NAMING RELIGION (AND ELIGIBLE COGNATES) IN TAX EXEMPTION CASES

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I. INTRODUCTION

Delineating acceptable boundaries between church and state presents the judiciary with a seemingly unanswerable conundrum. Justice Black writing for the Court in *Everson v. Board of Education*, 1 selected the phrase, a "high and impregnable wall," as a metaphorical description of the boundaries intended by the framers, which are usually translated as the views of Jefferson and Madison. 2 The metaphor stuck, and "strict separationists" have since arrayed themselves for battle against others who propose a more permeable relationship. Recently, the Court has eschewed metaphors in allowing, against establishment clause challenges: state income-tax deductions for public and private school expenses; 3 state-paid prayers in the Nebraska unicameral; 4 a municipally owned nativity scene in Pawtucket, Rhode Island; 5 and federally funded vocational assistance to a blind student studying to be a minister. 6 The Court, however, did not eschew the use of a metaphor when it recognized the ability to have a "moment of silence" in public schools. 7

Church and state controversies represent some of the most perplexing issues facing the Supreme Court this term. Does Little Bird of the Snow's father, as a condition of eligibility for public assistance programs, have to accept the assignment of a social security number to his daughter, despite the religious beliefs of the Abenaki Indians that a number identification system would rob her of the spiritual protection afforded by a name? 8 Moreover, is the establishment

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2. Id. at 18.
7. *See* Wallace v. Jaffree, 105 S. Ct. 2479, 2491 (1985). Although the Court recognized "every student's right to engage in voluntary prayer during an appropriate moment of silence during the school day," it invalidated the Alabama statute challenged in this case because it had "the sole purpose of expressing the State's endorsement of prayer activities for one minute at the beginning of each school day." Id. at 2491, 2492.
clause of the first amendment violated if public high school officials allow a student-organized prayer group to meet during a free activity period to read scripture and pray?9

The Eighth Circuit's recent decision in Lutheran Social Services v. United States,10 represents yet another skirmish in the conflict between church and state. Tax law sets the stage for this encounter. As a religious entity, Lutheran Social Services ("LSS") benefited from a tax exemption generally afforded nonprofit organizations.11 Such tax exemptions have survived establishment clause challenges12 and were not directly at issue in this case. In addition, "churches," "integrated auxiliaries" of a church, and "conventions or associations of churches," qualify for exemption from reporting requirements13 of the Internal Revenue Service ("IRS") after completing the dreaded Form 990. For this classification blessing, LSS unsuccessfully petitioned the IRS for a refund of of a $700.00 penalty assessed by the IRS against LSS for its having failed to file a Form 990. This request served as the basis of the suit.14 From LSS's prespective, it did not matter if the court called it a "church" or an "integrated auxiliary" of a church. In either event, it could breathe more easily around tax-reporting time without the hassles of having to deal with tax attorneys and accountants, a privilege enjoyed by other anointed, religious entities. LSS would not abide, without a fight, an IRS classification as a secular-oriented religious enterprise. This curse would have relegated it to a second-class religious status, requiring it to report its income but exempting the reported income from taxation. The slings and arrows of constitutional and statutory entitlement served LSS well in its argument before the Eighth Circuit. The Eighth Circuit held that, while LSS certainly did not look like a church, it most certainly did look like an integrated auxiliary, notwithstanding a treasury regulation to the contrary.15

This Article traces the constitutional and statutory issues raised by the tax exemption classifications discussed in Lutheran Social Services. It suggests not only that the Eighth Circuit was statutorily correct in extending LSS a preferred filing as well as tax-exemption status, but also that constitutional constraints would have been violated if the court had reached any other result.

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10. 758 F.2d 1283 (8th Cir. 1985).
14. Lutheran Social Servs., 758 F.2d at 1285.
15. Id. at 1291.
II. THE CONSTITUTIONALITY OF RELIGIOUS TAX EXEMPTIONS

Despite "two centuries of uninterrupted freedom from taxation," the Supreme Court first considered the constitutionality of religious tax exemptions in Walz v. Tax Commission.\textsuperscript{16} The Court, in Walz, denied an establishment clause challenge to a New York City property tax exemption extended by a state constitutional provision to properties used solely for religious worship.\textsuperscript{17} The majority opinion, written by Chief Justice Burger, together with the separate concurring opinions of Justices Brennan and Harlan, blended historical and analytical justification for their accommodative result. Dissenting, Justice Douglas urged a strict separationist approach which would have invalidated religious tax exemptions as being violative of the establishment clause.\textsuperscript{18} Although Walz has been qualified by more recent cases, it remains the landmark opinion on religious tax exemptions. The rationale given by the Justices, therefore, deserves close scrutiny when evaluating the constitutionality of religious tax exemptions.

History supplied the dominant justification for the rationale offered by the Walz majority. Chief Justice Burger and Justice Brennan robed history with sanctity through an almost ritualistic reference to Justice Holmes's dictum, "a page of history is worth a volume of logic."\textsuperscript{19} Once properly attired, pages of history were displayed to rebut any impression that the outcome could have been otherwise.\textsuperscript{20}

Page one of the historical account depicted the constitutional framers as being sympathetic with religious tax exemptions. Chief Justice Burger regarded as being significant the intent of "the men who wrote the Religion Clauses of the First amendment."\textsuperscript{21} Justice Brennan, concurring, referred extensively to "the understanding of the Founding Fathers" or "[w]hat the framers meant."\textsuperscript{22} He mentioned that, of the framers, only James Madison may have reached "an extreme view," "late in [his] life," in opposing tax exemptions for churches, but he noted that even Madison "expressed no such under-

\textsuperscript{16} 397 U.S. 664, 678 (1970).
\textsuperscript{17} Id. at 672-73.
\textsuperscript{18} Id. at 701.
\textsuperscript{19} Id. at 675-76, 681 (quoting New York Trust Co. v. Eisner, 256 U.S. 345, 349 (1921)). Tradition, custom, or historical continuity of practice all have been relied upon in recent years by the Supreme Court as a basis for legitimizing the extant church and state relationship. See, e.g., Chambers v. Marsh, 463 U.S. 783, 787 (1983).
\textsuperscript{20} Walz, 397 U.S. at 677-80.
\textsuperscript{21} Id. at 668.
\textsuperscript{22} Id. at 680 (citing Abington School Dist. v. Schempp, 374 U.S. 203, 230 (1963)).
standing of Establishment during the debates on the First Amend-
ment. Moreover, even if Madison privately had held these strict
views, "there is no evidence that they were shared by others among
the Framers and Ratifiers of the Bill of Rights." Similarly, none of
the other framers or ratifiers of the Bill of Rights who wrote prolif-
cally on church and state issues ever questioned the propriety of tax
exemptions despite their common usage. Justice Brennan con-
cluded that "it seems clear that the exemptions were not among the
evils that the Framers and Ratifiers of the Establishment Clause
sought to avoid." Justice Brennan extended this consensus view of
the framers to include the intent of the ratifiers at the state, ratifying
conventions. This view captures the "we the people" basis for con-
stitutional analysis and is partially responsive to the criticism that
the framers merely served as scriveners for principles embraced by
the people generally.

"Intentionalism" recently has received substantial hermeneutical
and normative criticism. Even Justice Brennan, who relied heavily
on history in Walz, has taken off his judicial robes long enough to
argue with Attorney General Edwin Meese III on the propriety and
possibility of constitutional interpretation by intentionalism. Against
Meese's admonition that "'[a] jurisprudence seriously aimed at the
explication of original intention would produce defensible principles
of government that would not be tainted by ideological predilec-
tion,'" Justice Brennan responded in a recent Georgetown seminar:
"A position that upholds constitutional claims only if they were
within the specific contemplation of the Framers in effect establishes
a presumption of resolving textual ambiguities against the claim of
constitutional right." Justice Brennan further excoriated intention-

23. Id. at 684-85 n.5.
24. Id.
25. Id. at 682, 685.
26. Id. at 682.
27. Id. at 685.
28. See Brest, The Misconceived Quest for the Original Understanding, 60 B.U.L.
Rev. 204, 213-17 (1980) (detailing the difficulties of seeking the farmers' intent in con-
stitutional adjudication); Sandalow, Constitutional Interpretation, 79 Mich. L. Rev.
1033, 1060-72 (1981) (asserting that historical intentionalism cannot provide a basis for
constitutional interpretation). See generally Powell, The Original Understanding of
Original Intent, 98 Harv. L. Rev. 885 (1985) (arguing that the framers intended the
Constitution to be read literally in the common law tradition of statutory construction,
rather than interpreted as a contract with the focus on the will of the parties); But see
(discussing the problems with constitutional interpretation set adrift from historical
moorings).
Attorney General).
30. Id. (quoting William Brennan, United States Supreme Court Justice).
alism because many constitutional provisions are "obscure," "anachronistic," or unsuited for coping with "current needs."\textsuperscript{31}

Perhaps anticipating the assault on intentionalism or personally doubting its conclusive nature, the Justices in \textit{Walz} offered alternative historical and normative justifications for upholding the constitutionality of tax exemptions. Chief Justice Burger, citing ample "tax exemption" legislation as support for his historical justification noted that "[i]t is significant that Congress, from its earliest days, has viewed the Religion Clauses of the Constitution as authorizing statutory real estate tax exemption to religious bodies."\textsuperscript{32} Justice Brennan similarly relies upon early state and federal tax exemptions afforded to religion generally as evidence of both the intent of the framers and the persistent deference afforded religions in tax matters.\textsuperscript{33} These "time immemorial" arguments, typical of common law analogical reasoning, shift the focus from the hermeneutical problem of unraveling the meaning of words used in a distant past to discovering the practice subsequently accepted in the community. A Burkean endorsement of customary practice cannot be unconditionally embraced if the constitution truly offers a limiting constraint on policies and judicial practices, but this type of endorsement imbues custom with at least a presumptive legitimacy.

