A Historical, Philosophical, and Etymological Study of the Word "Religion" as Used in the First Amendment: Coming to a Textually-Based Definition

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Abstract. The United States courts are at a loss for what qualifies as religious *for protections under the First Amendment. And it makes sense. Who wants to delineate a precise definition distinguishing the religious from the non-religious when an over-inclusive or under-inclusive definition stands to shake the legal landscape? Make it too broad, and religious exemptions may swallow the law or the state may be accused of establishment for pursuing legitimate legal ends. But define religion too narrowly, and you risk removing legal protections from diverse, non-traditional, or non-conventional religious beliefs and opening opportunities for state coercion to engage in arguably religious activities. Must the courts remain silent? With the recent abolition of the* Lemon *test and the calls for expanding free exercise protections, we need guidance on what exactly the Religion Clauses protect.*

This Article will do just that. By tracing (non-exhaustively) the origins of the word "religion" from its Latin and philosophical roots to its political usage in the Founding Era, this Article will argue for a starting definition that is faithful to the text and practical in application. Other authors have limited themselves to analogy, engaged in apparent ad hoc and outcome-oriented reasoning, or provided little substantive justification for their offered definitions. None looked for a distinguishing component of the "religious," and few looked to historical usage or philosophical origin.

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This Article will provide a definition of religion composed of distinct elements rooted in the Founding Era's understanding of the concept "religious." It is meant to give a faithful yet clear way to discern the religious from the non-religious, or at a minimum, serve as a springboard for a serious inquiry into the issue.

Introduction

For over two hundred years, scholars and lawyers nationwide have debated, interpreted, and applied the United States Constitution. Few provisions of the Constitution have attracted as much attention as the First Amendment. Indeed, the everyday person understands this one provision of the Bill of Rights as potentially the most integral and most sacred in the founding document.[1] Because of its far-reaching implications, it is no surprise that Supreme Court decisions interpreting the First Amendment receive intense attention and ultimately end up in textbooks as illustrative opinions.[2]

Of the protections afforded by the First Amendment, interpretations of the Religion Clauses are frequently the most intense. The Establishment and Free Exercise Clauses—which state, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof"—have led to two lines of cases, each embracing multiple schools of jurisprudence.[3] Yet both establishment and free exercise jurisprudence have generally avoided one crucial question: what is this "religion" that is afforded protections and of which the government is prohibited from establishing?

It is easy to see why the Court has evaded the question. In a society that considers politics and religion to be topics unfit for table conversation, surely a conversation built off both topics would attract the ire of many: both jurists and laypersons. Academically speaking, the task is daunting, and an error interpreting the word too broadly or narrowly could leave many religious persons—particularly members of minority religions—unprotected or likewise prevent the government from regulating most activities.

This Article attempts to answer this question of "religion" unlike previous scholars by looking at the philosophical and etymological roots of the word's use. First, Part I gives a history of U.S. case law, hinting at a method of distinguishing religion from non-religion.[4] This Part then discusses approaches offered by numerous scholars over the past century who recognized and attempted to resolve the problem.[5]

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[1] *See, e.g.*, *2023 Update*, FREEDOM FORUM, https://perma.cc/BH6G-MR7K (indicating that ninety-three percent of polled Americans consider the First Amendment to be "vital").

[2] *See, e.g.*, ARTHUR D. HELLMAN, WILLIAM D. ARAIZA, THOMAS E. BAKER & ASHUTOSH A. BHAGWAT, FIRST AMENDMENT *passim* (5th ed. 2022).

[3] U.S. CONST. amend. I; *see, e.g.*, Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2426–29 (2022) (discussing Establishment Clause jurisprudence); Sherbert v. Verner, 374 U.S. 398, 403, 406 (1963) (discussing the Free Exercise Clause jurisprudence).

[4] *See infra* Section I.A.

[5] *See infra* Section I.B.

Part II—the main portion—of this Article traces the etymological and philosophical origins of the word "religion" before and through the Founding Era.[6] This Part culminates in a definition of religion that reflects the Founding Era's understanding of the word:

> Religion, for the purposes of the First Amendment, includes (A) all assertions of truth of and concerning the supernatural, (B) all assertions of truth flowing forth from supernatural beliefs, and (C) actions taken pursuant to such beliefs.[7]

Finally, in Part III, this Article explains the practical strengths of this textualist definition, comparing it to other proffered definitions and applying it to difficult cases.

I. A Missing Definition

The Supreme Court has never squarely addressed the question of religion's meaning within the context of the First Amendment. On several occasions, the Court has considered the meaning of religion, but usually in passing dicta while reasoning to a final conclusion.[8] As a result, the Court's jurisprudence does not provide a clear and defined answer as to what constitutes religion. This Part provides an overview of relevant Supreme Court case law hinting at the definition of religion within the First Amendment, Supreme Court case law defining religion within statutory contexts (e.g., the Selective Service Act), and circuit and state court decisions tackling the religion question. It then provides an overview of scholarly commentary that attempts to define religion.

A. *Case Law*

Because the Supreme Court's opining on the definition of religion is so rare, this section examines the few cases that have addressed the issue in constitutional and statutory construction cases. With less discretion to avoid the question, lower courts provide additional examples of the judiciary grappling with the definition of religion. Many of the discussed cases primarily addressed establishment or free exercise questions. Given that this Article focuses on the definition of religion, this Section only attempts to glean answers as to *what religion is* and not *when religion is established* or *its free exercise is infringed upon*.

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[6] *See infra* Section II.

[7] This definition should be viewed without prejudice to possible categorical exceptions. *See infra* note 256.

[8] *See infra* Section I.A.

1. First Amendment Jurisprudence

For the first century following the adoption of the Bill of Rights, the Supreme Court rarely had to apply the Religion Clauses, largely because (1) the First Amendment only applied to federal actions before the ratification of the Fourteenth Amendment, and (2) few federal laws implicated religious concerns.[9] As such, the first cases to discuss religion were brought against the federal government. In these cases, the discussion on what constituted religion was brief and presumed that everyone understood the term's meaning.[10] Nevertheless, they shed some light on the understanding at the time.

For example, in *Watson v. Jones*,[11] the Court—dealing with a property rights issue between a church and its congregation—observed, "In this country the full and free right to entertain any religious belief, to practice any religious principle and to teach any religious doctrine which does not violate the laws of morality and property, and which does not infringe personal rights, is conceded to all."[12] While this statement is dicta, the case helps illustrate a contemporary understanding of what religion is. This dictum reflects a distinction between religion and morality and between religion and other discrete categories of activity encompassed within religion (i.e., belief, practices, and teachings).[13]

It wasn't until western expansion that the Supreme Court truly tackled the issue of defining religion. In *Reynolds v. United States*,[14] the Court addressed a claim on error from the Utah territory challenging the prosecution of bigamy as violating the First Amendment's free exercise Clause.[15] The Court correctly observed that religion was not defined in the Constitution and, as a result, could only determine the meaning by looking at the history of the text and how it was understood by the Founding generation.[16] Quoting James Madison's *Memorial and Remonstrance Against Religious Assessments*[17] and Thomas Jefferson's

9 *See* Barron v. Baltimore, 32 U.S. (7 Pet.) 243, 250 (1833).

10 *See, e.g.*, Watson v. Jones, 80 U.S. (13 Wall.) 679, 728–29 (1871).

11 80 U.S. (13 Wall.) 679 (1871).

12 *Id.* at 728.

13 *See infra* Part III for further discussion.

14 98 U.S. 145 (1878).

15 *Id.* at 161–62. The defendant argued that, because it was a duty of male members of the Mormon religion to practice polygamy, the First Amendment compels the territorial judgment to instruct the jury to enter a verdict of not guilty. *Id.*

16 *Id.* at 162.

17 JAMES MADISON, MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ASSESSMENTS (1785), *reprinted in* 2 THE WRITINGS OF JAMES MADISON 183 (Gaillard Hunt ed., 1901).

Letter to Danbury Baptist,[18] the Court stated that religion is "the duty we owe the Creator" and is a "matter which lies solely between man and his God."[19] The Court also distinguished between the absolute protection of religious belief and the qualified protection of religious actions, ultimately deciding that the First Amendment afforded the defendant no defense to a criminal prosecution of the act of bigamy.[20]

Addressing a similar issue on appeal from the Idaho territory, the Court echoed the same definition proffered by *Reynolds* in *Davis v. Beason,*[21] stating religion is a "reference to one's views of his relations to his Creator, and to the obligations they impose of reverence for his being and character, and of obedience to his will."[22] Like *Reynolds*, the *Davis* Court asserted that, while a nation's laws may never interfere with religious belief, laws oriented towards the "peace, good order and morals of society" may nevertheless be enforced.[23] The *Davis* Court further stated that bigamy fundamentally violates some "common sense of mankind," which justified its outright prohibition.[24]

The Court did not discuss the essence of religion within the First Amendment again until 1944 in *United States v. Ballard*.[25] Here, two leaders of a religious sect called the "I Am" movement were indicted for

[18] Letter from Thomas Jefferson, President, U.S., to Nehemiah Dodge et al., Comm. of the Danbury Baptist Ass'n in the State of Conn. (Jan. 1, 1802), *reprinted in* 36 THE PAPERS OF THOMAS JEFFERSON 258 (Barbara B. Oberg ed., 2009). *See infra* Section II.A for a discussion on Jefferson's writings pertaining to religion.

[19] *Reynolds*, 98 U.S. at 163–64.

[20] *Id.* at 166–67. The court distinguished between beliefs and "practices," *id.*, but "action" will ultimately be more descriptive in defining the contours of "religion" in Part III, *infra*.

[21] 133 U.S. 333 (1890).

[22] *Id.* at 342. In *Davis*, the court addressed whether requiring potential voters to make an oath that they were not a member of an organization espousing polygamy violated the Free Exercise Clause, and subsequently, whether a law punishing illegal voter registration could be enforced against the defendant, a member of the Mormon faith. *Id.* at 341.

[23] *Id.* at 342 ("With man's relations to his Maker and the obligations he may think they impose, and the manner in which an expression shall be made by him of his belief on those subjects, no interference can be permitted, provided always the laws of society, designed to secure its peace and prosperity, and the morals of its people, are not interfered with.").

[24] *Id.* at 341–42 ("Bigamy and polygamy are crimes by the laws of all civilized and Christian countries . . . . They tend to destroy the purity of the marriage relation, to disturb the peace of families, to degrade woman and to debase man. Few crimes are more pernicious to the best interests of society and receive more general or more deserved punishment. To extend exemption from punishment for such crimes would be to shock the moral judgment of the community. To call their advocacy a tenet of religion is to offend the common sense of mankind.").

[25] 322 U.S. 78 (1944).

mail fraud.[26] The Court ruled that, while evaluating the sincerity of a religious belief is permissible, the Court of Appeals for the Ninth Circuit erred when it held a jury could evaluate the truth of the "I Am" movement's religious tenets.[27] Particularly, the Court observed that "[h]eresy trials are foreign to our Constitution" and "[m]en may believe what they cannot prove," implying that a core element of religion must deal with the truth or falsity of some substantively different type of claim than most fact issues.[28]

Following the incorporation of the First Amendment against the states, the Court opened the door to more free exercise and establishment challenges.[29] One of the first cases was *Fowler v. Rhode Island*.[30] This rather short opinion dealt with a Jehovah's Witness preacher who gave a religious speech in a local park, allegedly violating a city ordinance.[31] The ordinance in question permitted religious services and sermons but not "political or religious meeting[s]."[32] Ultimately, the Court asserted that *Reynolds* and *Davis* were exceptions to a broader rule that "it is no business of courts to say that what is a religious practice or activity for one group is not religion under the protection of the First Amendment," implying that the answer to "what is religion" is entirely subjective.[33]

Among all the cases in the mid-twentieth century, *Torcaso v. Watkins*[34] contributed the most to the "what is religion" debate. The simple decision, which held as unconstitutional a religious oath requirement[35] for public officeholders, famously stated: "Among religions in this country which do not teach what would generally be considered a belief in the existence of God are Buddhism, Taoism, Ethical Culture, Secular Humanism, and others."[36] For the purposes of this Article, the

[26] *Id.* at 79. The defendants claimed they had a supernatural ability to heal people of ailments and solicited payment for such. *Id.* at 80.

[27] *Id.* at 86–87.

[28] *See id.* at 86–87 ("If one could be sent to jail because a jury . . . found [Christian] teachings false, little indeed would be left of religious freedom.").

[29] *See generally* Everson v. Bd. of Educ., 330 U.S. 1 (1947) (incorporating the Establishment Clause against the states by subjecting the public reimbursement for travel costs to-and-from private Catholic schools to constitutional scrutiny); Cantwell v. Connecticut, 310 U.S. 296 (1940) (incorporating Free Exercise clause protections against the States).

[30] 345 U.S. 67 (1953).

[31] *Id.* at 67–68.

[32] *Id.* at 67, 69.

[33] *See id.* at 70.

[34] 367 U.S. 488 (1961).

[35] The oath required a professed belief in God. *Id.* at 489.

[36] *Id.* at 495 n.11. This statement by the Court continues to fuel many religion clause debates, namely whether secularism is a religion and whether the court can prefer religion over irreligion. *See*

footnote's observation—if correct in interpretation—provides the vital insight that belief in a god is not necessary for a belief to qualify as religious under the First Amendment.

