religion . . . does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability."[146] Although not required by its holding, the Tenth Circuit went on to agree with the district court's assessment that Meyers's beliefs did not constitute a religion.[147] The district court had looked at both the statutory definition of 'religion' under the Religious Freedom Restoration Act and conflated it with the constitutional definition before concluding that "Meyers's professed beliefs have an ad hoc quality that neatly justify his desire to smoke marijuana."[148] Applying a test similar to the Third Circuit's three-prong test, the district court held that the fact that he had a pure enjoyment of smoking marijuana, without more, could not constitute religion.[149] The Tenth Circuit explicitly upheld the analysis and religion test of the district court.[150]

### *2. A Sampling from the Other Circuits*

Most circuits have agreed with Judge Brorby's dissenting opinion in *Meyers*. Citing *Seeger*, he writes that

> [b]y attempting to evaluate another's religion with a factor-driven test we have essentially gutted the Free Exercise Clause of its meaning and are ignoring the Supreme Court's cautionary words that a person's views can be "incomprehensible" to the court and still be religious in his or her "own scheme of things."[151]

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143 Alvarado v. City of San Jose, 94 F.3d 1223, 1229–30, 1232 (9th Cir. 1996). The *Seeger/Welsh* test would have been impossible since there was no one to ask whether the statute was, in the plaintiffs' scheme of things, religious. At no point in the opinion did the Ninth Circuit suggest that it was adopting the Third Circuit's test, which it applied at the request of plaintiffs, in order to hold that even using the test requested by plaintiffs, there was still no violation of the Establishment Clause. *Id.* at 1230.

144 *Id.*

145 *Meyers II*, 95 F.3d at 1480.

146 *Id.* at 1481 (citing Emp't Div., Dep't of Human Res. of Oregon v. Smith, 494 U.S. 872, 879 (1990)). *See infra* Part V.A (discussing how the Supreme Court forbids religious beliefs from trumping neutral laws).

147 *Meyers II*, 95 F.3d at 1484.

148 U.S. v. Meyers (*Meyers I*), 906 F. Supp. 1494, 1508–09 (D. Wyo. 1995).

149 *Id.* at 1509.

150 *Meyers II*, 95 F.3d at 1484.

151 *Id.* at 1490 (Brorby, J., dissenting).

For example, in *Ford v. McGinnis*, writing for the Second Circuit, then-Judge Sotomayor explicitly followed the Supreme Court's subjective precedent.[152] In *Ford*, the court considered the case of a Muslim inmate who requested accommodation for Eid ul Fitr, the feast that concludes the celebration of Ramadan.[153] Citing *Seeger*, Judge Sotomayor held that "[d]espite the fact that all the religious authorities testified to their belief that the postponed Eid ul Fitr was without religious significance, the proper inquiry was always whether Ford's belief was sincerely held and '*in his own scheme of things*, religious.'"[154]

Similarly, in *Theriault v. Silber*, the Fifth Circuit vacated a district court holding that "the Eclatarian faith, also known as the Church of the New Song" was not a religion.[155] The court invoked *Seeger* in stating that any standard of what is religion that would "exclude[ ], for example, agnosticism or conscientious atheism, from the Free Exercise and Establishment shields . . . is too narrow."[156] Finally, in *Kaufman v. McCaughtry*, the Seventh Circuit invoked *Seeger* and *Welsh* in finding that atheism is a religion for First Amendment purposes, even where the adherent claims his belief is the "antithesis of religion."[157] Even where courts do discuss the Third Circuit test, they tend to discuss it only in order to show that the purported religion in question satisfies even that multi-factor objective test.[158]

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[152] *Ford*, 352 F.3d at 589.

[153] *Id.* at 584.

[154] *Id.* at 598 (quoting *Seeger*, 380 U.S. at 185) (emphasis in original).

[155] *Theriault*, 547 F.2d at 1280–81. The Fifth Circuit declined to discuss whether Eclatarianism is a religion until the district court applied the proper standard. *Id.* at 1281. According to the district court, Eclatarian faith "[d]eclar[es] as its source certain obscure passages from the Book of Revelations in the New Testament Bible, . . . concerns itself with a supreme spirit known as 'Eclat' and espouses, in general, a doctrine of brotherhood and love." Theriault v. Carlson, 353 F. Supp. 1061, 1063 (N.D. Ga. 1973).

[156] *Theriault*, 547 F.2d at 1281. *See also Wiggins*, 753 F.2d at 666 (The court found that belief in the white supremacist philosophy of the Aryan Nation can be religious and that "a belief can be both secular and religious. The categories are not mutually exclusive."); *Callahan*, 658 F.2d at 679 (holding that plaintiff's "views regarding social security numbers as the 'mark of the beast' are theological in nature and plainly religious within the meaning of the First Amendment").

[157] *Kaufman*, 419 F.3d at 681–82 ("[W]hether atheism is a 'religion' for First Amendment purposes is a somewhat different question than whether its adherents believe in a supreme being, or attend regular devotional services, or have a sacred Scripture. . . . Without venturing too far into the realm of the philosophical, we have suggested in the past that when a person sincerely holds beliefs dealing with issues of 'ultimate concern' that for her occupy a 'place parallel to that filled by God in traditionally religious persons,' those beliefs represent her religion." (internal ellipses and citations omitted)).

[158] For example, the Fourth Circuit found that "the Church of Wicca is a religion protected by the [F]ree [E]xercise [C]lause of the [F]irst [A]mendment" by looking to the fact that "the Church occupies a place in the lives of its members 'parallel to that filled by the orthodox belief in God' in religions more widely accepted in the United States." *Dettmer*, 799 F.2d at 931–32 (citing *Seeger*, 380 U.S. at 166). The court also noted that "members of the Church of Wicca 'adhere to a fairly complex set of doctrines [that] . . . concern ultimate questions of human life, as do the doctrines of recognized religions." *Id. See also* Love v. Reed, 216 F.3d 682, 687 (8th Cir. 2000) ("First, we note that, while

## III. WHAT DOES IT MEAN TO BELIEVE IN ANIMAL LIBERATION?

*The animals of the world exist for their own reasons. They were not made for humans any more than black people were made for whites or women for men.*

—Alice Walker, *Forward* to Marjorie Spiegel's *The Dreaded Comparison: Human and Animal Slavery*[159]

### *A. Definition of Animal Liberation*

Although there are many faith-based animal liberationists, the philosophy is not an essential element of any mainstream religion as interpreted by most of its practitioners,[160] and it is not a mainstream religion of itself. Additionally, most of the arguments made on behalf of animal rights are focused on philosophy[161] and science,[162] rather than

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the Third Circuit emphasized the importance of setting some objective guidelines, they also conceded that they did not intend to articulate a rigid 'test' for defining a religion and that 'flexibility and careful consideration of each belief system are needed.' . . . Yet even applying the *Africa* standards as a 'test,' we find that Love's belief system is a religion." (internal citations and alterations omitted) (citing *Africa*, 662 F.2d at 1032 n.13)).

159 Alice Walker, *Foreword* to MARJORIE SPIEGEL, THE DREADED COMPARISON: HUMAN AND ANIMAL SLAVERY 13, 14 (1996) (Walker describes Spiegel's argument, calling it "cogent, humane . . . astute . . . [and] sound.").

160 Even Hinduism is largely vegetarian, more by tradition than out of an explicit adherence to animal liberation, although Gandhi is an example of a Hindu who was also an animal liberationist. *See Hinduism*, FAITHINFOOD.ORG, http://faithinfood.org/spirituality-food/hinduism (accessed Nov. 30, 2014) ("Hinduism is the world's oldest living religion, with a rich collection of spiritual and philosophical traditions. . . . Most Hindus are vegetarian because of this belief in the sanctity of life.") [http://perma.cc/5W4G-ZDA3]; *see also* M. K. GANDHI, THE MORAL BASIS OF VEGETARIANISM 20–21 (1959) ("[I]f anybody said that I should die if I did not take beef tea or mutton, even under medical advice, I would prefer death. That is the basis of my vegetarianism.").

161 *See e.g.*, TOM REGAN, THE CASE FOR ANIMAL RIGHTS 244 (1983) ("[T]he same is true of those moral patients (e.g., animals in the wild) who can take care of themselves without the need of human intervention. . . . Though what we, as moral agents, do to each other causally affects how we fare during the course of our individual lives, that we are the subjects of such a life is not similarly dependent on what others do to or for us. We have this status in the world, as do moral patients, whether human or animal, on our own; having this status is *logically* part of what it is for us to or them *to be* in the world." (emphasis in original)); PETER SINGER, ANIMAL LIBERATION 255 (1975) ("The core of this book is the claim that to discriminate against beings solely on account of their species is a form of prejudice, immoral and indefensible in the same way that discrimination on the basis of race is immoral and indefensible.").

162 *See e.g.*, MARC BEKOFF, THE EMOTIONAL LIVES OF ANIMALS: A LEADING SCIENTIST EXPLORES ANIMAL JOY, SORROW, AND EMPATHY—AND WHY THEY MATTER (2007) (discussing scientific evidence supporting the existence of animal emotions, and arguing that this evidence should inform our relationships with animals); AMY HATKOFF, THE INNER WORLD OF FARM ANIMALS: THEIR AMAZING SOCIAL, EMOTIONAL, AND INTELLECTUAL CAPACITIES (2009) (tracing academic study of animal emotional and intellectual capacity from Charles Darwin in the 1800s through modern "universities, institutions, and organizations throughout the world").

the more ethereal foci of traditional theology.[163] The best-known argument for animal liberation goes like this: Other animals are made of flesh, blood, and bone, just like human beings are. They have the same five physiological senses as humans and feel pain in the same way and to the same degree. They are cognitively, behaviorally, and emotionally complex. As Darwin explained, differences between humans and other animals are differences of degree, not kind.[164] For the same reason most human beings would not eat, wear, or experiment on other humans—because they are individuals with moral worth in their own right—so too with animals.[165]

In overtly constitutional terms, animal rights activists agree with Professor Lawrence Tribe, who strongly supported People for the Ethical Treatment of Animals (PETA)'s Thirteenth Amendment claim[166] on behalf of orcas held in indentured servitude at SeaWorld:

> The [Thirteenth] [A]mendment's purpose, concerned with human slavery as a matter of original intent, is not bounded by the expectations of its authors, any more than the anti-discrimination provisions of the Fourteenth Amendment turned out to be bounded by its authors' expectations. . . . [I]t seems to me no abuse of the Constitution to invoke it on behalf of non-human animals cruelly confined for purposes of involuntary servitude. To the contrary, I can readily imagine a future in which ordinary citizens . . . look back with horror on the ways in which we now treat some of these noble creatures. . . . [T]hat day may come more quickly than some might expect. . . . Even if [PETA's] lawsuit fails and the orcas on whose behalf it is brought are not ultimately freed, we all benefit from the national reflection and deliberation that the filing of this suit could initiate.[167]

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163 Although it is worth noting that philosopher Tom Regan has invoked the creation story on behalf of veganism as an essential element of practiced Christianity: "I find in the opening saga of creation an even deeper, more profound message regarding God's plans in and hopes for creation. For I find in this account the unmistakable message that God did *not* create nonhuman animals for our use—not in science, not for the purpose of vanity products, not for our entertainment, not for our sport or recreation, not even for our bodily sustenance. On the contrary, the nonhuman animals currently exploited in these ways were created to be just what they are: *independently good* expressions of the divine love that, in ways that are likely always to remain to some degree mysterious to us, was expressed in God's creative activity." TOM REGAN, THE THEE GENERATION: REFLECTIONS ON THE COMING REVOLUTION 149–50 (1991) (emphasis in original).

164 CHARLES DARWIN, THE DESCENT OF MAN: SELECTION IN RELATION TO SEX 179 (1871).

165 This is Peter Singer's *Animal Liberation* at its most basic and without the comparisons to other forms of injustice, as well as the evaluation of specific abuses of animals in society that are unjustifiable. *See generally* PETER SINGER, *supra* note 161.

