

TRUE BELIEVERS?: PROBLEMS OF DEFINITION IN TITLE VII RELIGIOUS DISCRIMINATION JURISPRUDENCE

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INTRODUCTION

Imagine that you are an owner of a retail store. Your employees regularly come into contact with the public. To foster an image that appeals to customers, you adopt a dress code for all employees. The dress code requires employees to wear uniforms and to keep their hair neatly trimmed. In addition, it forbids employees to display facial piercings while they work. One of your employees has several facial piercings, including an eyebrow ring. When you announce your no-facial-piercing policy, she refuses to remove the piercing, saying that it is part of her “religion.” After further inquiry, you learn that she is a member of the “Church of Body Modification,” a church based on the Internet which encourages piercings and tattoos. What do you do? Must you accommodate her “religion”? If you fire her, can she sue you for “religious discrimination”?

Now imagine that your dress code also requires men to be clean-shaven. One of your employees has a beard. When you announce your no-facial-hair policy, he refuses to shave his beard, saying that it is part of his “religion.” After further inquiry, you learn that he is a Sikh and that his religion forbids him to shave his facial hair. What do you do? Do you react differently than you did with the member of the Church of Body Modification?

The preceding hypothetical situations are based on actual cases.¹ They throw into sharp relief an issue that lurks in many cases of religious discrimination brought under Title VII of the Civil Rights Act of 1964: What exactly *is* the “religion” which is protected? More practically, these cases force us to confront basic policy issues: Should members of the Church of Body Modification be protected in a manner similar to Muslims? What about ethical vegans?² White supremacists who claim their belief system is “religious”?³ Ardent Republicans or Democrats? Given the state of the law today, these questions have no clear-

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1. *Cloutier v. Costco Wholesale Corp.*, 390 F.3d 126 (1st Cir. 2004) (discussing no-facial-piercing policy); *EEOC v. Sambo’s of Georgia, Inc.*, 530 F. Supp. 86 (D.C. Ga. 1981) (discussing no-facial-hair policy).

2. *See Friedman v. S. Cal. Permanente Med. Group*, 125 Cal. Rptr. 2d 663, 665-66 (2002) (holding that veganism does not constitute a “religion” for purposes of California’s Fair Employment and Housing Act because it did not address “ultimate” questions (such as the meaning of life), was insufficiently comprehensive, and gave rise to no formal or external signs).

3. *Compare Peterson v. Wilbur Commc’ns, Inc.*, 205 F. Supp. 2d 1014, 1021-24 (E.D. Wis. 2002) (holding that a church that preached a set of white supremacist beliefs called “Creativity” is a “religion” for purposes of Title VII), *with Slater v. King Soopers*, 809 F. Supp. 809 (D. Colo. 1992) (holding that the Ku Klux Klan is not a religion for purposes of Title VII).

cut answers.

This Note analyzes and critiques the prevailing definition of “religion” used to decide religious discrimination suits under Title VII of the Civil Rights Act of 1964 (“Title VII”).⁴ In Part I, this Note provides a brief introduction to religious discrimination in employment. Part II explores the background of courts’ attempts to define religion in the context of Title VII. In particular, it discusses the U.S. Supreme Court’s conscientious objector cases and some of its First Amendment jurisprudence. Part III explores the definitions courts purport to use when considering claims of religious discrimination under Title VII. Part IV analyzes and critiques these definitions, suggesting that courts do not follow the radical implications of the Supreme Court’s First Amendment jurisprudence when deciding Title VII cases.

I. BRIEF INTRODUCTION TO RELIGIOUS DISCRIMINATION IN EMPLOYMENT

A. *The Standards of Title VII*

Title VII prohibits various forms of employment discrimination, including discrimination on the basis of religion.⁵ This broad prohibition applies to both public and private employers.⁶ Title VII provides, in relevant part:

(a) It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s . . . religion . . . ; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual’s . . . religion.⁷

Title VII defines “religion” to include “all aspects of religious observance and practice, as well as belief.”⁸

The EEOC and the courts have interpreted Title VII broadly.⁹ The language

4. 42 U.S.C. §§ 2000e to 2000e-17 (2000).

5. *Id.* § 2000e-2.

6. *Id.* §§ 2000e-16 (prohibiting employment discrimination by the federal government), 2000e(a) (applying the statute to state and local governments), 2000e(b) (defining “employer” to include companies which affect commerce and have fifteen or more employees for twenty or more calendar weeks in the current or preceding calendar year).

7. *Id.* § 2000e-2(a).

8. *Id.* § 2000e(j).

9. Russell S. Post, Note, *The Serpentine Wall and the Serpent’s Tongue: Rethinking the*

of the statute itself forbids employers from making certain discriminatory decisions, such as refusing to hire a job applicant simply because he or she is Muslim.¹⁰ Courts have also read the statute to prohibit harassment based on race, sex, national origin, and religion.¹¹ Under this reading, an employee may sustain a claim for a “hostile work environment” if he or she suffers harassment which is sufficiently severe.¹² In 1972, the EEOC endorsed the viability of hostile work environment claims in the context of religious discrimination, holding that the “failure to provide a working environment free of religious intimidation is violative of Section 703(a) of Title VII [42 U.S.C. § 2000e-2].”¹³ Thus, an employee who is repeatedly subjected to anti-Semitic epithets by his or her supervisor may be entitled to relief under Title VII.¹⁴

In its original form, Title VII did not explicitly require employers to accommodate employees’ religious practices. For example, the statute did not seem to require an employer to grant employees time off to attend religious services.¹⁵ In the wake of numerous complaints from employees who had been denied time off for religious observances, the EEOC addressed the issue in its 1966 Guidelines.¹⁶ These guidelines held that an employer could establish a normal work week which was generally applicable to all employees without discriminating on the basis of religion; however, the EEOC also stated that employers should accommodate the religious practices of its employees unless doing so would create a “serious inconvenience to the conduct of the business.”¹⁷ In 1967, the EEOC amended its Guidelines to require an employer to make such accommodations unless doing so would cause “undue hardship.”¹⁸ This amendment seemed to confer upon employers an affirmative obligation to excuse employees from work to attend religious services. Most courts refused to impose this burden on employers.¹⁹

In 1972, Congress amended Title VII. In so doing, it followed the EEOC Guidelines and explicitly required employers to accommodate the religious

Religious Harassment Debate, 83 VA. L. REV. 177, 181 (1997).

10. 42 U.S.C. § 2000e-2.

11. Post, *supra* note 9, at 181-82.

12. *Id.*

13. *Id.* at 182 (quoting EEOC Dec. No. 72-1114, 1973 EEOC Decisions (CCH) P 6347 (Feb. 18, 1972)).

14. See, e.g., *Shanoff v. Ill. Dep’t of Human Servs.*, 258 F.3d 696 (7th Cir. 2001).

15. See Civil Rights Act of 1964, Pub. L. No. 88-352, § 701, 78 Stat. 241, 253 (1964) (codified as amended at 42 U.S.C. § 2000e (2000)). The original version did not include § 701(j), which currently requires employers to accommodate the religious practices of employees. 42 U.S.C. § 2000e(j) (2000).

16. Debbie N. Kaminer, *Title VII’s Failure to Provide Meaningful and Consistent Protection of Religious Employees: Proposals for an Amendment*, 21 BERKELEY J. EMP. & LAB. L. 575, 581 (2000).

17. *Id.* (quoting 29 C.F.R. § 1605.1 (1967)).

18. *Id.* (quoting 29 C.F.R. § 1605.1 (1968)).

19. *Id.* at 582.

practices of their employees.²⁰ It accomplished this by amending Title VII's definition of religion to read: "The term 'religion' includes all aspects of religious observance and practice, as well as belief, *unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.*"²¹

B. The Meaning of "Reasonable Accommodation"

The U.S. Supreme Court defined the contours of this reasonable accommodation in two landmark cases. In *Trans World Airlines, Inc. v. Hardison*,²² the Court held that any accommodation imposing more than a *de minimis* cost constitutes an "undue hardship" for the purposes of Title VII. In *Hardison*, the plaintiff belonged to the Worldwide Church of God, a Christian group which required its members to observe the Sabbath by refraining from performing any work from sunset on Friday until sunset on Saturday.²³ He informed his manager of this conflict, and the problem was temporarily solved when he transferred to the night shift, thereby allowing him to observe his Sabbath. When the plaintiff transferred to another position on the day shift, he again faced the possibility of having to work on Saturdays.²⁴

When another employee went on vacation, he was asked to work Saturdays. Although the employer agreed to allow the union to seek a change of work assignments for him, the union was not willing to violate the seniority provisions of the collective-bargaining contract and allow the plaintiff to bid for a shift having Saturdays off. The plaintiff proposed that he be allowed to work four days per week. The company rejected this proposal.²⁵ It argued that the plaintiff's position was essential, so it could not be left open on weekends. Moreover, filling his position with an employee from another area would have harmed other operations. Finally, employing another person who was not normally assigned to work on Saturdays would have required the employer to pay premium wages.²⁶ An accommodation was never reached, and the plaintiff refused to report for work on Saturdays. Ultimately, he was terminated because he refused to work during his designated shift.²⁷ He brought suit, alleging religious discrimination in violation of Title VII.

The Court concluded that the employer had not violated Title VII.²⁸ The

20. *Id.* at 583.

21. 42 U.S.C. § 2000e(j) (2000) (emphasis added).

22. 432 U.S. 63 (1977).

23. *Id.* at 67; *see also* Johnson v. Angelica Unif. Group, Inc., 762 F.2d 671, 672 (1985) (discussing the tenets of the Worldwide Church of God).

24. *Hardison*, 432 U.S. at 67-68.

25. *Id.* at 68.

26. *Id.* at 68-69.

27. *Id.* at 69.

28. *Id.* at 70.