The Court delineated a few more parameters in the cases of *Wisconsin v. Yoder*[37] and *Thomas v. Review Board*.[38] Going against the grain of many prior selective-service, religious-exemption cases,[39] the *Yoder* Court asserted that there must be a distinction between a religious and secular-philosophical belief.[40] The distinction between a mere philosophic and a religious belief serves as one of the more important inquiries for lower courts today when determining if a belief is religious.[41] The Court echoed this distinction again in *Thomas* when it determined that a religious objector who struggled to articulate his objections to working at a foundry producing tanks was entitled to unemployment compensation.[42] In its conclusion, the Court cited *Yoder* and stated,

> [R]eligious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection. . . .
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> . . . .
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> . . . [I]t is not within the judicial function and judicial competence to inquire whether the petitioner or his fellow worker more correctly perceived the commands of their common faith. Courts are not arbiters of scriptural interpretation.[43]

Between *Yoder* and *Thomas*, there appears to be an understanding that the secular—where philosophy resides—is something wholly separate from the religious.

infra Section I.A.3 and Part III. This Article will address the prior question. The latter question is largely one that belongs to the interpretation of what "establishment" means and is beyond this Article's scope.

37 406 U.S. 205 (1972).

38 450 U.S. 707 (1981).

39 *See infra* Section I.A.2.

40 *Yoder*, 406 U.S. at 215–16 ("A way of life, however virtuous and admirable, may not be interposed as a barrier to reasonable state regulation of education if it is based on purely secular considerations; to have the protection of the Religion Clauses, the claims must be rooted in religious belief . . . . [I]f the Amish asserted their claims because of their subjective evaluation and rejection of the contemporary secular values accepted by the majority, much as Thoreau rejected the social values of his time and isolated himself at Walden Pond, their claims would not rest on a religious basis.")

41 *See, e.g.*, Founding Church of Scientology v. United States, 409 F.2d 1146, 1151 (D.C. Cir. 1969); Malnak v. Yogi, 592 F.2d 197, 204 (3d Cir. 1979).

42 *Thomas*, 450 U.S. at 720.

43 *Id.* at 714–16.

2. Selective Service Cases

The Supreme Court has addressed the question of religion in only a few statutory contexts, namely when interpreting Selective Service exemptions. In 1931, however, the Court interpreted a naturalization provision in *United States v. Macintosh*.[44] While not directly interpreting the First Amendment, the Court grappled with provisions in the Nationality Act requiring an oath to "bear arms" for the United States before naturalization, particularly whether religious considerations were integrated into the law.[45] In his dissent, Chief Justice Charles Evan Hughes observed the statute only required a promise to "support and defend the Constitution and laws of the United States against all enemies, foreign and domestic, and bear true faith and allegiance to the same."[46] His view, which a majority of the Court vindicated fifteen years later, was that the text incorporated a historically understood principle that oaths do not require a "promise to put allegiance to temporal power above what is sincerely believed to be one's duty of obedience to God" or one's "religious or conscientious scruples."[47] Chief Justice Hughes' observation of a dichotomy between temporal power and duty to God echoes the similar dichotomy between the secular and the religious in *Yoder*.

The Court's jurisprudence on applying the Universal Military Training and Service Act's religious objector exemption is frequently cited when lower courts seek to determine if a set of beliefs is religious.[48] While these cases do not directly address the meaning of religion within the First Amendment, the Court expressly determined what objections were religious in nature and, consequentially, what constituted religion for purposes of the Selective Service Act.[49] While not a controlling interpretation of the First Amendment, it is understandable why these cases are used in many academic attempts to define religion.

Before the Supreme Court addressed the issue, several courts of appeals interpreted the religious exemption. The first to do so, the Court of Appeals for the Second Circuit, loosely discussed the issue in *United*

44 283 U.S. 605, 608 (1931), *overruled by* Girouard v. United States, 328 U.S. 61, 69 (1946).

45 *Macintosh*, 283 U.S. at 619–20. The issue was whether a man could satisfy the oath requirement with a qualified oath to bear arms only in a morally justified war, rather than the usual unconditional oath. *Id.*

46 *Id.* at 630 (Hughes, C.J., dissenting).

47 *Id.*; *Girouard*, 328 U.S. at 63–67 (citing Chief Justice Hughes' dissent in overturning *Macintosh*).

48 *See* 50 U.S.C. § 456(j).

49 *See, e.g.*, United States v. Seeger, 380 U.S. 163, 176 (1965); United States v. Welsh, 398 U.S. 333, 339–340 (1970).

States v. Kauten.[50] While the court did not define "religion," it drew upon a perceived distinction between the politico-philosophical and the religious reasons to object, characterizing the defendant's beliefs as non-religious.[51] However, the court of appeals also seemed to connect a "compelling voice of conscience" and "religious impulse."[52] The Court of Appeals for the Ninth Circuit addressed similar questions three years later.[53] For nearly the same reasons articulated in *Kauten*,, the court likewise found a conscientious objector not entitled to relief.[54]

The Supreme Court weighed in shortly thereafter in *United States v. Seeger*.[55] The Court defined religion as "[a] sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by the God of those admittedly qualifying for the exemption."[56] The Court relied primarily on the text of the statute using "Supreme Being" instead of "God," opining that this choice of words meant that Congress did not want to demarcate "the form or nature of this higher authority."[57] This interpretation stood as a contrast to prior views of religion that focused on the substance of belief and not the subjective role of the belief in the believer's life.[58]

Five years later, the Court went further in *Welsh v. United States*.[59] Seeming to embrace an almost completely subjective view of religion, the Court stated a belief must "stem from the registrant's moral, ethical, or religious beliefs about what is right and wrong and that these beliefs be held with the strength of traditional religious convictions" to be religious.[60] The Court went on to state that beliefs that are "purely ethical or moral" in nature and "impose . . . a duty" upon a person's conscience are

50 133 F.2d 703 (2d. Cir. 1943).

51 *Id.* at 708 ("[C]ongress intended to satisfy the consciences of the very limited class we have described and not to give exemption to the great number of persons who might object to a particular war on philosophical or political grounds."). Defendant was an agnostic who opposed the war because of a strong philosophical principle. *Id.* at 707 n.2.

52 *Id.* at 708.

53 Berman v. United States, 156 F.2d 377 (9th Cir. 1946).

54 *Id.* at 380–81 ("[N]o matter how pure and admirable his [philosophical views] may be, and no matter how devotedly he adheres to it, his philosophy and morals and social policy without the concept of deity cannot be said to be religion in the sense of that term as it is used in the statute.").

55 380 U.S. 163, 176 (1965). *Seeger* dealt with three conscientious objectors who did not belong to an orthodox religious sect but stated that their beliefs in a "cosmic order" or a "supreme reality" manifest in nature constituted religion. *Id.* at 164–65, 185–88.

56 *Id.* at 176.

57 *Id.* at 175.

58 *Compare Seeger*, 380 U.S. at 175–76, *with* Reynolds v. United States, 98 U.S. 145, 161–67 (1879).

59 398 U.S. 333 (1970).

60 *Id.* at 340.

religious under § 456(j).[61] This contrasts widely with the later decision of the *Yoder* Court that determined purely ethical and philosophical beliefs were distinguished from religious beliefs.[62] Despite the inconsistencies, a wide variety of lower courts at the state and federal level pull from both the *Seeger-Welsh* and *Yoder* definitions, which has led to starkly different rulings.

3. Lower Court Rulings

This Section briefly surveys various decisions by lower federal and state courts interpreting religion within various contexts. Nearly all the opinions pull from Supreme Court case law on the subject, regardless of the legal context. If anything, this Section illustrates the confusion around what constitutes "religion," the difficulty in framing the issue, and the spectrum of broad to narrow definitions offered by jurists. By no means is this Section exhaustive.

Early state cases before *Seeger* and *Welsh* relied heavily on *Reynolds* and *Davis* to interpret the word "religion." Massachusetts, dealing with a case almost identical to *West Virginia State Board of Education v. Barnette*[63]—that is, a student who refused to say the pledge of allegiance in class on religious grounds—concluded the law did not violate Massachusetts' religious protections because the requirement was not religious in nature.[64] The Massachusetts Supreme Judicial Court analogized the case to *Reynolds*, seeing the secular purpose of honoring the flag as comparable to the secular purpose of regulating marriage and comparing the refusal to say the pledge to the refusal to observe marriage laws.[65] California similarly refused to issue a writ of mandamus forcing a

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[61] *Id.*

[62] Wisconsin v. Yoder, 406 U.S. 205, 215–16 (1972).

[63] 319 U.S. 624 (1943).

[64] Nicholls v. Lynn, 7 N.E.2d 577, 580 (Mass. 1937). It should be noted that this decision was rendered prior to the incorporation of the Religion Clauses in *Everson v. Board of Education*, 330 U.S. 1 (1947), and *Cantwell v. Connecticut*, 310 U.S. 296 (1940). The case is offered here not for its now-erroneous conclusion on what constitutes an infringement on free exercise but rather for its valuable observation that the law and action regulated were not religious in nature. The relevant Massachusetts provision states: "[N]o subject shall be hurt, molested, or restrained, in his person, liberty, or estate for worshipping God in the manner and season most agreeable to the dictates of his own conscience . . . ." MASS. CONST. art. II.

[65] *Nicholls*, 7 N.E.2d. at 580 ("The pledge of allegiance to the flag, as set forth in the rule of the school committee and referred to in said chapter 258, is an acknowledgment of sovereignty, a promise of obedience, a recognition of authority above the will of the individual, to be respected and obeyed. It has nothing to do with religion. . . . It does not in any reasonable sense hurt, molest, or restrain a human being in respect to 'worshipping God' within the meaning of words in the [Massachusetts] Constitution."). Any error in this decision stems from the court's misunderstanding of what

school to readmit a student expelled for the same reasons.[66] According to these courts, the laws requiring the pledge of allegiance in schools were not religious, and their secular purpose outweighed any religious objection.[67]

Some religions, like Scientology, have perplexed courts for decades because judges are forced to determine just which activities are religious and which are not. For example, in 1969, the Court of Appeals for the D.C. Circuit dealt with a challenge to condemnation of the Church of Scientology's property by the Food and Drug Administration ("FDA").[68] The FDA argued that the Church of Scientology falsely labeled and distributed "Hubbard Electrometers,"[69] which allegedly had health benefits.[70] The court concluded that the belief in the efficacy of the Hubbard machines was religious, relying heavily on *Ballard*, because the government did not contest Scientology's status as a religion or the belief in the machines as a doctrine of the church.[71] The Supreme Court of Missouri reached an opposite conclusion in determining whether the Missouri Constitution's automatic *ad valorem* tax exemption for religious groups applies to Scientologists.[72] Repudiating the application of *Seeger*, the court found the church's activities were not religious because they had little to do with a belief in a "Supreme Being."[73] Not surprisingly, the definition of religion comes up in the context of state and federal tax exemptions, often, but not always, tied up with state and federal constitutional provisions.[74]

The educational arena is another context in which courts must decide what constitutes religion. One of the more cited lower court opinions comes from a religious challenge to a school's activities and a concurrence

constitutes "prohibiting free exercise of religion," and less so of what constitutes something "religious" itself. Alternatively, they failed to afford weight to the tenets of the plaintiff's religion.

66 Gabrielli v. Knickerbocker, 82 P.2d 391, 394 (Cal. 1938). This judgment can also be considered erroneous. *See supra* text accompanying note 65.

67 *See Nicholls*, 7 N.E.2d at 580; *Gabrielli*, 82 P.2d at 394.

68 Founding Church of Scientology v. United States, 409 F.2d 1146, 1151 (D.C. Cir. 1969).

69 *See What Is the E-Meter and How Does It Work?,* CHURCH OF SCIENTOLOGY INT'L, https://perma.cc/UZF3-ANJU.

70 *Founding Church of Scientology*, 409 F.2d at 1151–52.

71 *Id.* at 1158–62.

72 Mo. Church of Scientology v. State Tax Comm'n, 560 S.W.2d 837, 842–44 (Mo. 1977).

73 *Id.* at 840–42.

74 *See, e.g.*, Sunday Sch. Bd. of S. Baptist Convention v. McCue, 293 P.2d 234, 235 (Kan. 1956).

by Judge Arlin Adams.[75] In *Malnak v. Yogi*,[76] the Court of Appeals for the Third Circuit had to address whether or not the teaching of the "Science of Creative Intelligence Transcendental Meditation" ("SCI/TM") in a high school violated the Establishment Clause.[77] While the majority held this violated the First Amendment, they did not articulate why SCI/TM was a "religion."[78] Judge Adams single-handedly tackled the issue. In his concurrence, he attempted to outline the parameters of religion.[79] After recounting the Supreme Court's jurisprudence (including *Seeger*), he outlined three indicia by which one could identify a religion: (1) the "ultimate" nature of the belief (i.e., religions deal with humanity's "ultimate concern"); (2) the fitting of the belief within a larger comprehensive framework; and (3) formal, external, or surface signs that may be analogized to accepted religions (i.e., similarity to existing religions).[80] These factors ("*Malnak* factors"), he argued, are meant to be weighed flexibly, and all need not be present.[81] While this test is not controlling, it possibly represents the first attempt to provide an authoritative "test" for religion.

