

How the First Amendment is Limiting Religious Freedom

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ABSTRACT

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Supreme Court Justice Stewart said in 1964 that when it came to obscenity, although he could not define it, he knew it when he saw it, and religion seems to fall into that same category. There is currently no definition of religion that excludes what most would consider secular, while simultaneously including everything we might see as religious. The First Amendment, with all its weight, demands religious freedom and yet the Founding Fathers provided no definition. So how have courts managed to uphold the First Amendment without a definition? *Can* the First Amendment be upheld without a definition? How have new religious movements changed the way courts view the First Amendment? Or have the First Amendment views of courts changed new religious movements? This paper reviews landmark court cases in which a definition of religion has been established and applied to a group in order to reach a decision. Upon examining these definitions we find that courts do not see new religious movements (specifically the Church of Scientology) as religions and have forced them to change as they seek religious freedom. These changes are in fact limiting religious freedom.



“That the Supreme Court of the United States should find itself in the position of interpreting American religion to itself is a situation full of irony and paradox.”

— Winnifred Sullivan (1994:42)

Introduction

The First Amendment of the United States Constitution reads in part, “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.” The ambiguity of religion presents a myriad of paradoxical problems for the courts. The First Amendment requires the courts to protect religious freedom while simultaneously keeping their distance. Historically and at present, courts have understood freedom of religion to signify a freedom of belief (Horwitz, 1997-1998: 129). Freedom of speech, though, is another part of the First Amendment and is understood to include “the freedom to believe and to express those beliefs in language” (Sullivan, 1994: 116). Having an opinion on any subject is a belief, which is protected under freedom of speech, but only religious beliefs are conferred religious freedom. Since religion is listed separately from speech in the Amendment, this implies two distinctions: religion is different from speech, and religion is given a freedom separate from freedom of belief. Unfortunately, due to the lack of a definition of religion, it will be shown how courts are shaping new religious movements and how these changes are limiting religious freedom.

If religion is something other than belief, how do the courts determine what qualifies as religion? Paul Horwitz notes, “the courts have expressed a great reluctance to wade into this difficult question” (1997-1998: 127). Winnifred Sullivan agrees with Horwitz, she states that “American courts have always been shy about entering this arena” (2005: 100) and she questions if it is even the courts’ responsibility to define religion. The First Amendment guarantees religious freedom, but how can courts fulfill their obligations towards the Amendment without providing an acceptable definition of religion? The exceptions made for religions *depend* on a definition. As Sullivan says, “either the First Amendment gives religion a privileged status or it does not.” (1994: 116) Though difficult to develop, I believe that a definition of the term religion is paramount for a proper implementation of the First Amendment.

The source of the problem comes from the inability to produce a definition that is applicable to all religions. How are courts supposed to know if they are fulfilling their responsibilities towards the First Amendment if they are unable to agree as to what is qualified as a religion? Strict definitions could very well exclude all religions but one. The court case *Davis v. Beason* in 1890 used a strict definition, saying, “[T]he term ‘religion’ has reference to one’s views of his relations to his Creator, and to the obligations they impose of reverence for his [sic] being and character, and of obedience to his [sic] will” (Horwitz, 1997-1998: 129). For this court, religion was thought to mean beliefs that specifically pertained to a male God that demands obedience to prescribed laws. This definition would exclude non-theist religions such as Buddhism, and therefore prove itself inadequate due to its strictness (Bowser, 1977:191).



Broader definitions are also insufficient, as they would allow “totems, witchcraft, the rights of man, Marxism, liberalism, Japanese tea ceremonies, nationalism, sports, free market ideology, and a host of other institutions and practices” (Cavanaugh, 2006: 8) to be considered religions. Sincerity has been used as a measuring stick to determine what courts accept as a religion, but as will be shown, this does nothing to resolve the problem. If any ideology, opinion, or preference are to be protected as a religion (as sincerity would allow), then how does freedom of religion retain its significance and power? In my view, the First Amendment would become redundant and unnecessary. There is no current definition that can accomplish what the courts need without discriminating in one way or another, for “to define is to exclude, and to exclude is to discriminate” (Sullivan, 2005: 101). Courts can do one of two things by defining religion: limit current religions or grant religious freedom rights to secular entities.

One question that must be asked is: where is religious freedom today in relation to where it can be or even ought to be? If we are not maximizing the benefits of this freedom, what can be done to reasonably increase those benefits? This paper reviews landmark court cases in which a definition of religion has been established and applied to a group in order to reach a decision. What effects did previous cases have on current rulings and have they satisfactorily maximized religious freedom? As the courts have struggled with these questions, so has academia. Winnifred F. Sullivan (2005), Elizabeth Shakman Hurd (2012), Lori G. Beaman (2008), and others have labored diligently to identify the point of convergence of religion and law. Their work testifies to the difficulty of balancing the two successfully. Based on previous cases and the work of scholars, we can begin to see the distance between where religious freedom is today and where it could be.