Court found that the company had made attempts to accommodate the plaintiff, these attempts were “reasonable” according to the terms of the statute, and requiring the company to do more would have constituted an “undue hardship.”²⁹ Ultimately, the Court held that the “undue hardship” standard of Title VII only required the company to bear a *de minimis* cost. It reasoned:

To require [the company] to bear more than a *de minimis* cost in order to give [the plaintiff] Saturdays off is an undue hardship [T]o require [the company] to bear additional costs when no such costs are incurred to give other employees the day off that they want would involve unequal treatment of employees on the basis of their religion. [The suggestion that the company] should incur certain costs in order to give [the plaintiff] Saturdays off . . . would in effect require [the company] to finance an additional Saturday off and then to choose the employee who will enjoy it on the basis of his religious beliefs. While incurring extra costs to secure a replacement for [the plaintiff] might remove the necessity of compelling another employee to work involuntarily in [the plaintiff’s] place, it would not change the fact that the privilege of having Saturdays off would be allocated according to religious beliefs.³⁰

Noting that Congress was primarily concerned with the elimination of discrimination in employment when it passed Title VII, the Court refused to construe the statute to require an employer to “discriminate against some employees in order to enable others to observe their Sabbath.”³¹ Thus, the Court established that Title VII only required employers to bear a *de minimis* cost when accommodating the religious practices of their employees.

The Court further narrowed the accommodations required of employers in *Ansonia Board of Education v. Philbrook*.³² In that case, the plaintiff was a teacher and a member of the Worldwide Church of God. In addition to forbidding work on Saturdays, the group required members to refrain from work on various holy days. Under the terms of the collective bargaining agreement, teachers were allowed three paid days off for religious reasons. In addition, teachers were given three paid personal days off.³³ These personal days could not be used for purposes for which there was already a designated leave. Thus, they could not be used for religious reasons. The plaintiff, however, usually needed to miss about six days per year for religious celebrations. For several years, he used the three days authorized for religious reasons and took unauthorized leave (time without pay) for additional holidays. Eventually the plaintiff became dissatisfied with the arrangement.³⁴ He suggested two

29. *Id.* at 77.

30. *Id.* at 84-85.

31. *Id.* at 85.

32. 479 U.S. 60 (1986).

33. *Id.* at 63-64.

34. *Id.* at 64.

alternatives: either he could use his personal leave for additional holy days or he could pay the cost of a substitute teacher for holy days on which he could not work and in return receive full pay. The school district refused these requests, arguing that allowing plaintiff to take unpaid leave constituted a reasonable accommodation.³⁵ The plaintiff brought suit under Title VII for failure to accommodate his religious practices, arguing that his employer was required to accept one of the accommodations he had proposed because none of his alternatives constituted an "undue hardship."³⁶

The Court held that an employer fulfills its duty to accommodate under Title VII so long as it offers a reasonable accommodation to the employee, even if that accommodation is not the employee's preferred accommodation.³⁷ The Court reasoned:

We find no basis in either the statute or its legislative history for requiring an employer to choose any particular accommodation. . . . Thus, where the employer has already reasonably accommodated the employee's religious needs, the statutory inquiry is at an end. The employer need not further show that each of the employee's alternative accommodations would result in undue hardship.³⁸

Ultimately, the Court remanded the case for consideration of whether the employer's proposed accommodation of unpaid days off constituted a "reasonable accommodation."³⁹

C. Causes of Action for Religious Discrimination

Thus, the present interpretation of Title VII allows for three separate causes of action for religious discrimination. First, an employee may bring a case for disparate treatment.⁴⁰ To establish a prima facie case of disparate treatment, he or she must show that: (1) he or she adhered to a religious belief system or engaged in religious practices; (2) he or she was qualified for the position; (3) he or she suffered an adverse employment action; and (4) others who do not share his or her religion received more favorable treatment.⁴¹ Second, an employee may bring a claim for religious harassment or hostile work environment.⁴² To establish a prima facie case on this claim, he or she must show that: (1) he or she

35. *Id.* at 65.

36. *Id.* at 62-65.

37. *Id.* at 68.

38. *Id.* (internal citations omitted).

39. *Id.* at 70 (noting that, while unpaid leave usually constitutes a reasonable accommodation, it is not a reasonable accommodation when unpaid leave is allowed for all purposes *except* religious purposes).

40. MICHAEL WOLF ET AL., *RELIGION IN THE WORKPLACE: A COMPREHENSIVE GUIDE TO LEGAL RIGHTS AND RESPONSIBILITIES* 38 (1998).

41. *Id.* at 43-44.

42. *Id.* at 53.

is a member of a protected religious group; (2) he or she was subjected to unwelcome harassment; (3) the harassment was based on his or her religion; and (4) the harassment affected a term, condition, or privilege of employment.⁴³ Finally, an employee may bring a claim for failure to accommodate his or her religious practices.⁴⁴ To establish a prima facie case under this theory, the employee must show that: (1) he or she has a sincere religious belief that conflicts with an employment requirement; (2) the employer was put on notice of the conflict; and (3) he or she has been disciplined or will otherwise suffer an adverse consequence for adherence to his or her religious belief.⁴⁵

For each cause of action, the employee must show that he or she subscribes to some sort of "religion," such that he or she is entitled to the protection of Title VII. Although the courts have developed sophisticated rubrics to analyze each of the causes of action, the definition of the "religion" that is to be protected remains murky. This confusion results, in part, from the lack of legislative history which might indicate exactly what Congress intended to protect when it incorporated religion into its broad policy of antidiscrimination.⁴⁶ Title VII singles out religion for protection by placing it in the same category as race, color, sex, and national origin.⁴⁷ The legislative history of the statute reveals no discussion or debate about the rationale for making religion a protected category.⁴⁸ Russell S. Post has observed:

This pervasive silence suggests that religion was included in Title VII as boilerplate language to ensure uniformity of the antidiscrimination principle, not as a function of any compelling policy rationale. This inference is supported by the fact that the earliest antecedents of Title VII, New Deal employment measures, often included prohibitions against discrimination on account of "race, color, or creed," offering easy templates for the drafters of Title VII to adopt verbatim.

In retrospect, therefore, the prohibition against religious discrimination looks more like an afterthought than an imperative of public policy.⁴⁹

Thus, courts have been left to develop a definition of religion which accords with the policies behind Title VII. In so doing, they must pay heed to the U.S. Supreme Court's pronouncements concerning religion and the strictures of the First Amendment.

43. *Id.* at 56.

44. *Id.* at 67.

45. *Id.* at 68.

46. Post, *supra* note 9, at 180-81.

47. 42 U.S.C. § 2000e-2 (2000).

48. Post, *supra* note 9, at 181 n.11.

49. *Id.* at 181.

II. DEFINING "RELIGION": BACKGROUND AND LIMITATIONS

A. *Background: The Conscientious Objector Cases and the Definition of "Religion"*

Although the U.S. Supreme Court has adopted various definitions of "religion," the approach most often used in religious discrimination cases originates from cases interpreting the conscientious objector exemption to the Universal Military Training and Service Act of 1948.⁵⁰ In 1890, the Court adopted a substantive definition, requiring that religion "refer to the belief in and worship of a deity."⁵¹ Some sixty years later, it moved toward a functional definition of religion, holding that the term "religion" did not apply solely to those beliefs which rested on belief in a deity.⁵² The Court expanded on this definition in *United States v. Seeger*⁵³ and *Welsh v. United States*,⁵⁴ thereby setting the stage for future cases.

1. *"Non-Traditional" Religions: United States v. Seeger.*—In *Seeger*, the Court considered several cases involving claims of men who had claimed conscientious objector status under the Universal Military Training and Service Act. Each had been convicted under the Act after refusing to submit to induction in the armed forces.⁵⁵ The Act exempted those persons from combatant training and service in the armed forces of the United States "who by reason of their religious training and belief are conscientiously opposed to participation in war in any form."⁵⁶ It defined "religious training and belief" as "an individual's belief in relation to a Supreme Being involving duties superior to those arising from any human relation, but [not including] essentially political, sociological, or philosophical views or a merely personal moral code."⁵⁷

The Court concluded that Congress, in using the phrase "Supreme Being," meant to "embrace all religions and to exclude essentially political, sociological, or philosophical views."⁵⁸ In developing a test to identify "religious" beliefs under the Act, the Court considered the history of exemptions for conscientious objectors.⁵⁹ First, it noted that government has long recognized the "moral dilemma" posed to persons of various religious faiths by the "call to arms."⁶⁰ While tracing the development of the exemption, it noted that Congress had

50. See John C. Knechtle, *If We Don't Know What It Is, How Do We Know if It's Established?*, 41 BRANDEIS L.J. 521, 525-26 (2003).

51. *Id.* (citing *Davis v. Beason*, 133 U.S. 333 (1890)).

52. *Id.* (citing *Torcaso v. Watkins*, 367 U.S. 488 (1961)).

53. 380 U.S. 163 (1965).

54. 398 U.S. 333 (1970).

55. *Seeger*, 380 U.S. at 166-69.

56. *Id.* at 164 (citing 50 U.S.C. App. § 456(j) (1958)).

57. *Id.* at 165 (quoting 50 U.S.C. App. § 456(j) (1958)) (alteration in original).

58. *Id.* at 165.

59. *Id.* at 171-72.