In another educational context, *Grove v. Mead School District No. 354*,[82] the Court of Appeals for the Ninth Circuit dealt with a civil rights action challenging the use of a book in a literature course.[83] Plaintiffs—parents of students—accused the book of advancing the religion of "secular humanism" (something identified as a religion in *Torcaso*). Still, the court held that, while secular humanism may be a religion in some

75 Malnak v. Yogi, 592 F.2d 197, 200–15 (3d Cir. 1979) (Adams, J., concurring) (per curiam). The concurrence's approach was later applied by a U.S. Court of Appeals for the Third Circuit majority and approvingly cited by other courts. *See, e.g.*, Africa v. Pennsylvania, 662 F.2d 1025, 1032–36 (3d Cir. 1981) (applying *Malnak*); United States v. Meyers, 95 F.3d 1475, 1482 n.2, 1489 (10th Cir. 1996) (affirming the district court's use of a multifactor-based approach including the *Malnak* factors and finding the belief that the use of marijuana is good for mankind and the earth to not be religious); Alvarado v. City of San Jose, 94 F.3d 1223, 1228 (9th Cir. 1996) (applying *Malnak* factors and finding that a "Plumed Serpent" statue installed by the city to commemorate Spanish and Mexican culture was not religious).

76 592 F.2d 197 (3d Cir. 1979) (per curiam).

77 *Id.* at 197–98. SCI/TM taught that "pure creative intelligence" is the basis of life; that through the process of Transcendental Meditation students could perceive the full potential of their lives; and required the students to attend a puja ceremony where they gave an offering to a deified guru to discover their own personal "mantra." *Id.* at 198.

78 *See id.* at 197–200. The court offered only this by way of analysis: "Careful examination of the textbook, the expert testimony elicited, and the uncontested facts concerning the puja [ceremony] convince us that religious activity was involved . . . ." *Id.*

79 *Id.* at 201 (Adams, J., concurring).

80 *Id.* at 207–10.

81 *Id.* at 209.

82 753 F.2d 1528 (9th Cir. 1985).

83 *Id.* at 1531. The book in question was *The Learning Tree* by Gordon Parks.

contexts, the autobiographical book was included for a secular purpose.[84] Other courts have considered atheism and humanism as religions because of the questions they seek to answer.[85]

The most robust discussions of the definition of religion occur when courts face obscure or new beliefs seeking religious protection. Rarely, outside of an educational context, are novel "religions" accused of being promoted by the government in violation of the Establishment Clause.[86] For example, in *International Society for Krishna Consciousness, Inc. v. Barber*,[87] the Court of Appeals for the Second Circuit evaluated at length whether Krishna Consciousness was a religion.[88] The court relied heavily on the *Seeger-Welsh* approach and cited scholarly sources, determining that because the belief system was of "ultimate concern" to the adherents, it was a religion.[89]

Relying on this precedent, the District Court for the Eastern District of Virginia determined that Wicca was a religion in *Dettmer v. Landon*.[90] Likewise in another oft-cited case, *Africa v. Pennsylvania*,[91] the Court of Appeals for the Third Circuit determined whether an organization called "MOVE" was a religion.[92] Applying the *Malnak* factors, the court held MOVE was not a religion deserving of protections, primarily due to its failure to answer "fundamental" or "ultimate" questions or assert that its tenets were necessary for humankind.[93]

Overall, the approaches of lower courts have varied and are often inconsistent. None of the federal circuits (including the Court of Appeals for the Third Circuit in *Malnak*) offer a truly comprehensive test to

[84] *Id.* at 1534.

[85] *See, e.g.*, Kaufman v. McCaughtry, 422 F. Supp. 2d 1016, 1020–22 (W.D. Wis. 2006); Smith v. Bd. of Sch. Comm'rs, 655 F. Supp. 939, 979 (S.D. Ala. 1987), *rev'd*, 827 F.2d 684 (11th Cir. 1987).

[86] *But see* United States v. Allen, 760 F.2d 447, 449–50 (2d Cir. 1985) (holding prosecution of anti-nuclear protesters who destroyed U.S. property not a violation of the First Amendment because the government had a secular purpose in protecting its property and was not trying to advance a religion of "nuclearism").

[87] 650 F.2d 430 (2d Cir. 1981).

[88] *Id.* at 438–40 (2d Cir. 1981).

[89] *Id.* at 440. The court also cited dicta from *Kauten*: "A concern is more than intellectual when a believer would categorically 'disregard elementary self-interest . . . in preference to transgressing its tenets.'" *Id.* (citing United States v. Kauten, 133 F.2d 703, 708 (2d Cir. 1943)).

[90] 617 F. Supp. 592, 595–96 (E.D. Va. 1985) ("[C]ourts must accept a belief as 'religious' so long as it is sincere, it occupies a meaningful position in the individual's life, and it relates to that individual's 'ultimate concern.' . . . With the above principles in mind, the Court thinks that the Church of Wicca is clearly a religion for First Amendment purposes.").

[91] 662 F.2d 1025 (3d Cir. 1981).

[92] Africa v. Pennsylvania, 662 F.2d 1025, 1025 (3d Cir. 1981). The plaintiff in the case sought religious accommodations during his confinement, namely a diet of entirely raw foods. *Id.*

[93] *Id.* at 1032–33.

distinguish between the religious and non-religious. As a result, citations to *Yoder*, *Seeger*, and *Welsh* followed by loose analogizing to previous circuit cases are the preferred method of resolving these cases.

B. *Scholarly Speculation*

This Article is not the first to observe the absence of a firm definition or test for what qualifies as religion. Several scholars have attempted to outline the contours of religion—proposing standards that run the gambit from highly inclusive to extremely narrow and approaching the issue from numerous different perspectives utilizing various methodologies.[94] This Section is a non-exhaustive, brief discussion of those definitions. Many of the first scholars to write on this issue did not offer a constitutional definition but instead opted to merely describe the Supreme Court's treatment of religion.[95] Other legal scholars chose to look at the issue through the lenses of other disciplines, and many works today continue in this vein.[96] Before the mid-twentieth century, however, few chose to construct a definition or test out of the text of the First Amendment or from case law.[97] Below is a brief discussion of the three main approaches to defining religion.

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[94] *See infra* Sections I.B.1–3.

[95] *See, e.g.*, Anita Bowser, *Delimiting Religion in the Constitution: A Classification Problem*, 11 VAL. U. L. REV. 163, 225–226 (1977) (distilling and restating the definition of religion from *Seeger* and *Welsh* and defining religion as that which is "related by doctrinal, ethical, or ritualistic consideration to the Ultimate Concern . . . in the life of an individual or group, the belief or faith to which all else is subordinate and which occupies in the life of its possessor a place parallel to that filled by the orthodox belief in God, giving fundamental meaning to life and dictating standards of belief, conduct or worship"); John H. Mansfield, *Conscientious Objection—1964 Term*, 3 RELIGION & PUB. ORD. 3, 4–5 (1965) (explaining the Court's reasoning in *Seeger* and criticizing attempted distinctions between religious objection and non-religious objection).

[96] *See, e.g.*, James M. Donovan, *God is as God Does: Law, Anthropology, and the Definition of "Religion"*, 6 SETON HALL CONST. L. J. 23, 70–98 (1995) (discussing a purely anthropological and sociolinguistic approach to understanding religion). Some scholars have even gone so far to apply obscure branches of nominalism to the Religion Clauses and argue that no definition of religion is even possible. *See, e.g.*, Victoria S. Harrison, *The Pragmatics of Defining Religion in a Multi-cultural World*, 59 INT'L J. FOR PHIL. RELIGION, 133, 136–37 (2006) (arguing that there are no "essential" properties of religion); George C. Freeman III., *The Misguided Search for the Constitutional Definition of "Religion,"* 71 GEO. L.J. 1519, 1520 (1983) (arguing that attempts to define religion are misguided).

[97] In other words, few scholars tried to identify defining elements of religion.

1. Functional "Purposive" Approaches

One of the first comprehensive scholarly works attempting to ascribe meaning to religion—a *Harvard Law Review* note published in 1977—constructed a "bifurcated" definition from the limited case law.[98] Taking a mostly "purposive" approach,[99] the author argued that the "dramatic changes in American life" such as the growth in religious pluralism, the changing view of religion in contemporary society, and the secularization of the culture necessitate two separate definitions of religion within the context of the First Amendment.[100] For the Free Exercise Clause, the author argued for an expansive "functional" approach that would best effectuate the purpose of the First Amendment (i.e. protection of the "inviolability of conscience").[101] This "functional" approach to a definition differed from "content-oriented" methods in that a "functional" approach looks to the phenomenological role of an alleged religion in the individual's life while a "content-oriented" definition looks to a distinguishing characteristic within religion itself.[102] In other words, what distinguishes religion from non-religion is more so the function of the thing in an individual's mind than any quality of the belief or action. The author found this better than a content-oriented definition, which would run the risk of omitting newer or religions unfamiliar to the Founders.[103]

Using this purposive approach, the author advocated for the "ultimate concern" test discussed by the *Seeger* court and put forth by theologian Paul Tillich.[104] Under this definition, religion in a free exercise context would refer to the "underlying concern which gives meaning to a person's whole life" (i.e., "the motivational aspect of human experience" that is

98 *Toward a Constitutional Definition of Religion*, 91 HARV. L. REV. 1056, 1083 (1978) [hereinafter *Student Note*].

99 See Abigail R. Moncrieff, *Statutory Realism: The Jurisprudential Ambivalence of Interpretive Theory*, 72 RUTGERS U. L. REV. 39 (2019), and John F. Manning, *The New Purposivism*, 2011 SUP. CT. REV. 113 (2011), for a discussion on the interpretive theory.

100 *Student Note*, *supra* note 98, at 1083–84. The author argues that two separate definitions are necessary to properly effectuate the "values underlying the religion clauses." *Id.* at 1085.

101 *Id.* at 1072. The note based its assertion that the purpose of the Free Exercise Clause was to protect the "freedom of conscience" on three observations: (1) the recognition of the importance of freedom of conscience itself by some Supreme Court Justices, (2) the emotional well-being that flows from freedom of belief, and (3) that religious freedom promotes pluralism of thought. *Id.* at 1058 (respectively citing Walz v. Tax Comm'n, 397 U.S. 664, 719–20 (1970) (Douglas, J., dissenting); J. Morris Clark, *Guidelines for the Free Exercise Clause*, 83 HARV. L. REV. 327, 342 (1969); and *Walz*, 397 U.S. at 689 (Brennan J., concurring)).

102 *Id.* at 1075.

103 *Id.* at 1072–73.

104 *Id.* at 1066–83.

"unconditional, absolute, or unqualified").[105] With regards to the Establishment Clause, the author articulated different purposes to effectuate: protecting religious freedom of choice, avoiding political strife that results from intertwining religion and politics, and immunizing the church and state from each other.[106] In an effort to achieve these goals, the note supports an "operational" test for religion requiring the court to approximate the power possessed by followers of a practice and the extent to which that practice is recognized as religious.[107] The greater something is approximated as a religion, the more likely the government action supporting it violates the Establishment Clause. Other scholars have offered similar approaches, almost always rooted in *Seeger*.[108] These definitions mainly vary on just what function religion serves in the life of the individual.[109]

2. Content-Based "Essential" Approaches

Countering this purposive or functional approach, several scholars tried to articulate objective criteria for identifying religion. In his 1992 law review article, Anand Agneshwar criticized the *Seeger* approach and advocated for defining religion as "a system of beliefs, based on supernatural assumptions, that posits the existence of apparent evil, suffering, or ignorance in the world and announces a means of salvation or redemption from those conditions."[110] Breaking his definition into elements, religious beliefs would have to (1) be a part of a system of belief, (2) be supernatural in origin, (3) contain some belief in an evil,[111] and (4)

[105] *Id.* at 1066–67. The author emphasized a preferred definition that is subjective and relates solely to the individual's perception, observing that solely nominal adherents of a religion would receive no religious protections normally afforded to their faith if they didn't truly hold those tenets as their ultimate concern. *See id.* at n.129.

[106] *Student Note*, *supra* note 98, at 1058.

[107] *Id.* at 1086. The author articulated three factors to consider when a court engages in the approximation: (1) structural elements of the organization; (2) theological components of the belief including sacred texts, ethics, creeds, etc.; and (3) attitudinal conformity. *Id.* at 1087.

[108] *See, e.g.*, Donovan, *supra* note 96, at 95 (defining religion as a belief system that "serves the psychological function of alleviating death anxiety"); Ben Clements, *Defining "Religion" in the First Amendment: A Functional Approach*, 74 CORNELL L. REV. 532, 552–53 (1989) (defining religion as a comprehensive belief system that answers "fundamental and ultimate questions having to do with deep and imponderable matters").

[109] *See supra* note 108. Minor disagreements as to what *role* religion plays in an individual's life is not enough to discount that all of these approaches still look to the subjective perception of the person and not to any *quality* of the belief.

[110] Anand Agneshwar, *Rediscovering God in the Constitution*, 67 N.Y.U. L. REV. 295, 319 (1992).