What we are seeing from courts is the tendency to drastically limit what qualifies as a religion, and this is consequently weakening religious freedom. When courts define religion, they influence subsequent legal proceedings, but when those definitions are applied universally, they are inadequate to determine what is and is not religion. Even though an adequate definition may not even be possible, courts are increasingly using a strict definition and new religiously based organizations struggle to conform to its religious guidelines. As a result, the courts are shaping non-mainstream religions to resemble the religions they have deemed acceptable. One group in particular, the Church of Scientology, has been forced to modify their beliefs and practices to resemble mainstream religions. For example, they have restructured their organization in such a way that resembles Protestant Christian churches. It is a prime example of how the First Amendment is limiting religious freedom.

Defining Religion: Trial and Error

The courts’ hesitancy to use a broad definition of religion reveals the minimum qualifications they are setting for inclusion in the definition of religion. If an extensive definition was used, it would allow opportunity for non-religious organizations to make fraudulent claims to be exempt from laws. Such was the case in *United States v. Meyers*, prompting the judge to apply a narrower test of religion. Meyers was charged with possession and trafficking of marijuana and claimed protection as the founder of the Church of Marijuana. Judge Brimmer “canvassed the cases dealing with the definition of religion and arrived at a

multifactor test” (Horwitz, 1997-1998: 136) to decide if the Church of Marijuana could have a religious status. Judge Brimmer decided that a religion should satisfy five criteria:

[Religions] often address “ultimate ideas”; often involve “metaphysical” or transcendent beliefs; prescribe a moral or ethical way of life; are comprehensive in nature; and typically exhibit certain “accoutrements” or “external signs”, such as the presence of a founder or prophet, important or sacred writings, ceremonies, holidays, and organizational structure (Horwitz, 1997-1998: 136).

The Church of Marijuana was found lacking in regards to these criteria and was therefore not considered a religion by the court. It was also noted that “Meyers’ professed beliefs have an ad hoc quality that neatly justify his desire to smoke marijuana” (Horwitz, 1997-1998: 136). The five-criteria test is extremely narrow and has flaws when it comes to defining religion. What do the terms “often” and “ultimate ideas” signify? To what degree should moral or ethical way (s) of life be prescribed? How comprehensive in nature must the religion be? Is a “founder” the same as a “prophet?” How is “prophet” defined? Must all five criteria be satisfied or is satisfying four sufficient? These questions and more bring the court right back to the starting position of defining religion and show the inclination of courts to use a constricted definition. It is also important to note that “although the court explicitly stated that it had not rested its holding on a finding that Meyers’ religion was a mere sham” (Horwitz, 1997-1998: 136), the ruling was actually influenced by Meyers’ lack of sincerity in his “church.”

Testing the sincerity of belief, while a compelling tool for determining what the First Amendment covers, is actually not a test of religion. The usefulness of testing sincerity resides in preventing fraudulent claims that would either exempt individuals from the law or grant them benefits they would otherwise be unqualified for, not in deciding what constitutes a religion (Rotunda and Nowak, 2013: 227).

In the *United States v. Ballard* case the founders of the “I Am” movement were convicted of fraud by the district court. They had been soliciting funds through the mail based on “representations that they had the power to heal illnesses and injuries” (Horwitz, 1997-1998: 144). The count of fraud was indicted against them because “they ‘well knew’ that these representations were false” (Rotunda and Nowak, 2013: 227). In other words, the prosecutors claimed the defendants intended to deceive others into giving them money. The trial was therefore not about the qualifications of the “I Am” movement as a religion, but rather if the defendants sincerely believed they had the powers to heal. This is an important distinction that the trial judge made clear in his instructions to the jury by saying, “religion cannot come into this case” (*US v. Ballard*, 1944). The jury could not deliberate on the truthfulness of the founders’ claims, they could only decide on whether the defendants sincerely believed their claims. If the defendants sincerely believed they had the power to heal, they should be acquitted. Not on the grounds that they belonged to a religion and could therefore have claim to an exemption of the law, but simply because they did not intend to commit fraud. On the other hand, if they did not hold such beliefs, they should be convicted of fraud (*US v. Ballard*, 1944).