60. *Id.* at 170.

always continued its practice of “excusing from armed service those who believed that they owed an obligation, superior to that due the state, of not participating in war in any form.”⁶¹ Similarly, the Court noted that those who oppose war on the basis of political, sociological, or economic considerations have never been exempted because “[t]hese judgments have historically been reserved for the Government, and in matters which can be said to fall within these areas the conviction of the individual has never been permitted to override that of the state.”⁶²

After recognizing the difficulty inherent in discussing “spiritual” matters in a religiously pluralistic society,⁶³ the Court adopted a test of whether a belief is “religious” for purposes of the Act. It held that the appropriate inquiry 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.”⁶⁴ In characterizing this test, the Court quoted approvingly Protestant theologian Paul Tillich’s conception of God as “the source of your being, of your ultimate concern, *of what you take seriously without any reservation.*”⁶⁵

The Court applied this test to three separate claimants. Seeger declared that he was conscientiously opposed to participation in war in any form because of his “religious” beliefs.⁶⁶ He preferred to leave the question of his belief in a Supreme Being open. He characterized his “religion” as a “belief in and devotion to goodness and virtue for their own sakes, and a religious faith in a purely ethical creed.”⁶⁷ Seeger cited Plato, Aristotle, and Spinoza to support his belief in intellectual and moral integrity “without belief in God, except in the remotest sense.”⁶⁸ His claim for conscientious objector status had been denied because it was deemed not to be based on a “belief in relation to a Supreme Being,” as required by the Act.⁶⁹ The Court reversed his conviction, finding that his belief system was sufficiently “religious” to satisfy the requirements of the Act.⁷⁰ It reasoned:

In summary, Seeger professed “religious belief” and “religious faith.” He did not disavow any belief “in a relation to a Supreme Being”; indeed he stated that “the cosmic order does, perhaps, suggest a creative intelligence.” He decried the tremendous “spiritual” price man must pay for his willingness to destroy human life. . . . We think it clear that the

61. *Id.* at 172.

62. *Id.* at 173.

63. *Id.* at 174-76.

64. *Id.* at 166.

65. *Id.* at 187 (quoting PAUL TILlich, *THE SHAKING OF THE FOUNDATIONS* 57 (1948)).

66. *Id.* at 166.

67. *Id.*

68. *Id.*

69. *Id.* at 167.

70. *Id.* at 187.

beliefs which prompted his objection occupy the same place in his life as the belief in a traditional deity holds in the lives of his friends, the Quakers.⁷¹

Jakobson also claimed conscientious objector status. He stated that he "believed in a 'Supreme Being' who was 'Creator of Man' in the sense of being 'ultimately responsible for the existence of' man and who was the 'Supreme Reality' of which 'the existence of man is the *result*.'"⁷² He stated that he believed in "Godness" which he defined as "the Ultimate Cause for the fact of the Being of the Universe."⁷³ He had concluded that his "most important religious law" was that "no man ought ever to willfully sacrifice another man's life as a means to any other end."⁷⁴ He represented that his religious and social thinking were the product of meditation and thought.⁷⁵ His claim was originally denied because it was based upon a "personal moral code," as opposed to a "religion."⁷⁶ The Court reversed his conviction, reasoning that his belief in opposition to war was "related to a Supreme Being."⁷⁷

Peter was also convicted under the Act after he refused to submit to induction.⁷⁸ In his application for a conscientious objector exemption, he had stated that he was not a member of a religious sect or organization. He hedged the question as to his belief in a Supreme Being, but quoted with approval a definition of religion as "the consciousness of some power manifest in nature" and "the supreme expression of human nature."⁷⁹ When asked directly about his belief in a Supreme Being, he stated that he supposed "you could call that a belief in the Supreme Being or God. These just do not happen to be the words I use."⁸⁰ The Court reversed his conviction, finding that his reference to "some power manifest in nature" and his acknowledgment that his beliefs could be characterized as a belief in a Supreme Being were sufficiently "religious" to qualify for exemption under the Act.⁸¹

2. "*Nonreligious*" Belief Systems: *Welsh v. United States*.—Having expanded the conscientious objector exemption to persons who professed "non-traditional" views of God in *Seeger*, the Court considered the status of those who characterized their belief systems as "nonreligious" in *Welsh v. United States*.⁸² *Welsh's* application for conscientious objector status was denied, and he was

71. *Id.*

72. *Id.* at 167.

73. *Id.* at 168.

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.* at 187.

78. *Id.* at 169.

79. *Id.* at 169.

80. *Id.*

81. *Id.* at 187-88.

82. 398 U.S. 333 (1970).

convicted under the Act after he refused to submit to induction into the Armed Forces.⁸³ Welsh was unable to sign the statement printed on the Selective Service Form which stated, "I am, by reason of my religious training and belief, conscientiously opposed to participation in war in any form."⁸⁴ He signed only after striking out the words "my religious training and" from the form.⁸⁵ Later, he indicated that his beliefs had been formed by reading in the fields of history and sociology.⁸⁶ Welsh preferred to leave the question of whether he believed in a "Supreme Being" open.⁸⁷ Although he indicated that he believed the taking of human life was morally wrong,⁸⁸ his original application characterized his beliefs as nonreligious.⁸⁹ While the Selective Service conceded that Welsh's beliefs were held "with the strength of more traditional religious convictions,"⁹⁰ his original application for conscientious objector status was denied because his beliefs were deemed insufficiently "religious."⁹¹

The Court overturned Welsh's conviction. In so doing, it extended the *Seeger* definition of "religious" to include beliefs which the believer does not even characterize as "religious."⁹² The Court discounted the government's reliance on Welsh's own interpretation of his beliefs as "nonreligious," saying, "We think this attempt . . . fails for the reason that it places undue emphasis on the registrant's interpretation of his own beliefs."⁹³ Moreover, the Court rebuffed the suggestion that Welsh's beliefs constituted "essentially political, sociological, or philosophical views or a merely personal code."⁹⁴ Although the Court recognized that Welsh's conscientious objection was based in part on his perception of world politics, it reasoned that the definition of "religious" need not exclude political, economic, or philosophical views. The Court noted:

Once the Selective Service System has taken the first step and determined under the standards set out here and in *Seeger* that the registrant is a "religious" conscientious objector, it follows that his views cannot be "essentially political, sociological, or philosophical." Nor can they be a "merely personal moral code."⁹⁵

83. *Id.* at 335-38.

84. *Id.* at 336-37.

85. *Id.* at 337.

86. *Id.* at 341.

87. *Id.* at 336-37.

88. *Id.* at 343.

89. *Id.* at 341-42. Subsequently, Welsh wrote a letter to the Appeal Board which stated that his beliefs *were* religious "in the ethical sense of the word," although not "in the conventional sense." *Id.*

90. *Id.* at 337.

91. *Id.*

92. *Id.* at 341.

93. *Id.*

94. *Id.* at 342.

95. *Id.* at 343.

Thus, the Court concluded, Welsh's belief that killing was morally wrong was sufficiently religious to entitle him to a conscientious objector exemption.⁹⁶ In so holding, the Court defined the Act's definition of "religious" in the most expansive terms: "That section exempts from military service all those whose consciences, spurred by deeply held moral, ethical, or religious beliefs, would give them no rest or peace if they allowed themselves to become a part of an instrument of war."⁹⁷

*B. Limitations: First Amendment Jurisprudence and
the Definition of "Religion"*

Although the Court avoided constitutional issues in both *Seeger* and *Welsh*, its definition of "religious" was necessarily limited by the First Amendment. The First Amendment of the U.S. Constitution provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof"⁹⁸ The U.S. Supreme Court has recognized that this deceptively simple phrase limits the federal government's ability to define "religion" and the judiciary's ability to inquire into "religious" matters.⁹⁹

1. *Judicial Inquiry into "Religious" Matters.*—Most obviously, the First Amendment forecloses judicial inquiry into "religious" matters. Specifically, courts cannot rule on the truth or falsity of a theological statement.¹⁰⁰ In *United States v. Ballard*,¹⁰¹ the U.S. Supreme Court noted that such a ruling would violate the Free Exercise Clause:

Freedom of thought, which includes freedom of religious belief, is basic in a society of free men. It embraces the right to maintain theories of life and of death and of the hereafter which are rank heresy to followers of the orthodox faiths. Heresy trials are foreign to our Constitution. Men may believe what they cannot prove. They may not be put to the proof of their religious doctrines or beliefs. Religious experiences which are as real as life to some may be incomprehensible to others. Yet the fact that they may be beyond the ken of mortals does not mean that they can be made suspect before the law. Many take their gospel from the New Testament. But it would hardly be supposed that they could be tried before a jury charged with the duty of determining whether those teachings contained false representations. The miracles of the New Testament, the Divinity of Christ, life after death, the power of prayer are deep in the religious convictions of many. If one could be sent to jail

96. *Id.* at 343-44.

97. *Id.* at 344.

98. U.S. CONST. amend. I.

99. See KATHLEEN M. SULLIVAN & GERALD GUNTHER, *FIRST AMENDMENT LAW* 466-68 (1998) (discussing the attempt to define religion within the confines of the First Amendment).

100. DONALD A. FARBER, *THE FIRST AMENDMENT* 269 (2d ed. 2003).

101. 322 U.S. 78 (1944).

because a jury in a hostile environment found those teachings false, little indeed would be left of religious freedom.¹⁰²

Although courts are more willing to consider the “sincerity” of religious beliefs, the First Amendment also limits this inquiry. In general, any person wishing to take advantage of a religious exemption may be required to establish the “sincerity” of his religious belief.¹⁰³ Nonetheless, a court’s “sincerity” analysis does have limits.

In *Thomas v. Review Board of the Indiana Employment Security Division*,¹⁰⁴ the U.S. Supreme Court addressed the status of apparently “inconsistent” religious beliefs. Thomas was a Jehovah’s Witness, who quit his job after learning that he was working in the production of weapons.¹⁰⁵ After quitting, he applied for unemployment compensation benefits. At an administrative hearing, he testified that contributing to the production of arms violated his religion.¹⁰⁶ The compensation board initially denied his application for benefits because it concluded that he had quit for “personal” reasons.

Thomas challenged this decision, arguing that it violated his Free Exercise rights.¹⁰⁷ The Supreme Court of Indiana rejected this claim, characterizing his choice to quit his job as a “personal philosophical choice rather than a religious choice.”¹⁰⁸ In reaching this conclusion, the court placed weight on the fact that Thomas said he was “struggling” with his beliefs and on Thomas’s inability to articulate his beliefs precisely.¹⁰⁹ It also noted that another Jehovah’s Witness employed at the plant did not object on religious grounds to working on weapons.¹¹⁰

The U.S. Supreme Court reversed this decision, finding that Thomas’ beliefs were entitled to protection under the First Amendment, even if they seemed unclear or irrational. It noted:

We see, therefore, that Thomas drew a line, and it is not for us to say that the line he drew was an unreasonable one. Courts should not undertake to dissect religious beliefs because the believer admits he is ‘struggling’ with his position or because his beliefs are not articulated with the clarity and precision that a more sophisticated person might employ.¹¹¹

102. *Id.* at 86-87 (internal citation omitted).