[111] Perhaps some ethical belief.

contain some belief in a means of deliverance or redemption.[112] Agneshwar argues his definition includes most major world religions and is much easier to apply than *Seeger*. [113]

Similarly, Jeffrey Oldham also rejects the idea of using bifurcated definitions and argues that a single "content-based" definition is more consistent with the text of the First Amendment than "functional" or "analogical" approaches.[114] He proposes a definition of religion as "(1) a faith-based system of beliefs and actions, (2) that makes reference to a supernatural reality, (3) [the supernatural reality of which] dictates the believers' perception of good and evil, and (4) answers the question arising from the existence of such forces."[115] Oldham asserts that "[t]he core foundation of religion is based upon faith rather than reason, and faith involves something unexplainable and greater than man."[116]

Likewise, Andrew Austin outlined criteria he found essential to religion.[117] He argued that whatever religion may be, its definition must serve the purpose of the Religion Clauses, include all groups universally accepted as religious, provide objective criteria, and fairly and truly distinguish between the religious and non-religious.[118] While Austin gave his definition solely for Free Exercise Clause purposes,[119] he concludes the essential component of religion is founded upon faith (i.e., not based on logical reasoning).[120]

Very much like Austin, Jesse Choper favors a definition of religion that partially relies on faith, specifically a belief that one's actions or inactions have extratemporal consequences.[121] Choper observed that the Constitution's First Amendment free speech doctrines protect most expressions of religious belief, and the Fifth and Fourteenth Amendments' Equal Protection and Due Process Clauses bar most discrimination on the

[112] *See id.*

[113] *See id.* at 320–26.

[114] Jeffrey L. Oldham, *Constitutional "Religion" A Survey of First Amendment Definitions of Religion*, 6 TEX. F. ON C.L. & C.R. 117, 168–70 (2001).

[115] *Id.* at 170 (numbers added).

[116] *Id.* at 169–170. Oldham further argues that religion must be defined narrowly to adequately reflect what the Framers of the First Amendment intended in their use of the word.

[117] Andrew W. Austin, *Faith and the Constitutional Definition of Religion*, 22 CUMB. L. REV. 1, 6–9 (1991).

[118] *Id.* at 6–7.

[119] *Id.* at 10–11.

[120] *Id.* at 36.

[121] Jesse H. Choper, *Defining "Religion" in the First Amendment*, 1982 U. ILL. L. REV. 579, 597–601 (1982).

basis of religion.[122] The remaining function of the Free Exercise Clause, he argues, is to extend further protections to "religious" conduct[123] and religious belief or speech that might fall within an exception to the free speech doctrines.[124] His extratemporal test is designed towards this conduct-gap and relies solely upon a singular element—extratemporal consequences—to distinguish religious conduct from non-religious.[125]

Observing all of these objective approaches, Professor Lee J. Strang advocates for a narrow definition of "religion."[126] Professor Strang argues that the objectified meaning contained in the First Amendment requires a detailed inquiry into how the framers viewed religion.[127] Looking at the first states' approaches to religious liberty as well as the writings of the Founding Fathers, Professor Strang concluded that the "intellectual foundation provided by [John] Locke" carried a particular view of religion.[128] This view, he asserts, is that the originalist definition of religion is "a monotheistic belief system . . . that holds true to a future set of rewards and punishments and thus imposes duties on believers in this world."[129] Professor Strang later supported this definition with Corpus linguistics.[130]

3. Analogical Approaches

Finally, a large swath of scholars uses a multi-factor balancing analysis to determine what is religious. This approach was partly championed by

[122] *Id.* at 581–83. Notably, the Religion Clauses' meaning cannot be based on the Fourteenth Amendment's function as it came much later.

[123] *Id.* at 583–85.

[124] *Id.* at 584–86. Namely, barring courts from deciding disputes on the truth or falsity of "religious" claims. *Id.*; *see also* Jones v. Wolf, 443 U.S. 595, 608 (1979); United States v. Ballard, 322 U.S. 78, 86–88 (1944).

[125] Choper, *supra* note 121, at 597–601.

[126] Lee J. Strang, *The Meaning of "Religion" in the First Amendment*, 40 DUQ. L. REV. 181, 183, 204–10 (2002).

[127] *Id.* at 210–11.

[128] *Id.* at 211–19.

[129] *Id.* at 238. This definition can be broken down into 3 distinct elements: (1) belief in a deity, (2) duties in this life, and (3) future state of rewards and punishments.

[130] Lee J. Strang, *The Original Meaning of "religion" in the First Amendment: A Test Case of Originalism's Utilization of Corpus Linguistics*, 2017 B.Y.U. L. REV. 1683 (2017). Corpus linguistics is an empirical method used to identify patterns of language and is often used to help identify how words were used within a certain time period. Professor Strang utilized the Corpus of Founding Era American English ("COFEA") and the *Pennsylvania Gazette* in his study. *Id.* at 1693. Ultimately, he found that there was a high frequency of words implying a theistic meaning found around the word religion. *Id.* at 1697–1703.

Judge Adams in his *Malnak* concurrence.[131] Kent Greenawalt, a professor of jurisprudence and prominent advocate of this approach, argues that multi-factor analogizing to a recognized religion is the most practical and prudent.[132] While he differs on the precise factors Judge Adams articulates, Professor Greenawalt asserts the most useful test for religion must analogize an alleged-religion-in-question to those religions that are "indisputably religious."[133] In conducting this comparison, the reviewing judge should take into account a wide array of non-exclusive factors to determine if the alleged religion is similar enough to the "indisputably religious."[134]

Observing that the understanding of religion has colloquially changed over time, other scholars propose comparable approaches, arguing that First Amendment jurisprudence should reflect that shift.[135] Supplementing an analogical approach with certain guidelines—such as not denying religious status solely on the lack of a concept of god (so as to root out the United States' historical Western biases in understanding the "indisputably religious")—is just one of many adjustments one could make to an analogical analysis.[136] Notably, most proposed analogical tests also embrace a purely purposive approach.[137]

From all these definitions, one can distill three general approaches to defining religion: functional (purposive) approaches; content-based

[131] Malnak v. Yogi, 592 F.2d 197, 207–10 (3d Cir. 1979) (Adams, J., concurring) (approach is found in the third prong of his proposed test).

[132] Kent Greenawalt, *Religion as a Concept in Constitutional Law*, 72 CALIF. L. REV. 753, 767–68 (1984).

[133] *Id.* at 767. Greenawalt does nothing more to describe the "indisputably religious" beyond stating that it is an instance where virtually everyone would say, "This is certainly religion." He lists Roman Catholicism, Greek Orthodoxy, Lutheranism, Methodism, and Orthodox Judaism as examples. *Id.*

[134] *See id.* at 767–68. Greenawalt's non-exclusive factors are (1) belief in God, (2) comprehensive view of the world and human purposes, (3) a belief in some form of the afterlife, (4) communication with God through ritual acts of worship and through corporate and individual prayer, (5) practices involving repentance and the forgiveness of sins, (6) religious feelings of awe, guilt, or adoration, (7) use of sacred texts, (8) organization to facilitate the corporate aspects of religious practice and to promote and perpetuate beliefs and practices. *Id.*

[135] *See, e.g.*, Eduardo Peñalver, *The Concept of Religion*, 107 YALE L.J. 791, 813–14 (1997) (contrasting the largely "western, Protestant" notion of religion from other culturally distinct understandings).

[136] *Id.* at 818–19. Peñalver further argues for two more "negative guidelines": (1) not denying religious status solely because of particular structural/institutional features of the belief system and (2) not denying religious status solely because of the failure to focus on or distinguish the sacred, spiritual, supernatural, or other-worldly. *Id.*

[137] Discussed further below. *See infra* Part III.

(essential) approaches; and analogical (balancing) approaches.[138] This Article will ultimately argue that an essential definition is the best approach when interpreting the Religion Clauses.

II. Working Towards a Definition

With all these proffered definitions, it is difficult to know where to begin searching for a definition of religion within the First Amendment. Before outlining guidelines for formulating a definition, it is wise to look first at the usage of the word by the Constitution's drafters. While there are many competing theories of constitutional interpretation, none of them eschew the text of the Constitution itself, nor do they degrade the value of looking at historical meaning.[139] This Article adheres to the view commonly called textualism (and "original-public-meaning originalism") and, while this Article discusses that interpretive method, arguing for it is beyond the Article's scope.[140] Ultimately, the philosophical and etymological distinctions made by the Founding Era, natural law philosophers, and early jurists support a definition of religion distinguishing it from numerous other concepts—like conscience, morality, or temporal affairs—encompassing both belief and act, and extending to numerous named faith backgrounds.

A. *Religion in the Founding Era*

What the First Amendment means by "religion" depends on the Founding generation's understanding and use of the word.[141] This approach differs notably from looking to the original intent of the many authors of the First Amendment, instead probing the common use or

[138] These categories act as a fair way of distinguishing the scholarly approaches thus far; Jeffrey Oldham first articulated them well in his work. Oldham, *supra* note 114, at 149. Andrew Austin alternatively articulates two categories, as he considers the analogous approach to be more of a subset of the functional. Austin, *supra* note 117, at 7.

[139] Even a living constitutionalist would argue that the text and historical context is the starting point for interpretation. Harvard Law School, *The Antonin Scalia Lecture Series: A Dialogue with Justice Elena Kagan on the Reading of Statutes*, YOUTUBE (Nov. 25, 2015), https://perma.cc/UZ22-7MMQ.

[140] For sources arguing the merits of textualism over alternative approaches, see ANTONIN SCALIA & BRYAN GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS (2012). *But see* Jonathan R. Siegel, *The Inexorable Radicalization of Textualism*, 158 U. PA. L. REV. 117, 169–71 (2009) (noting drawbacks to "axiomatic" formalism in textualist methodology).

[141] *See* SCALIA & GARNER, *supra* note 140 at 78–92 (fixed-meaning canon) ("Words must be given the meaning they had when the text was adopted.").

meaning at the time.[142] Accordingly, the contemporary 1789 usage of the word "religion" reflects the meaning of the word in the First Amendment.

By analyzing the writings and views of the Founding Fathers and the Lockean thought they relied on, one can draw four conclusions about the definition of religion. First, religion had a real and palpable objective meaning when the First Amendment was ratified and was not rooted on the subjective interpretations of individuals. Second, religion was not synonymous with morality or conscience. Third, the meaning was rooted in some relationship with God or the divine and thus was a content-based definition under Oldham's framework. Fourth, religion was not limited to Judeo-Christian doctrine but rather applied to a broader phenomenon or category of belief.

At the time the First Amendment was drafted, there seemed to be little to no debate on how to define religion by Congress. In fact, the Senate, upon receiving a draft of the language of the First Amendment from the House, cared more about the nuances of the text, particularly with regards to conscience rights than they did the word "religion."[143] It stands to reason that with a lack of debate on the issue among people from across the newly formed United States, religion had a widely accepted meaning. Indeed, many of the Founders wrote on the proper role of religion within the politico-social sphere, all with similar observations. James Madison, for example, protested a bill to provide tax-funded Christian education in his *Memorial and Remonstrance*, arguing that religion is fundamentally not subject to the government.[144] Citing Virginia's Declaration of Rights, he stated that "[r]eligion, *or the duty which we owe to our Creator*, and the manner of discharging it" was the product of conviction or reason and not coercion.[145] Interestingly, Madison questioned, "Who does not see that the same authority which can establish Christianity, in exclusion of all other Religions, may establish with the same ease any particular sect of Christians, in exclusion of all other Sects?" and made numerous references to the "*Christian* Religion."[146] From just the Senate journals and Madison's writings, it would appear that religion is something broader than Christianity yet narrower than

[142] *Id.* While arguably one should look to the intent of the lawgiver to interpret his meaning when he promulgates law, in a world where the legislators of a particular statute are many, this "public meaning" approach allows a singular objective meaning (in most cases) to be discerned as at any given time there is arguably one collective-subjective proper meaning of a term (at least contextually).

[143] *See* S. JOURNAL, 1ST CONG., 1ST SESS., at 117 (1789) (striking "nor shall the rights of conscience be infringed" from the draft of the first amendment).

[144] MADISON, *supra* note 17, at 184.

[145] *Id.* (emphasis added). *See also* VA. CONST. art. I. §16 (The Virginia Declaration of Rights). This language was heavily relied on by the Court in *Reynolds*. *See supra* Section I.A.1.

[146] MADISON, *supra* note 17, at 186 (emphasis added).

conscience rights. But did this hold true with others in the Founding generation?

Thomas Jefferson, in his *Notes on Religion*, spoke of John Locke's view of religion and concluded that "neither Pagan nor Mahomedan nor Jew ought to be excluded from the civil rights of the Commonwealth because of his religion."[147] In his *Autobiography*, he wrote in support of a Religious Freedom Bill considered by the Virginia legislature. Following the legislature's rejection of an amendment that would have placed Jesus Christ in front of "the holy author of our religion," Jefferson stated, "The insertion was rejected by a great majority, in proof that they meant to comprehend within the mantle of protection the Jew and the Gentile, the Christian and the Mahometan, the Hindoo and infidel of every denomination."[148]

George Washington, in his *Thanksgiving Proclamation of 1789*, tied religion heavily to "the great Lord, and Ruler of Nations" or "the beneficent Author of all the good that was, that is, or that will be," supporting the viewpoint that religion necessitates a Supreme Being.[149] He qualified religion as "true" at one point[150] and appears to notice a distinction between civil and religious liberty.[151] His personal writings share the same affect: "The bosom of America is open to receive . . . the oppressed & persecuted of all Nations & Religions."[152]

Even Thomas Paine, in the 1792 *Rights of Man*, refers to the "Founder of the *Christian* Religion," adding that qualifier to religion to distinguish Christianity from religion itself.[153] Paine interestingly argues that man's natural right to freedom of religion is an intellectual right, relating to the right of man to "judge in his own cause."[154] In other words, the internal ability to judge what is right and wrong, or to use one's conscience, is something inherent in man's existence. While Paine ties conscience and morality closely to religion, he never uses them synonymously, and

147 THOMAS JEFFERSON, NOTES ON RELIGION (1776), *reprinted in* 2 THE WORKS OF THOMAS JEFFERSON 252, 267 (Paul Leicester Ford ed., 1904).