In this regard, Chief Justice Burger opined that "[f]ew concepts are more deeply embedded in the fabric of our national life . . ." than tax exemptions for religious organizations.\textsuperscript{34} All fifty states, as well as federal income tax law, have recognized such exemptions, and Congress has uniformly exempted church property from real and personal property assessments.\textsuperscript{35} While Chief Justice Burger acknowledged "that no one acquires a vested or protected right in violation of the Constitution by long use," he asserted that "an unbroken practice of according the exemption to churches, openly and by affirmative state action, not covertly or by state inaction, is not something to be lightly cast aside."\textsuperscript{36} Both Chief Justice Burger and Justice Brennan concluded with a Holmesian historical defense: "If a thing has been practised for two hundred years by common consent, it will need a strong case for the Fourteenth Amendment to affect it . . ."\textsuperscript{37}

\begin{thebibliography}{99}
\bibitem{32} \textit{Walz}, 397 U.S. at 677.
\bibitem{33} \textit{Id.} at 682-85 (Brennan, J., concurring).
\bibitem{34} \textit{Id.} at 676.
\bibitem{35} \textit{Id.} at 676-77.
\bibitem{36} \textit{Id.} at 678.
\bibitem{37} \textit{Id.} at 678, 686 (quoting Jackman v. Rosenbaum Co., 260 U.S. 22, 31 (1922)).
\end{thebibliography}
In his dissent, Justice Douglas advocated a strict separationist approach which would have invalidated tax exemptions, while giving short shrift to historical arguments. The revolution associated with *Everson v. Board of Education*, which effected the selective incorporation of the first amendment into the fourteenth amendment, Justice Douglas insisted, "makes irrelevant the 'two centuries of uninterrupted freedom from taxation,' referred to by the Court." Justice Douglas conceded the long-standing tradition of religious tax exemptions, yet turned the historical argument on its head; he argued that the establishment clause and the free exercise clause have been made applicable to the states for only a few decades. Thus, "tax exemption of church property in this country is indeed highly suspect, as it arose in the early days when the church was an agency of the state." This is a curious argument. On the one hand, Justice Douglas discounted tax exemptions at the state level because the first amendment originally applied only to Congress. This contention, however, leaves unaddressed the list of tax exemptions noted by the majority which had been extended to religion by Congress "from its earliest days." On the other hand, Justice Douglas seemed to have been suggesting that even these exemptions are tainted because they arose at a time when the state felt an affirmative obligation to aid religion; since the time had obviously come for reversing that sense of responsibility, these historical precedents were of no consequence.

Justice Douglas' reasoning seemingly would have shifted the focus from a historical to a normative analysis. Instead, his arguments relied heavily on Madison's Memorial and Remonstrance delivered in 1785 opposing a Virginia tax for the support of Christian churches. According to Justice Douglas, Madison's intentionalism, regarding Virginia's tax for the sake of religion, either supplanted or embodied that of the constitutional framers, notwithstanding historical evidence to the contrary. Justice Douglas' strict "no aid" approach to religion would allow either tax exemptions or direct subsidies to religious agencies performing social welfare operations, but only if these activities could be separated from the religious aspect of the involved religion. Thus, if a church characterized its welfare services as a

39. *Walz*, 397 U.S. at 701-03 (quoting *Walz*, 397 U.S. at 678 (Chief Justice Burger's majority opinion)).
40. Id. at 703.
41. Id. at 677. The Court cited substantial and continuing examples of exemptions from federal tax laws. Id. at 676-78 nn.4-8.
42. Id. at 704-06, 710 (quoting 2 THE WRITINGS OF JAMES MADISON 183-91 (G. Hunt ed. 1901)).
43. Id. at 704-06.
44. Id. at 708-10.
form of religious worship or gospel responsibility, subsidies and tax exemptions would be forbidden. If it described such activities as being unessential to the religion's mission, then direct and indirect aid could be constitutionally extended. Interestingly, actual legislative and judicial interpretation of the establishment clause has yielded a nearly opposite result.

The majority and concurring Justices in Walz also offered analytical reasoning to buttress the constitutional foundation for religious tax exemptions. Anticipating the three-part test which the Court would adopt in Lemon v. Kurtzman, Chief Justice Burger found that the "legislative purpose of the property tax exemption is neither the advancement nor the inhibition of religion; it is neither sponsorship nor hostility." Specifically, religion, along with many other charitable entities, fosters a state's moral or mental improvement. Consequently, the state "has an affirmative policy that considers these groups as beneficial and stabilizing influences in community life and finds this classification useful, desirable, and in the public interest." Against Justice Douglas' recommendation, the Court disclaimed any interest in conditioning permissible exemptions on the "social welfare services or 'good works' that some churches perform," stating:

To give emphasis to so variable an aspect of the work of religious bodies would introduce an element of governmental evaluation and standards as to the worth of particular social welfare programs, thus producing a kind of continuing day-to-day relationship which the policy of neutrality seeks to minimize. Hence, the use of a social welfare yardstick as a significant element to qualify for tax exemption could conceivably give rise to confrontations that could escalate to constitutional dimensions.

This point is critical in evaluating the constitutional implications of tax laws exempting "preferred" religions because of their perceived contributions to society. This type of distinction would likely entail doctrinal and administrative entanglement of the sort repeatedly held to be impermissible by the Court.

In Walz, Chief Justice Burger found that tax exemptions would minimize, not create, government entanglement with religion. The Chief Justice stated:

46. Walz, 397 U.S. at 672.
47. Id. at 673.
48. Id.
49. Id. at 674.
The test is inescapably one of degree. Either course, taxation of churches or exemptions, occasions some degree of involvement with religion. Elimination of exemption would tend to expand the involvement of government by giving rise to tax valuation of church property, tax liens, tax foreclosures, and the direct confrontations and conflicts that follow in the train of those legal processes.\footnote{50. Id.}

Thus, "[t]he grant of a tax exemption is not sponsorship since the government does not transfer part of its revenue to churches but simply abstains from demanding that the church support the state."\footnote{51. Id. at 675.}

Justice Brennan, in his concurring opinion, identified two secular purposes justifying tax exemptions to religious organizations. First, religions share common characteristics with charitable corporations that "contribute to the well-being of the community in a variety of nonreligious ways."\footnote{52. Id. at 687.} Second, they "uniquely contribute to the pluralism of American society by their religious activities."\footnote{53. Id. at 689.}

In summary, the *Walz* case established several points regarding the constitutionality of tax exemptions: (1) the framers did not intend to preclude indirect aid to religion by way of religious tax exemptions; (2) state and federal legislation has extended tax exemption to religions from the earliest time to the present; (3) such exemptions serve secular purposes regardless of the welfare/worship make-up of any particular religion; (4) Justice Douglas' approach of exempting "good works," but not "sacred services," would jeopardize state neutrality and entangle the government with responsibility for evaluating religious activities; and (5) the elimination of exemptions would entangle the state in surveillance, reporting, and conflicts inherent in enforcing tax liens and foreclosures. These exemptions minimize church and state confrontations, foster charitable and moral development, and contribute to American pluralism.

Although *Walz* remains the landmark case evaluating the constitutionality of religious tax exemptions, two 1983 Supreme Court cases may provide some limitations. The case of *Regan v. Taxation with Representation*,\footnote{54. 461 U.S. 540 (1983). The *Taxation with Representation* decision dealt primarily with free speech rather than religion issues. *Id.* at 546-51.} suggests that the state has wide discretion in setting the scope of tax exemptions generally. In *Taxation with Representation*, a public interest group challenged the constitutionality of section 501(c)(3) of the Internal Revenue Code. This section denies tax exemption to nonprofit organizations that engage in substan-
tial lobbying activities. Analogizing tax exemptions to subsidies, the Court held that Congress could condition tax-exempt status, even though the condition may have a chilling effect on first amendment rights to lobby. Also significant was the Court's rejection of a fifth amendment due process argument that Congress could not allow certain organizations, such as veterans groups, to retain exemption status despite their extensive lobbying, while denying other nonprofit entities the same entitlement. The Court held that Congress could weigh the comparative contributions made to the public interest by distinct groups and, accordingly, fashion limitations on tax-exempt status.

The *Taxation with Representation* Court's rationale, when applied to religious tax exemptions, raises difficult issues that have not yet been resolved. The depiction of tax exemptions as a form of subsidy seemingly would weaken the validity of tax exemptions for religions because *Everson v. Board of Education* denounced as a violation of the establishment clause all subsidies to religion. In a footnote citing *Walz*, the Court in *Taxation with Representation* denied the logical reasoning of this extension to religious exemptions, stating that exemptions are not the equivalent to subsidies "in all respects." Also, the *Taxation with Representation* decision states that distinctions may be made between types of nonprofit corporations afforded tax exemptions, but it leaves open the validity of distinctions made between the same type of organizations. That is, could Congress allow certain veterans groups to lobby without losing their tax-exempt status, but not other veterans groups? The establishment clause increases the perplexity of line-drawing between religious groups. Would the due process clause and the establishment clause invalidate any congressional attempt to qualify tax-exempt status afforded religions on the basis of their comparative contributions to the public interest? This question is more than rhetorical.

The case of *Bob Jones University v. United States* further complicates the tax exemption debacle. In 1976, the IRS revoked Bob Jones University's tax-exempt status because it enforced disciplinary rules forbidding interracial dating and marriage. Similarly, the IRS

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57. *Id.* at 546-51.
58. *Id.* at 549.
60. *Id.* at 16.
61. *Taxation with Representation*, 461 U.S. at 544 n.5 (citing *Walz*, 397 U.S. at 674-76, 690-91 (Brennan, J., concurring), 699 (opinion of Harlan, J.)).
63. *Id.* at 578.
had revoked the tax-exempt status of Goldsboro Christian Schools, Inc., a private school operating classes from kindergarten through high school, because of the school’s teaching that the Bible forbids “[c]ultural or biological mixing of the races.”64 Both schools challenged the denial of their tax exemptions on establishment clause, free exercise of religion, and equal protection grounds.