166 Complaint for Declaratory and Injunctive Relief at 1–2, Tilikum *ex rel.* People for the Ethical Treatment of Animals, Inc. v. SeaWorld Parks & Entm't Inc., 842 F. Supp. 2d 1259 (S.D. Cal. 2012) (No. 11cv2476 JM WMC).

167 E-mail from Lawrence Tribe, Professor, Harvard Law Sch., to David Crary, Reporter, Associated Press (Oct. 25, 2011, 6:25 am) (on file with *Animal Law*). *See also* Bruce Friedrich, *Is Sea World a Slave Plantation? Lawsuit for Animals Garners High-Power Support*, GEO. L. WKLY., http://www.gulawweekly.org/opinion/2011/11/1/is-sea-

To the question of PETA's decision to file on behalf of orcas, Professor Tribe opined that the group was probably trying

> to make a point about how the mere absence of superficial resemblance to human beings shouldn't be permitted to obscure the more important issue of whether we are guilty of abusing and exploiting creatures with remarkably sophisticated social, cognitive, and communicative capabilities as well as the capacity to suffer—and whether that abuse and exploitation are inconsistent with the deepest values that our Constitution was instituted to protect.[168]

It is worth briefly distinguishing animal rights from animal welfare; the latter philosophy can look extremely similar to animal rights, especially because animals are treated abysmally in the vast majority of ways they are used in society,[169] so those who denounce cruelty to animals in the context of common uses are sometimes confused with animal liberationists. For example, Professor Cass Sunstein notes in a popular book for animal law classes that "through their daily behavior, people who love [their] pets, and greatly care about their welfare, help ensure short and painful lives for millions, even billions of animals who cannot easily be distinguished from dogs and cats."[170] While that statement could have come from an animal rights supporter, Sunstein's proposed solution is not to suggest a vegetarian or vegan diet for readers; his suggestion is the creation of laws to protect farm animals. While the vast majority of animal rights supporters also advocate for improved laws for animals,[171] support for such laws—presented as the principal solution to factory farming—place Sunstein firmly into the philosophical realm of animal welfare, rather than animal rights.[172] For animal liberationists, the solution is also deeply personal, and requires a lifestyle change.

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world-a-slave-plantation-lawsuit-for-animals-garners.html (Nov. 1, 2011) (accessed Nov. 30, 2014) (analyzing the import of PETA's lawsuit on animals in other contexts) [http://perma.cc/7G2B-FNZL].

168 E-mail from Lawrence Tribe to David Crary, *supra* note 167.

169 By far, the predominant use of animals is as food, and the conditions for animals in the food industry are nothing short of horrific. *See* Cheryl L. Leahy, *Large-Scale Farmed Animal Abuse and Neglect: Law and Its Enforcement*, 4 J. ANIMAL L. & ETHICS 63, 63 (2011) (discussing progression in the enforcement of animal cruelty laws for farmed animals).

170 Cass R. Sunstein, *Introduction* to ANIMAL RIGHTS: CURRENT DEBATES AND NEW DIRECTIONS 3 (Cass R. Sunstein & Martha C. Nussbaum, eds., 2004).

171 *But see e.g.*, GARY L. FRANCIONE, RAIN WITHOUT THUNDER: THE IDEOLOGY OF THE ANIMAL RIGHTS MOVEMENT 10 (1996) (taking a critical view of U.S. animal law for overfocusing on a "minimal animal welfare position").

172 Sunstein, however, does ultimately address animal concerns in terms that sound more akin to rights than welfare. *See* Cass Sunstein, *The Rights of Animals*, 70 U. CHI. L. REV. 387, 401 (2003) ("[I]n the long run our willingness to subject animals to unjustified suffering will be seen as a form of unconscious barbarity—not the same as, but in some ways morally akin to, slavery and the mass extermination of human beings."); s*ee also* Friedrich, *supra* note 167 (noting Sunstein delivers similar sentiments via public oratory).

### *B. Schisms among Animal Liberationists*

Just as there is a wide variety of beliefs within the broader framing of most philosophies and religions, there is a wide variety of understandings of what animal liberation/rights means, including at least three different 'creation' stories for the modern animal rights movement. The most popular story teaches that the modern animal rights movement began with the publication of *Animal Liberation* by Princeton Professor Peter Singer in 1975.[173] However, some in the animal liberation movement argue that Singer is a false prophet, suggesting that Tom Regan, Emeritus Professor of Philosophy at North Carolina State deserves the moniker "father of the animal rights movement" for his 1983 book, *The Case for Animal Rights*.[174] Finally, Andrew Linzey, an Anglican minister and Oxford theology professor, correctly notes that his book, *Animal Rights*, "heralded the modern animal movement,"[175] though it is less well-known.[176]

The dispute is not entirely one of bragging rights, since the three scholars offer significantly different perspectives. In brief, Singer takes a utilitarian approach based in Benthamite philosophy, arguing that we should treat animals with certain attributes in the same way we would treat humans with those same attributes.[177] Regan takes a deontological approach based in Kantian philosophy, arguing that we

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[173] Joseph Lubinski, *Introduction to Animal Rights*, ANIMAL LEGAL & HIST. CTR., http://www.animallaw.info/article/introduction-animal-rights-2nd-ed (2d ed. 2004) (accessed Nov. 17, 2014) ("[T]he animal rights movement was born in 1975 with the publication of Peter Singer's still-controversial *Animal Liberation*.") [http://perma.cc/5KG2-W7TD]. *See also generally* PETER SINGER, *supra* note 161 (Singer's foundational publication, *Animal Liberation*).

[174] Gary L. Francione, *Animal Rights and Animal Welfare*, 48 RUTGERS L. REV. 397, 410, 421 n.98 (1996) (internal quotation marks and citation omitted) (discussing the longstanding debate about whether Singer or Regan started the animal rights movement). *See also* REGAN, THE CASE FOR ANIMAL RIGHTS, *supra* note 161 (Regan's foundational animal rights publication); ANIMAL PRAGMATISM: RETHINKING HUMAN-NONHUMAN RELATIONSHIPS 5 (Erin McKenna & Andrew Light eds., 2004) ("[T]he common claim that Peter Singer is the father of the animal rights movement [is] strictly speaking . . . false.").

[175] ANDREW LINZEY, ANIMAL THEOLOGY 188 (Univ. of Ill. Press (1994)) (describing *Animal Rights: A Christian Assessment of Man's Treatment of Animals* as his "first work which heralded the beginning of the modern animal rights movement").

[176] There is actually a fairly robust animal rights history that pre-dates Singer and Regan, but it is not well known and did not catch on in the same way. One especially important book from that history is Henry Salt's *Animals' Rights: Considered in Relation to Social Progress*, which was first published in England in 1892. In Singer's preface to the 1980 edition, he notes that "[d]efenders of animals, myself included, have been able to add relatively little to the essential case Salt outlined in 1892 . . . ." Peter Singer, *Preface* to HENRY SALT, ANIMALS' RIGHTS: CONSIDERED IN RELATION TO SOCIAL PROGRESS, at viii (Soc'y for Animal Rights, Inc. 1980) (1892).

[177] Francione, *Animal Rights and Animal Welfare*, *supra* note 174, at 410–11. *See also* PETER SINGER, *supra* note 161, at 22 (arguing that while the "value of life" may be influenced by factors such as a creature's mental level, "[t]he evil of pain is, in itself, unaffected by other characteristics of the being that feels the pain," suggesting "we should give the same respect to the lives of animals as we give to the lives of those

should not sacrifice animals for humans under any circumstances; just like we would not kill innocent human beings, regardless of any purported benefit to other humans.[178] Linzey posits a 'preferential option' for animals that borrows from Catholic Liberation Theology,[179] suggesting that animals are designed by God and are innocents in the same way as children.[180] Thus, in Linzey's view, people of faith should be protectors of animals in the same way they would be protectors of other innocents.

For those within the animal rights community, the schisms can be the stuff of great acrimony and lengthy treatises.[181] From outside the animal rights movement, the differences appear inconsequential, since all three sects of animal rights oppose what is entirely normal for at least 98% of U.S. society;[182] in essence, animal liberation teaches, in all three of its principal incarnations, that animals should not be turned into food or clothing, experimented on in laboratories, or used as a means of human amusement.[183] All three animal liberation sects would likely agree with novelist and civil rights activist Alice Walker, who declares in her foreword to a book that compares human to animal slavery that "[t]he animals of the world exist for their own reasons. They were not made for humans any more than black people were made for whites or women for men."[184]

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humans at a similar mental level" and should seek to minimize suffering for all sentient creatures).

178 Regan refers to this as the respect principle. Francione, *Animal Rights and Animal Welfare*, *supra* note 174, at 417 n.80. *See* REGAN, THE THEE GENERATION, *supra* note 163, at 397 (rejecting a resource-esque valuation of animals in relation to their utility to humans, calling for recognition that animals have inherent value, and are "owed treatment respectful of their value as a matter of strict justice").

179 ANDREW LINZEY, ANIMAL RIGHTS: A CHRISTIAN ASSESSMENT OF MAN'S TREATMENT OF ANIMALS 74–75 (1976) (discussing man's "special responsibility to animals"). *See also* PONTIFICAL COUNCIL FOR JUSTICE AND PEACE, COMPENDIUM OF THE SOCIAL DOCTRINE OF THE CHURCH, ch. 4 § 3(c) (2004) (available at http://www.vatican.va/roman_curia/pontifical_councils/justpeace/documents/rc_pc_justpeace_doc_20060526_compendio-dott-soc_en.html (accessed Dec. 22, 2014)) (describing the preferential option for the poor as indicating "the poor, the marginalized and in all cases those whose living conditions interfere with their proper growth should be the focus of particular concern") [http://perma.cc/4NBC-2B5N].

180 LINZEY, ANIMAL THEOLOGY, *supra* note 175, at 36 ("[A]nimals constitute a special category of moral obligation, a category to which the best, perhaps only, analogy is that of parental obligations to children.").

181 *See e.g.*, Francione, *Animal Rights and Animal Welfare*, *supra* note 174 (discussing different theological conceptions of animal liberation).

182 Hal Herzog, *Why Are There So Few Vegetarians?*, PSYCHOLOGY TODAY, http://www.psychologytoday.com/blog/animals-and-us/201109/why-are-there-so-few-vegetarians (Sept. 6, 2011) (accessed Nov. 30, 2014) [http://perma.cc/GK4W-TBE8].

183 *See generally* PETA, http://www.PETA.org (accessed Nov. 30, 2014) ("Animals are not ours to eat, wear, experiment on, use for entertainment, or abuse in any way.") [http://perma.cc/9357-DLAZ].

184 Alice Walker, *supra* note 159, at 14 (endorsing and reframing the argument Marjorie Spiegel builds in *The Dreaded Comparison*).

### *C. Explicitly Religious Animal Liberation*

Of the three principal sects of animal liberation, only Linzey's is overtly religious. Linzey's animal liberation theology builds explicitly on the principles laid out in *Matthew* 25:31–46, suggesting that animals are among "the least of these" discussed by Jesus.[185] Since Linzey, there have been many more Christian thinkers who have argued on behalf of a faith-based compassion for animals, sometimes up to and including veganism as a requirement of Christianity.[186] Perhaps most notably, religion scholar Keith Akers has seized onto scholarly efforts to discover the historical Jesus to argue convincingly that Jesus himself was a vegetarian and animal rights supporter.[187]

Most major faiths have strong contingents of practicing animal liberationists.[188] For example, the Dalai Lama regularly explains that

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[185] LINZEY, ANIMAL RIGHTS, *supra* note 179, at 70. *See* JENNIFER HORSEMAN & JAMIE FLOWERS, PLEASE DON'T EAT THE ANIMALS: ALL THE REASONS YOU NEED TO BE A VEGETARIAN 92 (2007) ("Animals are God's creatures, not human property, nor utilities, nor resources, nor commodities, but precious beings in God's sight. . . . Christians whose eyes are fixed on the awfulness of crucifixion are in a special position to understand the awfulness of innocent suffering. The Cross of Christ is God's absolute identification with the weak, the powerless, and the vulnerable, but most of all with unprotected, undefended, innocent suffering." (quoting Andrew Linzey)); Andrew Linzey, *Forward* to IAN A. STUART, THE ANIMALS' BIBLE, at vi (2009) ("Animals are creatures of the same God; subjects of a God-given life; nothing less than fellow creatures created on the same day; similarly blessed and given their own living space; included in the same Noahic covenant; subject, like us, to divine care and providence; fellow worshippers of the same God—creatures, in short, who are loved and who will be redeemed by their Creator."). *See generally Matthew* 25:31-46 (the parable of the sheep and the goats, in which Jesus divides humanity between "the righteous" and the rest—the righteous being those who have cared for the impoverished, needy, alienated, and oppressed, "the least").