148 THOMAS JEFFERSON, AUTOBIOGRAPHY (1821), *reprinted in* AUTOBIOGRAPHY YALE LAW SCHOOL, THE AVALON PROJECT: DOCUMENTS IN LAW, HISTORY AND DIPLOMACY (2008), https://perma.cc/S5Q4-LJZC.

149 George Washington, *Thanksgiving Proclamation, 3 October 1789*, *reprinted in* 4 THE PAPERS OF GEORGE WASHINGTON 131–32 (W.W. Abbot & Dorothy Twohig eds., 1993).

150 *Id.* (beseeching God to "promote the knowledge and practice of true religion and virtue").

151 *Id.* (assigning October 3, 1789, to be a day for rendering thanks for "the civil and religious liberty with which we are blessed").

152 Letter from George Washington to Joshua Holmes (Dec. 2, 1783), FOUNDERS ONLINE, NAT'L ARCHIVES, https://perma.cc/AAE3-SL4G.

153 THOMAS PAINE, RIGHTS OF MAN 70 (Penguin Classics 1985) (1791) (emphasis added).

154 *Id.* at 68.

throughout his work, he refers to religion in a more spiritual sense as man's duty or devotion to God.[155] Yet, Paine also shared in the idea that religion was for all mankind and draws only a distinction between good and evil persons:

> It is also to be observed that all the religions known in the world are founded, so far as they relate to man, on the unity of man, as being all of one degree. Whether in heaven or in hell, or in whatever state man may be supposed to exist hereafter, the good and the bad are the only distinctions.[156]

In other words, he claims that every religion, while asserting to be true, necessarily asserts it is true with regards to all mankind (i.e., that the "religious" was some sort of objective claim about reality). Meanwhile, the only true distinction religion draws between persons is an ethical one (i.e., persons who have lived good lives or evil ones). In this early view, it would seem that morality is not religion but can "pour forth" from it.

Many of the first state constitutions and legislative acts included provisions that shed the same light on the meaning of religion. As mentioned above, the Virginia Declaration of Rights refers to religion as "the duty we owe to our Creator, and the manner of discharging it" but also guarantees "the free exercise of religion, according to the dictates of conscience."[157] In doing so, it both references a supreme being and indicates a separateness between conscience and religion. So too, the Massachusetts Constitution provides for the public instruction of "piety, religion, and morality" pointing towards a general recognition of each as something distinct.[158] Other states' constitutions also seem to view religion as distinct from—and broader than—Christianity.[159]

In addition, the two articles by Professor Strang provide a thoroughly researched dive into the contemporary literature of the era. He references many statutes and debates around the Religion Clauses and "no religious tests" clauses of the Founding Era. [160] As suggested above, many of these

[155] *See generally* PAINE, *supra* note 153.

[156] *Id.* at 67.

[157] VA. CONST. art. I, § 16.

[158] MASS. CONST. of 1780, pt. 1, art. III, para. 1 ("As the happiness of a people and the good order and preservation of civil government essentially depend upon piety, religion and morality; and as these cannot be generally diffused through a community, but by the institution of the public worship of God and of public instructions in piety, religion and morality: Therefore . . . the legislature shall, from time to time, authorize and require, the several towns . . . and other bodies politic, or religious societies, to make suitable provision . . . for the support and maintenance of public Protestant teachers of piety, religion and morality, in all cases where such provision shall not be made voluntarily.").

[159] *See, e.g.*, GA. CONST. of 1777, art. IV (referring to the "Protestant Religion"); S.C. CONST. of 1776, pmbl. (referring to the "Roman Catholic religion"); MD. CONST. of 1776, art. XXXIII (referring to the "Christian Religion").

[160] Strang, *supra* note 126, at 233–35.

debates stemmed from the difference between protecting "conscience" and "religion."[161] Professor Strang also found the literature most frequently used religion in a theistic sense, not in a secular, moral sense.[162] In fact, according to Strang, contemporary literature suggested that religion and morality were most often used distinctly yet interrelatedly.[163]

When interpreting a legal provision, it makes sense to also consult legal sources of the era. On questions of British common law, Blackstone's *Commentaries on the Laws of England* was one of the most frequently cited authoritative source of the Founding Era. A cursory review of Sir William Blackstone's writing shows that even he qualified religion with further adjectives.[164] Blackstone recognized the contrast between the affairs of the religious and the affairs of the temporal world.[165] He also contrasts between "nature and religion"[166] and apparently distinguishes between religion and morality.[167]

On the philosophical side, it is no secret that the political philosopher John Locke shaped much of the Bill of Rights' drafters' and ratifiers' worldview. Locke, who lived only a generation or two before the American Revolution, wrote on religion and religious liberty in his *Letter Concerning Toleration*.[168] In the letter, Locke emphasized the distinction between the direct ends of civil government and the ends of religion, believing the civil government as having just an interest in the possession of life and the things necessary for such[169] and referring to religion as concerning the salvation of the soul or the relation to God.[170] Locke's emphasis on the two ends of civil and religious authority and the importance of religious liberty influenced the drafters of the First Amendment. Within his distinction between the concerns of the civil and

[161] *Id.; see also infra* Section II.D.

[162] Strang, *supra* note 126, at 1698–99.

[163] *Id.* at 1699–700 ("This concordance line suggests that religion and *morality* were related by religion's capacity to push people to act ethically.").

[164] 1 WILLIAM BLACKSTONE, COMMENTARIES *216–17, *236 (referring to the "popish" religion and the "protestant" religion).

[165] *See id.* at *382 ("A dean and chapter are the council of the bishop, to assist him with their advice in affairs of *religion*, and also in the *temporal* concerns of his see." (emphasis added)).

[166] *See id.* at *45; *see also infra* Section II.B.

[167] *See id.* at *438.

[168] JOHN LOCKE, LETTER CONCERNING TOLERATION (Liberal Arts Press 2d ed. 1955) (1689). Keeping with the theme, the letter also qualified "religion" with words like "true" or "Christian," further adding to the evidence suggesting that religion was something broader than the Judeo-Christian faith. *See id.* at 13–14.

[169] *Id.* at 17.

[170] *Id.* at 17–26.

spiritual, Locke justified religious toleration on the grounds that true religion could only be exercised without coercion.[171]

This Article, however, is concerned not so much with Locke's view on liberty, but rather what he viewed as religious and how that influenced the Founding generation. Locke's letter describes the power of religion as initially stemming from "the inward and full persuasion of the mind" with regards to what is "well pleasing unto God."[172] Following correct belief, religion could and should be exercised.[173] Stating this within the context of the civil and spiritual distinction, one would conclude that the "religious" is that which concerns not worldly affairs but godly. But then what exactly is godly? If the Judeo-Christian God is not the defining element of religion as a concept, then what is? To answer this question, one must turn to the ancestor of Lockean thought: natural law philosophy and its Aristotelian essentialism.

B. *Natural Philosophy's Understanding of Religion*

Understanding how the First Amendment's drafters and contemporaries understood religion requires a basic understanding of their philosophical worldview. Tracing natural law thought up to Locke sheds light on the philosophical understanding of the word (however, it is not dispositive). To do so, a brief primer on the philosophy is beneficial. Present-day scholars describe natural law theory as a concept "able to identify conditions and principles of practical right-mindedness, of good and proper order among persons, and in individual conduct."[174] Theorists typically start with basic observations about the "nature" of an object, taking into account its ontology (i.e., its essential "whatness") and teleology (i.e., the manifest purpose or end of the object). Frequently, this is informed by insights from a deeper view of metaphysical reality.[175] Once the object is understood, an assertion about what is "good" for the object achieving its end can follow.[176]

For natural law theorists, the object of observation is the human person, and as such, their assertion about what is good ultimately is an ethical one. By applying the ontological and teleological observations about the human person—including the "set of basic practical principles"

171 *See e.g.*, *id.* at 22.

172 *Id.* at 18.

173 *See id.*

174 JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 18 (Paul Craig ed., 2d ed. 2011).

175 *See id.* at 35.

176 *See id.* at 34–36.

which every person considers for individual flourishing—the natural law theorist can reason to objective moral standards.[177]

John Locke was an adherent of this natural law philosophy (frequently referred to as the *philosophia perennis*) and believed in a "universally obligatory moral law promulgated by the human reason as it reflects on God and his rights, on man's relation to God, and on the fundamental equality of all men as rational creatures."[178] The thought was not novel and can be traced back through most of Western philosophy.[179] Locke's focus, within the natural law theory, was on the importance of individual rights, as he approached natural law as a political theory rather than a metaphysical idea.[180] As a successor of natural-law thought, Locke believed that truth can come from one of two sources: reason (of which he spent most of his writings) and revelation (divinely revealed truth to humankind).[181]

While this Article does not trace the natural law philosophy through each century of Western philosophy, the core tenets and conclusions of natural law theory's metaphysical view are instrumental to understanding the "morality and religion" distinction and the "temporal affairs and religious affairs" distinction. Two of Locke's influential predecessors, Thomas Aquinas and Aristotle, articulate it well. Aquinas is often considered the preeminent natural law theorist if not the founder of natural law theory.[182] His view of the natural law was fundamentally ethical and metaphysical, meaning that natural law prescribed right and wrong and reflected an essential reality of human existence.[183] In the *Summa Theologica*, Aquinas, asserting that "good is that which all things seek after," described the natural law as man's rational participation in

[177] *Id.* at 23.

[178] 5 FREDERICK COPLESTON, A HISTORY OF PHILOSOPHY 129 (Image Books 1994) (1959).

[179] *See, e.g.*, *infra* notes 180, 189 and accompanying text.

[180] HEINRICH A. ROMMEN, THE NATURAL LAW: A STUDY IN LEGAL AND SOCIAL HISTORY AND PHILOSOPHY 80 (Thomas R. Hanley trans., 1998).

[181] *See* COPLESTON, *supra* note 178, 120–21 ("Locke insisted, therefore, that even though God can certainly reveal truths which transcend reason, in the sense that reason alone cannot establish them as true, it must be shown by reason that they are in fact revealed before we can be expected to accept them by faith.").

[182] *See, e.g.*, Randy E. Barnett, *Law Professor's Guide to Natural Law and Natural Rights*, 20 HARV. J.L. & PUB. POL'Y 655, 667 (1997) (referring to Thomas Aquinas as "the father of modern natural law analysis"); ROMMEN, *supra* note 180, at xxi–xxii ("Thomas's treatment of natural law is by far the most influential and certainly the most quoted discussion of the subject in the history of philosophy . . . . Two centuries before the American Revolution, and nearly three centuries before the American Civil War, issues of political self-determination and slavery were debated in terms framed by Thomistic natural law theory.").

[183] *See* THOMAS AQUINAS, SUMMA THEOLOGICA, pt. I-II, q. 94 (Fathers of the English Dominican Province trans., Benzinger Brothers 1947).

pursuing good and avoiding evil.[184] For Aquinas, however, natural law comes from reason, not revelation and is proximately mandated by the natural, not the supernatural.[185] Aquinas talked more of this contrast between reason and revelation in his *Summa Contra Gentiles*.[186] He describes natural reason as the natural power to "comprehend a substance" through intellect, where revelation is the communicated truths to humankind from the divine.[187] In the *Summa Contra Gentiles*, he speaks of the necessity for revelation to supplement natural reason because (1) many truths about the supernatural could not be apprehended by natural reason and observation alone; (2) some persons are ill-fit to acquire knowledge on their own; (3) many could not possibly spend enough time to acquire deep knowledge with so many temporal obligations; and (4) the frequency of error in human reason.[188] Thus, by Aquinas's and later Locke's time, the natural law philosophy recognized its limits to discover supernatural truth and accepted that natural law can and should be supplemented by revelation where it exists.

Aquinas's explication of natural law philosophy's view of morality was, itself, partly pulled from Aristotle's writings. Aristotelian thought lies at the core of the Founding Era's philosophy, particularly in its understanding of the "good" and of "nature." In *Nicomachaen Ethics*, Aristotle describes "the good" as the end for "which all things aim," and the end for which one does something, desired for its own sake.[189] Being a "good" human person was obtained by achieving the highest aim for an

[184] *Id.* art. 2 ("I answer that" section). Among the goods that each human person pursues is 1) the preservation of one's own life, because it is naturally good for something existing to continue existence, 2) procreation and child-rearing, because it is naturally good for animals to do so and the human person shares in that nature, 3) knowing truth, because that is the sign of a naturally good human mind, and 4) living in society, because humans are social creatures. *Id.* Because humankind shares the same human nature, first principles are apparent to and binding on each person. *Id.* at q. 94, art. 4 ("I answer that" section).

[185] *See id.* at q. 94, art 4 ("I answer that" section). Contrast natural law with divine law which Aquinas describes as proximate mandates from God himself. *See id.* at q. 91, art. 4 & 5.

[186] *See* THOMAS AQUINAS, SUMMA CONTRA GENTILES, bk. 1, ch. 3 (photo. reprt. 2014) (Anton C. Pegis trans., Univ. of Notre Dame Press 1975).