Writing for the Court, Chief Justice Burger treated very lightly the free exercise claims raised in the case. Chief Justice Burger explained that tax exemptions must be tied to benefits to society—a view denounced because of entanglement implications in Walz.65 Since the discriminatory beliefs and corresponding practices of these schools constituted an invidious evil of the first order, nothing else they did could override their deleterious effect on the public interest. Although denial of tax exemption benefits would “inevitably have substantial impact on the operation of private religious schools,”66 free exercise could be overridden by showing that the limitation serves “‘an overriding governmental interest.’”67

The Court, in Bob Jones, relied on United States v. Lee68 as justification for limiting free exercise claims. In Lee, the Court refused to exempt, on grounds of religious belief, an Amish member from the social security taxing system. The court explained:

To maintain an organized society that guarantees religious freedom to a great variety of faiths requires that some religious practices yield to the common good. Religious beliefs can be accommodated . . ., but there is a point at which accommodation would “radically restrict the operating latitude of the legislature.”69

Thus, mandatory participation, thought to be critical to the social security system, outweighed the free exercise claim. The Court also worried about the threat of a floodgate of tax avoidance schemes, if the free exercise claim had been recognized.70 This “inconvenience” justification, however, cannot be reconciled with the strict scrutiny analysis generally applied to defeat fiscal integrity arguments in non-religious contexts.71

64. Id. at 583 n.6.
65. See id. at 584-92.
66. Id. at 603-04.
67. Id. (quoting United States v. Lee, 455 U.S. 252, 257-58 (1982)).
68. 455 U.S. 252 (1982).
69. Id. at 259 (quoting Braunfeld v. Brown, 366 U.S. 599, 606 (1961)).
70. Id. at 260.
71. See Phylor v. Doe, 457 U.S. 202, 229 (1982) (stating that equal protection was violated where children of illegal aliens were excluded from public schools for reasons of financial integrity); Graham v. Richardson, 403 U.S. 365, 376 (1971) (stating that equal protection prohibits denial of welfare benefits to resident aliens on residency grounds); Shapiro v. Thompson, 394 U.S. 618, 627 (1969) (stating that equal protection
The *Bob Jones* decision presents problems beyond those in *Lee*. The Court paid lip service to the "compelling state interest" and the "least restrictive means" standards appropriate whenever governmental interests threaten free exercise claims. But even if "fiscal integrity" and floodgate arguments would have met the test in *Lee*, which is a doubtful proposition, the Court in *Bob Jones* certainly eviscerated the core of free exercise. Eradicating discrimination based on personal preference, whether concerning the impropriety of interracial marriage, dating, or "cultural or biological mixing of the faces," is distinguishable from state-compelled discrimination.72 Furthermore, religiously inspired discrimination, if the beliefs are sincerely held, represents a different problem than invidious discrimination based upon personal preference. Perhaps, the pivotal role educational institutions play in our society explains the result in *Bob Jones*.

The principle announced in *Bob Jones*, however, raises the spectre of the state using its tax-exemption policy as a sword to coerce orthodoxy in religious beliefs and practices. Moreover, the state's ability to compel the filing of reports threatens investigative entanglement between the state and religion along doctrinal lines. This result would raise ominous establishment clause problems as suggested by the Court in *Walz*.73 The potential for limitless controversies urges restraint. For example, how can *Bob Jones* be distinguished from religious institutions which discriminate on the basis of sex in eligibility for the priesthood, ministry, or even congregational seating requirements? Perhaps sex discrimination is not as invidious as racial discrimination, but such a distinction is slight when public policy is the only barrier. The distinction becomes even less tenable when tax exemptions and reporting requirements require the courts to become involved in doctrinal entanglements, an inquiry which courts have not previously allowed themselves to consider.74

If the naming of acceptable religious doctrines, religious practices, or religious organizations is to become the business of the courts, then the courts must establish that they are able to perform the task. Defining what constitutionally constitutes religion or reli-

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gious activities for purposes of legislative preferences has remained an unsolved mystery. Until the courts adequately resolve definitional problems in religion cases, the constitutionality of any tax-exemption scheme will remain problematic.

III. RELIGION BY ANY OTHER NAME

The question of a working definitional analysis of religion for first amendment interpretive purposes should begin with an investigation of the language of the first amendment: "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof . . . ."\(^{75}\) Unfortunately, as Chief Justice Burger noted in *Walz*: "The Establishment and Free Exercise Clauses of the First Amendment are not the most precisely drawn portions of the Constitution."\(^{76}\) The Supreme Court's variable interpretations of the first amendment illustrate definitional difficulties that still exist.

A. INTERPRETIVE CASE LAW

The courts have woven a confused web regarding what constitutes "religion" and "religious practices" within the meaning of the first amendment. The Supreme Court's first definitional encounter with religion came with the highly politicized issue of Mormon polygamy. In the landmark case of *Reynolds v. United States*,\(^{77}\) Chief Justice Waite adopted Thomas Jefferson's highly personalized and deistic emphasis of free conscience,\(^{78}\) but narrowly interpreted the protection afforded religious practices, as compared with conscience. Quoting Jefferson, Chief Justice Waite opined that "religion is a mat-

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75. U.S. CONST. amend. I.
77. 98 U.S. 145 (1878).
78. See id. at 163-64. At the time of the ratification of the Constitution, Americans viewed religion through theistic, if not Calvinistic, lenses. They generally equated religion with an active partisan God. The rationalistic influence of the Enlightenment, however, spawned many important deists, such as Madison and Jefferson, who doubted God's involvement in our daily existence. While most individuals identified religion with protestant Christian beliefs, Thomas Jefferson, writing as a true deist in support of the Virginia Bill for Establishing Religious Freedom, included within the definition of religion "the Jew and the Gentile, and Christian and Mahometan, the Hindoo, and infidel of every denomination." T. JEFFERSON, AUTOBIOGRAPHY, in *Writings of Thomas Jefferson* 66-67 (Library ed. 1903). Significantly, Madison's initial draft of the first amendment which guaranteed that no state shall violate "the equal rights of conscience," 1 ANNALS OF CONG. 435 (J. Gales ed. (1789)), reflected a similar latitudinarian view of protected religious beliefs. The framers, however, omitted references to free conscience in the last three of the ten drafts of the amendment. See M. MALBIN, RELIGION AND POLITICS: THE INTENTIONS OF AUTHORS OF THE FIRST AMENDMENT 17 (1976) (discussing the legislative history of the first amendment). In fact, many framers and ratifiers would have excluded professed atheism, which could be and often was illegal, from the protection of the free exercise clause.
ter which lies solely between man and his God; that he owes account
to none other for his faith or his worship; that the legislative powers
of the government reach actions only, and not opinions. . ."79

This relegation of an expansive view of religion to an affair of beliefs made the foregone conclusion in Reynolds, the fact that the first amendment does not protect polygamy, easier to justify, but less useful as precedent. Congress had no authority to legislate in matters of belief, but it had unfettered discretion to regulate religious conduct—at least complete discretion regarding conduct thought to be violative "of social duties or subversive of good order."80 Since belief, stripped of any entitlement to act in accordance with the belief, hardly threatened the public order, the virtues of untrammelled beliefs could be extolled, while unorthodox religious practices could be attacked with a vengeance.81

Of course, the Reynolds definition of religion essentially reads out of the first amendment "free exercise," since the free speech clause protects not only beliefs, but verbal conduct as well. It also largely eviscerates any meaningful understanding of the establishment clause which condemns preferential treatment of religion. The theism of Mormons, their professed belief in Christ, even their justification of the polygamous practices by reference to like conduct on the part of the patriarchs Abraham, Isaac, and Jacob, could not protect sincere but unconventional marital practices. Professor Lawrence Tribe suggested that Reynolds can best be understood as an early effort to articulate a "secular purpose" requirement but ultimately concludes that "[f]ew decisions better illustrate how amorphous goals may serve to mask religious persecution."82

The political nature of the assault upon Mormonism represented by the Reynolds Court's manipulation of the definition of religion is more clearly manifest in the only other nineteenth century case in which the Supreme Court had an occasion to define religion. In Davis v. Beason,83 the Court stated: "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 obedi-

79. Reynolds, 98 U.S. at 164 (quoting Thomas Jefferson in a reply to a committee of the Danbury Baptist Association).
80. Id.
81. Polygamy along with slavery had been condemned as one of the twin relics of barbarism that the Republican party vowed to eradicate in its party platform of 1858. The priorities of slavery and the reconstruction delayed the successful assault on polygamy until the mid-1870's. Once Congress and the courts combined forces, the demise of polygamy became inevitable. The Reynolds case represented an important, but not a final, step in this concerted effort to eliminate an unpopular religious practice.
83. 133 U.S. 333 (1890).
ence to his will." 84 The Davis case arose out of a concerted effort in Utah, Idaho, and Nevada to exclude Mormons from jury service, public office, and voting because of their belief in, and practice of, polygamy. A federal statute, the Edmunds Act, 85 excluded polygamists from voting. 86 Idaho went even further and excluded all Mormons, even those not practicing polygamy, from voting. Rejecting the argument that such a prohibition operated against individuals who simply believed in an objectionable religious doctrine, the Court, ostensibly following a Reynolds belief-conduct dichotomy, held that belief in the acceptability of polygamy qualified as aiding and abetting unsavory practices. 87

Davis is particularly troublesome because Davis claimed to have abandoned his religious membership to preserve his franchise. The Court disregarded the harshness of its assumption, once a believer always a believer, to disfranchise a voter who once believed in polygamy. 88 The broad theistic definition given religion in Davis, therefore, provided no real security for unorthodox theistic beliefs. The nineteenth-century Mormon cases essentially made the definition of religion irrelevant to the propriety of state regulation.