[186] *See e.g.*, JOHN DEAR, CHRISTIANITY AND VEGETARIANISM: PURSUING THE NONVIOLENCE OF JESUS 4–5, 13, 15–16 (1990) (available at http://fivesparrowsfoundation.org/wp-content/uploads/2014/11/Christianity-and-Vegetarianism.pdf (accessed Dec. 22, 2014)) (while the author, a Catholic priest, urges his readers to give over eating flesh for vegetarianism based on Christian morality and theology, he ultimately advocates for an entirely non-violent diet, and frames veganism positively) [http://perma.cc/LE43-8V6D]; CHARLES CAMOSY, FOR LOVE OF ANIMALS: CHRISTIAN ETHICS, CONSISTENT ACTION 1 (2013) (advocating for compassion and justice for animals and suggesting the only dietary position consistent with a pro-life ideology is to not eat meat); PETA, *Blessed Are the Merciful: Go Vegetarian*, http://www.jesusveg.com/index2.html (accessed Oct. 6, 2014) (arguing for vegetarianism as an essential aspect of the Christian faith) [http://perma.cc/S6SC-SDV7].

[187] KEITH AKERS, THE LOST RELIGION OF JESUS: SIMPLE LIVING AND NONVIOLENCE IN EARLY CHRISTIANITY 134 (2000); KEITH AKERS, DISCIPLES: HOW JEWISH CHRISTIANITY SHAPED JESUS AND SHATTERED THE CHURCH 104, 266 (2014). Although Akers is not well known, both of his books have been met with wide praise among theologians active in historical Jesus scholarship. *See e.g.*, Walter Wink, *Forward* to KEITH AKERS, THE LOST RELIGION OF JESUS: SIMPLE LIVING AND NONVIOLENCE IN EARLY CHRISTIANITY, at xi (2000) ("Other scholars have explored this field and several significant studies have been published, but none of them has the impact this one has.").

[188] For a look at the vegetarian tradition in various faiths, see STEVEN ROSEN, FOOD FOR THE SPIRIT: VEGETARIANISM AND THE WORLD RELIGIONS (1987). For an appeal on behalf of animal liberation that draws from many traditions and religious writings, see

"[his] religion is kindness,"[189] and he has spoken explicitly in support of animal rights.[190] Indeed, many have been inspired by the Buddhist texts to remove animal exploitation from their lives to the greatest extent possible.[191] In the West, the philosophy of animal liberation from a Christian and Jewish perspective is significant and growing.[192]

## IV. FOR FREE EXERCISE PURPOSES, ANIMAL LIBERATION IS A RELIGION

Because they may be thinking about the question in non-constitutional terms, many people who understand the philosophy of animal liberation will likely assume that animal rights as a stand-alone philosophy cannot possibly constitute a religion. While perhaps a Christian, a Jew, or a Buddhist can make a tenable case for animal rights as an essential part of her own religion—as a personal requirement of her faith—atheist or agnostic beliefs in animal rights are often viewed as philosophical or political, not religious. Although dismissal of animal liberation as religion is entirely sensible and would align with the common understanding of the term 'religion,' the constitutional definition is much more encompassing. Under the Free Exercise Clause of the First Amendment,[193] a belief in animal rights qualifies as a religion under both the *Seeger/Welsh* subjective test and under the more rigorous objective test applied by the Third and Tenth Circuits.

### *A. The* Seeger/Welsh *Test*

If one were to write an animal liberation pledge, it would probably sound like this: "I believe that animal life is valuable in and of itself. Therefore, I will not injure or kill any animal. I cannot, therefore, con-

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WILL TUTTLE, THE WORLD PEACE DIET: EATING FOR SPIRITUAL HEALTH AND SOCIAL HARMONY (2005).

189 Tara Brach, *My Religion Is Kindness*, TARA BRACH BLOG, http://blog.tarabrach.com/2012/04/my-religion-is-kindness.html (Apr. 9, 2012) (accessed Nov. 30, 2014) [http://perma.cc/WC8Y-GLZK].

190 *See* PETA, *The Dalai Lama Calls for an End to Animal Experiments*, http://www.peta.org/blog/dalai-lama-calls-end-animal-experiments/#ixzz30JfokZYL (June 14, 2007) (accessed Nov. 30, 2014) [http://perma.cc/LRD5-6KLX]; Associated Press, *Dalai Lama Doesn't Want a KFC in Tibet*, USA TODAY, http://usatoday30.usatoday.com/money/industries/food/2004-06-24-dalai-lama-kfc_x.htm (June 24, 2004) (accessed Nov. 30, 2014) [http://perma.cc/7F58-D3XR].

191 For an excellent entrée into Buddhism and animal rights, see NORM PHELPS, THE GREAT COMPASSION: BUDDHISM AND ANIMAL RIGHTS, at xiii (2004).

192 For Jewish scholarship, see JUDAISM AND ANIMALS RIGHTS: CLASSICAL AND CONTEMPORARY RESPONSES 249–50 (Roberta Kalechofsky ed., 1992). *See also* Isaac Bashevis Singer, *The Letter Writer*, *in* THE COLLECTED STORIES OF ISAAC BASHEVIS SINGER 271 (1982) ("In relation to them, all people are Nazis; for the animals it is an eternal Treblinka."); Yael Shemesh, *Vegetarian Ideology in Talmudic Literature and Traditional Biblical Exegesis*, 9 REV. RABBINIC JUDAISM 141, 141 (2006) ("[I]n recent years many works have been published that try to demonstrate that, in the modern world, meat-eating is incompatible with Jewish values.").

193 U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof[.]").

scientiously comply with any insistence that I participate in activities that I feel are immoral and totally repugnant."[194] Except for the substitution of "animal" for "human," this pledge is what the *Welsh* Court found to be a statement of religious belief.[195] Despite his explicit disavowal of conventionally religious motivation, the Court stressed that Welsh's strength of belief and the dictates of his conscience vis-à-vis killing in war mirrored Seeger's beliefs and warranted similar religious protection.[196] Animal liberationists have a similar "duty of conscience" that guides them in their lives and that is "parallel to that filled by God in traditionally religious persons."[197] As Mohandas Gandhi explained, "if anybody said that I should die if I did not take beef tea or mutton, even under medical advice, I would prefer death. That is the basis of my vegetarianism."[198]

Similarly, the *Seeger* Court unanimously found the plaintiffs' beliefs to be religious because (1) they believed in "goodness and virtue for their own sakes" and (2) they defined God as, basically, "goodness."[199] This subjective test did not ask whether the plaintiffs defined their beliefs as religious, but rather focused on whether each objector's beliefs were, "in his own scheme of things,"[200] held in a way that transcends a "merely personal moral code."[201] Animal liberationists view their moral obligation to non-killing of animals as an ethical obligation on par with the moral obligation of plaintiffs Welsh and Seeger not to kill other human beings.[202] Clearly, if Welsh and Seeger had religious beliefs, so too do animal liberationists.

### *B. Judge Adams's Tripartite Test*

Animal liberation also constitutes a religion under the objective test created by the Third Circuit. As noted in Part II.C, the Third Circuit used *Seeger* and *Welsh* for constitutional guidance, placing its own test of religion within the context of the *Seeger* question: Does this belief play the role of religion in the life of the believer? The Third Cir-

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194 *See supra* Part II (discussing the definition of religion under the Constitution and Supreme Court and circuit court precedent).

195 *Welsh*, 398 U.S. at 343.

196 *Id.* at 337.

197 *See id.* at 340 ("If an individual deeply and sincerely holds beliefs . . . [that] impose upon him a duty of conscience to refrain from participating in any [activity] those beliefs certainly occupy . . . a place parallel to that filled by God in traditionally religious persons." (internal quotation marks omitted)).

198 GANDHI, *supra* note 160, at 20–21.

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

200 *Id.* at 185.

201 *Id.* at 165.

202 *See id.* at 187 ("We are reminded once more of Dr. Tillich's thoughts: And if that word (God) has not much meaning for you, translate it, and speak of the depths of your life, of the source of your being, of your ultimate concern, of what you take seriously without any reservation. Perhaps, in order to do so, you must forget everything traditional that you have learned about God." (internal citation and quotation marks omitted)).

cuit's three-factor test focuses on 'ultimate ideas,' comprehensiveness, and trappings of religiosity. Animal liberation beliefs satisfy the first two factors overwhelmingly, and the final factor more than adequately.

First, 'ultimate ideas': "[A]bove all else, religions are characterized by their adherence to and promotion of certain underlying theories of man's nature or his place in the Universe."[203] For example, Judge Adams found that SCI/TM cleared this bar because of its teaching that Creative Intelligence is the "basis of everything."[204] However, Judge Adams did not find an 'ultimate concern' where Mr. Africa's MOVE organization "[did] not appear to take a position with respect to matters of personal morality, human mortality, or the meaning and purpose of life."[205] Similar to the Creative Intelligence theory of the place of humanity in the universe, and entirely dissimilar from Mr. Africa's personal desire to eat raw foods, the central focus of the animal liberationist's belief system is on human nature and our place in the universe. In direct contrast to Mr. Africa's lack of moral outrage at competing practices, animal liberation teaches that biases against "members of other species are a form of prejudice no less objectionable than prejudice about a person's race or sex,"[206] that "all animals are equal,"[207] and that "animals are not ours to eat, to wear, to experiment on, use for human amusement, or abuse in any way."[208] Thus, to animal liberationists, the actions engaged in by the vast majority of people in society are seen as morally wrong[209] and worthy of moral condemnation.[210] Indeed, animal liberationists compare eating meat and other forms of animal exploitation to the Holocaust[211] and slav-

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[203] *Africa*, 662 F.2d at 1035 (internal quotation marks and citation omitted).

[204] *Malnak*, 592 F.2d at 213 (Adams, J., concurring).

[205] *Africa*, 662 F.2d at 1033. In *Malnak*, Judge Adams offers a strong argument that the Free Exercise and Establishment Clauses should define religion identically. *Malnak*, 592 F.2d at 210–13 (Adams, J., concurring) (considering the First Amendment's linguistic construction, dismissing concerns that doing so would overly limit the government's ability to act on concerns from crime to welfare which may be inspired by religious sentiment, and finally suggesting that a differentiated definition creates tiers of religion with access to different levels of government support).

[206] PETER SINGER, *supra* note 161, at xiii.

[207] *Id.* at 1.

[208] PETA, *supra* note 183.

[209] The Third Circuit suggests reaching fundamental moral conclusions is a hallmark of religion. *Africa*, 662 F.2d at 1033 ("Traditional religions consider and attempt to come to terms with . . . questions having to do with, among other things, life and death, right and wrong, and good and evil.").

[210] Peter Singer denounces what he calls "speciesism." *See* PETER SINGER, *supra* note 161, at 9 ("[R]acist[s] violate the principle of equality by giving greater weight to the interests of members of [their] own race . . . . [S]exist[s] violate the principle of equality by favoring the interests of [their] own sex. Similarly, . . . speciesist[s] allow the interests of [their] own species to override the greater interests of members of other species. The pattern is identical in each case.").