[187] *See id.* Aquinas likens a man who rejects a philosopher's teachings as false because he can't understand them to the man who rejects divine revelation because it is beyond the investigation of natural reason. *Id.*

[188] *See id.* at ch. 4–5.

[189] ARISTOTLE, NICOMACHAEN ETHICS bk. 1, ch. 1–2 (c. 335 B.C.E.), *reprinted in* 2 W. D. ROSS & J. O. URMSON, COMPLETE WORKS OF ARISTOTLE 1729–30 (Jonathan Barnes ed., Revised Oxford trans. 1995). He also states that to an extent, each good that one achieves is aimed at another higher or further good. For example, a man works at crafting for the good of owning a new tool; he uses the tool for laboring in a field, for the good of acquiring food; he uses food to feed himself and his family, for the good of being fed; and so on.

individual human, which to Aristotle was internal virtue.[190] The good life necessitated "good action."[191] This was later explained by Aquinas: "Good . . . is achieved only in the concurrence of all the factors pertaining to the perfection of the thing."[192]

Aristotle's view of the good was intimately related to and informed by his view of human nature, which identifies "nature" as synonymous to the "form" or "order" of a particular thing.[193] Human nature consists of all things that fundamentally define human persons.[194] This is so strongly tied to "the good" in that "the perfection of [a] thing" cannot come about without a deep understanding of what that thing is.[195] Knowledge of the "nature" of a thing is necessary to understand what makes that thing "good."[196] Consequently, natural law's core view of morality—to "do good and avoid evil"—is the application of this standard to the human person, who must act in accordance with his or her nature as made known through natural reason.[197] It was in this moral worldview that the founding generation understood law to be binding.[198]

If Lockean natural law philosophy contemplates that morality requires conformance to truths about human nature as revealed through reason, it logically follows that divinely revealed truths could shed further light on what would ethically be required of a human person. Indeed, if a higher good (or a deeper knowledge of human nature) were to be revealed to humankind, then natural law theory would mandate conformance with such truth. Most natural law philosophers would hold morality and ethics to be the end of proper state order and law.[199] But would natural law

[190] *Id.* at 1731–35.

[191] *Id.* at 1737.

[192] THOMAS AQUINAS, COMMENTARY ON ARISTOTLE'S *NICOMACHEAN ETHICS* 48 (C.I. Litzinger trans., Dumb Ox Books 1993) (c. 1270 C.E.).

[193] THOMAS AQUINAS, COMMENTARY ON ARISTOTLE'S *METAPHYSICS* 296–301 (John P. Rowan trans., Dumb Ox Books 1995) (c. 1270 C.E.). In other words, nature is the defining element or fundamental organizational principle of an object. Aristotle directly defined nature as "the substance of things which have in themselves, as such, [the] source of [their] movement." ARISTOTLE, METAPHYSICS bk. 5, ch. 4 (c. 340 B.C.E.), *reprinted in* 2 W. D. ROSS, COMPLETE WORKS OF ARISTOTLE 1603 (Jonathan Barnes ed., Revised Oxford trans. 1995).

[194] *See* AQUINAS, *supra* note 193.

[195] *See* AQUINAS, *supra* note 192, at 48.

[196] *See id.*

[197] *See* AQUINAS, *supra* note 183, q. 94 art. 4.

[198] *See, e.g.*, 1 BLACKSTONE, *supra* note 164, at *38–62. Even with Locke's newer social contract views imported into the natural law philosophy he recognized that where "any number of men are so united into one society . . . . he authorizes the society . . . to make laws for him, as the public good of the society shall require." JOHN LOCKE, SECOND TREATISE OF GOVERNMENT ch. 7, at 53 (Richard H. Cox ed., John Wiley & Sons 1983) (1690).

[199] *See, e.g.*, ROMMEN, *supra* note 180, at 227–33.

theorists justify forceful compliance with such "revealed" truth? A passing glance at the drafters, fearing European wars of religion, would suggest no.[200] Yet, philosophically speaking, why?

While much of Aquinas's works utilized Aristotelian thought, he also cited and pulled from Neo-Platonists from the ancient Roman world who reflected on religion's relationship with the state.[201] Interestingly enough, Lactantius, advisor to Emperor Constantine and one of the many predecessors to Aquinas, spoke on the matter of religious liberty as early as the third and fourth centuries:

> Religion ought to be defended, not by killing but by dying, not by fury but by patience, not by crime but by faith. The former action each time belongs to evil, the latter to good, and it is necessary that good be the practice of religion, not evil. If you wish, indeed, to defend religion by blood, if by torments, if by evil, then, it will not be defended, but it will be polluted and violated. There is nothing so voluntary as religion, and if the mind of the one sacrificing in a religious rite is turned aside, the act is now removed; there is no act of religion.[202]

Likewise, Ambrose of Milan, a leading bishop and early theologian, wrote a remonstrance reproaching Emperor Valentintian for asserting that the emperor could appoint laymen to determine matters of religion.[203] Augustine of Hippo argued that laws should not force people to embrace a religion but could prevent underlying evils made known by revelation.[204]

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[200] *See e.g.*, JEFFERSON, *supra* note 147, at 268; Everson v. Bd of Educ., 330 U.S. 1, 8–13 (1947). Indeed, the Court in *Everson* quotes the Virginia Bill for Religious Liberty: "Almighty God hath created the mind free; that all attempts to influence it by temporal punishments or burthens, or by civil incapacitations, tend only to beget habits of hypocrisy and meanness, and are a departure from the plan of the Holy author of our religion, who being Lord both of body and mind, yet chose not to propagate it by coercions on either . . . . " *Id.* at 12–13.

[201] Aquinas notoriously cites Neo-Platonists throughout his works, particularly with regards to the "divine." *See, e.g.*, 2 FREDERICK COPLESTON, A HISTORY OF PHILOSOPHY 427 (Image Books 1985).

[202] LACTANTIUS, DIVINARUM INSTITUTIONUM bk. V, ch. 14 (c. 303 C.E.), *reprinted in* 49 THE FATHERS OF THE CHURCH 379–80 (Roy Joseph Deferrari ed., Sister Mary Francis McDonald trans., 1964) (title translated as THE DIVINE INSTITUTES). The similarity of this to Locke's *Letter Concerning Toleration* are astounding.

[203] AMBROSE, EPISTOLA AD VALENTIANUM, Letter 21 (Rev. H. Walford trans., James Parker & Co. 1881) (c. 386 C.E.) ("[T]hat in a matter of the Faith or of any ecclesiastical ordinance, the judges ought to be qualified for it, both competent by office and qualified by profession . . . . who is there who will deny that in a cause of the Faith, in a cause, I say, of the Faith, Bishops are wont to judge Christian Emperors, not Emperors to judge Bishops.").

[204] AUGUSTINE, CONTRA LITTERAS PETILIANI bk. II, ch. 84 (c. 400 C.E.), *reprinted in* THREE BOOKS OF AUGUSTINE 820 (A.M. Overett ed., Rev. J.R. King trans., 2018). ("No one is indeed to be compelled to embrace the faith against his will. . . . If any laws, therefore, have been enacted against you, you are not thereby forced to do well, but are only prevented from doing ill. For no one can do well unless he has deliberately chosen, and unless he has loved what is in free will; but the fear of punishment, even if it does not share in the pleasures of a good conscience, at any rate keep the evil desire from escaping beyond the bounds of thought.").

Here, we begin to see early foundations of the natural law philosophy's condemnation of both forced religious belief and assertions of temporal authority over the spiritual—early seeds underlying thought reared again in the Religion Clauses. These writings illustrate that religion both encompassed factual beliefs and moral actions that logically followed. They even hinted at a distinction between "sources" of that authority and reason.

Aquinas's writings contributed a related, crucial distinction between the natural and supernatural. In the *Summa Theologica*, Aquinas addresses the question of whether Sacred Doctrine (i.e., revelation) is a science (i.e., a product of reason).[205] He answers affirmatively but states there are two types of reason: those known by the "natural light of intelligence" and those that proceed from a higher science.[206] He further states that "Sacred [D]octrine derives its principles not from any human knowledge, but from the divine knowledge, through which, as through the highest wisdom, all our knowledge is set in order."[207] This elevated nature of revelation is distinct and "supernatural." One Thomist scholar describes Aquinas's use of supernatural as "[referencing] some power or effect or agent or gift or end or some such is not natural and that it is outside the order of nature on account of direct divine intervention."[208] Thus, there is an important distinction between truth derived from reason and observable nature and truth which is outside the order of nature. Blackstone essentially echoed this separation when he distinguished between the affairs of the religious and temporal worlds.[209] In his *Commentaries*, when discussing the foundations of law, he also states, "[U]pon these two foundations, the law of nature and the law of revelation, depend all human laws; that is to say, no human laws should be suffered to contradict these."[210] He further acknowledges that the affairs of humans (i.e., temporal and natural affairs) are subordinate to those of the divine (i.e., the supernatural).[211]

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[205] AQUINAS, *supra* note 183, pt. I, q. 1, art. 2.

[206] *Id.*

[207] *Id.* at pt. 1, q. 1, art. 6, reply to obj. 1.

[208] Andrew Murray, *The Spiritual and the Supernatural according to Thomas Aquinas*, presented at Biennial Conf. in Philosophy, Religion and Culture, 'The Supernatural,' Catholic Inst. of Sydney (Oct. 3–5, 1998).

[209] *See* I BLACKSTONE, *supra* note 164, at *42, *141. Blackstone's distinction between religious and temporal *affairs* does not mean he endorsed a segregation of their respective authorities.

[210] *See id.* at *42.

[211] *See id.*

C. *Etymological Roots of Religion*

The philosophical concept of religion paralleled the evolving linguistic use of the term. While the exact origin of the word religion is unclear, it is generally accepted to come from the Latin word *religio*, generally referencing the careful performance of obligations or rituals.[212] The origin of *religio*, however, is more contested.[213] Cicero was one of the first to offer a definition. In *De Natura Deorum*, where he distinguished religion from superstition stating that the person who "spent whole days in prayer and sacrifice to ensure that their children should outlive them" were properly superstitious while the person who "carefully reviewed and so to speak retraced all the lore of ritual" were religious.[214] Cicero believed *religio* to come from *relegere*, meaning to retrace or reread.[215] Lactantius offered an alternative. He asserted that the origin of the word came from *religare*, meaning to re-bind or re-tie.[216] A few other modern Latinists offer alternative theories suggesting that *religio* comes from the Latin words for "to care for."[217] Whatever its origins, *religio* itself was used in Rome to mean something akin to "scruple," and importantly had no definitive legal meaning.[218]

By the Middle Ages, *religio* was used in two varied ways—one denoting the virtue (or habit) of religion, akin to reverence or piety, and another being a belief system.[219] At this time, Aquinas wrote on religion, describing it as "offering service and ceremonial rights to a superior nature that men call divine."[220] Again, there is a distinction between a lower and higher nature. After briefly discussing both Augustine and Cicero's definitions of *religio*, Aquinas explains that religion can refer to two types

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[212] Jonathan Z. Smith, *Religion, Religions, Religious*, *in* CRITICAL TERMS FOR RELIGIOUS STUDIES 269 (Mark C. Taylor ed., 1998).

[213] *See id.* at 269–82.

[214] CICERO, DE NATURA DEORUM bk. II, ch. 28, at 193 (G. P. Goold ed., H. Rackman trans., Loeb Classical Library 2014) (c. 45 B.C.E).

[215] *Id.*

[216] LACTANTIUS, DIVINARUM INSTITUTIONUM bk. IV, ch. 28 (c. 303 C.E.), *reprinted in* 49 THE FATHERS OF THE CHURCH 318 (Roy Joseph Deferrari ed., Sister Mary Francis McDonald trans., 1964) (title translated as THE DIVINE INSTITUTES) ("[Man must] instruct himself by the rudiments of justice for the practice of true religion. For we come to be under this condition, that we pay the just debt of service to the God who brings us into being, that we know Him alone, that we follow Him. We are fastened and bound to God by this bond of piety, whence religion itself takes its name.").

[217] *See, e.g.*, Benson Saler, *Religio and the Definition of Religion*, 2 CULTURAL ANTHROPOLOGY 395 (1987).

[218] *Id.* at 396 (citing W. Warde Fowler, *The Latin History of the Word* Religio, 2 TRANSACTIONS THIRD INT'L CONG. FOR HIST. RELIGION 169, 169–75 (1908)).

[219] *See* Smith, *supra* note 212, at 271.

[220] AQUINAS, *supra* note 183, pt. II-II, q. 81, art. 1.

of acts: (1) those immediately and proximately praising God (i.e. worship and sacrifice) and (2) those that honor God through obtaining virtue and order (i.e., living temperately, exercising mercy, or serving those in need).[221] He ultimately concludes that religion is a virtue, meaning a habit that "makes its possessor good and his act good likewise."[222] This view of religion being intimately tied up with the good yet conceptually distinct, continued into the modern era.

As new cultures and peoples were encountered during the age of exploration, intellectuals began describing these new cultures' rituals and beliefs as "religious" but also distinguished them from the "true Religion."[223] Not long after this time, Enlightenment thinkers began to use the term "natural religion" (i.e., belief about God entirely stemming from secular reason).[224] While their methodology and many of their insights were not new—much of their insights can be traced back to the natural religion of Aristotle—Enlightenment thinkers prioritized natural reason over revelation.[225] Consequently, later natural law thinkers in the decades before the Bill of Rights, who previously theorized about humankind's nature and the readily apparent ethics that stemmed from it, attempted to discern everything they could about their creator without any assistance from a revelation (i.e. natural religion).[226] This manifested in a rise of deism in early America among the educated class.[227] Nevertheless, these viewpoints on the creator were widely described as "religious" in nature.[228] The objective view and use of the word religion has evolved through the nineteenth and twentieth centuries in academia, reflected

[221] *Id.*

[222] *Id.* at pt. II-II, q. 81, art. 2.