The leaders were convicted, but the verdict was overturned in the U.S. Appeals Court because “in order to prove the offense charged, it was necessary to show that defendants had purposely set forth at least some false convictions” (*US v. Ballard*, 1944) that would violate the First Amendment. The case then went to the U.S. Supreme Court. They reversed the decision by the Court of Appeals, five to four, on the grounds that testing sincerity could not include testing the “truth or falsity of an asserted religious belief. To hold otherwise would allow a trail for heresy” (Rotunda and Nowak, 2013: 228). In other words, testing for sincerity is not the same as validating a religion. This decision has certain implications that had to be examined.

With this ruling, the Supreme Court did little to help define religion. In fact, this ruling provided a way for courts to avoid defining religion. The courts neither accepted the “I Am” movement as a religion, nor disqualified it as such. It was irrelevant to the trial; they were simply seeking to establish if certain individuals did or did not intend to commit fraud. However, for the purposes of the sincerity test, it is as if every sincerely held belief is hypothetically accepted as a religion, upon which the court then challenges the sincerity of the individual to establish his or her connection to the hypothetical religion (Rotunda and Nowak, 2013: 171). Any evidence of insincerity does not disqualify a belief as a religion; it merely establishes the disconnection of an individual from the belief and the religious freedom benefits that could potentially follow. In my opinion, this is a great loophole as it enables courts to avoid defining religion when sincerity is easily disproved. But what about truly sincere beliefs and the implications that would follow?

The problem associated with the process of testing sincerity is that it allows for “any asserted belief [to be] religious in nature” (Rotunda and Nowak, 2013: 171), but “the very concept of ordered liberty precludes allowing every person to make his own standards on matter of conduct in which society as a whole has important interest” (*Wisconsin v. Yoder*, 1972). The broadness of including every belief in religion is equivalent to saying that there is no religion. Sincerity is extremely broad as a basis for defining what qualifies as a religion. Would the sincere belief that a favorite sports team will win the championship be sufficient for exemption under the Free Exercise Clause? Such a ruling would make a mockery of religious freedom by equating religions with sport teams. Furthermore, if all sincere beliefs were religions, political parties would be religions and any law or policy enacted through political advocacy (i.e. every law and policy ever enacted) would violate the Establishment Clause (Bowser, 1977:186, 197).

Sincerity, in my opinion, is insufficient to define religion; it is tested only to ensure that those who are claiming to have religious beliefs have the grounds to do so. Sincerity was also insufficient in the *Florida in the Warner v. City of Boca Raton* case in which “legally defined orthodoxy, not sincerity, was the final standard” of judgment, despite the judge acknowledging that the plaintiffs “have sincere religious beliefs...[which] are entitled to protection under the law” (Sullivan, 2005:6-7). In this case, the judge defined religion as the central teachings of an orthodox organization.

The Warner case presents us with a common assumption regarding the definition of religion—an established organization. As shown in the Meyers case, the court was looking for “external signs such as the presence of a founder or prophet, important or sacred writings, ceremonies, holidays, and



organizational structure” (Horwitz, 1997-1998: 136, emphasis added). In the Warner case, the judge demanded as much and more—acknowledging only central beliefs of an institution to be part of a religion. In Boca Raton, Florida, the local cemetery established policies that required memorials to be small flat plaques that did not rise above the ground. Several residents with deceased relatives in the cemetery had received tacit permissions to place objects on the graves including “numerous statues, plantings, crosses, Stars of David, and other” (Sullivan, 2005:2) and had done so for as many as fifteen years. Unexpectedly, the city requested the removal of the objects and threaten they would be forcefully removed. A group of residents sued the city, citing a violation of a specific clause of the First Amendment, the Free Exercise Clause.

The lawyers for the defendants (the City) wanted to show that “what plaintiffs chose to do at these gravesites... was personal, rather than religious, because the particular actions were not compulsory—that is, they were not specifically demanded of them by their religions and they were not central to the identity of their religious traditions” (Sullivan, 2005: 35). Their argument was that if an action was not prescribed by the religion, it was not part of the religion (Sullivan, 2005: 35). Moreover, only actions that are “central to the identity of [the] religious tradition” (Sullivan, 2005: 35) are considered by the court to be religion. Any fringe beliefs of a religion, no matter how special or unique they may be, are not part of the religion. This requires religions to have an “authority above the level of the individual, an authority that mandate[s] particular behavior, in order to determine the significance of a particular religious act” (Sullivan, 2005: 35). This limits religion to an institution or organization with authorities that prescribe the correct way to act to their congregation.