103. FARBER, *supra* note 100, at 269; *see, e.g.*, *Int’l Soc’y for Krishna Consciousness, Inc. v. Barber*, 650 F.2d 430, 441-43 (2d Cir. 1981) (examining the “sincerity” of devotees of the Krishna Consciousness religion).

104. 450 U.S. 707 (1981).

105. *Id.* at 710.

106. *Id.* at 710-11.

107. *Id.* at 713.

108. *Id.*

109. *Id.* at 714.

110. *Id.* at 715.

111. *Id.*

Thus, for the Court, it was enough that Thomas seemed to have an “honest conviction that such work was forbidden by his religion.”¹¹²

The *Thomas* case highlights the difficulty of distinguishing between a determination of a religion’s truth and an inquiry into a believer’s sincerity. Dissenting in *Ballard*, Justice Jackson noted how difficult this distinction can be.¹¹³ Simply stated, humans find it “hard to conclude that a particularly fanciful or incredible belief can be sincerely held.”¹¹⁴ Thus, “sincerity” determinations often run the risk of becoming “truth” determinations, which are forbidden under the First Amendment. It is not surprising that courts are often reluctant to engage in such an analysis.¹¹⁵

2. *Limitations on Defining “Religion.”*—More subtly, the First Amendment proscribes the ability of the government to define “religion.” Concurring in *Welsh v. United States*, Justice Harlan construed the conscientious objector cases in constitutional terms.¹¹⁶ He interpreted the Act to include *only* theistic religions in its definition of “religious.”¹¹⁷ Such a definition, in his eyes, violated the Free Exercise Clause because it favored adherents of religions that worship a “Supreme Being.”¹¹⁸ Moreover, insofar as it distinguished between arguably “religious” groups, such a definition ran afoul of the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution.¹¹⁹ Congress and the courts, then, are limited in their ability to define “religion.” The mandates of the First Amendment virtually compel a broad definition, at least for Free Exercise purposes.¹²⁰

To say the least, such an expansive definition has radical implications. Taken on their face, the Supreme Court’s definitions suggest that many beliefs and practices not typically considered to be “religious” may qualify for the protection of the First Amendment. For example, a person who is denied a job

112. *Id.* at 716.

113. *United States v. Ballard*, 322 U.S. 78, 93 (1944) (Jackson, J., dissenting).

114. *Int’l Soc’y for Krishna Consciousness, Inc. v. Barber*, 650 F.2d 430, 441 (2d Cir. 1981).

115. *See, e.g., EEOC v. Unión Independiente de la Autoridad de Acueductos y Alcantarillados*, 279 F.3d 49, 57 (1st Cir. 2002) (quoting *Philbrook v. Ansonia Bd. of Educ.*, 757 F.2d 476, 482 (2d Cir. 1985)) (warning that courts must make sure that “sincerity” analysis not turn on the factfinder’s own idea of what a religion should be).

116. *Welsh v. United States*, 398 U.S. 333, 356-58 (1970) (Harlan, J., concurring).

117. *Id.* at 357 (finding that the Act’s explicit reference to belief in a Supreme Being “excludes from its ‘scope’ individuals motivated by teachings of nontheistic religions, and individuals guided by an inner ethical voice that bespeaks secular and not ‘religious’ reflection”).

118. *Id.* at 358. It should also be noted that Justice Harlan thought that the Act also offended the Establishment Clause because it accorded advantages to “religious” adherents but not to individuals guided by purely moral, ethical, or philosophical sources. *Id.*

119. *Id.* at 357.

120. *See Knechtle, supra* note 50, at 528-30 (discussing the suggestion of some scholars that the courts adopt a broad definition for Free Exercise purposes and a narrow definition for Establishment Clause purposes); SULLIVAN & GUNTHER, *supra* note 99, at 468 (same).

after refusing to receive an inoculation which was grown in chicken embryos because he is an “ethical vegan” would seem to have just as colorable a claim to religious discrimination as an employee who is denied a job after refusing a vaccination because she is a Jehovah’s Witness.¹²¹ Similarly, an employee who is fired because of his sincerely held scientific beliefs about the Big Bang might be protected under Title VII.¹²² Given this background, how do courts apply the definition of “religion” in practice? The next section of this Note explores the definitions courts purport to use when considering claims of religious discrimination under Title VII.

III. ON THE FRONT LINES: DEFINING “RELIGION” IN EMPLOYMENT DISCRIMINATION CASES

Understanding the “religion” in religious discrimination cases brought under Title VII can be a daunting task. The cases almost universally purport to apply the definition of “religion” contained in *Welsh* and *Seeger*.¹²³ Courts are, however, reluctant to probe too deeply into questions of “religion.” Thus, it can be difficult to grasp the contours of the “religion” which they purport to protect. Nonetheless, courts occasionally offer hints of the definition which they are using. Sometimes, they address the issue directly. More often, they address the issue indirectly, while considering the “sincerity” of a religious belief or the existence of a legitimate “conflict” between a religious belief or practice and a requirement of employment. The remainder of this section attempts to parse out a definition of “religion” by examining several examples of such cases.

A. “*It is No Business of the Courts . . .*”¹²⁴—*Except When It Is*

For the reasons discussed in Part II, courts are reticent to inquire into the “religious” quality of beliefs and practices. This pattern holds true in Title VII religious discrimination cases. Even the most casual survey of cases reveals that the vast majority refrain from this inquiry.¹²⁵ Occasionally courts invoke the

121. *But see* *Friedman v. Southern Cal. Permanente Med. Group*, 125 Cal. Rptr. 2d 663, 686 (Cal. Ct. App. 2002) (holding that veganism was not a “religious creed”).

122. *But see* *Captain (Ret.) Drew A. Swank, Cold Fusion Confusion: The Equal Employment Opportunity Commission’s Incredible Interpretation of Religion in LaViolette v. Daley*, ARMY LAW., Mar. 2002, at 74 (criticizing an EEOC decision which held that unusual beliefs regarding cold fusion and other “scientific” beliefs are entitled to the same protection from discrimination as other, more traditionally “religious” beliefs).

123. The cases are too numerous to cite, but it is worth noting that the EEOC explicitly adopted the definition of religion as developed in *Seeger* and *Welsh*. See 29 C.F.R. § 1605.1 (2005) (“[T]he Commission will define religious practices to include moral or ethical beliefs as to what is right and wrong which are sincerely held with the strength of traditional religious views. This standard was developed in [*Seeger* and *Welsh*].”).

124. *Fowler v. Rhode Island*, 345 U.S. 67, 70 (1953).

125. See, e.g., *Favero v. Huntsville Indep. Sch. Dist.*, 939 F. Supp. 1281, 1286 (S.D. Tex. 1996) (assuming, without analysis, that beliefs stemming from membership in the Worldwide

mantra of *Fowler v. Rhode Island*, saying, “[I]t is no business of courts to say that what is a religious practice or activity for one group is not religion”¹²⁶ For example, in *Heller v. EBB Auto Co.*, the U.S. Court of Appeals for the Ninth Circuit quoted this language in the course of finding that even a religious practice which is not obviously “mandatory” may qualify for protection under Title VII.¹²⁷ Oftentimes, courts simply gloss over the issue of whether or not a belief is “religious,”¹²⁸ despite the fact that every plaintiff in a religious discrimination case bears the burden of proving that he or she holds a bona fide religious belief.¹²⁹ This reticence is understandable, given the danger of judicial overreaching in this area. Nonetheless, courts sometimes ignore the warning of *Fowler* and engage in an analysis of whether or not a given belief or practice is “religious.”

1. *Brown v. Pena*.—In one of the more infamous cases in religious discrimination jurisprudence, the U.S. District Court for the Southern District of Florida was called upon to evaluate the status of a plaintiff’s belief in cat food.¹³⁰ In *Brown*, the plaintiff brought suit against the Director of the EEOC after the Director dismissed both of the employment discrimination charges he filed with the Miami District Office.¹³¹ The plaintiff claimed that he had been discriminated against on the basis of his “personal religious creed” that “Kozy Kitten People/Cat Food . . . is contributing significantly to [his] state of well being . . . [and therefore] to [his] overall work performance” by increasing his energy.¹³² The EEOC dismissed the charges, finding that the plaintiff’s belief was not “religious” within the meaning of Title VII. The plaintiff challenged this dismissal in a lawsuit.

In assessing the plaintiff’s claim, the court looked to *Seeger* to define the parameters of “religion.”¹³³ It also referenced a three-factor test utilized by the U.S. Court of Appeals for the Fifth Circuit in determining whether a belief is religious.¹³⁴ In characterizing the test, the court stated:

Church of God are “religious”); *Anderson v. Gen. Dynamics Convair Aerospace Div.*, 589 F.2d 397, 410 (9th Cir. 1978) (treating belief that members of the Seventh Day Adventist Church should not contribute to labor organizations as “religious” without analysis); *EEOC v. Townley Eng’g & Mfg. Co.*, 859 F.2d 610, 614 (9th Cir. 1988) (treating atheism as “religious” without analysis).

126. *Fowler*, 345 U.S. at 70.

127. *Heller v. EEB Auto Co.*, 8 F.3d 1433, 1438 (9th Cir. 1993).

128. *See, e.g., Smitherman v. Williams-Sonoma, Inc.*, No. 96 Civ. 5772 (BSJ), 1999 U.S. Dist. LEXIS 12336, at *11-13 (S.D.N.Y. Aug. 11, 1999) (considering plaintiff’s religious discrimination claim without mention of whether her Rastafarian beliefs constitute “religion” for purposes of Title VII).

129. *See supra* text accompanying notes 38-43.

130. *Brown v. Pena*, 441 F. Supp. 1382 (S.D. Fla. 1977).

131. *Id.* at 1383.