[223] *See* Smith, *supra* note 212, at 271–72. Smith's work does not analyze the evolution of religion in a thoughtful, philosophical sense, but rather in an empirical-historical sense. As such, his work does less to trace the understanding of "what religion was" through history, but rather looks at "accidental" characteristics (i.e., characteristics that do not change the essence of the object) as well as surface-level differences of discussions surrounding religion. Smith's work does provide a concise history of the study of religion and its taxonomy with numerous cites to European primary sources from around the founder's era. *See id.* at 275–76.

[224] *Id.* at 271–72

[225] *See, e.g.*, THOMAS JEFFERSON, THE LIFE AND MORALS OF JESUS OF NAZARETH (1820), *reprinted in* THE JEFFERSON BIBLE (Smithsonian ed. 2011). This work was Thomas Jefferson's attempt to remove all supernatural references from the Gospels and focus solely on the ethics of Jesus.

[226] *See, e.g.*, DAVID HUME, DIALOGUES CONCERNING NATURAL RELIGION (1776).

[227] *See* THOMAS PAINE, THE AGE OF REASON: BEING AN INVESTIGATION OF TRUE AND FABULOUS THEOLOGY 21–25 (Moncure Daniel Conway ed., G.P. Putnam's Sons 1896) (1794) (embracing belief in God while rejecting revelation or organized religion as a source of divine knowledge).

[228] *See, e.g.*, *id.* at 199 ("[M]y disbelief of the Bible is founded on a pure and religious belief in God . . . .").

largely in the thought of *Seeger* and *Welsh*. For the purposes of this Article, however, the inquiry ends at the ratification of the Bill of Rights.

D. *What Is Religion Then?*

Understanding the history of the word religion, as well as the philosophy surrounding its use in the First Amendment, helps one outline the parameters for a constitutional definition and test for what is religious. As discussed above, this Article presumes the meaning of religion is the original public meaning of the word at the time of penning the Bill of Rights. As a matter of textual interpretation, this original public meaning would encompass the commonly understood meaning of the word within the educated community in the late 1700s, which was intimately rooted in a natural philosophy.[229] Admittingly, the nuanced philosophical definition of Aquinas or the ancients is not controlling, yet it informs our understanding of Locke and the Founders' philosophical understanding of "religion."[230] The first principle to establish then is that religion had an objective meaning to the Founders. They viewed religion as denoting something different from the non-religious. That religion was something conceptually distinct should be manifestly clear from many authors of the era distinguishing religion from, for example, morality, conscience, piety,[231] or the consistent ties to God.[232] That religion is something objective necessarily means there must be content-based distinctions or elements that define its scope. As such, a content-based definition is compelled instead of an analogical or functional definition.[233]

So, what was religion to the Founders? From reading the Founders' writings, it is readily apparent that by consistently qualifying the word with "Christian" or "the true," the Founders understood religion encompassed both non-Christian faiths and religions they believed to be

[229] *See supra* Sections 0.0, 0.0.

[230] Use of historical evidence like this is most useful when it was a practice or understanding that prevailed up until the "period immediately before and after the framing of the Constitution." N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2136 (2022) (quoting Sprint Comms. Co. v. APCC Servs., Inc., 554 U.S. 269, 311 (2008) (Roberts, C.J., dissenting)).

[231] *See, e.g.*, PAINE, *supra* note 153 and accompanying text; VA. CONST. art. I. §16.

[232] *See, e.g.*, Washington, *supra* note 149 and accompanying text.

[233] Analogical factors, no doubt, are helpful to discerning just what qualities and elements adhere to a set of beliefs to make them "religious," but an analogy in and of itself, is not *sufficient* to establish something as religious. Functional definitions, similarly, overlook the inquiry, "what is religion," in favor of "what could best serve (the judge's view of) the goal of the First Amendment's free exercise and establishment clauses." Essentially, neither approach gets to the core of what is religion.

false.[234] Jefferson's list of faiths "Jew and the Gentile, the Christian and the Mahometan, the Hindoo and infidel of every denomination" is highly informative as to what the word religion invoked in the minds of the Founding generation[235] The few scholars that push content-based definitions often come very close to a correct definition of religion except, perhaps, for Jefferson's pointed remark.[236] But this is not the only parameter set by the Founders' writings. Many of the Founders tied religion to some relationship with the divine or spiritual, particularly the reference to the "duty we owe our creator."[237] On its surface, this quote seems to point to religion denoting beliefs pertaining to "human origins" or "morality," but a history of the language reveals much more depth.

Informed by natural philosophy, the Founders would have recognized many distinctions surrounding the religious. The distinction between ethics-morality and religion is particularly palpable. Morals imposed many duties on the individual, almost always flowing from some observation of human nature. Within the context of law, these duties also flowed forth from a legitimate authority serving the common good. Ethical duties were also asserted to flow forth from religious beliefs as well. Yet, religion was not purely an ethic. The belief in a creator, for example, was very much religious but not in and of itself ethical. It may inform ethical decisions—for if there is a creator, a creator-creature relationship carries duties a particular human being might owe within the relationship—but belief in a creator alone is not ethics. This seems to be widely understood in the Founding Era[238] and is echoed in later case law.[239] Morality, then, is not synonymous with religion but can be religious.

Similarly, religion was not the same as conscience. The explicit choice to forego direct conscience rights in the constitution should be dispositive of this,[240] but conscience, being one's subjective understanding of moral obligation in particular instances, is often viewed as the subjective

234 *See, e.g.*, MADISON, *supra* note 17, at 183–84; GA. CONST. of 1777, art. VI; S.C. CONST. of 1776, pmbl.; MD. CONST. of 1776, art. XXXIII; BLACKSTONE, *supra* note 164, at *425.

235 *See, e.g.*, JEFFERSON, *supra* note 148 and accompanying text.

236 *See e.g.*, Strang, *supra* note 126, at 182–83 (advocating for a definition that only encompasses monotheistic religions).

237 *See, e.g.*, MADISON, *supra* note 17, at 184; Washington, *supra* note 149; PAINE, *supra* note 153, at 67. *Cf.* Reynolds v. United States, 98 U.S. 145, 163–64 (1879).

238 *See, e.g.*, MASS. CONST. of 1780, pt. 1, art. III, para. 1; PAINE, *supra* note 153.

239 *See, e.g.*, Watson v. Jones, 80 U.S. (13 Wall.) 697, 728 (1872); Davis v. Beason, 133 U.S. 333, 342 (1890).

240 *See* S. JOURNAL, 1ST CONG., 1ST SESS., at 104, 163 (1789).

component of morality.[241] As put forth by natural philosophy, morality can be either secular or religious, depending on its source.[242]

This difference helps explain the *Reynolds* distinction between absolute protections of belief and qualified protections for action. The recognition that religion includes both (A) belief and (B) actions is important to coming to religion's definition. Indeed, *religio* originally related only to action but later came to embrace both particular types of beliefs and actions.[243] Because morality concerns itself with human actions, *Reynolds*' holding recognized that, at times, asserted religious-moral beliefs might conflict with the perceived secular, natural-moral view embodied in law.[244] Because some morally obligatory actions (or inactions) flow forth from a religious belief, what constitutes a religious belief should be the focus of the inquiry. A particular species of belief is at the core of what religion is in the constitutional context.

Religious belief, like any belief, is a kind of truth claim about reality.[245] Yet, centuries of scholars and case law recognize that philosophy[246]—the typical method of making and asserting truth claims—is emphatically not religious.[247] As discussed above, the philosophy of Blackstone, Locke, Aquinas, and Aristotle recognized a duality and distinction between truth made apparent by natural reason and truth made apparent by revelation.[248] Natural reason was deeply rooted in empirical observations of the everyday world and extrapolating from that through logic.[249] Revelation on the other hand was knowledge acquired through supernatural means—something or someone coming from an existence beyond or transcending the natural world communicating some truth (or even more broadly, some knowledge coming from beyond the natural).[250] Even recent cases distinguish between secular philosophical assertions and religious

241 *See supra* Section 0.0.

242 *See supra* Section 0.0.

243 *See supra* Section 0.0.

244 Whether *Reynolds* came to the right conclusion is not the subject of this Article and largely stems from one's view of the proper extent of free exercise protections of religion, *not* what is religion.

245 *See, e.g.*, PAINE, *supra* note 153, at 70 (implying that religion is a truth claim for all mankind).

246 Philosophy here includes both natural reason and the scientific method.

247 *See, e.g.*, United States v. Ballard, 322 U.S. 78, 87 (1944); Founding Church of Scientology of Wash. v. United States, 409 F.2d 1146, 1151 (D.C. Cir. 1969). Religion concerns truth of some substantively different type of claim.

248 *See supra* Section II.B.

249 *See supra* Section II.B.

250 It should be noted that the traditional scholastic distinction between the preternatural and the supernatural is not being adhered to in this essay. Supernatural for the purposes of this article, encompasses both the supernatural and preternatural.

truth.[251] The *Macintosh* dissent, in particular, articulated the age-old distinction described by Blackstone and Locke of temporal authority—the authority of the state coming from the natural world[252]—and religious authority—the authority stemming from revelation.

But not all religious beliefs seem to be directly and proximately "revealed" through a formal revelation. All Christians assert that sacred scripture is functionally revelation, yet there is vast disagreement on how to exegete it.[253] People who hold the Bible to be revealed truth disagree on doctrines as fundamental as the Trinity.[254] Similarly, Muslims who hold the Qur'an or hadith to be divinely revealed, disagree on specific theological truths.[255] Nevertheless, each of these particular beliefs are held to be religious and rightfully so. Revelation is sufficient to establish a particular belief as religious but not necessary to make a belief religious. Religious belief does not necessarily stem from the form of acquisition of the truth, but rather the nature of the knowledge itself.

A predicate to believing in a revelation is a belief that it comes forth from the supernatural. Thus, religion, at its core, is tied to beliefs of and concerning supernatural realities. This is also supported if we view the inquiry from a different angle. Natural religion, including the deism of many of the Founders, is a belief concerning the supernatural reached entirely through logic and reason. Few scholars would argue that the means that the Founders use (i.e., empirical observations, comparing cultures, and inductive reasoning) is religious, yet many would assert that the conclusion (i.e., that there is a creator-god) is. And this is entirely because religion hinges on a belief of and concerning the supernatural.

An appropriate test to determine "what is religion" should follow from this logic. Courts can and should apply the following test to distinguish religion from non-religion:

> Religion, for the purposes of the First Amendment, includes A) all assertions of truth of and concerning the supernatural, B) all assertions of truth flowing forth from supernatural beliefs, and C) actions taken pursuant to such beliefs.

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[251] *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205, 215–16 (1972); Thomas v. Rev. Bd. of the Ind. Emp. Sec. Div., 450 U.S. 707, 714–20 (1981); Nicholls v. Mayor and Sch. Comm. of Lynn, 7 N.E.2d 577, 580 (Mass. 1937); Gabrielli v. Knickerbocker, 82 P.2d 391, 394 (Cal. 1938).

[252] *See* United States v. Macintosh, 283 U.S. 605, 627–635 (Hughes, C.J., dissenting). This Article does not enter into the debate on the ethics and nature of "temporal power." It simply makes the observation that temporal power exists and is exercised by the state.

[253] *See generally Hermeneutics*, BRITANNICA.COM, https://perma.cc/2MP7-KUN9 (last updated Sept. 29, 2023) (describing the study of scriptural interpretation).

[254] *See id.*

[255] *See id.*

This definition (the "Offered Definition") holds true to the Founding Fathers' use of the word "religion," their natural law worldview, and the etymology of the word up until their time.[256]

Additionally, while this Article does not adhere to the purposive approach, this definition effectuates the purposes that natural law theorists would have had in supporting the Religion Clauses. With the protections envisioned, the state, being a creation of natural reason, is free to make laws that natural reason dictates are necessary for the common good of society; however, it is not an organization claiming authority over or absolute competency in the supernatural. If, in fact, there was some supernatural truth, the state would still operate in its capacity as a worldly and temporal organization, but it should not be an arbiter or barrier to a supernatural truth or any moral obligations such truth might impose (i.e., it should not prohibit the free exercise of religion). Likewise, dating back to Neo-Platonists, one can find philosophers viewing religion as something that inherently must be accepted by an act of the intellect (or assent of the mind) and not by compulsion.[257] "Establishing" religion was arguably not the role of the state and surely not the primary role of one. Actions necessary for the good of society rooted in natural ethics were always debatable as the natural world was readily available to the human observer, so the primary order to "establish" was a natural one, not a supernatural one. As a result, proscribing the establishment of supernatural dominion by the state and the coercive interference with a moral lifestyle in line with supernatural truth effectuated these goals.

III. Comparison to Other Definitions and Application of the Offered Definition

How does this test hold up to other tests offered by scholars and jurists so far? And, more importantly, what are the legal implications of adopting it?