The case of Cantwell v. Connecticut 89 signalled a shift in the level of tolerance which the Court believed the first amendment required. In Cantwell, the Court held that the protection of the first amendment extended to both "freedom to believe and freedom to act." 90 Whereas freedom to believe remained absolute, the latter could be overridden upon the state's showing of a "clear and present danger." 91 Here, the state's interest in licensing door-to-door solicitation did not override a Seventh Day Adventist's free exercise claim. 92

Ever since the Court, in Cantwell, extended first amendment protection from the state's regulatory authority to cover conduct as well as beliefs, judicial definitions of religion and protected religious practices have received increased attention. The Court in United States v. Ballard, 93 stated that religious freedom includes "the right to maintain theories of life and of death and of the hereafter which are rank heresy to followers of the orthodox faiths." 94 In Fowler

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84. Id. at 342.
85. Ch. 47, 22 Stat. 30 (1882).
86. Id. § 8, 22 Stat. at 31.
87. Davis, 133 U.S. at 348.
88. See id. at 337, 348.
89. 310 U.S. 296 (1940).
90. Id. at 303.
91. Id. at 303-04, 311.
92. Id.
93. 322 U.S. 78 (1944).
94. Id. at 86.
Rhode Island, the Court offered that "it is no business of courts to say that what is a religious practice or activity for one group is not religion under the protection of the First Amendment." Along the same latitudinarian lines, the Court, in Torcaso v. Watkins, held unconstitutional a statutory profession of belief in God as a condition for holding office in Maryland. There, the Court for the first time expressly extended the tent housing protected religion to include nontheistic beliefs stating: "among religions in this country which do not teach what would generally be considered a belief in the existence of God are Buddhism, Taoism, Ethical Culture, Secular Humanism and others."

In Sherbert v. Verner, the Court adopted the modern "compelling state interest" and "the gravest abuses, endangering paramount interests" approach as a further barrier to legitimizing state regulation of religion. The application of such a stringent compelling state interest test coupled with an expansive definition of religion, significantly enhances the shield afforded religion by the first amendment. An example of this enhanced protection is Wisconsin v. Yoder. In Yoder, the Court recognized that the religious prerogative of Amish parents entitled them to exempt their children from compulsory school attendance after the eighth grade. The Court held that, while first amendment protection would not extend to a Thoreauian "subjective evaluation and rejection of the contemporary secular values accepted by the majority," it would extend to sincere religious beliefs, however unorthodox.

The final interpretive cases in which the Court has liberally addressed the definitional meaning of protected "religion" are conscientious objector cases. In United States v. Seeger, the Court considered the meaning of "religious training and belief" as used in section 6(j) of the Universal Military Training and Service Act of 1948. Section 6(j) provided a conscientious objector exemption from military service to anyone:

[W]ho, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. Reli-
igious training and belief in this connection means an individual's belief in relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code.\textsuperscript{106}

Andrew Seeger, however, expressed doubt about the reality of a Supreme Being; his opposition to war rested on a "'religious faith in a purely ethical creed.'"\textsuperscript{107}

A literal interpretation of the phrase "religious training and belief," as used in the statute, would have denied Seeger an exemption. Moreover, legislative history also indicated a congressional intent to distinguish members of religions known for their pacifism from personal objections to war. Nonetheless, the Court, relying on the writing of Paul Tillich,\textsuperscript{108} interpreted the statute as extending the exemption to every belief system opposing war: "[T]he test [for religious belief] . . . 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."\textsuperscript{109}

This "functional"\textsuperscript{110} definition of religion certainly offers a loose interpretation of the statute. If nontheistic beliefs fulfill the role of theistic beliefs in the life of a secular humanist, then the exemption applies. This result is compatible with the Court's expansive constitutional interpretation of religion and ultimately may be more of a constitutional definition than a statutory definition. Accordingly, since Seeger's nontheistic beliefs paralleled section 9(j)’s "orthodox belief in God," his opposition to war was religious and his exemption could not be denied.\textsuperscript{111}

The logical extension of Seeger came in \textit{Welsh v. United States},\textsuperscript{112} where Elliot Welsh denied that his opposition to war rested on religion, whether God-inspired or a parallel belief system. The Court, however, rejected Welsh's own "nonreligious" characterization of his opposition to war. Only if his beliefs were insincere or did not "rest at all upon moral, ethical, or religious principles but instead rest[ed] solely upon considerations of policy, pragmatism, or expediency," could the exemption be denied.\textsuperscript{113} Since Welsh's opposition was not

\textsuperscript{107} \textit{Seeger}, 380 U.S. at 166.
\textsuperscript{108} \textit{Id.} at 180 (quoting P. TILLICH, II SYSTEMATIC THEOLOGY 12 (1957)).
\textsuperscript{109} \textit{Id.} at 165-66.
\textsuperscript{110} See \textit{L. Tribe, supra} note 82, at 830.
\textsuperscript{111} \textit{Seeger}, 380 U.S at 187-88.
\textsuperscript{112} 398 U.S. 333 (1970).
\textsuperscript{113} \textit{Id.} at 342-43.
merely expedient, he could not be denied an exemption.\textsuperscript{114}

Viewed as constitutional interpretations, \textit{Seeger} and \textit{Welch} seemingly would proscribe the Court's evaluation of any belief system that served as a functional equivalent to traditional religious beliefs. Although in dictum, the Court in \textit{Thomas v. Review Board}\textsuperscript{115} threatened to close the door on expansive interpretations of "religion," suggesting that religious, or their equivalent, claims may be "so bizarre" as to be "clearly nonreligious in motivation,"\textsuperscript{116} to date the door has remained open.

B. \textbf{ANALYTICAL PARADIGMS DEFINING OR EXPLAINING RELIGION}

The Supreme Court's open-ended definition of religion, although consonant with a liberal interpretation of the first amendment, has caused much confusion, because legislation often relies, without explanation or elaboration, on the term "religion" or its cognates as a basis for extending statutory benefits, usually exemptions from state regulation. Various angles of view or perspectives have been proposed by scholars, jurists, policy makers and philosophers in the effort to identify which religious entities are entitled to specific legislative exemptions. Not all of the approaches are equally sensitive to constitutional implications, a point glossed over by many courts. Classification proposals recommended as an assistance in resolving religion issues can be categorized as definitional, analytical, functional, or normative.

1. \textit{Definitional Analysis}

The least complex and constitutionally most problematic mode of analysis, strict definitional, is the analysis adopted by administrative agencies and many courts. Certain recommended essentials provide a litmus test for classification of religions for purposes of statutory protection. While administratively efficient, any narrow definitional test inevitably raises constitutional issues which the courts regularly evade. Legislatures could reduce, but not eliminate, definitional dilemmas by specifically enumerating the essential characteristics of the type of religiousness intended to be protected. Sensing constitutional dangers, the legislative posture consistently has been on par with Uncle Remus' tar baby: they ain't saying nothing. Even if legislative bodies chose to come down from the mountain and speak, unorthodox faiths which fell outside the definitional scheme

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{114} \textit{Id.} at 343-44.
\item \textsuperscript{115} 450 U.S. 707 (1981).
\item \textsuperscript{116} \textit{See id.} at 715.
\end{itemize}
\end{footnotesize}
would undoubtedly, and justifiably, raise a hue and cry of discrimination.

Dean Choper, although skeptical of the possibility of any definition capturing all religions, offers his own version. He insists that religion necessarily entails "extratemporal consequences."117 This definition rests on a distinction of the "degree of internal trauma" imposed on those who believe that they "have put their soul in jeopardy for eternity" as compared to others who feel that they "have only violated a moral scruple."118 Why does psychological trauma provide the determinative factor in religion cases? Moreover, should expert testimony or evidence on comparative trauma associated with temporal and external scruples be required? If a belief system entails all the other indicia associated with religion, must we deny it a preferred status if its members deny or doubt the nature of eternal life? Does a qualitative trauma definition find support in either the framers' intent or interpretive case law? If not, what normative arguments favor its adoption, other than the efficiency argument that it will make deciding cases easier?

Of course, Dean Choper does not own a monopoly on definitional proposals. The problem with any strict definitional approach is that none are capable of reasonably supporting the weight of constitutional scrutiny. Many writers have described the search for an adequate definition of religion as an impossible, if not misdirected, quest.

Professor Kent Greenawalt expressed skepticism of the merits of defining religion, stating that "any dictionary approach oversimplifies the concept of religion, and the very phrase 'definition of religion' is potentially misleading. No specification of essential conditions will capture all . . . the beliefs, practices, and organizations that are regarded as religions in modern culture and should be treated as such under the Constitution."119 Additionally, George Freeman also decried a definitional approach to resolving religion problems in constitutional law.120 Even Dean Choper admits that "the scope of religious pluralism in the United States alone has resulted in such a multiplicity and diversity of ideas about what is a 'religion' or a 'religious belief' that no simple formula seems able to accommodate them all."121

118. Id. at 598.
121. Choper, supra note 117, at 597.
If these scholars are correct in concluding that a definition of religion which is protected by the first amendment is impossible, then the courts have an impossible task in determining which belief systems can take advantage of various regulatory exemptions. In light of this "impossible task," definitional critics have offered analytical alternatives which seem more in line with constitutional constraints.