132. *Id.* at 1384 (alterations in original).

133. *Id.*

134. *Id.* at 1385 (citing *Brown v. Dade Christian Schools, Inc.*, 556 F.2d 310, 324 (5th Cir. 1977) (Roney, J., dissenting)).

[T]he “religious” nature of a belief depends on (1) whether the belief is based on a theory of “man’s nature or his place in the Universe,” (2) which is not merely a personal preference but has an institutional quality about it, and (3) which is sincere. It is significant that throughout these carefully reasoned opinions runs the exclusion of unique personal moral preferences from the characterization of religious beliefs.¹³⁵

The court concluded that the plaintiff’s belief in pet food did not qualify as a religion. It reasoned: “Plaintiff’s ‘personal religious creed’ concerning Kozy Kitten Cat Food can only be described as such a mere personal preference and, therefore, is beyond the parameters of the concept of religion as protected by the [C]onstitution or, by logical extension, [Title VII].”¹³⁶

Although the court analyzed the plaintiff’s religion only briefly, its enumeration of a “test” for religion suggests that his belief system was deficient in several respects. First, it was not based on a theory of “man’s nature or his place in the Universe.” Second, it was insufficiently “institutional,” and thus doomed to the category of the “merely personal preference.” Finally, the court seems to imply that his purported belief was not “sincere.”

While the claims of this plaintiff were extreme, the court’s analysis reflects the notion that *some* beliefs are simply *not* within the gambit of the “religious.” Such beliefs are apparently so *clearly* not “religious” that the court does not even bother to analyze their status fully. In *Brown*, the court seems to be looking for certain landmarks that would indicate the presence of a religion: a theory of man’s place in the universe, institutional manifestations, and sincerity. When it fails to find any of these markers, it dismisses the possibility that such a belief system is “religious.” The *Brown* court probably came to the correct conclusion—at least regarding this plaintiff—but its method could be more problematic when applied to other belief systems.

2. *Fraser v. New York City Board of Education*.—In *Fraser v. New York City Board of Education*,¹³⁷ the U.S. District Court for the Southern District of New York held that a plaintiff could not sustain a claim for religious discrimination because he did not characterize his beliefs as “religious.”¹³⁸ The plaintiff, an African-American male, brought suit against his former employer, alleging that he had been discriminated against on the basis of—among other things—religion. He said that he had been discriminated against because he was a Hebrew Israelite.¹³⁹

The court dismissed his claim of religious discrimination. It found that the plaintiff had failed to carry his burden of showing that he had a “bona fide religious belief.”¹⁴⁰ It reasoned that the plaintiff could not succeed because he

135. *Id.* (citing *Brown*, 556 F.2d at 324 (Roney, J., dissenting)) (internal citation omitted).

136. *Id.*

137. No. 96 Civ. 0625 (SHS), 1998 U.S. Dist. LEXIS 1338 (S.D.N.Y. Feb. 10, 1998).

138. *Id.* at *16.

139. *Id.* at *11.

140. *Id.* at *15.

did not characterize his belief as religious:

Here, plaintiff—though referring extensively to the bible—has maintained that Hebrew Israelite “is not a religion,” and that “to [a] true Hebrew Israelite who is aware of his Identity he has no religion.” Since plaintiff does not claim to have a sincere religious belief that conflicted with his employment, he has failed to present a prima facie case of religious discrimination¹⁴¹

Despite the guidance of *Welsh*, the court concluded that a belief cannot be “religious” if the believer says it is “not religion.”

3. *Slater v. King Soopers, Inc.*—Courts face difficult issues when confronted with white supremacists who claim that they have been discriminated against on the basis of their religion. In *Slater*, the U.S. District Court for the District of Colorado held that the Ku Klux Klan did not constitute a “religion” for purposes of Title VII.¹⁴² The employee alleged that he had been discharged because of an “Adolph [sic] Hitler Rally” which he had organized and in which he had participated as part of his affiliation with the Ku Klux Klan.¹⁴³ Citing the definition of “religion” found in *Seeger* and *Welsh*, the court determined that the employee’s belief system did not qualify for protection:

As stated by one court when faced with the issue here presented: “the proclaimed racist and anti-semitic ideology of the organization to which [the plaintiff] belongs takes on . . . , a narrow, temporal and political character inconsistent with the meaning of ‘religion’ as used in § 2000e.”¹⁴⁴

The court also cited with approval the EEOC’s determination that the Ku Klux Klan did not constitute a “religion” because it was essentially a political and social group.¹⁴⁵ Ultimately, the court concluded, membership in the Ku Klux Klan did not qualify as “religious” for purposes of Title VII.

The *Slater* court’s analysis is remarkable insofar as it suggests that some beliefs may simply be too repugnant to qualify as “religious.” On its face, the court is implying that an avowedly racist and anti-Semitic ideology *cannot* be “religious” because it is too narrow, too temporal, and too political. Apparently, then, “religions” are *not* narrow, *not* temporal, and *not* political.¹⁴⁶ This suggests that “religions” should be expansive, focused on some time other than the here-and-now, and apolitical. For the *Slater* court, at least, a white supremacist ideology could never qualify as religious.

4. *Peterson v. Wilmur Communications, Inc.*—In direct contrast to *Slater*, the U.S. District Court for the Eastern District of Wisconsin held that a white

141. *Id.* at *16 (internal citation omitted) (alteration in original).

142. *Slater v. King Soopers, Inc.*, 809 F. Supp. 809, 810 (D. Colo. 1992).

143. *Id.*

144. *Id.* (quoting *Bellamy v. Mason’s Stores, Inc.*, 368 F. Supp. 1025, 1026 (E.D. Va. 1973)).

145. *Id.* (citing EEOC Dec. No. 79-06 (Oct. 6, 1978)).

146. *Id.*

supremacist “church” constituted a “religion” for purposes of Title VII.¹⁴⁷ In *Peterson*, the employee alleged that he had been demoted on the basis of his religious beliefs. He was a follower of the World Church of the Creator. This organization preached a system of beliefs called “Creativity.” The central tenet of Creativity was white supremacy.¹⁴⁸ Although Creativity did not espouse a belief in God, an afterlife, or a Supreme Being, it considered itself to be a religion.¹⁴⁹ One of its central texts was entitled “The White Man’s Bible.”¹⁵⁰ In the words of the court, Creativity taught that its adherents should “live their lives according to the principle that what is good for white people is the ultimate good and what is bad for white people is the ultimate sin.”¹⁵¹ The plaintiff was a “reverend” in the World Church of the Creator.¹⁵²

During the plaintiff’s employment with the defendant employer, an article appeared in the local newspaper which discussed the World Church of the Creator. The article contained an interview with the plaintiff and described his involvement in the church and his beliefs. In addition, the article included a photograph of the plaintiff holding a T-shirt bearing the image of a man who, while carrying a copy of “The White Man’s Bible,” had targeted African-American, Jewish, and Asian people in a two-day shooting spree in Indiana and Illinois before shooting himself in the summer of 1999.¹⁵³ When the plaintiff returned to work, the president of the company suspended him without pay. Two days later, he was demoted. His employer sent him a letter which indicated that he was being demoted because of his involvement in the World Church of the Creator.¹⁵⁴ The plaintiff filed suit, arguing that he had been demoted on the basis of his religion in violation of Title VII.¹⁵⁵

The court engaged in an extensive consideration of whether or not the plaintiff’s belief system qualified as “religious” for the purposes of Title VII. It looked to *Seeger* to define “religion,” noting:

[T]he court should find beliefs to be a religion if they “occupy the same place in the life of the [individual] as an orthodox belief in God holds in the life of one clearly qualified.” To satisfy this test, the plaintiff must show that the belief . . . [sic] “‘religious’ in [his or her] own scheme of things.”¹⁵⁶

147. *Peterson v. Wilmur Commc’ns, Inc.*, 205 F. Supp. 2d 1014, 1021 (E.D. Wis. 2002).

148. *Id.* at 1015.

149. *Id.* at 1015-16.

150. *Id.* at 1016.

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.* at 1016-17.

156. *Id.* at 1018 (quoting *United States v. Seeger*, 380 U.S. 163, 184 (1965) and *Redmond v. GAF Corp.*, 547 F.2d 897, 901 n.12 (7th Cir. 1978)) (internal citation omitted) (alteration in original).

The court also indicated that a belief system need not have a concept of God and that “[p]urely ‘moral and ethical beliefs’ can be religious ‘so long as they are held with the strength of religious convictions.’”¹⁵⁷ Finally, the court noted that it must give great deference to a believer’s own characterization of his belief as “religious.”¹⁵⁸

Applying this test to the plaintiff’s belief system, the court found that Creativity “functions as” a religion for the plaintiff.¹⁵⁹ The court pointed to several pieces of evidence to support its conclusion. First, it noted that the plaintiff considered Creativity to be his religion. Next, it emphasized the oath which plaintiff had taken upon becoming a minister.¹⁶⁰ Thus, it concluded that Creativity functioned as a religion in the life of the plaintiff.

The court also discounted suggestions that Creativity could not be a religion because other white supremacist organizations had been previously adjudged not to be religions.¹⁶¹ First, the court noted: “the fact that certain white supremacist organizations have been found not to be religions does not logically mean that Creativity also is not a religion for [the] plaintiff, given that the test for what is a religion turns in part on subjective factors.”¹⁶² The court also suggested that other courts which had rejected the religiosity of white supremacist organizations had not analyzed their status very deeply.¹⁶³ The court distinguished the EEOC decision which had determined that the Ku Klux Klan was not a religion for

157. *Id.* (quoting *Welsh v. United States*, 398 U.S. 333, 339-40 (1970)).

158. *Id.* (citing *Seeger*, 380 U.S. at 184).

159. *Id.* at 1022.