Many scholars try to effectuate the purposes of the Religion Clauses by bifurcating the definition and creating two separate tests.[258] But this bifurcation finds no support in a textualist approach and seems disingenuous with regards to the understanding of just what religion is or

[256] The Offered Definition is not intended to foreclose the possibility of categorical exceptions to its rule. Much like categorical exceptions to free speech protections exist (i.e., obscenity, fighting words, etc.), historical evidence may support definitive conclusions by the Founding Era as to certain beliefs encompassed by the Offered Definition that would not be considered religious (but arguably superstitious) and would not be afforded religious protections (e.g., Satanism, fortune-tellers, witchcraft). The author expresses no view as to the existence or the extent of such carve-outs.

[257] *See supra* notes 202 , 204.

[258] *See e.g.*, *Student Note*, *supra* note 98.

was to the Founding generation. The use of religion only once for both clauses is a strong reason not to bifurcate, and functionally, the word's use in both clauses did not denote two separate meanings. The Offered Definition recognizes the singular use of religion and exists to be applied in both contexts. Second, the Offered Definition stays true to the age-old purpose of preserving religious liberty; if there is a supernatural reality, it is higher than the mere natural reality, and thus any obligations to such supersede an individual's obligation to natural authority. It is, likewise, not the province of the state to dictate this supernatural reality and is imprudent to force acceptance of such when the risk of the state being wrong about the supernatural truth is great and the effectiveness of forced acceptance is minimal.

The *Fowler*, *Seeger*, and *Welsh* approach also fails at truly grasping the "essence" of religion. By making religion something that solely and subjectively occupies a role parallel to God, or beliefs that one holds with the strength of traditional religious convictions, the *Seeger-Welsh* approach forgoes truly trying to discern what makes all the "traditional religions" religious and almost becomes cyclical in argument. The traditional religions are religious simply because they are religious, and your belief is religious because you say it is like the traditional religions. This type of thinking would not help someone lacking familiarity with religion to understand the term. The definition also runs counter to the Founding generation's understanding of religion. Focusing on conviction of belief, the *Seeger-Welsh* definition almost echoes the Founders' understanding of conscience, which they chose not to protect, and seems to weigh the strength of belief instead of its nature or content. The Offered Definition lays out objectively observable elements to analyze a belief that is claimed to be religious and gives no credence to how strongly one might hold the belief.

The *Seeger-Welsh* approach also begot other approaches like the *Malnak* approach[259] and the Ultimate Concern Test.[260] One component of both these approaches is looking to what an individual's "ultimate concern" or "the motivational aspect of human experience" that is "unconditional, absolute, or unqualified."[261] This approach is far too narrow as it would not define beliefs about a Supreme Being that are entirely unconcerned with the ultimate point of human existence (e.g., deist views or other non-ultimate spiritual realities) as religious, yet it would also include secular moral beliefs that deal with the "ultimate end" of humankind (e.g., fundamental principles in secular ethics). This

259 Malnak v. Yogi, 592 F.2d 197, 207–10 (3d Cir. 1979) (Adams, J., concurring).

260 *See* Int'l Soc. For Krishna Consciousness, Inc. v. Barber, 650 F.2d 430, 440 (2d Cir. 1981).

261 *See Student Note*, *supra* note 98, at 1067.

distinction differs sharply from natural law theory's views of natural theology (seen as religious) and ethics (seen as a secular study). The Offered Definition does not fall into this error and properly distinguishes between the two in accordance with the Founders' philosophy.

The analogical approach found partly in *Malnak* and put forth by Professor Greenawalt and other scholars requires the weighing of multiple factors to see how similar the potential religion is to recognized religions.[262] This approach not only makes the same mistakes as *Seeger* and *Welsh* by not explaining what makes the generally accepted religious beliefs religious, but it also creates a wildly unpredictable approach to determining what is religious, giving too much discretion to judges who could easily use it to not protect minority or unfamiliar religions. On top of this, it really does not provide a definition, just a loose test. The Offered Definition contains clearer distinctions, leaving less up to ad hoc weighing by judges.

Finally, the content-based definitions, while sufficiently close in substance to the Offered Definition, fall short in some regards. Agneshwar, for example, requires a religion to contain some belief in a means of deliverance from evil. He does not seem to explain where exactly this element of religion comes from beyond his references to the Christo-centric society of the Founders' time.[263] As discussed above, the Founders seemed to understand that Christianity was one of many religions every time they qualified the word religious with "Christian" or "true." While surely Christianity contains all the elements of something that the Founding generation considered religious, one must hesitate before they siphon off Christian beliefs and put them at the core of religion. While the "fall of man" and his subsequent deliverance is a religious belief, other religions recognized by Jefferson, like Hinduism, contain only loose comparisons to redemption from evil in its belief in prāyaścitta and dharma.[264] Agneshwar's definition does not make clear whether all the elements had to adhere to one core belief or, rather, a number of beliefs could amalgamate together and suffice to be religion. This, paired with Agneshwar's minimal explanation for his focus on the redemptive component of religion, makes this author reject it as superfluous.

Oldham's and Austin's definitions are very similar to the Offered Definition, but they also err in using "faith," which they contrast with

262 *See* Greenawalt, *supra* note 132, at 767.

263 *See* Agneshwar, *supra* note 110, at 319–323.

264 Dharma typically references "truth" or "moral order" within Hinduism. Prāyaścitta are specific acts that can serve as a penance for infringements of dharma. These beliefs are not necessarily supernatural (another requirement of Agneshwar) and are frequently more akin to a natural ethic than a religious belief. *See Prāyaścitta*, OXFORDREFERENCE.COM, https://perma.cc/X3QN-7DTB; *see also Dharma*, OXFORDREFERENCE.COM, https://perma.cc/39BG-3ZV9.

reason, as a core element of religion.[265] While many people surely adhere to their religion with a blind faith, many also do so from a firm stance of reason. Indeed, the founders of many religions—should their claims of revelation be true—would most assuredly be well-reasoned in asserting and following their beliefs without any blind faith. If Joseph Smith truly had an other-worldly being reveal to him the location and language of golden tablets, he would be well-reasoned in asserting the tenets of Mormonism as truth, yet because there is no "faith" component, his belief would not be religious. Likewise, Muhammad would have been well-reasoned in listening to Gabriel, and surely his assertions were religious. In a similar vein, many religions extrapolate from their core faith-based truths to further truths solely through the use of reason. Would these beliefs be entitled to protection? The Offered Definition forgoes a "faith-based" component of religion and answers the question in the affirmative.

Similarly, Chopin and Professor Strang focus on "extratemporal consequences" while Professor Strang further limits religion to monotheistic faiths.[266] Professor Strang's approach and methodology were surely correct, but he failed to see exactly what element unites Jefferson's religions. He also focused too much on qualities associated with Christianity without justifying why they are indicative of religion and not just the Christian religion. As such, monotheism is an excessively narrow view of what constitutes religion. The extratemporal consequences are very much related to the supernatural approach embraced by the Offered Definition; however, it is much narrower. Again, Hinduism arguably could have issues with the extratemporal element as their rewards and punishments are not necessarily "extratemporal" and very much take place in time.[267] Furthermore, it would be unclear if "religious visions" would be seen as religious under this definition if they have nothing to do with any sense of future rewards and punishments. The Offered Definition recognizes that not all religious beliefs are independently concerned with what is beyond time per se but rather with what is beyond nature.

In practice, the Offered Definition would be effective and functional at distinguishing religion from non-religion precisely because it gets to the heart of how the Founders (and many people today) understand religion. The Offered Definition starts at the core of religion, recognizing that belief concerning truths about the supernatural is fundamental to every

265 *See supra* Section I.B.2.

266 *See id.*

267 *See generally* Charles J. Naegele, History and Influence of Law Code of Manu (2008) (S.J.D. dissertation, Golden Gate University School of Law) (on file with Golden Gate University School of Law Digital Commons) (tracing the history of an ancient Indian legal code and illustrating Hindu beliefs of divine intervention in everyday life).

religion. Every religion recognizes something beyond the natural reality. The second part of the test recognizes that if there is a supernatural reality, there might be other truths that reason dictates "flow forth" from it. For example, in many Christian denominations, basic precepts of morals are laid out in the Ten Commandments and other places in scripture, but denominations vary on the correct application of these broad principles. Each uses reason to interpret "supernatural" truths and extrapolate particularities. These particular beliefs nevertheless are religious because they are informed by a supernatural reality. Finally, the definition recognizes that religion is not just belief but also action in conformance with such. As a result, an action one takes pursuant to any religious belief would be religious.

Some objections or unique cases might challenge the test's efficacy. One might argue that Pantheism, Confucianism, and Humanism do not fit neatly into the supernatural category. Pantheism, broadly speaking, could be argued is not a religion because most pantheistic faiths believe that the natural world itself is God or "the eternal God [is] in intimate juxtaposition with the world."[268] While every pantheistic faith differs, generally, pantheism would still satisfy this supernatural belief at the core of the Offered Definition. Indeed, while a pantheist may not believe in truth "beyond" the natural world in the sense that it is "outside" of the natural world, many do believe in a transcendent supernatural quality that is beyond mere nature.[269] This is enough to satisfy the core component of the Offered Definition.[270]

Confucianism, much like pantheism, may or may not be a religion depending on the beliefs claimed by the individual. To many, Confucianism operates solely as an ethical system of belief with civic rituals.[271] In this context, Confucianism most assuredly is non-religious. Yet to some, Confucius is worshipped as a spirit along with traditional Chinese ancestral worship; this worship is religious.[272] As applied to secular humanism, the Offered Definition would find the belief that there is no supernatural reality or God to be religious in that it is an assertion of a truth of and concerning the supernatural, much like natural religion.

[268] William L. Reese, *Pantheism*, BRITANNICA.COM, https://perma.cc/52BZ-N733 (last updated July 16, 2023).

[269] *See id.*

[270] Some pantheists may be more fairly classified as materialist, only believing that the material world is real and that we should respect all existence. This on-the-border set of beliefs, absent any sort of supernatural transcendent quality, very likely would not be religious and would instead be philosophical.

[271] *Confucianism*, NATIONALGEOGRAPHIC.ORG, https://perma.cc/DV78-JJ48.

[272] Tu Weiming, *Confucianism*, BRITANNICA.COM, https://perma.cc/8P6P-U5Z3 (last updated Aug. 17, 2023).

Humanism would, however, be limited in its protections because, given that all of its further assertions are built off of solely natural reason, none of its tenets are informed by a supernatural reality. Therefore, they are all non-religious except for the belief that there is no divine.

Once again, the Offered Definition of religion is a separate answer than what constitutes "establishment" of religion or "prohibiting the free exercise thereof." At minimum, the definition only qualifies the object these two provisions act upon. In the establishment context, the federal government and states, through the incorporation doctrine, would be prevented from "establishing" any view or belief of or concerning the supernatural.[273] In the free exercise context, the government could not make any law that burdens the free exercise of supernatural beliefs and actions taken pursuant to such.[274]

Conclusion

Many jurists and scholars have tried to outline the exact contours of religion and come up short, often because of a desire to effectuate a perceived policy in the First Amendment or to bring the First Amendment up with the times. Others eschew attempts to define religion out of either a desire to not unintentionally exclude beliefs or out of a belief religion is inherently a nebulous concept. While at first glance these concerns and approaches might seem attractive, a true quest for the borders of religion starts at the text as understood by people in the Founding Era. Furthermore, our understanding of their viewpoint must be informed by the commonly accepted philosophical worldview of the time: natural philosophy. Texts from the Founders and their natural law forebearers support the idea that religion was something distinct from morality and philosophy. Simultaneously, the writings support a view that religion was

[273] This would bar government action that would be "impermissible" in light of the historical understanding in the Founding Era. *See* Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2429 (2022). Broadly speaking, this proscribes state coercion to engage in observing or accepting supernatural truths or in participating in solely supernaturally inspired actions. A court looking to the *Lemon* test for guidance might find issue with laws that (1) have a purpose or intent that concerns the supernatural, (2) have a primary effect of advancing beliefs in a supernatural assertions, and (3) excessively entangles the government with an institution designed to support particular supernatural truths. Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971). *But see Kennedy*, 142 S. Ct. at 2428) (recognizing the futility of *Lemon* and the endorsement test); Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2079–82 (2019) (plurality opinion) (advocating for the partial overturn of *Lemon* and listing contexts in which *Lemon* does not apply).

[274] Applying the free exercise construction in *Smith* (and in light of freedom of expression overlap), the protection would functionally apply only to religious actions—the third component of the Offered Definition—and not religious beliefs. Emp. Div., Dep't of Hum. Res. of Or. v. Smith, 494 U.S. 872, 879–80 (1990).

broader than Christianity yet narrower than a passionate philosophy. Religion was seen as being composed of both actions and belief, with belief at the core informing further beliefs and actions. The hallmark of religious belief, setting it apart from non-religious views, is its supernatural content or source. Once a belief is qualified as religious, it then "imparts" religious status on all beliefs informed by the core religious truth and, subsequently, all actions taken pursuant to such. Concisely stated, religion, for the purposes of the First Amendment, includes (A) all assertions of truth of and concerning the supernatural, (B) all assertions of truth flowing forth from supernatural beliefs, and (C) actions taken pursuant to such beliefs. These parameters hold true to the original public meaning of the word religion. If the courts adopt such a test, it would not only provide a more precise and well-defined method for recognizing religious beliefs, but it would put to rest a preeminent remaining issue in First Amendment diction.