2. Analogical Analysis

Professor Greenawalt recommended, as an alternative to a definitional approach, analogical reasoning or identifying family resemblances in a manner similar to Ludwig Wittgenstein's analysis of the meaning of "games" or H.L.A. Hart's analysis of the concept of "law."\(^{122}\) Greenawalt first would "identify instances to which the concept indisputably applies, and would ask in more doubtful instances how close the analogy is between these and the indisputable instances."\(^{123}\)

Construction of an "indisputably religious" paradigm necessarily rests on "beliefs, practices, and organizations" identified with orthodox religion.\(^{124}\) Professor Greenawalt suggested that the main elements of an analogical paradigm of "religion" would include:

[A] belief in God; a comprehensive view of the world and human purposes; a belief in some form of afterlife; communication with God through ritual acts of worship and through corporate and individual prayer; a particular perspective on moral obligations derived from a moral code or from a conception of God's nature; practices involving repentance and forgiveness of sins; "religious" feelings of awe, guilt, and adoration; the use of sacred texts; and organization to facilitate the corporate aspects of religious practice and to promote and perpetuate beliefs and practices.\(^{125}\)

No single feature, according to Professor Greenawalt, is necessary or indispensable; neither does any limited combination comprise the sufficient characteristics.\(^{126}\)

Professor Greenawalt would justify analogical reasoning, in religion cases, as resting "on the consonancy of the approach with the fundamental purposes that underlie the constitutional concept of religion."\(^{127}\) Although he did not offer a "full account of those pur-

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\(^{122}\) Greenawalt, supra note 119, at 763-64.

\(^{123}\) Id. at 763.

\(^{124}\) Id. at 767.

\(^{125}\) Id. at 767-68.

\(^{126}\) Id. at 763-64.

\(^{127}\) Id. at 765.
poses," he suggested that the "Framers' intent" offers the "critical starting point" and that "a modern understanding of religion and its place in society," the "relevance of the clause under which the case arises," and "the particular nature of the claim involved," are all relevant inquiries in this regard.129

A case-by-case analogical approach, although preferable to a strict definitional analysis, has problems of its own. As Professor Phillip Johnson correctly recognized, "everything depends upon what we choose as the point of comparison from which to analogize."130 Anticipating this criticism, Professor Greenawalt expressly denied that his paradigmatic essentials are true or accurate in any objective sense.131 However, the lack of objective standards is the problem. Without a defensible set of features thought to be constitutive of religion, and without identifiable purposes explaining the religion clauses or religious exemptions, the two most controversial issues in religion cases, the analogical approach suffers from its indeterminancy.

The dilemma of the analogical approach is that the constitutive essentials, if taken seriously, transform the analysis into a complex definitional arrangement. If certain "for-sure-at-least" essentials are necessary conditions, then the definitional quagmire deepens. If none of the identified features are necessarily constitutive, then the paradigm loses its cogeny. If everything is always up for grabs, then, ultimately, no answer will be reached. Administrative efficiency in a definitional approach will have been sacrificed for multifactual, analogical, case-by-case results which are incapable of yielding any principled resolutions.

3. Functional Analysis

The analogical model's variable dependency on religious orthodoxy jeopardizes the religious status of unorthodox belief systems which serve an equivalent role in the lives of their adherents. This result would seem to contradict the Seeger and Welch "functional" definition cases. The family resemblance may simply not be close enough. Thus, secular humanism may be deemed "nonreligious" where the existence of God is denied, afterlife is repudiated, ritual and worship services condemned, sacred texts rejected, and organizational associations deemed unessential. Indeed, this result may be

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128. Id.
129. Id. at 769.
131. See Greenawalt, supra note 105, at 815-16.
correct. Professor Tribe has noted that an overly expansive definition of religion might become an “awful engine of destruction,” barring public assistance, due to establishment clause challenges, of widely shared public values.\textsuperscript{132}

A nonfunctional approach, however, risks being underinclusive. Professor Tribe would escape the dilemma by embracing multiple definitions of religions—an expansive interpretation for free exercise purposes and a more traditional definition for establishment limitations.\textsuperscript{133} Thus, secular humanism could yield a successful conscientious objector status, such as in \textit{Seeger} and \textit{Welch}, without precluding, under establishment clause reasoning, the teaching of its precepts in public schools. The problem of multiple definitions interpreting the single word “religion” as applied to different aspects of the same constitutional amendment, however, remains troubling.

4. \textit{Normative Analysis}

Professor Phillip Johnson argued that all religion cases are political compromises of ideological biases which the courts simply should mediate for a semblance of evenhandedness.\textsuperscript{134} Perhaps, asking for conceptual coherency in religion cases is asking for too much. Legal realism and critical legal studies would require looking for political, if not conspiratorial, hands at work in religion, as well as in other cases. Principled resolution, in this sense, is but an illusion for the naive or the conspirators. Nonetheless, our sense of justice and rights urges further efforts at principled analysis. Such an analysis must take into account the purposes of religious privileges, exemptions or proscriptions.

Common moral understanding offers both utilitarian and rights-oriented descriptions of the moral basis that ought to underlie any conceptual analysis of religion. While both traditions can be relied upon to justify special legislative treatment of religions, the focus of the respective arguments and the protection they provide differ. Utilitarians construct various forms of public interest arguments favoring distinctive handling of religious issues. These consequentialists focus on the social effect of giving religion preferential status in applying regulatory laws. The \textit{Reynolds} result, for example, could be justified under utilitarian analysis since monogamous marriages were thought to be substantially in the public interest. Rights-oriented analysis, in comparison, focuses on individual entitlement, rather than public interest. Under a rights-oriented analysis, the issue in

\begin{itemize}
  \item \textsuperscript{132} See \textsc{L. Tribe, supra} note 82, at 831.
  \item \textsuperscript{133} \textit{Id}.
  \item \textsuperscript{134} See \textsc{Johnson, supra} note 130, at 841.
\end{itemize}
Reynolds would have been whether free exercise entitled individuals to choose their form of religiously supported marital relationship, even though contrary to the public interest.

The two traditions seem to blend together when a person argues that the maximization of individual rights advantages the greatest number of persons. John Stuart Mill suggested such an approach in his discussion of the Mormon polygamy issue in his essay *On Liberty*. The question then becomes whether rights are deemed constitutive or derivative. Resolution of this issue is critical because, whenever rights are derivative, they can be overridden any time the public interest arguably requires it.

The moral tradition affording rights a constitutive rather than derivative status is from deontological ethics made famous by Kant. The basic notion is that individuals are entitled to respect because of their inherent dignity. This respect requires a certain amount of restraint on the part of the state when dealing with its members. The limits of the restraint depend upon the level of inviolability founded on natural rights or justice thought protected in that regime. To the extent that individuals are deemed to be free and equal moral persons, they are entitled to respect in working out their own rational plan of life or theory of the good. So long as they do not violate the equal rights of others to do likewise, substantial deference protects individuals in the accommodation of their personal lives, with their belief systems being broadly interpreted.

John Rawls, for example, argued: "The question of equal liberty of conscience is settled. It is one of the fixed points of our considered judgments of justice." Rawls explained that liberty of conscience provides the core idea around which self-respect and individual integrity are built. In Rawls' opinion, rational individuals "cannot take chances with their liberty by permitting the dominant religious or moral doctrine to persecute or to suppress others if it wishes." Thus, in the area of conscience, a rational person would not allow religious liberty to be "subject to the calculus of social interests."

Even in a liberal regime premised on rights, all entitlements, including liberty of conscience and practice, have to be limited "by the common interest in public order and security." This limitation does not mean that public interest is superior to religious interests, but only that the protection of individual rights are lexically ordered.

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138. *Id.* § 33, at 207.
139. *Id.*
140. *Id.* § 34, at 212.
prior to any theory of the good. Lest public-order justification swallow up individual entitlement completely, Rawls insisted that any perceived threat to the public order be reasonably certain and imminent. In this sense, limitations are justified by the principle of equal liberty, not some general notion of the public good.

Consequentialist reasoning would abandon the focus on individual respect. Instead, public interest broadly interpreted would legitimately justify restrictions on conscience. Thus, a paternalistic perspective, limiting unorthodox or irrational belief systems, could be justified on the basis of the perceived benefits both to those regulated and to society at large. A less compelling argument justifying incursions on liberty of conscience and practice would suffice.

Of course, the ultimate validity of these systems, or any other system of moral analysis, is controversial and inconclusive. A jurist seeking to incorporate moral analysis into legal interpretivism would have to argue that the favored analysis "provides a smoother fit with the constitutional scheme as a whole." This inquiry would force the jurist to make adjustments between the moral principles announced and the fixed precedent relied upon as being authoritative. To the extent that the moral principle itself is authoritative or immutable it ought to be capable of overriding particular cases as being mistakes. Conversely, if the case is persuasive authority, then the acceptability of any moral principle would depend upon its accommodation with the principle. If both are in flux, mutual adjustments may have to be made.

Applied to state regulatory laws, religious exemptions based on a rights-oriented analysis, rather than a utilitarian analysis, fit more smoothly with constitutional standards. While religious exemptions in all cases may not be required as a matter of entitlement, unless the regulation constituted a form of proscription against religion, legislatively granted exemptions, if they are nondiscriminatory, are consistent with the tolerance that generally ought to be afforded religious beliefs and practices. Moreover, exemptions minimize potential regulatory conflicts that taxes necessarily entail.

Exemptions may also be justified from a utilitarian perspective, both because religions generally contribute to the public interest in a variety of ways and because state interference with religious beliefs likely would generate ill feelings between the state and religious societies. However, the identifiable contributions to the public interest offered by religions or religious activities may vary. If so, exemptions could be tied to the perceived social benefits involved perhaps

141. See id. § 34, at 213-15.
by narrowly defining "religion" or "church." Any utilitarian evaluation of the social contributions of distinct belief systems, however, would run counter to modern free exercise and establishment clause reasoning.

The various modes of analysis—definitional, analogical, functional, and normative—largely overlap and are capable of reinforcing or conflicting with proposed alternatives. Hopefully, the courts will attempt to define religion or religious terms, such as church, in a way that does more than provide a litmus test for determining qualification. Any analogical or definitional criteria establishing the family resemblance of the religious term involved ought to take into account the functional equivalents to religious belief systems and the moral premises upon which the religion clauses and any specific religious legislation rests. A more complex analytical approach will respect constitutional constraints and rebut the realist critique that religion cases are mere political compromises of either ideological or religious bias.