[211] *See* Lucy Rose Kaplan, *Foreward* to CHARLES PATTERSON, ETERNAL TREBLINKA: OUR TREATMENT OF ANIMALS AND THE HOLOCAUST, at xi (Lantern 2002) ("In *Eternal Treblinka*, not only are we shown the common roots of Nazi genocide and modern society's enslavement and slaughter of non-human animals in unprecedented detail, but for

ery.[212] As Isaac Bashevis Singer wrote, "[t]he man who eats meat or the hunter agrees with the cruelties of Nature, upholds with every bite of meat or fish that might is right. Vegetarianism is my religion, my protest."[213] Thus, animal rights stands against the fundamental ordering of the world as a place governed by a survival of the fittest philosophy; ideas as lived doctrines do not get any more ultimate than that.[214]

Second, the scope of animal rights is both broad and comprehensive, impacting every area of an animal liberationist's life. In *Malnak,* Judge Adams found that although SCI/TM "does not appear to include a complete or absolute moral code" and "is not as comprehensive as some religions," it does "provide[ ] answers to questions concerning the nature both of world and man" and is thus "sufficiently comprehensive to avoid the suggestion of an isolated theory unconnected with any particular world view or basic belief system."[215] Animal liberation is far more comprehensive than SCI/TM because it offers a more comprehensive moral code and belief system than most conventional religions. Those who do not subscribe to animal liberation philosophy will own shoes and other items made out of animals, use products that have repeatedly been tested on animals, and eat animals on a daily basis. For an animal liberationist, one's entire existence is taken over by living in accordance with animal rights philosophy. For many people of traditional faiths, keeping kosher or attending church on a weekly basis is the extent of their outward religiosity. For animal liberationists, the seriousness of the faith animates every aspect of their lives.[216] Certainly, if SCI/TM is sufficiently comprehensive to qualify as a religion, then animal liberation should as well.

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the first time we are presented with extensive evidence of the profoundly troubling connections between animal exploitation in the United States and Hitler's Final Solution."); *see also* Isaac Bashevis Singer, *supra* note 192, at 271 ("What do they know—all these scholars, all these philosophers, all the leaders of the world—about such as you? They have convinced themselves that man, the worst transgressor of all the species, is the crown of creation. All other creatures were created merely to provide him with food, pelts, to be tormented, exterminated. In relation to them, all people are Nazis; for the animals it is an eternal Treblinka.").

212 *See* Complaint for Declaratory and Injunctive Relief, *supra* note 166, at 1–2 (PETA's Thirteenth Amendment claim on behalf of orcas held at SeaWorld); *see also* Friedrich, *supra* note 167 (discussing PETA's lawsuit against SeaWorld).

213 ISAAC BASHEVIS SINGER & BURGIN, *supra* note 1, at 178.

214 *See generally* Harold A. Herzog, Jr., *"The Movement Is My Life": The Psychology of Animal Rights Activism*, 49 J. OF SOC. ISSUES 103, 106, 115, 117 (1993) (For animal liberationists, "thoughts concerning the treatment of animals had come to play a dominant role in their day-to-day mental life . . . the cause imbued their life with a sense of meaning that had been missing . . . as with religious fundamentalists, many of the activists were quite convinced that their perspective was correct and their cause just. They had discovered Truth.").

215 *Malnak*, 592 F.2d at 213 (Adams, J., concurring).

216 Herzog, *supra* note 214, at 116 ("Perhaps the most striking consistency among [animal rights] activists was the degree to which the movement had become a central focus in their lives.").

Finally, although not determinative and entirely absent for all four plaintiffs in the *Seeger* and *Welsh* cases, the animal rights movement has "surface signs that may be analogized to accepted religions."[217] Judge Adams noted that for SCI/TM, the teachers, organization, and ceremony all pointed toward analogous factors in conventional religion.[218] In contrast, Mr. Africa's MOVE organization

> lack[ed] almost all of the formal identifying characteristics common to most recognized religions. For example . . . although Africa referred to a series of guidelines that supposedly were written by John Africa and that allegedly set forth MOVE's principal tenets, no such documents were made available to the district court; thus, the record contains nothing that arguably might pass for a MOVE scripture book or catechism.[219]

The animal rights movement has a variety of coherent and competing theologies and theological texts,[220] a dress code,[221] a special diet,[222] and dozens of organizations focused with evangelical zeal on propagating the animal rights faith.[223] In fact, the animal liberation movement has activists from organizations such as the Humane League[224] and Vegan Outreach[225] who swarm colleges and universities every year, preaching animal rights and attempting to convert college students to join the animal rights movement. In 2013 alone, activities from these and other animal rights organizations gave out nearly 2 million leaflets to college students around the country.[226] All of these 'surface signs' are certainly comparable to any traditionally

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[217] *See Malnak*, 592 F.2d at 209–10 (Adams, J., concurring) (noting the presence of formal, external, or surface signs as an important consideration in determining whether a set of ideas should classify as a religion).

[218] *Id.* at 214.

[219] *Africa*, 662 F.2d at 1036.

[220] *See supra*, Part III.B (discussing the schisms among animal liberationists).

[221] *See generally Animals Used for Clothing*, PETA, http://www.peta.org/issues/animals-used-for-clothing (accessed Nov. 30, 2014) (explaining that most believers in animal rights do not wear leather, wool, fur or silk) [http://perma.cc/C522-CVHG].

[222] Although not all animal rights activists are vegan or vegetarian, many are. This is analogous to some Jews and some Muslims forgoing non-kosher or non-halal foods.

[223] In addition to a dozen or so national animal rights organizations, there are animal rights groups on most college campuses and in most major cities in the U.S. *See e.g.*, ACTION FOR ANIMALS AUSTIN, http://www.actionforanimalsaustin.org/ (accessed Nov. 30, 2014) (a grassroots animal rights group based in Austin, Texas) [http://perma.cc/5SGF-KM4V]; YALE ANIMAL WELFARE ALLIANCE, http://yale-animal-welfare-alliance.org/ (accessed Dec. 28, 2014) (noting that the organization "has handed out over 7,000 leaflets" over the past three years) [http://perma.cc/M9AD-TY6F].

[224] THE HUMANE LEAGUE, http://www.thehumaneleague.com (accessed Nov. 30, 2014) [http://perma.cc/HS23-VGNX].

[225] VEGAN OUTREACH, http://www.veganoutreach.org (accessed Nov. 30, 2014) [http://perma.cc/2JYU-URL7].

[226] *About*, VEGAN OUTREACH, http://veganoutreach.org/category/about (accessed Nov. 30, 2014) (illustrating distribution of nearly 2 million pamphlets through Vegan Outreach's higher education-focused "Adopt a College Program") [http://perma.cc/5W62-5XAR].

evangelical religious organization.[227] Considering the Tenth Circuit's admonition in *Meyers* that "the threshold for establishing the religious nature of . . . beliefs is low,"[228] it is clear that animal liberation qualifies as a religion for First Amendment purposes.

### *C.* Friedman v. Southern California Permanente Medical Group

While there are many federal court cases that concern prisoners arguing that vegetarianism or veganism is an essential aspect of their Buddhist, Wiccan, or other religious beliefs,[229] *Friedman v. Southern California Permanente Medical Group* is the only case that addresses the question of whether animal rights is a religion in itself.[230] In *Friedman*, the court held that veganism—a key tenant of animal rights for most animal liberationists—is not a religion for purposes of the California Fair Employment and Housing Act (FEHA).[231] The plaintiff refused an animal-derived vaccination that was required by his prospective employer, and then sued when he was denied the job, arguing that his belief in veganism was religious by essentially applying the *Seeger/Welsh* subjective test.[232] The *Friedman* court looked at state and federal jurisprudence interpreting the word 'religion' and contrasted the statutory definition in the FEHA with the U.S. Equal Employment Opportunity Commission (EEOC)'s definition.[233] In the end, the court's analysis tracked the Third Circuit's objective test from Judge Adams's *Malnak* concurrence and found against veganism as religion based on the three-factor test.[234]

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[227] *See generally* Wesley V. Jamison et al., *Every Sparrow That Falls: Understanding Animal Rights Activism as Functional Religion*, 8 SOC. & ANIMALS 305, 307, 325 (2000) (finding that the beliefs of animal rights supporters conform to the five typical components of functional religion: intense and memorable conversion experiences, newfound communities of meaning, normative creeds, elaborate and well-defined codes of behavior, and cult formation).

[228] *Meyers II*, 95 F.3d at 1482–83.

[229] *See infra*, Part V.D (discussing examples of federal vegan prisoner cases).

[230] Friedman v. S. Cal. Permanente Med. Grp., 102 Cal. App. 4th 39 (2002).

[231] *Id.* at 43.

[232] *See id.* (arguing that "[t]hese are sincere and meaningful beliefs which occupy a place in [plaintiff's] life parallel to that filled by God in traditionally religious individuals adhering to the Christian, Jewish, or Muslim Faiths"). *See supra* Part IV.A (discussing the *Seeger/Welsh* test).

[233] *Friedman*, 102 Cal. App. 4th at 45–46, 67–68.

[234] *See id.* at 69–70 ("There is no apparent spiritual or otherworldly component to plaintiff's beliefs. Rather, plaintiff alleges a moral and ethical creed limited to the single subject of highly valuing animal life and ordering one's life based on that perspective. . . . Second, while plaintiff's belief system governs his behavior in wide-ranging respects . . . it is not sufficiently comprehensive in nature to fall within the provisions of [FEHA]. . . . Third . . . no formal or external signs of a religion are present. There are no: teachers or leaders; services or ceremonies; structure or organization; orders of worship or articles of faith; or holidays.").

Of course, *Friedman* is interpreting one state statute,[235] not federal law or the U.S. Constitution. However, it does explicitly purport to offer an analysis that utilizes the Third Circuit's objective test,[236] so it is worth at least a brief discussion. The *Friedman* opinion has a variety of problems that include both questionable interpretation of the FEHA and EEOC regulations, and questionable analysis of federal court jurisprudence on the question of religion.[237] But most critical for purposes of this Article is the fact that the plaintiff in *Friedman* made his case under the subjective test offered by the Supreme Court in *Seeger/Welsh*, arguing that he holds "sincere and meaningful beliefs which occupy a place in [his] life parallel to that filled by God in traditionally religious individuals . . . ."[238] Instead, the court rejected the plaintiff's claim under the Third Circuit objective test, which the court explicitly distinguished from *Seeger/Welsh*.[239]

The court ignored the Supreme Court's focus on a plaintiff's "own scheme of things" from *Seeger* and *Welsh*, and applied Judge Adams's test without inviting the plaintiff to offer a point-by-point explanation of his veganism based on that test.[240] And so the court was able to make short work of its analysis; indeed, the court's entire three-part inquiry requires less than one full paragraph, most of which simply points out what is missing from the plaintiff's pleading. On the first factor, the court notes that "[t]here is no claim that veganism speaks to: the meaning of human existence; the purpose of life; theories of humankind's nature or its place in the universe; matters of human life and death; or the exercise of faith. There is no apparent spiritual or otherworldly component to plaintiff's beliefs."[241] On the second factor, the court states that veganism "is not sufficiently comprehensive in nature to fall within the provisions of [FEHA]."[242] And on the third factor, the court explains that "no formal or external signs of a religion are present. There are no: teachers or leaders; services or ceremonies; structure or organization; orders of worship or articles of faith; or holidays."[243]

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235 *Id.* at 70 (holding that "plaintiff's veganism is not a 'religious creed' within the meaning of the FEHA").

236 *Id.* at 67. *See* Donna D. Page, Comment, *Veganism and Sincerely Held "Religious" Beliefs in the Workplace: No Protection Without Definition*, 7 U. PA. J. LAB. & EMP. L. 363, 395 (2005) (offering a more extensive critique of the *Friedman* decision).

237 Page, *supra* note 236, at 397–99.

238 *Friedman*, 102 Cal. App. 4th at 44.

239 *See id.* at 59, 69–70 (describing Judge Adams's concurrence as the beginning of "federal courts . . . defining religion in a slightly different fashion than in *Seeger* and *Welsh*," and then concluding the best way to assess religiousness "is to use the objective analysis enunciated by the Third, Ninth, Eighth, and Tenth Circuits in [*Africa* and other cases relying upon Judge Adam's concurrence]").

240 *Id.* at 54.

241 *Id.* at 70.