In response to the defendant’s claim, two compelling traditions were part of the plaintiffs’ testimony. One was that, in the Catholic tradition, crosses are to be upright and never horizontal. The other, found in Jewish tradition, stipulates that graves are never to be walked on (some of the Jewish graves were roped off). The court did not recognize these as central beliefs in either traditions and concluded that protecting such beliefs would allow “the Plaintiffs [to] transform the nature and appearance of a municipal secular cemetery and establish *their own standardless cemetery rules...*” (Sullivan, 2005: 108, emphasis in original text). The court, in my opinion, correctly assessed the problem of including individual beliefs in the definition of religion, but then incorrectly claimed that the fringe beliefs of a religion are individual and therefore do not deserve protection under First Amendment. According to the court in this case, a religion must at least be an organization or institution with authorized leaders and central beliefs (which implies fringe beliefs, but then excludes them) (Sullivan, 2005: 35).

This is one of the more narrow definitions of religion, as it doesn’t even consider the beliefs, neither prominent nor prescribed by a religion, to be included in the religion. As one government representative said, “many religions do not require their adherents to pray at specific times of day, yet most members of Congress would consider prayer to be an unmistakable exercise of religion” (Sullivan, 2005: 96). This new definition, while seriously flawed, has a great impact on religions. Courts are not proactively working to shape religions to fit a particular mold of religion. However, through these court cases and many others, courts are unconsciously forcing religions, unorthodox as well as mainstream, to conform. This is setting a



precedent and creating a mold of what an acceptable religion looks like. This is limiting the power and the protection of the First Amendment. One religion that has been molded in this way is the Church of Scientology.

The Shaping of a Religion

Since its genesis in the early 1950's, the Church of Scientology (hereafter referred to as the Church) has been forced by the government to change in order to fit the more mainstream mold of religion. One of the most controversial aspects of Scientology is their use of electropsychometers or the "E-meter." These machines are used in auditing sessions during which the subject is attached to the machine, while holding two tin cans, and being asked a series of questions. After each question, "a needle on the apparatus registers changes in the electrical resistance of the subject's skin" (Horwitz, 1997-1998: 98). These changes indicate previous life experiences that are preventing the subject from full utilization of the brain, a main goal in Scientology (Horwitz, 1997-1998: 98). From these auditing sessions, the subjects can then remove their obstacles and increase the utilization of their brain. This is part of the reason Scientology claims it can help "[w]here tendency to disease or injury exists, or where disease or injury is being prolonged, or where unhappiness and worry causes [sic] mental or physical upset." (Horwitz, 1997-1998: 101) These claims were troubling to the US Food and Drug Administration (FDA) that raided the Church of Scientology's Washington headquarters in 1963 (Horwitz, 1997-1998: 101) and seized the E-meters. The FDA said the claims stating that the E-meter has the power to heal illnesses were false, misleading and violated the Food, Drug, and Cosmetic Act (Horwitz, 1997-1998: 103). The Church responded that the claims were made in religious literature and "a finding that the seized literature misrepresents the benefits from auditing is a finding that their religious doctrines are false" (Horwitz, 1997-1998: 103). The Church of Scientology sued the US Government and the case went to trial. The trial court found in favor of the US, but the verdict was reversed on appeal (*Founding Church of Scientology v. US*, 1969). The problem for the US Appellate Court District of Columbia Circuit was deciphering the use of early writings of L. Ron Hubbard, the founder of the Church of Scientology, in the religious literature published by the Church. These writings were scientific in nature and never claimed to be religious, but were used by the Church in religious materials. The US Appellate Court noted "that many false scientific claims permeate the writings and that these are not even inferentially held out as religious, either in their sponsorship or context" and decided that a "single false scientific non-religious label claim [in religious material] is sufficient to support condemnation [of the E-meters]" (Horwitz, 1997-1998: 104). The US Appellate Court, however, did not demand the Church to stop using E-meters. Instead the E-meters had to come with a warning indicating that those using it could not "represent that there is any medical or scientific basis for believing or asserting that the device is useful in the diagnosis, treatment or prevention of any disease" (Horwitz, 1997-1998: 105) and the Church's literature had to be changed accordingly.

In this case, the US Court of Appeals forced the religion of Scientology to publish a warning statement about believing in the healing power of that religion. Not only is requiring a religious warning statement unnerving, but the justification has terrifying implications as well. The courts have forced a change in the religious material a church publishes, saying that false non-religious claims made in a religious publication



are unacceptable. There is no doubt it would be illegal for the United States courts to change the Bible to suit scientific and medical research if they decided a false non-religious claim was made therein, yet under the courts' line of reasoning, it would have to be changed. The Church of Scientology accepted this fate and obliged to the decision of the court, changing its religious claims in order for them to be accepted.