160. The oath provided, in part:

Having been duly accepted for the Ministry in the World Church of the Creator, I hereby reaffirm my undying loyalty to the White Race and the World Church of the Creator and furthermore swear . . . that I will fervently promote the Creed and Program of Creativity as long as I live; that I will follow the Sixteen Commandments and encourage others to do the same; that the World Church of the Creator is the only pro-White organization of which I am a member so that my energies may not be divided; that I will remain knowledgeable of our sacred Creed, particularly of the books, Nature’s Eternal Religion and The White Man’s Bible; that I will always exhibit high character and respect; and lastly, that I will aggressively convert others to our Faith and build my own ministry.

Id.

161. *Id.* (citing *Slater v. King Soopers, Inc.*, 809 F. Supp. 809 (D. Colo. 1992) (finding that the Ku Klux Klan is not a religion under Title VII); *Bellamy v. Mason’s Stores, Inc.*, 368 F. Supp. 1025 (E.D. Va. 1973) (same); *Augustine v. Anti-Defamation League of B’Nai-B’Rith*, 249 N.W.2d 547 (Wis. 1977) (finding that the National Socialist White People’s Party is not a religion for purposes of a state anti-discrimination statute)).

162. *Id.*

163. *Id.* (noting that the courts in *Bellamy* and *Slater* provided little discussion as to how they reached their conclusions).

purposes of Title VII.¹⁶⁴ It noted that, unlike the Ku Klux Klan (which considered itself to be a political and fraternal organization, and not a religion), the World Church of the Creator considered Creativity to be a religion.¹⁶⁵ The court concluded that, although Creativity's beliefs could be characterized as "political," they could also function as "religious" beliefs for the plaintiff.¹⁶⁶

The court concluded its analysis by discussing the role of "morality" and "ethics" in the definition of "religion." In this case, the Defendant had argued that Creativity's beliefs could not be religious because they were immoral and unethical.¹⁶⁷ The court dismissed this argument completely:

[D]efendant misinterprets the regulation. The regulation does not indicate that Title VII only protects beliefs which defendant, society, the court or some other entity considers moral or ethical in the subjective sense. Indeed, the question of whether I find a belief moral, ethical or otherwise valid in this subjective sense is decidedly not an issue when I am determining whether a belief is "religious." Rather, the EEOC regulation means that "religion" under Title VII includes belief systems which espouse notions of morality and ethics and supply a means from distinguishing right from wrong. Creativity has these characteristics. Creativity teaches that followers should live their lives according to what will best foster the advancement of white people and the denigration of all others. This precept, although simplistic and repugnant to notions of equality that undergird the very non-discrimination statute at issue, is a means for determining right from wrong. Thus, defendant's argument must be rejected.¹⁶⁸

The court's analysis is notable on several counts. First, the court made a concerted effort to follow the implications of *Seeger* and *Welsh* to their logical ends. It paid close attention to the group's own characterization of Creativity as a religion and considered the possibility that apparently "political" beliefs might also be "religious." In so doing, the court also gave some impression of *its* view of religion. It explicitly stated that the category of "religion" is (or should be) "content neutral," so to speak. Thus, no belief system should be so repulsive to judicial notions of morality as to automatically disqualify itself from the ranks of the "religious." Although the potential contents of "religions" must, then, be limitless, the court espoused a clear view of the *function* of religions. Apparently, "religions" are "belief systems which espouse notions of morality and ethics and supply a means from distinguishing right from wrong."¹⁶⁹ Because Creativity provided the requisite means of distinguishing right from wrong (however repugnant that means might be), it qualified as a religion.

164. *Id.* (citing EEOC Dec. No. 79-06 (Oct. 6, 1978)).

165. *Id.* at 1023.

166. *Id.*

167. *Id.*

168. *Id.* (internal citations omitted).

169. *Id.*

B. Sincerity and Conflict

Having heeded the warning of *Fowler*, courts often gloss over the direct issue of whether a belief system is "religious." When confronted with a problematic case, they are more likely to engage in an analysis of the believer's "sincerity" or an analysis of whether his or her belief actually "conflicts" with an employment requirement. Although such analyses do not define "religion" directly, they do provide hints of the definition of "religion" with which the courts are operating.

1. *Hussein v. The Waldorf-Astoria*.—In *Hussein*, the U.S. District Court for the Southern District of New York confronted a claim of employment discrimination which it found to be less than credible.¹⁷⁰ The plaintiff, a Muslim male, worked as a "roll call" banquet waiter for various hotels.¹⁷¹ He was not a full-time employee of any single hotel. Instead, he was employed when a hotel required extra staff for a particular event. He belonged to the Hotel, Restaurant and Club Employees and Bartenders Union. According to the terms of a collective bargaining agreement, the hotels were obligated to accept the particular waiters assigned by the union unless the hotel had provided written notice to the union barring or suspending a particular waiter for misconduct.¹⁷² Over the course of his years of membership in the union, at least ten hotels had written letters to the union "barring" the plaintiff from working at their banquets for misconduct such as insubordination, rudeness, and physical altercations. The plaintiff also had filed many complaints against his union and various hotels where he had worked.¹⁷³

After returning from a suspension imposed by the union, the plaintiff accepted an assignment at the Waldorf Hotel. At that assignment, he got into an argument because he refused to wear a bow tie as required.¹⁷⁴ The union then provided the plaintiff with a written summary of the Waldorf's dress and appearance requirements, which included a rule that men were not allowed to have any facial hair, except for a neatly-trimmed mustache. Two months later, the plaintiff reported unshaven for an assignment at the Waldorf. He had not shaved for two to five days.¹⁷⁵ A Waldorf representative asked him about his beard, and he replied that it was a "part of my religion."¹⁷⁶ Notably, the plaintiff had never informed anyone at the Waldorf about his religion. The Waldorf would not let him work with a beard. It refused to accommodate his "religion" because it doubted the sincerity of the plaintiff's beliefs, feared that allowing him to wear facial hair would hurt the hotel's reputation, and worried that exempting

170. *Hussein v. The Waldorf-Astoria*, 134 F. Supp. 2d 591 (S.D.N.Y. 2001).

171. *Id.* at 593.

172. *Id.*

173. *Id.*

174. *Id.* at 593-94.

175. *Id.*

176. *Id.*

him from the appearance requirements would set a bad precedent for dealing with other roll call waiters. No more than three months later, the plaintiff shaved his beard and continued to remain clean-shaven.¹⁷⁷

The plaintiff brought suit, alleging that the Waldorf had violated Title VII by failing to accommodate his religious practice of wearing a beard.¹⁷⁸ The court granted summary judgment for the Waldorf, finding that the plaintiff had failed to state a prima facie case of religious discrimination under Title VII.¹⁷⁹ To establish a prima facie case of religious discrimination, the plaintiff must show that (1) he had a bona fide religious belief that conflicted with an employment requirement; (2) he informed the employer of this belief; and (3) he was disciplined for failure to comply with the conflicting employment requirement.¹⁸⁰

The court first considered whether the plaintiff had established that he had a “bona fide” religious belief that conflicted with an employment requirement. In considering the sincerity of the plaintiff’s claim that his religion required him to wear a beard, the court paid little credence to the plaintiff’s assertion that it was, in fact, a requirement of his religion.¹⁸¹ Instead, it focused on the plaintiff’s previous behavior. It noted that, until the night in question, the plaintiff had never worn a beard to work at the Waldorf, despite the fact that he had worked there for fourteen years. The court stated: “[The plaintiff] has made no effort to explain why, if his religion prevented him from shaving, he had never worn a beard before. He does not contend, for example, that he had just converted to his religion.”¹⁸² The court also found that the plaintiff’s sincerity was undercut by the fact that he shaved his beard within three months of the incident.¹⁸³ Ultimately, the court concluded that the plaintiff had simply used religion as an “excuse” when he showed up for work unshaven.¹⁸⁴ In granting summary judgment for the Waldorf, the court also noted that the plaintiff had never informed the hotel of his religion and that the Waldorf had acted on a good faith belief that his “religious” claim was not sincere.¹⁸⁵

The court’s sincerity analysis reveals some notions about its conception of religion. First, the court collapsed the analysis of whether a religious belief is “bona fide” into an analysis of whether it is “sincere.” The distinction between the two is fine, but a “bona fide religious belief” need not be the same as a “sincere religious belief.” The category of “bona fide” seems to refer to the “religious” character of the belief, while the sincerity analysis seems to focus more on whether the person “really” believes it. By making the two co-extensive, the court here operated on the assumption that, to be religious, beliefs

177. *Id.*

178. *Id.*

179. *Id.* at 599.

180. *Id.* at 596 (citing *Philbrook v. Ansonia Bd. of Educ.*, 757 F.2d 476, 481 (2d Cir. 1985)).

181. *Id.*

182. *Id.*

183. *Id.* at 596-97.

184. *Id.* at 597.

185. *Id.* at 597-98.

must also be “sincere.” The court’s citation of an opinion dismissing another of Hussein’s claims of religious discrimination is telling: “Title VII does not require the accommodation of personal preferences, even if wrapped in religious garb.”¹⁸⁶ Thus, even seemingly “religious” beliefs do not qualify as “religious” if they are not “sincere.”

The court also gave some guidance about how to identify “sincere religious beliefs.” In analyzing the plaintiff’s prior behavior, the court suggested that religious beliefs are the type of beliefs that cause believers to engage in behaviors consistent with those beliefs. Thus, if the plaintiff “really” believed that wearing a beard was part of his religion, he would surely have worn a beard at some point in his life prior to the night in question. At the very least, he would not have shaved off his beard a mere three months after claiming that it was “necessary” to his religion.

So conceived, religions are basically sets of “beliefs” that cause adherents to engage in certain required “behaviors.” Moreover, truly “religious” people are those who act in accordance with their purported beliefs. The plaintiff in *Hussein* suffered from more credibility problems than most, and the court was probably correct in deciding that his claim was not bona fide. However, its analysis is instructive for its view of religion.

2. *EEOC v. Unión Independiente de la Autoridad de Acueductos y Alcantarillados*.—In *Unión Independiente*, the U.S. Court of Appeals for the First Circuit approached its sincerity analysis in a similar fashion.¹⁸⁷ The plaintiff, a Seventh-Day Adventist, first applied for temporary employment with the defendant employer. When he applied, he did not indicate his religion. Later, he accepted a permanent position.¹⁸⁸ As a condition of this employment, he was obliged to join a union and pay union dues.