242 *Id.*

243 *Id.*

The court's concern with the fact that there is nothing "spiritual or otherworldly" to veganism,[244] is simply irrelevant. As far back as 1957, the District of Columbia Circuit Court of Appeals found that the Washington Ethical Society was a religious body under the District of Columbia Code, despite no belief in God or any supernatural power.[245] The Supreme Court has also protected atheism as religion for purposes of the First Amendment,[246] and in *Kaufman v. McCaughtry*, the Seventh Circuit noted that even explicit disavowal of religious belief is protected as religious belief for constitutional purposes.[247] The plaintiffs in both *Seeger* and *Welsh* based their opposition to war principally on rational arguments against war as a way of resolving conflict.[248] In *Welsh*, the Court extended the *Seeger* holding to cover an objector who "struck the word 'religious' entirely and later characterized his beliefs as having been formed 'by reading in the fields of history and sociology'"[249] and "was undeniably based in part on his perception of world politics."[250] The Court explained that "very few registrants are fully aware of the broad scope of the word 'religious' . . . and accordingly a registrant's statement that his beliefs are nonreligious is a highly unreliable guide for those charged with administering the exemption."[251] Consequently, the *Friedman* court was wrong to consider otherworldliness in its analysis.

As discussed in Parts III and IV, animal liberation certainly satisfies the first factor related to the big questions of existence, is entirely comprehensive in ways that track Third Circuit discussions of the sec-

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244 *Friedman*, 102 Cal. App. 4th at 70.

245 Wash. Ethical Soc'y v. District of Columbia, 249 F.2d 127, 128–29 (D.C. Cir. 1957).

246 *See e.g.*, Wallace v. Jaffree, 472 U.S. 38, 53–54 (1985) ("[T]he Court has unambiguously concluded that the individual freedom of conscience protected by the First Amendment embraces the right to select any religious faith or none at all.").

247 *Kaufman*, 419 F.3d at 681 ("The problem here was that the prison officials did not treat atheism as a 'religion,' perhaps in keeping with Kaufman's own insistence that it is the antithesis of religion. But whether atheism is a 'religion' for First Amendment purposes is a somewhat different question . . . .").

248 *See supra* note 86 and accompanying text (noting that both plaintiffs "strongly believed that killing in war was wrong, unethical, and immoral, and their consciences forbade them to take part in such an evil practice").

249 *Welsh*, 398 U.S. at 341.

250 *Id.* at 342 (internal citation omitted) ("I can only act according to what I am and what I see. And I see that the military complex wastes both human and material resources, that it fosters disregard for (what I consider a paramount concern) human needs and ends; I see that the means we employ to 'defend' our 'way of life' profoundly change that way of life. I see that in our failure to recognize the political, social, and economic realities of the world, we, *as a nation*, fail our responsibility *as a nation*." (emphasis in original) (internal citation omitted)). *See also Wiggins*, 753 F.2d at 666 ("Moreover, the district court seemed to be under the mistaken impression that an idea or belief cannot be both secular and religious. It apparently grounded its conclusion on the rationale that since the notion of white supremacy was secular, it could not also be religiously based. 'But a coincidence of religious and secular claims in no way extinguishes the weight appropriately accorded the religious one.' In other words, a belief can be both secular and religious." (internal citation omitted)).

251 *Welsh*, 398 U.S. at 341.

ond factor, and includes many of the trappings of religiosity that the *Friedman* court found wanting vis-à-vis the third factor. Had the court allowed Friedman to repackage the presentation of his views to explicitly address the issues raised in the three-factor test, and had Friedman done so in a manner similar to the analysis in this Article, the court likely would have come out the other way.

## V. PROTECTING THE FREE EXERCISE OF ANIMAL LIBERATIONISTS

In this Part, I will discuss some of the practical implications that flow from an understanding that a belief in animal rights is, for constitutional purposes, a religion. Often, Americans assume that since government cannot prohibit the free exercise of one's religion, broad accommodation is required. For example, schools would be forced to provide soy milk and dissection alternatives, prisons would be forced to provide vegetarian meals, and employers would be forced to grant exceptions to requirements that promote animal cruelty. In fact, reality is markedly more nuanced than that. Although there is no constitutional right to violate generally applicable laws or policies on the basis of one's religion, there remain some strong protections for the prisoners, students, teachers, and other animal liberationists who are trying to protect their religious freedom. In this Part, I will discuss evolving Supreme Court precedent regarding the Free Exercise Clause, congressional and state responses to the Supreme Court's decisions, the constitutional prohibition against discrimination on the basis of religious practice, and courts' assumption of the role of religious arbiter. I will conclude by discussing the one area where all of these issues come together most frequently in real life—the prison system.[252]

### *A. The Demise of Constitutional Strict Scrutiny*

The U.S. Constitution guarantees that no government entity can prohibit the free exercise of a citizen's religion.[253] For many years courts applied strict scrutiny to any government attempt to infringe on religion, requiring that any impingement on religious practice be in furtherance of a compelling purpose and constitute the least restrictive means of achieving that purpose. In *Thomas v. Review Board*[254] and

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[252] Because it is not a 'free exercise' issue and is outside the scope of this Article, I will not discuss the one downside of establishing animal rights as a religion, which is that schools could be challenged when they invite animal rights speakers to address classes. Recall that *Malnak* involved an Establishment Clause challenge to the teaching of Creation Science in New Jersey schools. *Malnak*, 592 F.2d at 197–98. However, since philosophies can be both secular and religious, according to *Wiggins*, 753 F.2d at 666, in the unlikely event that their presence were challenged on Establishment Clause grounds, animal liberationists invited to schools could simply present the philosophy in a disinterested manner.

[253] U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . .").

[254] *Thomas*, 450 U.S. at 707, 720.

*Sherbert v. Verner*,[255] the Supreme Court overturned laws that denied unemployment benefits to plaintiffs who had refused to work in an armaments factory and refused to work on Saturday, respectively, because of their religious beliefs. In both cases, the Court required, but did not find, a "compelling state interest" from the government for its actions, which infringed on the plaintiff's religious exercise.[256]

In 1990, the Supreme Court sharply narrowed *Sherbert* and *Thomas* with *Employment Division v. Smith*, in which the Court found against plaintiffs who sued the Employment Division of Oregon for withholding unemployment benefits after they were fired for using peyote, which the plaintiffs held to be a requirement of their religious belief.[257] The Court did not question peyote use as an element of the plaintiffs' religion, but noted instead "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).'"[258] The Court went on to note that it had never allowed religious belief to trump a neutral law, other than in cases where other fundamental rights were at issue.[259] Thus, the Court effectively, although not explicitly, vacated *Sherbert* and *Thomas*, detailing case after case in which the compelling purpose standard had been ignored by the Court, and finding that "'a stance of conscientious opposition [does not] relieve[ ] an objector from any colliding duty fixed by a democratic government.'"[260] Consequently, *Smith* dictates that where the only right at issue is free exercise, governments have great latitude to impose regulations without violating the Constitution's free exercise protection, so long as they are not specifically discriminating against religious practice,[261] and so long as their action does not implicate other constitutional or fundamental rights.

### *B. The Rise of Statutory and State-Level Strict Scrutiny*

Although the *Smith* decision dictates that governments are not constitutionally required to grant religious exemptions to prohibited conduct, it also states that they would be free to do so by statute.[262] In

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255 Sherbert v. Verner, 374 U.S. 398, 399–402 (1963).

256 *Thomas*, 450 U.S. at 719; *Sherbert*, 374 U.S. at 409.

257 Emp't Div., Dep't of Human Res. of Oregon v. Smith, 494 U.S. 872, 874 (1990).

258 *Id.* at 879 (internal citation omitted).

259 *Id.* at 881–82. The *Smith* Court indicates these fundamental rights include freedoms of speech and press, as well as parents being able to direct their children's education.

260 *Id.* at 882 (quoting Gillette v. U.S., 401 U.S. 437, 461 (1971)).

261 *See supra* Part II.B.2 (discussing *Church of the Lukumi Babalu Aye, Inc.*, where the Court ruled laws targeting a specific religion were unconstitutional).

262 *See Smith*, 494 U.S. at 890 ("Values that are protected against government interference through enshrinement in the Bill of Rights are not thereby banished from the political process. Just as a society that believes in the negative protection accorded to the press by the First Amendment is likely to enact laws that affirmatively foster the dissemination of the printed word, so also a society that believes in the negative protec-

response, Congress passed the Religious Freedom Restoration Act of 1993 (RFRA),[263] which restored the strict scrutiny standard abandoned by the Court in *Smith*, stating that "[g]overnment may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest."[264]

In 1997, the Supreme Court overturned RFRA as it applied to the states because Congress had purported to act according to its Fourteenth Amendment authority to require that states abide by constitutional principles, but the Court had already explicitly stated that strict scrutiny was not constitutionally required for government infringement of religious practice.[265] In response, Congress passed the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), which invokes Congress's spending powers to impose strict scrutiny for infringement on religion in the context of any jail or prison receiving federal funds.[266] Notably, every state feeds federal funding into its prison system.[267] Additionally, Title VII of the Civil Rights Act of 1964 applies a version of strict scrutiny to any employer infringing on an employee's free exercise right; specifically, an employer must accommodate religious exercise "unless [the] employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business."[268] Congress defines religion under the Act to "include[ ] all aspects of religious observance and practice, as well as belief"[269] and the Equal Opportunity Employment

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tion accorded to religious belief can be expected to be solicitous of that value in its legislation as well.").

263 *See* Religious Freedom Restoration Act (RFRA) of 1993, Pub. L. No. 103-141, 1993 U.S.C.C.A.N. (107 Stat.) 1488, *invalidated by* City of Boerne v. Flores, 521 U.S. 507 (1997) (noting that in *Smith* "the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion" and specifying that one of the purposes of the act is to "restore the compelling interest test").

264 42 U.S.C. § 2000bb-1(b).

265 *City of Boerne*, 521 U.S. at 508 ("Legislation which alters the Free Exercise Clause's meaning cannot be said to be enforcing the Clause. Congress does not enforce a constitutional right by changing what the right is.").

266 42 U.S.C. § 2000cc-1(a)(1) ("No government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution . . . even if the burden results from a rule of general applicability, unless the government demonstrates that imposition of the burden on that person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.").

267 *See* Cutter v. Wilkinson, 544 U.S. 709, 716 n.4 (2005) ("Every State, including Ohio, accepts federal funding for its prisons.").

268 42 U.S.C. §2000e(j) (2012). *See also* Cloutier v. Costco Wholesale Corp., 390 F.3d 126, 138 (1st Cir. 2004) (finding that a member of the Church of Body Modification was adequately accommodated by her employer such that her religious exercise was not violated).

269 42 U.S.C. § 2000e(j).

Commission (EEOC) explicitly invokes *Seeger* and *Welsh* as justification for its definition.[270] At least fifteen states have passed state laws similar to RFRA,[271] and at least ten have interpreted their state constitutions to require strict scrutiny in order to burden religion.[272]

Thus, even though animal liberationists will not generally have constitutional protection from government denial of their desire to practice their animal rights principles, there are many scenarios in which a heightened scrutiny should be applied, which would probably lead to protection: Prisoners can invoke RLUIPA to obtain a vegetarian diet, children forced to drink milk based on federal law can invoke RFRA to refuse it—and perhaps to get the law overturned,[273]—and teachers could invoke Title VII in order to refuse participation in a circus promotion. Of course, the rights invoked are not absolute, though it is hard to fathom a compelling purpose that the state might proffer for requiring someone to violate their religious principles in these scenarios.[274] The only animal liberationist from our scenarios who is probably not covered is the student who wishes to refuse to dissect; unless she lives in one of the twenty-five states that applies strict scrutiny by state statute or under its state constitution, she may be bereft of legal recourse.[275]

### *C. Constitutional Strict Scrutiny for Differential Treatment*

In addition to various forms of statutory or state-level constitutional strict scrutiny protection for religious exercise, there is one federal constitutional protection for animal liberationists that is critically

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[270] *See* 29 C.F.R. § 1605.1 (2013) ("[T]he Commission will define religious practices to include moral or ethical beliefs as to what is right and wrong which are sincerely held with the strength of traditional religious views. This standard was developed in [*Seeger*] and *Welsh* . . . .").