V. WHEN IS A CHURCH NOT A CHURCH

If definitional quandaries regarding "religion" and "religious beliefs" are not enough, Congress and state legislatures have further complicated the matter by keying regulatory exemptions to an entity's status as a "church" or its affiliation with a church or association of churches. Although interpretive case law involving the classification of "religions" for exemption purposes has developed over many years, distinctions based on church classification raise special problems with which the courts are only beginning to grapple.

Congress opened this pandora's box of distinctions tied to church classifications with its 1950 enactment of a tax on unrelated business income of organizations otherwise exempt from federal income tax. Specifically, charitable entities other than "a church, a convention or association of churches" meeting the qualifying criteria of section 501(c)(3) of the Internal Revenue Code are to be taxed on unrelated business income. Since section 501(c)(3) references "religious" rather than "church" organizations, some explanation of the intended distinction is required for any meaningful interpretation. Congress, however, has discreetly avoided the definitional quagmire of what constitutes a church.

Compounding the problem, Congress, in 1969, amended section 6033 of the Internal Revenue Code, dealing with the annual filing of financial returns.\textsuperscript{145} The amendment limited the filing exemption, previously extended to all section 501(c)(3) religious organizations, to "churches, their integrated auxiliaries, and conventions or association of churches,"\textsuperscript{146} the "exclusively religious activities of any religious order,"\textsuperscript{147} any section 510(c)(3) religious organization,\textsuperscript{148} or any other organization "operated, supervised, or controlled by or in connection with" a section 510(c)(3) religious organization.\textsuperscript{149}

Faced with enormous definitional dilemmas, the United States Department of the Treasury ("Treasury Department") promulgated definitional regulations, and the IRS has adopted yet additional criteria for evaluating whether an entity qualifies as a church. Section 1.511-2(a)(3)(ii) of the Treasury Regulations defines the word "church" as follows:

The term "church" includes . . . a religious organization if such . . . organization (a) is an integral part of a church, and (b) is engaged in carrying out the functions of a church, whether as a civil law corporation or otherwise. In determining whether a religious . . . organization is an integral part of a church, consideration will be given to the degree to which it is connected with, and controlled by, such church. A religious . . . organization shall be considered to be . . . carrying out the functions of a church if its duties include the ministration of sacerdotal functions and the conduct of religious worship . . . [as determined by] the tenets and practices of a particular religious body constituting a church.\textsuperscript{150}

Additionally, the IRS criteria for evaluating a church classification read as follows:

\begin{enumerate}
  \item a distinct legal existence
  \item a recognized creed and form of worship
  \item a definite and distinct ecclesiastical government
  \item a formal code of doctrine and discipline
  \item a distinct religious history
  \item a membership not associated with any other church or denomination
  \item an organization of ordained ministers
\end{enumerate}

\textsuperscript{147} Id. § 6033(a)(2)(A)(iii).
\textsuperscript{148} Id. § 6033(a)(2)(C)(i).
\textsuperscript{149} Id. § 6033(a)(2)(C)(iv).
(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
(14) schools for the preparation of its ministers.\textsuperscript{151}

The Treasury Department in January, 1977, defined “integrated auxiliary” as follows:

For purposes of this title, the term “integrated auxiliary of a church” means an organization—

(a) Which is exempt from taxation as an organization described in section 510(C)(3);

(b) Which is affiliated (within the meaning of paragraph (g)(5)(iii) of this section) with a church; and

(c) Whose principal activity is exclusively religious.\textsuperscript{152}

Armed with an opaque statute fraught with constitutional limits and, in more recent years, aided (detracted) by interpretive treasury regulations and IRS criteria, the courts have sailed the shoals of interpretivism in determining which religious organizations are entitled to tax and filing exemptions. The cases illustrate the dilemmas that the courts face and are not particularly encouraging.

A. “DEFINITIONAL” CASES

Several early cases announced variant definitional approaches to interpretive analysis of church classifications. Judge Halbert, in \textit{De La Salle Institute v. United States},\textsuperscript{153} adopted a “common meaning and usage” definition of “church.”\textsuperscript{154} The \textit{De La Salle Institute} decision involved activities of a Roman Catholic order of Christian Brothers organized for the purpose of furnishing a religious education for children. Part of the expense of the school was paid by income from the order’s winery, creating an unrelated business income problem. The court held that the parochial schools operated by the Christian Brothers were not churches, stating: “The religious activities [including dogmatic teaching, moral teaching, etc.] which take place at the schools are not sufficient to work a change of kind, turning the

\textsuperscript{152} Treas. Reg. § 1.6033-2(g)(5)(i) (1977).
\textsuperscript{153} 195 F. Supp. 891 (N.D. Cal. 1961).
\textsuperscript{154} Id. at 903.
RELIGION AND TAXATION

schools into churches.” In response to evidence that the schools existed for a religious purpose, the court stated: “The tenets of the Church cannot broaden the statutory exemption. What is a ‘church’ for purposes of the statute must be interpreted in the light of the common understanding of the word. An organization established to carry out ‘church’ functions, under the general understanding of the term, is a ‘church.’” Thus, the De La Salle Institute decision stands for a common dictionary treatment of “church,” but in doing so, it neglects answering the establishment clause and equal protection challenges of religious organizations whose unorthodoxy take them out of common classification as a church.

The Chapman v. Commissioner decision adopted an even stricter definitional approach. The organization seeking an exemption in Chapman was a nondenominational religious organization, called the Missionary Dentists, whose purpose was to preach the Gospel of Christianity, using dentistry as a means of contacting people. Reviewing the legislative history, the court reasoned that, “though every church may be a religious organization, every religious organization is not per se a church.” The court defined the word “church” as synonymous with the concept of denomination. Since Missionary Dentists were nondenominational, it would not qualify as a church, even though it consisted of missionary members devoted to propagating the faith of Christianity, as they performed services functionally equivalent to many orthodox churches. Here, the necessary and sufficient essentials of church classification were determined to be sectarian or denominational status.

Judge Tannenwald, in a concurring opinion, chided the court for having made “church” synonymous with “sect or denomination”; he recommended a De La Salle Institute “common sense approach,” locating the meaning of “‘church’ in ordinary, everyday parlance.” In Judge Tannenwald’s opinion, the word “church” connotes the bringing of “people together as the principal means of accomplishing its purpose.” Thus, evangelical activity cannot qualify as church activity unless people are brought physically together to accomplish that purpose. Judge Tannenwald’s definition of “church” as the bringing of people together for purposes of worship, similar to any

155. Id. at 902.
156. Id. at 903.
157. 48 T.C. 358 (1967).
158. Id. at 363.
159. Id.
160. See id. at 363-64.
161. Id. at 367.
162. Id. (emphasis original).
other narrow definitional approach, provides an efficient decisional basis for religion cases, but may yield unsatisfactory (unconstitutional) results.

The Parshall Christian Order, R.E. v. Board of Review163 decision provides another example of the limits of such an approach. The Parshall Christian Order decision raised the issue of whether a family-based, religious organization could qualify for an Iowa property tax exemption granted to any “religious society.”164 The Parshall family, consisting of the parents and two sons, had converted to the beliefs of the Miletus Church, a Delaware nonprofit organization, while living in California. Miletus’ statements of faith and religious practice, which were premised on the Christian Bible, centered on a vow of poverty, separation from the outside world, and focus on the family as the basic religious and social unit. In accordance with those beliefs, the Parshall family had moved from California to rural Iowa where they purchased a farm to separate themselves from the world. They incorporated the Parshall Christian Order (“PCO”) in Iowa, as an integrated auxiliary of the Miletus Church, and they transferred all their property and income to PCO. The Parshall family educated their children at home, produced electricity by wind and water resources, and relied upon their farm’s crops for most of their food requirements. Only the father’s outside income, which he transferred to PCO, supplemented the family resources.165

The Parshall family applied for property tax exemption as a religious society. The tax division and trial court denied the application and PCO appealed. The Iowa Supreme Court adopted a definitional approach and affirmed the denial. The court treated “religious society” as synonymous with “church” which, according to the common “dictionary” meaning, as per Judge Tannenwald in Chapman, consists of an association of persons brought together because of common religious beliefs.166 Since a family’s associational ties are natural rather than volitional, a family cannot qualify under a strict definition of a religious society. The court stated:

Nothing in these definitions suggests that a religious society can consist solely of the members of a nuclear family. Inherent within those definitions is the notion that the various individuals composing a religious society have become associated only through their mutual desire for worship and religious education. . . . [The Parshall family] will continue as a group regardless of any religious beliefs they may pro-

163. 315 N.W.2d 798 (Iowa 1982).
164. Id. at 802.
165. Id. at 799-801.
166. Id. at 802.
fess. Because the predominant reason for the Parshall's association is not religious pursuit, we conclude that PCO is not a religious institute or society . . . . \(^{167}\)

Under this approach, sincerity becomes irrelevant. This narrow definition of “religious society” certainly would not have passed constitutional muster if either an analogical, functional, or normative analysis had been applied. Perhaps the court was impliedly saying that sincerity problems with family-based religious societies are so substantial that a \textit{per se} rule precluding their qualification ought to be adopted. If it was, this reasoning is not persuasive.