According to the union, he did not indicate that he was categorically opposed to union membership at that time. Instead, he voiced his objection to Saturday meetings, joining demonstrations or strikes, taking the union’s loyalty oath, and paying union dues. The union attempted to accommodate him, offering to exempt him from Saturday meetings and public strikes or picketing, to paraphrase its loyalty oath to an affirmation, and to transfer his union dues to a nonprofit organization.¹⁸⁹ Only when he rejected these accommodations did he assert a categorical objection to union membership. By way of contrast, the employee maintained that he had opposed union membership all along.¹⁹⁰

When the employee refused to join, the union instituted disciplinary proceedings against him. Ultimately, it recommended that the employer suspend him from employment. After unsuccessful appeals, he was terminated for failing

186. *Id.* at 597 (quoting *Hussein v. Hotel Employees & Rest. Union, Local 6*, 108 F. Supp. 2d 360, 370 (S.D.N.Y. 2000)).

187. *EEOC v. Unión Independiente de la Autoridad de Acueductos y Alcantarillados*, 279 F.3d 49 (1st Cir. 2002).

188. *Id.* at 51.

189. *Id.* at 52.

190. *Id.*

to comply with the union membership requirement.¹⁹¹ The EEOC filed suit on his behalf, alleging that the union had violated Title VII by failing to provide a reasonable accommodation to the employee's religious beliefs and causing the employer to terminate him.¹⁹² The district court granted summary judgment for the employee. The union appealed, arguing that genuine issues of disputed fact remained with respect to various elements of the employee's prima facie case. In particular, it argued that a question of fact remained as to whether the employee's opposition to union membership was the product of a "bona fide religious belief."¹⁹³

The court found the grant of summary judgment to be erroneous.¹⁹⁴ First, the court noted that the "religious" nature of the employee's professed belief could not be disputed because it stemmed from the established tenets of the Seventh-Day Adventist faith. However, the court did engage in an analysis of whether his beliefs were "truly held."¹⁹⁵ Construing the facts in the light most favorable to the employer, the court found that a jury might conclude that the employee's beliefs were not sincere.

In support of this conclusion, it pointed to evidence of various behaviors that seemed to be at odds with his professed religious beliefs: the employee had lied on his employment application; he was divorced; he had taken an oath before a notary on one occasion; and he worked five days a week (as opposed to the six "required" by his faith).¹⁹⁶ The court also noted that the union's evidence suggested that:

[T]he alleged conflict between [the employee's] beliefs and union membership was a moving target: at first, [he] objected only to certain membership requirements, and he only voiced his opposition to any form of union membership after [the union] agreed to accommodate him with respect to each practice he had identified earlier.¹⁹⁷

The court remanded the case for trial, noting that "assessing the bona fides of an employee's religious belief is a delicate business."¹⁹⁸

In making its analysis, the court evinces a view of religion similar to that found in *Hussein*. It looked to the employee's behavior to determine whether his beliefs were "really" religious. It concluded that a jury might conclude that the employee was not "really" opposed to union membership because he had engaged in some acts contrary to his professed faith, such as getting a divorce. As in *Hussein*, "religion" is a set of beliefs which compels certain behaviors and "religious" people can be identified by comparing their actions with their

191. *Id.*

192. *Id.*

193. *Id.* at 55.

194. *Id.* at 57.

195. *Id.* at 56.

196. *Id.* at 56-57.

197. *Id.* at 57.

198. *Id.*

purported beliefs.

3. *Tiano v. Dillard Department Stores, Inc.*—Courts also hint at their view of religion when determining whether an employee's religious belief actually "conflicts" with an employment requirement. In *Tiano*, the U.S. Court of Appeals for the Ninth Circuit found that an employer had not violated Title VII when it denied an employee's request for unpaid leave to go on a pilgrimage.¹⁹⁹ The employee, a devout Roman Catholic, worked as a salesperson at a department store. Although the store allowed employees to take unpaid leave at the discretion of the management, it also had a policy which forbade employees from taking leave between October and December, which was the store's busiest season.²⁰⁰

The employee learned of a pilgrimage to Medjugorje, Yugoslavia, which would take place between October 17 and October 26. Many people have reported seeing visions of the Virgin Mary at Medjugorje. The employee testified that, after learning of this pilgrimage, she had a "calling from God" to attend the pilgrimage. When asked if she could have taken this pilgrimage at a different time, she said, "No."²⁰¹ She requested unpaid leave to go on the October pilgrimage. Her supervisor denied this request. She appealed to the Operations Manager, explaining that she was taking the trip for religious reasons. He also denied her request, citing the no-leave policy.²⁰² She appealed again, this time to the Store Manager. He denied her request. Although he allowed her to apply to transfer to another store, he told her that she would no longer have a job at his store when she returned from the pilgrimage. She completed the transfer papers and left for the pilgrimage soon thereafter.²⁰³

When the employee returned from the pilgrimage, she went to her old place of employment to inquire about her status. The Operations Manager told her that she was no longer employed by the store because she had resigned voluntarily. Ultimately, the employee brought suit, alleging that the department store had violated Title VII by terminating her because of her pilgrimage.²⁰⁴

The court held that the employee could not establish that she had a "bona fide religious belief" that conflicted with an employment requirement because she had not proved that her religious belief included a "temporal mandate."²⁰⁵ Reviewing the evidence, the court concluded: "[t]he evidence shows only a bona fide religious belief that she needed to go to Medjugorje at some time; she failed to prove the temporal mandate."²⁰⁶ It found that the employee's desire to take the pilgrimage at this particular time was merely a "personal preference." Its assessment of her "calling" is rather astonishing and worth quoting at length:

199. *Tiano v. Dillard Dep't Stores, Inc.*, 139 F.3d 679, 680 (9th Cir. 1998).

200. *Id.*

201. *Id.*

202. *Id.* at 680-81.

203. *Id.* at 681.

204. *Id.*

205. *Id.* at 682.

206. *Id.*

The only evidence offered by [the plaintiff] to prove that the temporal mandate was part of her calling was her testimony. She directly addressed the question only once: “I felt I was called to go I felt that from deep in my heart that I was called. *I had to be there at that time*. I had to go.” She offered no corroborating evidence to support the claim that she had to attend the pilgrimage between October 17 and 26. For example, she did not testify that the visions of the Virgin Mary were expected to be more intense during that period. Nor did she suggest that the Catholic Church advocated her attendance at that particular pilgrimage. In short, her lone unilateral statement that she “had to be there at that time” was her only evidence.²⁰⁷

The court also focused on evidence that it found to be contradictory to the plaintiff’s claim that the temporal mandate was part of her bona fide religious belief. First, it noted with suspicion the fact that she had not filed her complaint with the EEOC until after she learned that her ticket for the pilgrimage was not refundable.²⁰⁸ The court also gave weight to the testimony of a friend who had gone on the pilgrimage with the plaintiff. This friend testified that they had decided to go on this particular pilgrimage after talking about it and deciding that it would be interesting. She also testified that there was no “specific reason” for the plaintiff’s desire to go on this particular pilgrimage.²⁰⁹ The court concluded: “Thus, [the friend’s] testimony suggests that the time of the trip was a personal preference, not part of a bona fide religious belief. Both women ‘talked about it’ and ‘thought that it would be interesting to go on’—hardly a religious calling.”²¹⁰ Having concluded that the employee’s religious belief did not include a temporal mandate, the court determined that her religious belief did not “conflict” with an employment requirement. Thus, she could not make out a prima facie case of religious discrimination under Title VII.²¹¹

The court’s analysis is notable for several reasons. First, it expands upon the notion that “religions” basically consist of “beliefs” which result in actions. Starting with the notion that a person may be *required* by a particular religious belief to engage in certain actions, the court went on to suggest that the contents of these religious beliefs and actions are highly specific—and discernible by the court. Moreover, the court put the burden on the plaintiff to *prove* that her calling included a temporal mandate. This at the very least suggests that the court thought that it might be *possible* for the plaintiff to prove such a thing, which is an interesting notion in and of itself. Such a notion presumes that religious systems of thought are rational and capable of conforming to the “proof” standards of the courtroom. In addition, the court emphasized the notion that “real” religious beliefs can be identified by examining the believer’s

207. *Id.*

208. *Id.*

209. *Id.*

210. *Id.* at 682-83.

211. *Id.* at 683.

conduct: Because the believer acted in a way that the court perceived to be incompatible with her professed belief, the court concluded that her belief in a temporal mandate was not “bona fide.”

C. *Conclusions About the Definition of Religion Used in Employment Discrimination Cases*

As the case discussions above demonstrate, the seemingly simple category of “religion” turns out to be problematic. While most courts are unified in recognizing “traditional” churches (and organizations that bear some resemblance to “traditional” churches) as examples of the “religion” protected by Title VII,²¹² they struggle mightily to cope with less traditional belief systems. An analysis of these attempts has revealed several themes in the way courts conceive of “religion.” First, a “religion” is, first and foremost, a belief system. Second, “religious” belief systems address a discrete set of subjects. Third, “religious” beliefs cause believers to engage in certain actions. Fourth, “religious” people can be identified by comparing their beliefs to their actions. If the two conflict too greatly, courts will find that a supposedly “religious” belief is, in fact, not “sincere.” Finally, only “sincere” religious beliefs qualify for protection under Title VII. However commonsensical these conclusions seem, it is important to recognize that the courts’ conception of religion is not the *only* possibility. In fact, the courts’ approach has distinct problems.

IV. PROBLEMATIZING “RELIGION”: ANALYSIS AND CRITIQUE

The conception of “religion” which drives much of religious discrimination jurisprudence is problematic. Despite paying constant homage to *Seeger* and *Welsh*, courts do not consistently apply the expansive definition of religion found in those cases. They seem particularly reluctant to follow this expansive mandate when confronted with “non-traditional” religious beliefs. The remainder of this section analyzes and criticizes the manner in which courts define “religion.”