[271] W. COLE DURHAM & ROBERT SMITH, 1 RELIGIOUS ORGANIZATIONS AND THE LAW § 2:63 (2013) (*available at* Westlaw, database RELORGS).

[272] *Id.*

[273] In *Smith,* the Court notes that where fundamental rights beyond free exercise are at issue, the Court may apply strict scrutiny. *Smith*, 494 U.S. at 881. That was the actual issue in *Yoder*, where the Court allowed Amish families to remove their children from public education after grade eight, in violation of state law. Wisconsin v. Yoder, 406 U.S. 205, 207 (1972). The key fact was the families' belief being religious and dovetailing with parents' fundamental rights to raise their children. *Id.* at 214. A challenge to federal milk law could invoke both the constitutional value of free exercise and the fundamental right of parents to raise their children according to their values discussed in *Yoder*.

[274] A doctor or member of the military who objected to a vaccine that had been tested on animals would be an obvious example where the state would be able to prove a compelling purpose that was narrowly tailored to the scenario. Similarly, the employer in *Friedman* might have made a compelling case for Friedman's inoculation, based on working in the medical field, however unlikely his contact with patients. *Friedman*, 102 Cal. App. 4th at 44. Certainly, there are other examples. But in our scenarios and many other such cases, strict scrutiny will tilt in favor of religious accommodation.

[275] Although she would probably still be wise to attempt recourse through the state courts—if her state's highest court has not ruled on the issue, her case could be precedent-setting.

important—the fact that governments must satisfy strict scrutiny in order to deny religious license to some groups where it grants similar license to others. The *Smith* Court explained that "where the State has in place a system of individual exemptions, it may not refuse to extend that system . . . without compelling reason."[276]

This constitutional protection may be even more useful to animal liberationists than state-level and statutory protections, since in most scenarios where they would be seeking accommodation, states will already have in place—or will be willing to make—accommodations for more mainstream faiths. The federal prison system has accommodated kosher and Islamic dietary requests for many years,[277] and so it would have to satisfy strict scrutiny in order to deny a vegetarian or vegan prisoner a right to her faith-based meal. While it would be impossible for schools to meet an affirmative obligation to provide the broad range of religious diets that exist,[278] something as simple as allowing a student to refuse milk is already accommodated where the student proves a health need,[279] and so it would be difficult to imagine a compelling reason from a school for denying a religious request to refuse the milk. Most employers make religious accommodations for employees in a broad range of scenarios, from religious holidays to religious attire; if an employer were to refuse to allow employees an exemption from a circus promotion or something similarly easy to accommodate, they would certainly be opening themselves up to a complaint of religious discrimination. Once again, our student who wishes not to dissect might find herself with the weakest argument for accommodation, but if the school agreed that it would allow a Hindu or Jain adherent to complete an alternative assignment, then the school would not have grounds to deny such an accommodation to an animal liberationist.

### *D. Courts Are Not Religious Arbiters*

Another key consideration for animal liberationists attempting to vindicate their free exercise rights is that courts have emphasized that

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[276] *Smith*, 494 U.S. at 884 (internal citation omitted). *See also Vinning-El*, 657 F.3d at 593 ("*Smith* . . . did not change the norm forbidding materially different treatment of different religious faiths.").

[277] *See* 28 C.F.R. § 548.20(a) (1997) ("The Bureau provides inmates requesting a religious diet reasonable and equitable opportunity to observe their religious dietary practice within the constraints of budget limitations . . . ."); U.S. DEP'T OF JUSTICE, FED. BUREAU OF PRISONS, FOOD SERVICE MANUAL (Sept. 13, 2011) (available at http://www.acfsa.org/documents/stateRegulations/Fed_Food_Manual_PS_4700-006.pdf (accessed Nov. 30, 2014)) (detailing procedures for religious meal accommodations) [http://perma.cc/STS6-24VJ].

[278] *See generally* Jesse Ryan Loffler, *God Is Not the Lunch-Lady: Accommodation of Religious Dietary Practices in Public Schools*, 2010 CARDOZO L. REV. DE NOVO 430, 431–32, (available at http://www.cardozolawreview.com/Joomla1.5/content/denovo/LOFFLER_2010_430.pdf (accessed Dec. 28, 2014)) ("taking mandatory accommodation . . . to its logical extreme would make designing cafeteria rules and lunch menus impossible") [http://perma.cc/VQ7L-PNZA].

[279] 42 U.S.C § 1758(a)(2)(B).

it is not the courts' place to play the role of religious arbiter. One aspect of *Thomas* that was not shaken by the *Smith* decision was the proposition that courts are not allowed to judge the centrality of a plaintiff's religious practice to her faith. Recall that in *Thomas*, the plaintiff was a Jehovah's Witness who said that his religion dictated that he could not work in an arms factory.[280] The Indiana Supreme Court held against him, because other members of the plaintiff's faith were willing to work in armament factories, and because there was no dogmatic stance against working on behalf of war in the mainstream of his faith.[281] The Supreme Court reversed, holding that

> [i]ntrafaith differences of that kind are not uncommon among followers of a particular creed, and the judicial process is singularly ill equipped to resolve such differences in relation to the Religion Clauses. . . . [T]he guarantee of free exercise is not limited to beliefs which are shared by all of the members of a religious sect. . . . Courts are not arbiters of scriptural interpretation.[282]

The Court in *Smith* explicitly agreed. Although it held that a religious practice, without more, was not protected from a neutral law, the Court was unwilling to judge the centrality of peyote use to the plaintiff's religious beliefs, stating that

> [i]t is no more appropriate for judges to determine the "centrality" of religious beliefs before applying a "compelling interest" test in the free exercise field, than it would be for them to determine the "importance" of ideas before applying the "compelling interest" test in the free speech field. . . . Repeatedly and in many different contexts, we have warned that courts must not presume to determine the place of a particular belief in a religion or the plausibility of a religious claim.[283]

An intriguing application of this requirement—that courts avoid looking at the centrality of religious belief—appeared in *Meyers I*. Although the district court found that the Church of Marijuana was not religious, it also noted that "[h]ad Meyers asserted that the Church of

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[280] *Thomas*, 450 U.S. at 709.

[281] *Id.* at 714–15.

[282] *Id.* at 715–16.

[283] *Smith*, 494 U.S. at 886–87. *See also Thomas*, 450 U.S. at 715 ("The Indiana court also appears to have given significant weight to the fact that another Jehovah's Witness had no scruples about working on tank turrets; for that other Witness, at least, such work was 'scripturally' acceptable."); *Ballard*, 322 U.S. at 86–87 ("The First Amendment has a dual aspect. It not only forestalls compulsion by law of the acceptance of any creed or the practice of any form of worship but also safeguards the free exercise of the chosen form of religion." (internal quotation marks and citation omitted)); *Frazee*, 489 U.S. at 834 ("[W]e reject the notion that to claim the protection of the Free Exercise Clause, one must be responding to the commands of a particular religious organization."); *Vinning-El*, 657 F.3d at 593 ("A personal religious faith is entitled to as much protection as one espoused by an organized group."). In Spies v. Voinovich, 173 F.3d 398, 406–07 (6th Cir. 1999), the court engaged in a reasonableness test under *Turner* to find that vegetarian meals were sufficient to satisfy inmates desire for vegan meals. This is similar to the centrality analysis under RLUIPA, discussed below in Part V.E, and would almost certainly not survive review by the Supreme Court.

Marijuana was a Christian sect, and that his beliefs were related to Christianity, this Court probably would have been compelled to conclude that his beliefs were religious."[284] The court further explained that

> [i]f Meyers had linked his beliefs to Christianity, the Court could not have inquired into the orthodoxy or propriety of his beliefs, no matter how foreign they might be to the Christian tradition. Had Meyers sincerely made such a connection, he would have been able to purchase "religious" status for his beliefs by coattailing on Christianity. Unfortunately for Meyers, he made no such connection.[285]

Thus, in a Church of Animal Liberation, there would be room for the variety of beliefs among animal rights practitioners, including those who are vegetarian as opposed to vegan, and those who refuse to wear leather or use vaccines that were tested on animals or that include animal ingredients. Any decision not to cause animals harm, if it stems from a belief in animal liberation as discussed above, would qualify as religious.

That said, it is worth noting that there is more agreement about what faith requires among animal liberationists than exists among the largest religion in America. A February 2014 survey of more than 12,000 self-identified Catholics in twelve countries found substantial disagreement with at least four fundamental precepts of church teaching, including the prohibitions on divorce, contraception, abortion in all circumstances, and a married priesthood.[286] By comparison, one would be hard-pressed to find an animal rightist who did not agree with our vegetarian prisoner, dissection-refusing student, or circus-objecting teacher.[287]

### *E. A Statutory and Free Exercise Case-Study: RLUIPA*

To date, there has not been much litigation on the issue of faith-based denial of accommodations to animal rights believers. In our representative scenarios: parents get around the required milk by receiving notes from doctors or the students take the milk and give it away; students' desires to skip dissection are accommodated, the students give in, or they fail that assignment; teachers either participate in the circus promotion in violation of their principles or they call in sick that day. The lone animal rights accommodation dispute that has frequently reached the courts is the issue of vegan or vegetarian diets in prison. These cases have not involved inmates claiming animal rights

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284 *Meyers I*, 906 F. Supp. at 1508.

285 *Id.* (internal citations omitted).

286 *Voice of the People*, UNIVISION, http://univision.data4.mx/resultados_catolicos/eng/ENG_catholic-survey.pdf (Feb. 6, 2014) (accessed Nov. 30, 2014) [http://perma.cc/6TWB-FM34].

287 As noted, the bumper-sticker battle cry of animal rights is, "Animals are not ours to eat, wear, experiment on, use for human amusement, or abuse in any way." *See supra* note 183 and accompanying text.

or veganism as religion; rather, inmates have argued that veganism or vegetarianism is an essential part of their more conventional religion.

Since the passage of RLUIPA in 2000, these cases have proceeded under both RLUIPA and the Free Exercise Clause, because the latter allows for Section 1983 relief while RLUIPA allows only injunctive relief.[288] RLUIPA does not define religion, although it does make explicit that "[t]he term 'religious exercise' includes any exercise of religion, whether or not compelled by, or central to, a system of religious belief."[289] Nevertheless, the application of strict scrutiny has involved some courts in evaluation of religious dogma that would not be allowed with regard to free exercise analysis.[290] Courts justify delving into the nature of a plaintiff's religious practice by claiming that they are required to decide: (1) if the government's action substantially burden's the inmate's religion; and (2) if the government's interest is the least restrictive manner of accomplishing its goals.[291]

Some circuits recognize the constitutional issues that should prevent judges from determining what is and is not required in the practice of an individual's religion,[292] even when judges are doing so in

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[288] *See* Sossamon v. Texas, 131 S. Ct. 1651, 1660 (2011) ("These plausible arguments demonstrate that the phrase 'appropriate relief' in RLUIPA is not so free from ambiguity that we may conclude that the States, by receiving federal funds, have unequivocally expressed intent to waive their sovereign immunity to suits for damages. Strictly construing that phrase in favor of the sovereign . . . we conclude that it does not include suits for damages against a State.").

[289] 42 U.S.C. § 2000cc-5(7).

[290] *See supra* Part V.D (discussing the principle that courts do not act as religious arbiters). While free exercise analysis should not extend to investigating the plaintiff's religious practice, in the RLUIPA context the analysis often does reach that extent, as discussed below.