The \textit{Young Life v. Division of Employment and Training}\(^{168}\) decision also illustrates the limitations of a strict definitional approach in religion cases. Young Life was an incorporated, nonprofit, nondenominational Christian youth organization. Its avowed purpose was to encourage Christian young people to continue their spiritual life through bible study, prayer, and consistent Christian living. Young Life unsuccessfully applied for a “church” exemption from Colorado unemployment insurance requirements. Applying a \textit{Chapman} “sectarian” definition, the Colorado tax division and trial court denied the exemption largely because of Young Life’s nondenominational character.\(^{169}\)

On appeal, Young Life argued that limiting “church” status to sectarian organizations violated the establishment clause as well as the equal protection clause. Noting that the word “church” has never been defined legislatively, the court followed the tax division’s reliance on “common definitions” which equated the word “church” with a sectarian organization having an established congregation and a common meeting house and beliefs.\(^{170}\) Applying this strict definitional approach, the Colorado Supreme Court denied the exemption claim because of Young Life’s nondenominational status.\(^{171}\)

While these “definition” cases provide clear tests for classifying a church, they evidence surprising intolerance for unorthodox religious associations. Alternative approaches likely would yield different results, more in line with constitutional constraints.

\textbf{B. ANALOGICAL OR MULTIFACTUAL CASES}

The difference a variant analytical approach makes can be illus-
The Patino case involved essentially the same facts and religious organization involved in the Colorado *Young Life* case. However, the California court held that a strict definitional approach premised on a "common meaning" violated constitutional standards.\(^\text{173}\)

The court's analysis began with the recognition that "'[a] statute, of course, is to be construed, if such a construction is fairly possible, to avoid raising doubts of its constitutionality.'"\(^\text{174}\) The court then noted that "the exemption itself, by embracing only churches and not other religious organizations, arguably countenances an impermissible discrimination."\(^\text{175}\) Although the court skirted these constitutional problems, the majority acknowledged that "they remain the background against which the definitional problem is resolved."\(^\text{176}\)

According to the court, a *De La Salle Institute* definitional approach which focuses on traditional meaning, or general understanding of the term church, must be rejected on constitutional grounds.\(^\text{177}\) The court reasoned:

[A strict definitional analysis] attempts conclusively to define "church," to provide an axiomatic test of the necessary and sufficient conditions for its application. Such an attempt is doomed to constitutional failure. Acceptance of the forms and practices of orthodox churches, as exclusive norms, inevitably leads to the exclusion of less established, less orthodox organizations which fulfill the same "church" functions in the lives of their members as such organizations and the preclusion of new religious forms.\(^\text{178}\)

Recommended what it described as a functional approach, the court favored reliance on the varied weighting of the fourteen-point criteria developed by the IRS.\(^\text{179}\) The court applauded Wittgenstein's family resemblances paradigm as a basis for a less stringent, definitional analysis which would be less likely to "embitter the constitutional palate."\(^\text{180}\)

Other courts have also preferred an analogical, family resemblance, or multifactual approach as a constitutional alternative to a

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\(^{172}\) 122 Cal. App. 3d 559, 176 Cal. Rptr. 23 (1981).

\(^{173}\) *Id.* at 574, 176 Cal. Rptr. at 32.

\(^{174}\) *Id.* at 566, 176 Cal. Rptr. at 27 (quoting St. Martin Evangelical Lutheran Church v. South Dakota, 451 U.S. 772, 780 (1981)).

\(^{175}\) *Id.* at 567, 176 Cal. Rptr. at 28.

\(^{176}\) *Id.* at 568, 176 Cal. Rptr. at 28.

\(^{177}\) *See id.* at 570, 176 Cal. Rptr. at 30.

\(^{178}\) *Id.* at 574, 176 Cal. Rptr. at 32 (emphasis original).

\(^{179}\) *Id.* at 576 nn.18-19, 176 Cal. Rptr. at 33 nn.18-19.

\(^{180}\) *Id.* at 575 n.17, 176 Cal. Rptr. at 33 n.17 (citing L. WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS ¶ 66 (ed ed. 1958)).
strict definitional test. The IRS's fourteen-point criteria for evaluating church classification often is included as the base paradigm for purposes of comparison. The crystallization of these criteria, however, runs the risk of collapsing a complex, definitional analysis with an analogical approach.

For example, Judge Gesell, in *American Guidance Foundation, Inc. v. United States*,181 relied on the IRS's fourteen-point criteria to deny a family-centered religious organization status as a church under the Internal Revenue Code.182 The IRS conceded the sincerity of the family's religious beliefs and did not challenge its tax exemption. The only issue was whether the family-based, religious organization qualified as a church for additional privileges, such as exemption from financial reporting. Referencing the IRS's fourteen-point criteria as authoritative on the issue of defining a church, Judge Gesell explained:

While some of these [IRS criteria] are relatively minor, others, *e.g.*, the existence of an *established congregation* served by an organized ministry, the provision of *regular religious services* and religious education for the young, and the dissemination of a doctrinal code, are of central importance. The means by which an avowedly religious purpose is accomplished separates a "church" from other forms of religious enterprise. At a minimum, a church includes a body of believers or communicants that assembles regularly in order to worship. Unless the organization is reasonably available to the public in its conduct of worship, its educational instruction, and its promulgation of doctrine, it cannot fulfill this associational role.183

Under this approach, Judge Gesell reduced a multifactual analysis based upon tentative and variant criteria into a simple "minimum" definitional standard. Because the family's sincere religious beliefs constituted a "quintessentially private religious enterprise," the religious organization, described by its members as a church, "fail[ed] to qualify under the threshold indicia of communal activity necessary for a 'church.'"184 Judge Gesell, therefore, emphasized the public, communal, or associational criteria present in the IRS standard as determinative of an organization's being a church.185 Regardless of the functional or normative equivalence of religiosity or sincerity, and even though most of the other IRS criteria had been

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182. Id. at 306 n.2.
183. Id. at 306 (emphasis added) (citing *Chapman*, 48 T.C. at 367 (Tannenwald, J., concurring)).
184. Id. at 307.
185. Id. at 306-07.
met, a quintessentially private religious experience did not qualify for the benefits afforded churches.

The Ideal Life Church v. County of Washington,\textsuperscript{186} decision also raised issues regarding the adequacy of a “multifactual analysis test” for classifying churches. In Ideal Life Church, the petitioner claimed a religious tax exemption for his home which served as the meeting place for a family-based “church.” The organization had no formal doctrine, sacraments, rituals, or literature, and its members were free to belong to other faiths. Ideal Life applied for property tax exemption under Minnesota’s property tax exemption laws. The Minnesota tax court, though, found Ideal Life to be merely a tax-avoidance scheme.\textsuperscript{187}

On appeal, the court determined in an analogical manner that church classification depended “upon an analysis of all the facts and circumstances of each particular case.”\textsuperscript{188} Facts which indicated that Ideal Life did not qualify as a church included: a primary tax-avoidance purpose; the lack of doctrinal beliefs; free membership in other churches; the lack of a formally trained or ordained ministry; the lack of sacraments or rituals; the absence of any liturgy; no purpose to advance religion; and no belief in God.\textsuperscript{189} The most the petitioner could claim in defense of its church status was a monthly gathering or meeting and self-characterization as a church.

The court favored the adoption of the tax court’s “multifactual analysis” test, based on the IRS definitional criteria, lest any “‘factor or set of factors [be] completely determinative, resulting in either a too-narrow or overly-broad definition.’”\textsuperscript{190} This approach enabled the court to finesse “theistic” and “orthodoxy” establishment objections. Because no set of factors were given determinative weight, the court was able to sidestep any theistic or orthodoxy establishment clause objections which might have been raised.

In a concurring opinion, Judge Wahl noted that the case turned more on a “sincerity of belief” test, than a multifactual analysis of “church.”\textsuperscript{191} Citing Professor Harvey Cox’s concern over a “man-on-the-street” definition of religion or church as being too intolerant, Judge Wahl repudiated any dictionary approach premised on common meaning. He stated:

Dictionary definitions used by the majority are nothing more than “man-in-the-street” reflections by a dictionary pub-

\textsuperscript{186}. 304 N.W.2d 308 (Minn. 1981).
\textsuperscript{187}. Id. at 310-12.
\textsuperscript{188}. Id. at 315.
\textsuperscript{189}. Id.
\textsuperscript{190}. Id. (quoting Brief for Appellant at —, Ideal Life).
\textsuperscript{191}. See id. at 318.
Justice Wahl found the IRS criteria used by the court as a definitional base for its multifactual analysis to be "unduly restrictive and traditional." According to Judge Wahl, "I cannot agree that such a test is appropriate for use in protecting the important constitutional liberty of freedom of religion."  

C. FUNCTIONAL CASES

Analogical analysis based upon multifactual considerations suffers from either the indeterminacy of the paradigm criteria or the likelihood of the criteria's being treated in a necessary-and-sufficient manner. Family religions or churches pose conceptual difficulties because they bear strong resemblances to orthodox religions but are not favored by the courts. A functional analysis would yield more favorable results for the taxpayer. Assuming sincerity is not in issue, a family-based or even personal religion or belief system would constitute the functional equivalent of orthodox religions. The "associational," "communal," or "sectarian" definitional barriers simply would not bar "church" status of functional equivalents.

A functional analysis supplied the basis for determining church status in *Fellowship of Humanity v. County of Alameda.* The followers organized the Fellowship of Humanity for the following purposes:

*[T]*o establish and maintain a free fellowship for the study of human relationships from the viewpoint of religion, education and sociology; establishment and the propagation and nurture of the ideals of brotherhood of man, and without any distinctive creed or religious formula; . . . to promote humanism by means of public meetings, lectures, programs, study classes, publishing and distributing literature and such other means as may be deemed practical for the dissemination of constructive and progressive thought.

The issue in *Fellowship of Humanity* was whether an organization, interpreted as nonreligious in either a strict or multifactual sense, qualified for an exemption under a statute which required the property to be used "solely and exclusively for religious worship."  