A. *What Would Seeger Do?*

A primary problem with the courts’ treatment of “religion” is that they do not always apply the definition they purport to apply. As noted above, courts facing religious discrimination cases under Title VII almost universally invoke *Seeger* and *Welsh* when setting out the definition of “religion.”²¹³ Nonetheless, their application of the *Seeger* and *Welsh* formulation often breaks down.

Courts are reluctant to follow the radical implications of the *Seeger* mandate that the appropriate inquiry is “whether a given belief that is sincere and meaningful occupies a place in the life of its possessor parallel to that filled by

212. See cases cited *supra* note 125.

213. See *supra* note 123 and accompanying text.

the orthodox belief in God.”²¹⁴ For example, the court in *Brown v. Pena* did not even consider whether the plaintiff’s belief in the powers of cat food might occupy a place in his life parallel to that filled by the orthodox belief in God.²¹⁵ Likewise, the court in *Slater v. King Soopers, Inc.* seemed reticent to consider the possibility that an ideology so avowedly political and offensive might be “parallel” to a more traditional belief in God.²¹⁶

Similarly, courts do not often follow the lead of *Welsh* and look beyond a believer’s characterization of his belief system as “nonreligious.”²¹⁷ Thus, the court in *Fraser v. New York City Board of Education* concluded that the plaintiff’s Hebrew Israelite beliefs were not “religious,” despite the fact that his belief system bore many of the hallmarks of a traditional religion.²¹⁸ It is not hard to imagine that the *Welsh* court might have found the *Fraser* plaintiff to have “religious” beliefs.

At some level, it is understandable *why* courts do not apply the definition of *Seeger* and *Welsh* consistently. Applied literally, this formulation would open up the ample protections of Title VII to a *vast* array of belief systems that have not previously been considered “religious.” On its face, *any* belief system might occupy a place “parallel” to an orthodox belief in God—even a belief in the curative powers of cat food. Indeed, *every* person might be conceived of as having a “religion.”²¹⁹ If this is the case, Title VII would impose on employers a duty to accommodate the “religions” and “religious practices” of *every single employee*.²²⁰ Such a duty would strike straight to the heart of the traditional model of “at-will” employment, whereby employers may terminate (or refuse to hire) employees for any reason or no reason at all (so long as the reason is not illegal).²²¹

The problem with this approach is that courts are most likely to deviate from *Seeger* and *Welsh* when confronted with a “non-traditional” religion. Thus, members of traditional churches are considered presumptively religious and almost automatically receive the protections of Title VII. Adherents of less familiar belief systems—who might seem to need the protection of Title VII the most—are subjected to a more searching analysis. Although courts do not often discount the religiosity of belief systems, “non-traditional” systems are more

214. *United States v. Seeger*, 380 U.S. 163, 166 (1965).

215. *Brown v. Pena*, 441 F. Supp. 1382, 1384-85 (S.D. Fla. 1977).

216. *Slater v. King Soopers, Inc.*, 809 F. Supp. 809, 810 (D. Colo. 1992).

217. *Welsh v. United States*, 398 U.S. 333, 341 (1970).

218. *Fraser v. New York City Bd. of Educ.*, No. 96 Civ. 0625 (SHS), 1998 U.S. Dist. LEXIS 1338, at *16 (S.D.N.Y. Feb. 10, 1998).

219. James A. Sonne, *The Perils of Universal Accommodation: The Workplace Religious Freedom Act of 2003 and the Affirmative Action of 147,096,000 Souls*, 79 NOTRE DAME L. REV. 1023, 1024 (2004).

220. *Id.*

221. SAMUEL ESTREICHER & MICHAEL C. HARPER, *CASES AND MATERIALS ON EMPLOYMENT DISCRIMINATION AND EMPLOYMENT LAW* 742 (2d ed. 2004).

likely to be excluded.²²² Such a system of analysis hardly seems to further the antidiscrimination policies of Title VII.

B. *The Dark Side of Seeger and Welsh*

While courts' deviation from *Seeger* and *Welsh* leads to problems, their rigid adherence to this definition of "religion" also proves problematic. *Seeger* and *Welsh* defined "religion" almost exclusively in terms of "belief."²²³ Because those cases focused on a conscientious objector statute, they were looking for evidence of a very specific "belief"—namely, a belief that war is wrong. For purposes of the conscientious objector statute, the "belief" part of religion dominated. Courts mimic this focus on "belief" in religious discrimination cases brought under Title VII.

Such an approach to "religion" is deeply problematic. First, by focusing on "belief" to the exclusion of all else, courts leave themselves with no principled way to distinguish between "religion" and other "belief systems." When courts encounter a belief system which does not seem to be "religious enough" to warrant protection, they have a choice: they may follow the apparent implications of their chosen definition of religion and extend protection to *all* beliefs, or they may find some other way to exclude the believer from protection. Without more guidance, courts reach inconsistent results. For example, one court might find that a white supremacist ideology fits the strictures of *Seeger* and *Welsh*, while another might conclude that it is *not* the kind of belief system Title VII was intended to protect. Any definition that leads courts to reach inconsistent results is problematic.

Second, focusing on belief may cause courts to deny protection to people and practices which are legitimately "religious." Following *Seeger* and *Welsh*, the courts are very concerned that believers' beliefs be "sincere." As discussed above, courts will often determine whether beliefs are "sincere" by comparing a would-be believer's actions to his or her purported beliefs.²²⁴ Under such a method of analysis, a court will almost *always* be able to find a way to deny a plaintiff the protection of Title VII. One hardly need be a religious scholar to recognize that apparently "religious" people act in manners contrary to their professed beliefs *all the time*. Moreover, such deviation does not necessarily remove one from the category of "religious." If deviation from a professed set of beliefs disqualifies a person from the category of "religion," very few people will be protected by Title VII. Although the intent of Congress in including religion in Title VII is unclear,²²⁵ it hardly seems likely that Congress intended to protect only those who unfailingly behaved in accordance with a set of

222. See Lori G. Beaman, *The Courts and the Definition of Religion: Preserving the Status Quo Through Exclusion*, in *DEFINING RELIGION: INVESTIGATING THE BOUNDARIES BETWEEN THE SACRED AND THE SECULAR* 203 (Arthur L. Greil & David G. Bromley eds., 2003).

223. See *supra* Part II.A.

224. See *supra* Part III.B.

225. See *supra* text accompanying notes 47-49.

carefully-prescribed beliefs.

An analysis of the cases shows that courts do not routinely apply such a stringent standard to Title VII plaintiffs. In fact, courts are most likely to resort to this “sincerity” analysis when confronted with someone who seems obviously to be fabricating his or her claim (as in *Hussein v. The Waldorf Astoria*)²²⁶ or with someone who professes a rather incredible belief (as the court viewed the plaintiff’s claim in *Tiano v. Dillard Department Stores, Inc.*)²²⁷ The problem with this approach is that it seems to favor majoritarian religions and work to the disadvantage of more “non-traditional” religions, again in apparent conflict with the antidiscrimination principles of Title VII.

The disconnect between professed belief and behavior has led many scholars of religion to doubt the primacy of “belief” in the phenomenon of religion. Some scholars (following in the footsteps of French sociologist Emile Durkheim) focus on the primacy of the social and communal in religion.²²⁸ Others (following Mircea Eliade) focus on a sense of “the sacred” as the hallmark of religion.²²⁹ Still others emphasize ritual practice.²³⁰ Although none of these approaches is necessarily “correct,” it is worth noting that a focus on community or ritual might lead courts to identify “religions” in a manner more consistent with the policies of Title VII.

Finally, this belief-centered definition may run afoul of the Constitution. As the U.S. Supreme Court has noted, it is tempting to make the analysis of the “sincerity” of a plaintiff turn on the factfinder’s own idea of what a religion should be.²³¹ If courts fall prey to this temptation, they risk “establishing” a religion in contravention of the Establishment Clause of the First Amendment.²³² That is, if courts think that religions “should” consist of beliefs which result in specific actions, they may end up favoring *some* “religions” over others.

CONCLUSION: A RECOMMENDATION FOR THE FUTURE

The courts’ approach to “religion” in Title VII cases seems to be deeply flawed. What, then, are courts to do? At some level, their hands are tied by the EEOC’s adoption of the formulations of *Seeger* and *Welsh*. Nonetheless, these definitions rest on *statutory*—not *constitutional*—grounds. Thus, there is no theoretical bar to tweaking the definition of “religion” to the Title VII context.

226. See discussion *supra* Part III.B.1.

227. See discussion *supra* Part III.B.3.

228. For an overview of Durkheim’s view of religion, see DANIEL L. PALS, SEVEN THEORIES OF RELIGION 88-123 (1996).

229. For an overview of Eliade’s view of religion, see *id.* at 158-97.

230. For a discussion of the role of ritual in various definitions of religion, see Jonathan Z. Smith, *Religion, Religions, Religious*, in CRITICAL TERMS FOR RELIGIOUS STUDIES 270-71 (Mark C. Taylor ed., 1998). For a discussion of Victor Turner’s emphasis on ritual, see WALTER H. CAPPS, RELIGIOUS STUDIES: THE MAKING OF A DISCIPLINE 196-97 (1995).

231. *Philbrook v. Ansonia Bd. of Educ.*, 757 F.2d 476, 482 (2d Cir. 1985).

232. See *supra* text accompanying notes 116-20.

Ultimately, courts will be hard-pressed to create another definition of "religion" without more guidance from Congress regarding the purposes served by including religion within the protective reach of Title VII. Until Congress weighs in on this issue, courts would do well to approach religious discrimination suits with caution. Instead of slavishly following *Seeger*, *Welsh*, or any other formulation of "religion," courts should begin their analysis with a close consideration of the antidiscrimination policies of Title VII. By thinking in fresh ways about religion, courts might come to better resolutions of religious discrimination cases. At the very least, they will open the door to a broader societal discussion of the degree of protection that should be afforded to religion in the workplace.