[291] *See generally* Ira C. Lupu & Robert W. Tuttle, *The Forms and Limits of Religious Accommodation: The Case of RLUIPA*, 32 CARDOZO L. REV. 1907, 1931–32 (2011) ("In *Luke v. Williams*, a court determined that a Wiccan prisoner's religious exercise was not substantially burdened by the State's restriction on his practice of faith outdoors . . . . The court reached its decision, in part, because prison officials had consulted with an expert on Wiccan practice, who opined that practice of the faith did not require what the prisoner sought. In *Sayed v. Profitt*, a court ruled that a Muslim prisoner's religious exercise was not substantially burdened by the State's refusal to allow him to perform 'full ablution' (a shower) before weekly prayer service. The court agreed with prison officials, who in turn relied on an authority on Islam, in concluding that partial ablution is an adequate substitute. In *Vigil v. Jones*, a prisoner claimed to believe in 'Judeo-Christianity' and said that his religious exercise was substantially burdened by the prison's designation of him as a Protestant, which prohibited him from taking part in Jewish worship services. The court rejected his claim and held that Protestant worship gave the claimant 'a reasonable opportunity to participate in prison sponsored ceremonies that observe Judeo-Christian values.' In each of these disputes, a government official concluded that the claimant's religious exercise was not substantially burdened because the claimant had adequate alternative means of exercise."); Ethridge B. Ricks, *The Gospel According to the Warden: RLUIPA, the First Amendment, and Prisoners' Religious Liberty Requests*, 11 FIRST AMEND. L. REV. 542 (2013) (discussing how prisons have attempted to overcome RLUIPA's strict scrutiny standard).

[292] *See supra* Part V.D (discussing the principle that courts do not act as religious arbiters).

order to adhere to a statutory requirement; thus, these courts will look at a plaintiff's sincerity, but will avoid becoming arbiters of religious centrality. For example, in the Seventh Circuit, Judge Posner conflated a plaintiff's free exercise and RLUIPA claims[293] and then held that "[s]ince heresy is not excluded from the protection of the free exercise clause, optional as distinct from mandatory religious observances aren't excluded either."[294] Similarly, in 2005, Mondrea Vinning-El requested a vegan diet at Pinckneyville Correctional Center, where he was incarcerated.[295] According to Vinning-El, his request was denied because the prison chaplain determined that his professed religion, Moorish Science Temple, did not *require* a vegan diet for practitioners.[296] Vinning-El sued the jail, arguing that he sincerely believed that his religion required a vegan diet.[297] Judge Easterbrook agreed with Vinning-El that the question the chaplain should have asked is whether Vinning-El's belief was sincere, regardless of its alignment with Moorish Science.[298] He explained that "[i]f [the jail] turned Vinning-El down for the sole reason that Moorish Science does not make a vegan diet a tenet of religious faith, then he violated Vinning-El's clearly established rights . . . ."[299]

Although the vegan prisoner cases have focused on dietary accommodations within the context of another religion, they are important for two reasons. First, many prisoners seeking vegan diets have

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293 Grayson v. Schuler, 666 F.3d 450, 451 (7th Cir. 2012). The prisoner had sued only under the Free Exercise Clause, but because he was pro se, the Court also applied RLUIPA's strict scrutiny analysis. *Id.*

294 *Id.* at 454. *See also* Daley v. Lappin, 555 F. App'x 161, 164–65 (3d Cir. 2014) (holding that the district court erred in upholding a prison's refusal to provide a vegan diet because Rastafarianism does not mandate veganism; the court noted that the only relevant factors were "whether the beliefs avowed are (1) sincerely held, and (2) religious in nature, in the claimant's scheme of things" (internal quotation marks and citation omitted)); Nelson v. Miller, 570 F.3d 868, 879 (7th Cir. 2010) ("Miller required Nelson to show that his religion compelled the practice in question and to verify that compelled practice with documentation. As with *Koger*, the first of these requirements was unlawful under RLUIPA and the second imposed a substantial burden on Nelson's desired religious practice because it was impossible for him to show that his religion, Catholicism, required him to abstain from meat on all Fridays or avoid the meat of four-legged animals."); Koger v. Bryan, 523 F.3d 789, 794, 804 (7th Cir. 2008) (upholding a RLUIPA-based request for a vegan diet from a member of "Ordo Templi Orientis ("OTO"), a group associated with the religion of Thelema," which does not require veganism); LaFevers v. Saffle, 936 F.2d 1117, 1119 (10th Cir. 1991) (concluding plaintiff's beliefs are "sincerely held" and thus, "regardless of whether the Seventh Day Adventist Church . . . requires . . . a vegetarian diet," plaintiff "is entitled to First Amendment protection."); Dawson v. Burnett, 631 F. Supp. 2d 878, 894–95 (W.D. Mich. 2009) (finding that inmate's Buddhism could require veganism, despite the general acceptance of dairy consumption among Buddhists).

295 *Vinning-El*, 657 F.3d at 592.

296 *Id.* at 593.

297 *Id.* at 592.

298 *Id.* at 595 (vacating the decision and remanding for a determination of whether the chaplain "reasonably attempted to determine whether Vinning–El has a sincere belief that his religion requires a vegan diet").

299 *Id.* at 594.

claimed religious practice solely to obtain a vegan or vegetarian diet; these prisoners are not so much Rastas, Buddhists, or Wiccans first as they are animal liberationists first, seeking a religion that will justify their diets.[300] Thus, establishment of animal rights as a religion for free exercise purposes will reverse this perverse incentive, which finds prisoners forced to claim religions with which they do not actually identify. Second, the RLUIPA vegan cases illustrate the frequency with which district and even some circuit courts will deny a plaintiff relief based on an analysis of religious centrality. Unfortunately, vegan diets are not an essential or even common aspect of any traditional religion, and so these courts may find against a plaintiff proceeding under one of these faiths. But, where a prisoner chooses to invoke animal liberation as the justification for his or her veganism, courts will be forced to find in the prisoner's favor even where they resort to this balancing test, since a vegan diet is even more central to animal liberation than keeping kosher is to Judaism.[301]

## VI. FORMING A 'CHURCH OF ANIMAL LIBERATION' UNDER THE INTERNAL REVENUE CODE

Clearly, it is not just at the pre-litigation stage that free exercise rights are denied to animal liberationists; many district and even circuit courts looking at Religious Land Use and Institutionalized Persons Act (RLUIPA) questions, as well as the California Court of Appeals for the Second District in *Friedman*, have erred in their analyses of what qualifies as religious practice. In this Part, I will discuss how a 'Church of Animal Liberation' might prove useful to animal liberationists in securing their free exercise rights, how such a church could be formed as either a "church" or "religious organization" under the Internal Revenue Code (IRC), and why a religious organization, as opposed to a proper church, would be the best choice for animal liberationists seeking to vindicate their rights.

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[300] The author has personally assisted such prisoners. Kathy Hessler, Director of the Lewis & Clark Animal Legal Clinic, notes that of the prisoners Lewis & Clark has worked with, half request a vegan diet without citing a religion, and one-quarter cite a made-up religion that has veganism as a key tenet. The remaining prisoners tend to pick religions for which veganism seems tenable, such as Wiccan, Buddhist, or Native American. E-mail from Kathy Hessler to author, *supra* note 3.

[301] *Compare* Gary L. Francione, *About*, ANIMAL RIGHTS: THE ABOLITIONIST APPROACH, http://www.abolitionistapproach.com/about (accessed Dec. 22, 2014) (arguing under the heading "and Abolition Means Veganism!" that "veganism is the moral baseline of the animal rights position") [http://perma.cc/JE7G-VWM6], *with The Tenets of Reform Judaism*, JEWISH VIRTUAL LIBRARY, http://www.jewishvirtuallibrary.org/jsource/Judaism/reform_practices.html (accessed Dec. 22, 2014) (explaining that while Reform Jews are encouraged to study *kashrut* dietary laws as a historical and cultural artifact, acceptable options for following those dietary restrictions range from "full observance to total nonobservance") [http://perma.cc/8AXV-53CG].

### *A. The Value of a 'Church of Animal Liberation'*

Belief in animal rights should be protected by the Free Exercise Clause of the Constitution and applicable statutes, as well as by state constitutional jurisprudence that requires heightened scrutiny before religious practice can be infringed upon. However, there are two problems: First, the argument has not made its way to the federal court system, and even if it had, it would likely not be followed by school principals, prison wardens, or most employers—who are not generally making their decisions with such issues in mind. Second, district and even some circuit courts continue to violate the constitutional rights of animal liberationists by playing religious arbiter where a faith practice falls outside orthodoxy.

Of course, no one would question the religious motivation of a Jewish or Muslim prisoner who refused to eat pork or a Hindu student who refused to eat a beef burger or to dissect a cow eyeball; it is understood that these are legitimately held religious beliefs, even if they are not obligatory for all members of the asserted faiths. A 'Church of Animal Liberation' would attempt to replicate this sort of understanding among institutions that are the first line of decision-making on requests for religious accommodation (e.g., prisons, schools, and workplaces), as well as courts (e.g., *Friedman* and the RLUIPA vegan cases). Focusing on the ethical arguments for animal liberationists and setting up articles of incorporation to align with constitutional precedent, the Church would serve to create a structure in which future rights assertions could be based. For example, prisoners, workers, and students could point to the articles of incorporation of the Church of Animal Liberation as justification for their sincerely held ethical obligation to avoid eating meat or dairy, dissecting animals, or participating in a circus promotion.

Additionally, the simple fact of incorporation would prove helpful. In a bit of somewhat circular reasoning, the District of Columbia Circuit used the fact that the Church of Scientology had incorporated as a religion as evidence that it was, in fact, a religion.[302] Thus, it seems likely that the creation of a Church of Animal Liberation as either a church or religious organization under the IRC might prove helpful, both for pre-court challenges where animal rights practitioners are looking for support during the administrative process, as well as for court challenges of administrative decisions where support for the religious nature of the practices is useful. In order to determine whether such a group should be set up as a proper church for tax purposes or as a religious organization, this Article briefly reviews the requirements for both.

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[302] *Founding Church of Scientology*, 409 F.2d at 1154.

### *B. Standards for a Church*

Although there is no statutory definition of 'church' in the IRC,[303] there is some Internal Revenue Service (IRS) guidance and useful case law on the topic. Basically, "[t]he means by which an avowedly religious purpose is accomplished [is what] separates a 'church' from other forms of religious enterprise."[304] The IRS explains that "[b]ecause beliefs and practices vary so widely, there is no single definition of the word church for tax purposes. The IRS considers the facts and circumstances of each organization applying for church status,"[305] applying an ad hoc fourteen-factor test.[306]

In *Foundations of Human Understanding v. U.S.*, the Federal Circuit examined the IRS's fourteen-factor test and shared the concerns that were expressed by the trial court.[307] In dicta, the court questioned the constitutionality of the test since it "appears to favor some forms of religious expression over others in a manner in which, if not inconsistent with the letter of the Constitution, the court finds troubling when considered in light of the constitutional protections of the Establishment and Free Exercise Clauses."[308] The court noted that "courts have generally declined to accept the [fourteen] criteria as a definitive test for whether an institution qualifies as a church."[309] The court then went on to suggest that although the IRS uses the fourteen-factor test administratively, courts that purport to follow it generally focus on fac-

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303 Found. of Human Understanding v. U. S., 614 F.3d 1383, 1388 (Fed. Cir. 2010) ("Neither Congress nor the IRS has provided much guidance as to the meaning of the term 'church' in I.R.C. § 170 or what is required for an institution to qualify for that designation. As the trial court observed, neither the statute nor any IRS regulation defines that statutory term."). *See "Churches" Defined*, IRS, http://www.irs.gov/Charities-&-Non-Profits/Churches-&-Religious-Organizations/Churches—Defined (Mar. 4, 2014) (accessed Dec. 23, 2014) (noting that [t]he term *church* is found, but not specifically defined, in the Internal Revenue Code") [http://perma.cc/DDU7-XEES].

304 Spiritual Outreach Soc'y v. Comm'r, 927 F.2d 335, 339 (8th Cir. 1991).

305 IRS, PUB. NO. 557, TAX EXEMPT STATUS FOR YOUR ORGANIZATION 29 (2013) (available at http://www.irs.gov/file_source/pub/irs-pdf/p557.pdf (accessed Nov. 30, 2014)) [hereinafter TAX EXEMPT STATUS FOR YOUR ORGANIZATION] [http://perma.cc/SC66-JD5F].