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192. Id. at 319 (citing Professor Harvey Cox, *reprinted in* L. Tribe, *American Constitutional Law* § 14-b, at 827 n.8 (1978)).
193. Id. at 320.
194. Id.
196. 153 Cal. App. 2d at —, 315 P.2d at 398.
The court reasoned:

It is not permitted to test [the] validity of, or to compare beliefs. This simply means that "religion" fills a void that exists in the lives of most men. Regardless of why a particular belief suffices, as long as it serves this purpose, it must be accorded the same status of an orthodox religious belief. Of course, the belief cannot violate the laws or morals of the community, but subject to this limitation, the content of the belief is not a matter of governmental concern.\textsuperscript{198}

Since the Fellowship served the same role for its members as traditional religion does for its participants, the courts felt constitutionally obligated to extend its exemption status.\textsuperscript{199}

These cases illustrate the different results which likely will follow from the selection of variant analytical modes for determining church or religious status. When Congress, the Treasury Department, or IRS administrative officials, define "church" or "religion" in a way that prefers certain religious organizations over others, then the establishment, due process, and equal protection clauses demand that such a distinction satisfy compelling-state-interest and least-restrictive-alternative tests. Of course, if the definitional distinctions are imposed on a statutory structure by anyone other than the legislative body, then the courts can use the rhetoric of statutory interpretivism to invalidate impermissible discrimination.

Where Congress has failed to legislate, however, unspoken constitutional standards provide the background for statutory interpretation. This was the approach that the court adopted in the \textit{Seeger} and \textit{Welch}, conscientious objector cases. A similar situation greets courts faced with the task of defining church or religion. Because Congress has not spoken definitionally in this area, unspoken constitutional standards must guide the courts. Reliance on such a constitutionally inspired version of statutory interpretation explains the Eighth Circuit's decision in \textit{Lutheran Social Service v. United States}.\textsuperscript{200}

\textbf{V. LUTHERAN SOCIAL SERVICE v. UNITED STATES}

Lutheran Social Service of Minnesota ("LSS") ostensibly filed this action to obtain a refund of a $700.00 tax penalty imposed on it for its having failed to file a timely tax information reporting form, Form 990, as required by 26 U.S.C. § 6033(a)(1). In reality, LSS commenced the action to challenge the constitutionality and statutory legitimacy of the filing exemption classifications provided in 26 U.S.C.

\textsuperscript{198} 153 Cal. App. 2d at —, 315 P.2d at 406.
\textsuperscript{199} 153 Cal. App. 2d at —, 315 P.2d at 409.
\textsuperscript{200} 758 F.2d 1283 (8th Cir. 1985).
§ 6033(a)(1)(2) and the Treasury Department's interpretive regulation section 1.6033-2(g)(5)(i).

Section 6033(a)(1) requires:

Except as provided in paragraph (2), every organization exempt from taxation under section 501(a) shall file an annual return, stating specifically the items of gross income, receipts, and disbursements, and such other information for the purpose of carrying out the internal revenue laws as the Secretary may by forms or regulations prescribe.  

Section 6033(a)(2)(A) exempts from filing the following:

(ii) churches, their integrated auxiliaries, and conventions or associations of churches,

(ii) any organization (other than a private foundation, as defined in section 509(a)) described in subparagraph (C), the gross receipts of which in each taxable year are normally not more than $5,000, or

(iii) the exclusively religious activities of any religious order.

Notably, religious entities that are not separately incorporated from their church affiliates, even where they perform "secular" social services, are exempt from section 1.6033-2(g)(5)(iv), example 6 of the Treasury Regulations. In comparison, section 1.6033-2(g)(5)(i) of the Treasury Regulations defines the term "integrated auxiliary" to include only religious auxiliaries that have an exclusively religious purpose.

LSS operated as a nonprofit, social service agency for the three major, national Lutheran synods: the American Lutheran Church, the Lutheran Church in America, and the Lutheran Church-Missouri. Had any of these separate synods organized the service separately and operated it as part of its ministry, without separate incorporation, it would have clearly qualified for an exemption from filing. Because LSS was separately incorporated, its child care, adoption, counseling, residential treatment, camp, and chaplaincy services were required, according to the IRS and the district court, to file a Form 990.

The issue, on appeal, was whether LSS qualified as either a church or an integrated auxiliary of a church. Relying on the IRS's
fourteen-point criteria, the court held that LSS did not qualify as a church.207 The court did not explain the mode of analysis selected in evaluating the IRS criteria, but the opinion reflected a strict definitional approach. As operated, this sectarian (Lutheran) organization served social needs, for religious reasons, on a nondenominational basis. The court reasoned that because “LSS's primary activities consist of providing social services to the public at large irrespective of their religious beliefs. . . . LSS’s counselors are not required to counsel with any particular religious orientation.”208 Because the services were “secular in nature” rather than “sacerdotal” or worshipful, LSS did not qualify as a church.209

Under this reasoning social service agencies do not qualify as a church because they serve social, rather than religious, needs. Although the district court expressly tied this result to De La Salle Institute’s “common understanding” of church, the Eighth Circuit, following the Supreme Court’s approach in St. Martin Evangelical Lutheran Church v. South Dakota,210 decided to “express no opinion as to the validity of the ‘common understanding’ approach.”211 The court, however, gave very little explanation of its reasoning. While it referred to the IRS criteria as determinative, none of the specific criteria were discussed. Thus, the court offered no explanation or evaluation for determining the family resemblance or differences between LSS and other churches.

Perhaps, the court felt justified in a narrow and cursory treatment of what constitutes church status because of an expansive interpretation—presumably because of constitutional implications—of the term “integrated auxiliary.”212 The expansive definition of integrated auxiliary came at the cost of an interpretive treasury regulation. Section 1.6033-2(g)(5)(i) defines “integrated auxiliary” as an organization:

(a) Which is exempt from taxation as an organization described in section 501(c)(3);
(b) Which is affiliated . . . with a church; and
(c) Whose principal activity is exclusively religious.213

207. Id. at 1286-87.
208. Id. at 1287.
209. Id.
210. 451 U.S. 772 (1981). In St. Martin, the Court stated that it “disallowed any intimidations in this case defining or limiting what constitutes a church . . . under any . . . provision of the Internal Revenue Code.” Id. at 784 n.15.
211. Lutheran Social Serv., 758 F.2d at 1287 n.4 (citing St. Martin, 451 U.S. at 784 n.15).
212. See id. at 1288-91. Reasoning that “[c]ourts should avoid construing statutes in ways that would render them unconstitutional,” the court noted that “Congress clearly sought to equalize tax treatment among religions.” Id. at 1288 n.5.
The "exclusively religious" requirement provided the only snag to LSS's classification as an integrated auxiliary. While the legislative history of section 6033 does not define integrated auxiliary, the Conference Committee of the House and Senate provided a list of examples of organizations that were intended to be included in that category:

The integrated auxiliary organizations to which this applies include the church's religious school youth group, and men's and women's clubs.214

Since social service agencies resembled the nonreligious examples listed in the conference report, the legislative history was thought to be contrary to the Treasury regulation's "exclusively religious" requirement as to integrated auxiliaries.215

The court held that, while Treasury regulations are entitled to a great deal of deference, here "the plain language of section 6033 and the legislative history of 6033 convince us that the IRS regulation is inconsistent with clear congressional policy."216 On the issue of plain language, the court noted that Congress uses the phrase "exclusively religious" in connection with religious orders exempted, but not auxiliaries.217 Accordingly, the Treasury improperly read an "exclusively religious" requirement into "integrated auxiliaries" where none was intended. Thus, the court held the Treasury regulation to be invalid.218

This result is also constitutionally required, especially if LSS does not qualify as a church. The essential point is that neither the IRS nor Congress has the constitutional authority to distinguish between forms of religious organizations having analogical, functional, and normative equivalence. If LSS, for example, constituted the entirety of a secular humanist organization which had other analogical and functional indicia of a church, it is difficult to see how the exemption could be denied. Similarly, if LSS had not been separately incorporated, but had been part of its hierarchical church, such as the Catholic Church, then its activities would have qualified under the

215. Id. at 1291. The district court relied upon legislative history from a subsequent tax act to find a congressional intent to exclude religious-affiliated organizations providing social services from the classification of "integrated auxiliary." Id. at 1290 (quoting Lutheran Social Serv. v. United States, 583 F. Supp. 1298, 1305 (D. Minn. 1984) (quoting H.R. Rep. No. 1210, 94th Cong., 2d Sess. 15-16)). The Eighth Circuit stated: "[t]he district court's reliance on the legislative history of a subsequent unrelated Act was misplaced." Id.
216. Id.
217. Id.
218. Id. at 1290.
broad protection afforded dependent organizations of a church. Why should the form of the legal affiliation, which is largely determined by secular laws, be determinative?

Further, applying the “exclusively religious” classification would require a court to become involved with doctrinal entanglement in determining whether certain activities were deemed to be religious within the tenets of the particular faith. In Lutheran Social Service, the court noted that LSS fulfilled religious purposes, in that “it performs functions of the church bodies to which it is related by satisfying the tenet of the Lutheran faith which requires the stimulation of works of mercy through social action ministries developed to promote human welfare.”219 These purposes sound “religious” from a Lutheran perspective even though services performed in connection with the “social gospel” are also performed by secular organizations. Whether the purposes are exclusively religious, again, would depend on unraveling the definition of “religious.” The Eighth Circuit properly avoided this perplexity by invalidating the Treasury Department’s unwarranted and unconstitutional discrimination among favored religious auxiliaries.

VI. CONCLUSION

The final unanswered question which remains is the propriety of Congress’ differentiating between types of religious organizations. Normative analysis suggests that the benefits of the free exercise, establishment, due process, and equal protection clauses require that any differentiation between types of religious organizations must be justified by a showing of a reasonable and imminent threat to public order and security. Preferring orthodox organizations through favorable tax or reporting treatment cannot be justified by merely showing that the public interest is served. Such a utilitarian balancing deprecates respect for individual belief systems and runs counter to the tradition of respect for human rights. The decision in Lutheran Social Services correctly protects religious-affiliated organizations from reporting requirements, but it does not go far enough in protecting religious entities from governmental regulation and surveillance.

219. Id. at 1291.