Another way the Church of Scientology has been shaped by courts has been in issues regarding taxation. The Church imposes a fee for each auditing session, as well as other trainings, and they treat these fees as "donations" made to their religious organization. The Church claimed tax-exempt status and members of their faith obviously wrote off the donations on their taxes as well. In the case *Hernandez v. Commissioner*, the US Supreme Court upheld the decision of the Internal Revenue Service (IRS) to deny a tax-exempt status to the Church. The tax battle with the Church began in 1967 when the tax-exempt status of the Church was revoked because the IRS declared that their use of the donations did not qualify as religious in purpose, a requisite for the status, but rather was used to benefit L. Ron Hubbard and his wife (Walsh, 1995-1996: 337). At that time, a twenty-five hour auditing session cost \$500 while the cost to purchase an E-meter was only \$125 (Horwitz, 1997-1998: 101). The IRS saw this giant disparity as a commercial, for-profit enterprise. Not only was the status revoked for the disparity, but also, in the Hernandez case, the courts declared the fees were "'fixed payments' made in return for the required service of auditing" (Walsh, 1995-1996: 338) and not charitable contributions.

In response to this decision, the Church restructured its leadership (Walsh, 1995-1996: 338), and changed its operational policy (Frantz, 1997). Even though the court's decision had not been overturned, in 1993, due to the changes made in Church policy, the IRS granted the Church tax-exempt status, saying, "that a two year examination revealed that Scientology was a religious organization within the scope of Internal Revenue Code section 501(c)(3)" (Walsh, 1995-1996: 339). This was done because the IRS. "could not justify treating payments for auditing and training differently from payments made to mainstream religions" (Samansky, 2004-2005: 69). In my view, this shows incredible discrimination by the courts because they are unwilling to recognize the Church of Scientology as a religion worthy of First Amendment protection. While the IRS has decided to grant Scientology this particular freedom, the decisions taken by the courts are limiting the First Amendment because, as Horwitz writes, the law:

...may disfavor new religious movements, both because their religious practices and precepts may deviate from mainstream faiths' practices, and because of the possibility that 'new religious groups will develop innovative means of financing that are consistent with emerging forms of religious expression' (1997-1998: 110).

The Church's battle lasted twenty-six years and it was only formally recognized by *any* branch of the US government as a religion after it changed to conform to mainstream religion.

Conclusion

External entities changing the internal operations and beliefs of various religions are common throughout history, but religious freedom as guaranteed by the First Amendment is still relatively new in human



history. It is still being teased out through courts and what we are seeing is the inability of freedom of religion, in the most literal sense, to exist in society. To expect complete freedom of religion, though, is an unobtainable ideal. The government has established laws that society must abide, even if a religious principle contradicts them. In *Reynolds v. United States*, the nineteenth-century polygamy case that shaped The Church of Jesus Christ of Latter-Day Saints (Mormons), the court concluded:

“Can a man excuse his practices to the contrary [of the law] because of his religious belief? To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself” (Sullivan, 1994: 124).

This limitation of religious freedom is understandable and certainly warranted, but the line surrounding what is religiously acceptable is steadily contracting. This is only moving religious freedom further away from its maximized potential.

It is my opinion that when it comes to religious freedom, one of the most fundamental human freedoms, it would be wise to error on the side of inclusion. To deny legitimate groups protection would be far worse than to allow frauds to take advantage of it. US Supreme Court Justice Jackson, dissenting in the Ballard case, said, “the price of freedom of religion... is that we must put up with, and even pay for, a good deal of rubbish” (*U.S. v. Ballard*, 1944). Unfortunately America is comfortable with Protestant Christianity and is suspect of any other religion, new or ancient (Sullivan, 2011: 335). What is legitimate is not always popular, but it seems to me that only what is popular is protected. New religions are being molded to resemble Protestantism through:

...worshipping on Sunday, financing themselves through volunteer donations, supplying religious education to children through Sunday schools, developing specialized chaplaincies to serve hospitals and the military, creating seminaries to produce an educated clergy, and...bringing up their children to choose for themselves (Sullivan, 2011: 335).

This shaping of religions has gone beyond just actions, which is what the Reynolds case concluded the law was allowed to change. The shaping has reached *belief*, which is what the Reynolds case concluded the law was not allowed to change (*Reynolds v US*, 1878). The power of the First Amendment is diminishing and the courts, the very institutions responsible for protecting the Constitution, are causing religious freedom to be diminished. While it is not possible to define religion without exclusion, the First Amendment views of the courts must shift to favor inclusion in order to maximize this freedom. Extreme inclusion is not desirable and courts must be on guard to prevent it. Nonetheless, the predominantly Christian mold of what constitutes a religion must be rescinded as new religions emerge if religious freedom is to be unconstrained.

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