306 *Spiritual Outreach Soc'y*, 927 F.2d at 338 ("The criteria are as follows: (1) a distinct legal existence; (2) a recognized creed and form of worship; (3) a definite and distinct ecclesiastical government; (4) a formal code of doctrine and discipline; (5) a distinct religious history; (6) a membership not associated with any other church or denomination; (7) an organization of ordained ministers; (8) ordained ministers selected after completing prescribed studies; (9) a literature of its own; (10) established places of worship; (11) regular congregations; (12) regular religious services; (13) Sunday schools for religious instruction of the young; and (14) schools for the preparation of its ministers.").

307 *Found. of Human Understanding*, 614 F.3d at 1388.

308 *Id.* at 1387. Oddly, the court further notes that, "Nonetheless, the court looked to the 14 criteria for guidance and found that the Foundation satisfied some, but not all, of those criteria. For example, the court found that the Foundation had not established that it had a regular congregation or that it held regular services during the years at issue." *Id.* If there is a Free Exercise Clause issue with the fourteen-factor test, it will have to wait for a future challenge.

309 *Id.* at 1388.

tors that effectively apply "the associational test, which defines a church as an organization that includes a body of believers who assemble regularly for communal worship."[310]

Specifically, in *Foundation of Human Understanding*, the Federal Circuit considered an appeal from an organization that primarily operated over the radio airwaves.[311] In finding that the Foundation was not a church despite being a religious organization under Section 501(c)(3), the Federal Circuit stated that under the associational test, "[a]t a minimum, a church includes a body of believers or communicants that assembles regularly in order to worship."[312] Because the Foundation rarely gathered in person, it was not a church under the IRC.[313]

Similarly, in *Spiritual Outreach Society v. Commissioner*, the Eighth Circuit found that the Spiritual Outreach Society (SOS) was not a church, despite the fact that there was "no doubt that SOS is engaged in sincere religious activity."[314] Although the court ostensibly applied the fourteen-factor test, it focused—as predicted by the Federal Circuit—on "the [factors] we have deemed to be of central importance," finding against SOS because it lacked "the existence of an established congregation served by an organized ministry, the provision of regular religious services and religious education for the young . . . ."[315]

Although beyond the scope of this Article, considering the lack of statutory clarity regarding how a church should be differentiated from a religious organization, the Federal Circuit is right to find constitutional infirmities with the fourteen-factor test. However, the associational test is arguably even less constitutionally tenable. By narrowing the focus, courts that apply the latter test are much more guilty of showing religious favoritism than those using the fourteen-factor test. Thus, it would appear that the associational test is even more constitutionally questionable. The Federal Circuit did not attempt to explain how a narrower test is less constitutionally fraught than a broader one, and this might make an excellent topic for future analysis.

### *C. Standard for a Religious Organization*

There is no definition of a 'religious organization' under the IRC, and while the Code does discuss 'religious purposes' to some degree, it does not elaborate on what constitutes 'religious purposes,' beyond

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310 *Id.* at 1387–88.

311 *Found. of Human Understanding*, 614 F.3d at 1391.

312 *Id.* at 1389 (internal quotation marks and citation omitted).

313 *Id.* at 1390 ("While the associational test does not demand that religious gatherings be held with a particular frequency or on a particular schedule, it does require gatherings that, by virtue of their nature and frequency, provide the opportunity for members to form a religious fellowship through communal worship.").

314 *Spiritual Outreach Soc'y*, 927 F.3d at 339.

315 *Id.*

generalities.[316] Regardless, it is clear that the bar for what constitutes 'religious purposes' under the IRC is, by contrast to the requirements for a church, extremely low.[317] The IRS has published an *Exempt Organizations Determinations Manual* which provides some guidance on what religious purposes means under the IRC. Section 3 of the *Manual* covers "religious, charitable, educational and other organizations . . . ."[318] Because religious organizations are grouped with organizations that attempt to promote public safety and international amateur sports, among other things, the focus of both the IRS Manual and case law is on questions of charitable purpose, rather than on whether that purpose is religious; just like the IRS does not spend much time attempting to determine whether a group is actually promoting amateur sports, it does not spend much time on whether a group's purpose is religious, as long as it satisfies the rest of the charitable requirements. For example, religious organizations, like educational and other organizations incorporated under the Code, cannot allow income to benefit private individuals,[319] cannot substantially work to influence legislation,[320] cannot work for specific candidates in political elections,[321] and must operate in accordance with all laws of general applicability and public policy.[322] Additionally, religious organizations are subject to the same burden of proving their right to ex-

316 There is no definition for 'religious organization' under the IRC; however, the Code does discuss "religious purposes" in the context of defining charitable contributions, though it does not elaborate on what constitutes "religious purposes." Internal Revenue Code, 26 U.S.C. § 170(c)(2)(B) (2012).

317 *Id.*

318 IRS, INTERNAL REVENUE MANUAL 7.25.3.1.1 (Feb. 23, 1999) (available at http://www.irs.gov/irm/part7/irm_07-025-003.html (accessed Nov. 30, 2014)) ("IRC 501(c)(3) exempts from Federal income tax: corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting to influence legislation (except as otherwise provided in subsection (i)), and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office.") [http://perma.cc/VZ7D-BRJN].

319 *See e.g.*, Carrie A. Maxwell Trust, Pasadena Methodist Found. v. Comm'r, 2 TCM (CCH) 905, 909 (1943) (finding that a trust set up for elderly clergyman and his wife was not exempt under 501(c)(3)).

320 *See e.g.*, Christian Echoes Nat'l Ministry, Inc. v. U.S., 470 F.2d 849, 855 (10th Cir. 1972) (holding that a religious organization could be denied tax exemption where it engaged in substantial lobbying).

321 *Id.* at 856.

322 *See e.g.*, Bob Jones Univ. v. U.S., 461 U.S. 574, 604 (1983) ("[G]overnmental interest [in opposing racist policies in education] substantially outweighs whatever burden denial of tax benefits places on petitioners' exercise of their religious beliefs. The interests asserted by petitioners cannot be accommodated with that compelling governmental interest and no 'less restrictive means' are available to achieve the governmental interest." (internal citations omitted)).

emption as other charitable organizations incorporated under Section 501(c)(3)—exemption is a privilege, not a legal right.[323] None of the discussion focuses to any meaningful degree on whether an organization is or is not 'religious.'

Thus, in the *Exempt Organizations Examination Guidelines*, the IRS notes that "[u]nder the First Amendment, the Service cannot consider the content or sources of a doctrine alleged to constitute a particular religion, and cannot evaluate the content of a doctrine an organization claims is religious."[324] In IRS *Publication 557, Tax-Exempt Status for Your Organization*, the agency states that, "If there is a clear showing that the beliefs (or doctrines) are sincerely held by those professing them, the IRS will not question the religious nature of those beliefs."[325] Thus, for the same basic reasons animal liberation is a religion under *Seeger* and *Welsh*, it would even more easily pass muster as a 'religious organization' under the IRC.

### *D. Church v. Religious Organization*

The principal benefits to the formation of a church over a standard religious organization are based in paperwork and oversight. For example, unlike religious organizations, churches do not have to apply for exemption, and donations are tax deductible regardless of IRS recognition.[326] Additionally, religious organizations are required to file annual returns and keep detailed records,[327] but churches are explicitly exempted from this requirement.[328] While there are extensive rules and regulations that dictate how churches must be examined by the IRS, these requirements are far less onerous than for other charitable organizations, including religious organizations.[329]

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323 IRS, INTERNAL REVENUE MANUAL 7.25.3.6.3 (Feb. 23, 1999) (available at http://www.irs.gov/irm/part7/irm_07-025-003.html (accessed Nov. 30, 2014)) [http://perma.cc/V6BE-SMGA]; *Christian Echoes Nat'l Ministry*, 470 F.2d at 857. Other cases deal with issues that arise once a religious organization exists. For example, in Hernandez v. Comm'r, 490 U.S. 680 (1989), the Supreme Court held that one key element of the Church of Scientology—sessions called "auditing" and "training"—were not deductible because the money was exchanged for services.

324 IRS, INTERNAL REVENUE MANUAL 4.76.6.1 (Apr. 1, 2003) (available at http://www.irs.gov/irm/part4/irm_04-076-006.html (accessed Nov. 30, 2014)) [http://perma.cc/B4MM-EGSD].

325 TAX EXEMPT STATUS FOR YOUR ORGANIZATION, *supra* note 305, at 29.

326 IRS, INTERNAL REVENUE MANUAL 4.76.7.11 (June 1, 2004) (available at http://www.irs.gov/irm/part4/irm_04-076-007.html (accessed Nov. 30, 2014)) [http://perma.cc/3VY6-N3TS].

327 26 U.S.C. § 6033(a)(1).

328 *Id.* § 6033(a)(3)(A)(i).

329 *See* The Church Audit Procedures Act, 26 U.S.C. § 7611 (2012) (detailing IRS restrictions and requirements on church tax inquiries and examinations); *see also* IRS, INTERNAL REVENUE MANUAL 4.76.7 (Aug. 20, 2010) (available at http://www.irs.gov/irm/part4/irm_04-076-007.html#d0e94 (accessed Nov. 30, 2014)) (providing further guidance regarding IRS restrictions on church tax inquiries and examinations) [http://perma.cc/2KSG-UTGS]; *Special Rules Limiting IRS Authority to Audit a Church*, IRS, http://www.irs.gov/Charities-&-Non-Profits/Churches-&-Religious-Organizations/Spe-

Although these benefits of forming as a church are attractive, there is nothing in the constitutional analysis of what constitutes religion that would indicate any benefit with regard to free exercise protection in forming a church as opposed to a religious organization. The First Amendment protects the free exercise of religion, not the free exercise of churches, and for our purposes, the incorporation and paperwork benefits of a church over a religious organization are not worth the stricter standards and requirements of in-person religious services that would be required to form a church.[330]

## VII. CONCLUSION

Every time a prisoner is refused a vegan meal despite a belief in animal liberation, his constitutional right to free exercise of his religion is infringed. The same is true for the child who is forced to accept milk on her breakfast or lunch tray, the student who is forced to dissect against his will, and the teacher who is forced to participate in a school promotion of the circus. Thus, where a statute or a state constitution calls for strict scrutiny before a religious practice can be burdened, these animal rights practices should be protected, in the same manner as traditional practices. And where a prison, school, or employer does or would accommodate a traditional religious practice, it should accommodate a practice that is based in animal liberation.

However, these decisions are most often made by prison wardens, school administrators, and employers, with no thought of courts or the Constitution. Because prison wardens, school administrators, and employers cannot be expected to understand the nuanced jurisprudential balance that has arisen with regard to a constitutional definition of religion, the formation of a Church of Animal Liberation as a religious organization under the Internal Revenue Code would be helpful in securing constitutional and statutory religious rights for animal liberationists.

Thomas Jefferson believed that "[t]he constitutional freedom of religion [is] the most inalienable and sacred of all human rights."[331] He was not alone; religious freedom was critical enough to the founders of our country that it was given the first clause of the First Amendment in the Bill of Rights. And yet the free exercise rights of animal liberationists are routinely violated, in part because they have not yet made

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cial-Rules-Limiting-IRS-Authority-to-Audit-a-Church (updated Aug. 21, 2014) (accessed Dec. 28, 2014) ("Congress has imposed special limitations, found in Section 7611 of the Internal Revenue Code, on how and when the IRS may conduct civil tax inquiries and examinations of churches. The IRS may begin a *church tax inquiry* only if an appropriate high-level Treasury official reasonably believes, on the basis of facts and circumstances recorded in writing, that an organization claiming to be a church or convention or association of churches may not qualify for exemption . . . ." (emphasis in original)) [http://perma.cc/4MC6-SY69].

330 *E.g.*, *supra* note 305–06 and accompanying text (outlining some of the requirements involved in achieving church status).

331 JEFFERSON, *supra* note 2, at 958.

the case that animal liberation constitutes religion under constitutional jurisprudence, and have not done all they can to ensure that their First Amendment rights are protected. My goal with this Article is to change that.