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Defining Religion: An Immodest Proposal

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The word "religion" is not defined in the Constitution.¹

The Supreme Court's rare attempts to define religion have been seriously inadequate.²

The truth or falsehood of all of man's conclusions, inferences, thought and knowledge rests on the truth or falsehood of his definitions.³

I. INTRODUCTION

A. Do We Need a Definition of Religion?

The Religion Clauses⁴ doctrine of the Supreme Court is clearly in a state of flux. Charitable commentators have described it as being in a state of "great[,] confusion."⁵ Less charitable descriptions include "doctrinal quagmire,"⁶ "schizophrenia,"⁷ "inconsistent and unprincipled,"⁸ "a conceptual disaster area,"⁹ "a mess,"¹⁰ "incantation of verbal formulae devoid of explanatory value,"¹¹ and "words, words, words."¹² This outpouring of scholarly witticisms is due in part to the Court's inability,¹³ or disinclination,¹⁴ to provide a workable

4. What is customarily referred to as Religion Clauses (actually, there is only one clause) is contained in the First Amendment to the United States Constitution, which reads, in pertinent part: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. CONST. amend. I.
6. Id. at 267.
7. Id. at 264.
13. "The definition of religion—or, for that matter, the question of whether a
definition of the term "religion" for purposes of First Amendment jurisprudence.

Recent cases have done little to clarify the confusion.15 Is Lemon v. Kurtzman16 alive or dead? Whatever happened to accommodation?17

This confusion is systemic. It results partially from the Supreme Court’s inability to agree on the basic issue of what it is willing to call "religion" in a First Amendment context. "The inability to define religion is not simply a problem that sometimes arises in particular cases," wrote one commentator, "rather, it reflects a fundamental gap

14. "It is no business of [the] courts to say that what is a religious practice or activity for one group is not religion under the protection of the First Amendment." Fowler v. Rhode Island, 345 U.S. 67, 70 (1953).

One commentator attributed the Court's unwillingness to its desire to "avoid opening Pandora's box of what constitutes 'religion.'" James E. Ellsworth, "Religion" in Secondary Schools: An Apparent Conflict of Rights—Free Exercise, the Establishment Clause, and Equal Access, 26 GONZ. L. REV. 505, 519 n.69 (1990-91). Lower courts also have noted that the Supreme Court "appears to have avoided the problem with studied frequency in recent years," United States v. Kuch, 288 F. Supp. 439, 443 (D.D.C. 1968).

As a result, some courts neatly sidestep defining religion, even though the nature of the cases seems to require it. Thus, the Tax Court, in a case involving a challenge to a tax exemption of a religious corporation, stated that it was convinced that "any constitutionally permissible definition would treat petitioners, together with the church, as religious organizations." Golden Rule Church Ass'n v. Commissioner, 41 T.C. 719, 730 n.10 (1964).


16. 403 U.S. 602 (1971). In order to survive a challenge under Lemon, the governmental action (1) must have a secular purpose; (2) must neither advance nor inhibit religion in its primary effect; and (3) must not foster an excessive government entanglement with religion. Id. at 612-13. In Weisman, the majority of the Supreme Court paid lip service to Lemon, but ultimately decided the case on coercion grounds. Weisman, 112 S. Ct. at 2659-60. In Kiryas Joel, Justice Blackmun, in his concurrence, expressed his view that the discussion does not signal departure from Lemon. Kiryas Joel, 114 S. Ct. at 2494 (Blackmun, J., concurring).

17. The much-discussed Smith decision, refusing to grant a free exercise exemption to peyote smokers, seems inconsistent with the prior line of cases, which allowed religious exceptions where state laws burdened free exercise. See, e.g., Thomas v. Review Bd., 450 U.S. 707 (1981); Sherbert v. Verner, 374 U.S. 398 (1963). On the other hand, the recent Church of the Lukumi Babalu Aye decision seems to swing in the opposite direction. See, especially, Justice Souter's concurrence, in which he continues his practice, begun in Weisman, of challenging the logic of previously decided cases (this time taking on the Smith majority reasoning of Justice Scalia). Church of the Lukumi Babalu Aye, 113 S. Ct. at 2240-50 (Souter, J., concurring).
in first amendment theory. How can we say anything about religion if we do not know what it is?18

In an oft-cited article, another commentator wrote, "the scope of religious pluralism in the United States alone has resulted in such a multiplicity and diversity of ideas about what is a 'religion' or a 'religious belief' that no simple formula seems able to accommodate them all."19

This Article provides such a definition. Given this multiplicity of concepts that encompass and are encompassed by the term "religion," a meaningful discussion requires references to other disciplines, such as philosophy. Yet, of the scholarship relating to religion, few have attempted a philosophically coherent discussion.20 The same holds true for court decisions.

Simply put, we need a definition of religion because it determines what is protected and what is not. The establishment of a definition would permit an answer as to whether such diverse beliefs as Confucianism,21 political philosophy,22 Marxism,23 Communism,24

21. Whether Confucianism is a religion . . . is determined by the definition of the term 'religion.' If one defines religion as a theistic belief system concerned with the origin and destiny of humanity, then Confucianism does not appear to be a religion. If, however, the definition embraces an ethical system which marginalizes supernatural elements and is grounded in empirically established reason, then Confucianism is indeed a religious tradition.
22. Commentators often equate philosophy with religion: [I]f a person views a certain political philosophy as providing imperative duties of conscience, perhaps even duties he would sacrifice his life for, then that person may also view the philosophy as addressing such fundamental questions as man's role in the universe, the nature of good and evil, and perhaps even the meaning of life and death. If a philosophy does play such a role in a person's life, then it should be treated as a religion with regard to that person.

There are numerous problems with this approach. Not the least of them is that every philosophy worth its salt must address "fundamental questions" of "man's role in the universe, the nature of good and evil, and . . . the meaning of life and death." Indeed, the non-
belief in GNP,\textsuperscript{25} being a millionaire,\textsuperscript{26} and even atheism,\textsuperscript{27} are, in involvement of modern philosophers is a fairly recent phenomenon:

Many professional philosophers, for reasons too complex to discuss here, have systematically isolated themselves from the general public; and they have refused to deal with the crucial questions outlined earlier. When was the last time you sought out a philosopher for advice? Or when was the last time you saw a philosopher interviewed on the news for his opinion on some important issue? In previous centuries, a philosopher was viewed as a sage, a repository of wisdom, from which one solicited knowledge and advice. The suggestion that one should seek out a philosopher for guidance today would be greeted in most circles with gales of laughter.

This, as I said, is largely the fault of philosophers themselves.


\textsuperscript{23.} See MICHAEL KIDRON \& RONALD SEGAL, *THE NEW STATE OF THE WORLD ATLAS* 34 (4th ed. 1991) (listing Moscow denomination, Peking denomination, etc. religion of Marxism-Leninism). Even such an otherwise perceptive thinker as Judge Arlin Adams might consider Marxism a religion under certain circumstances. \textit{See, e.g., Malnak v. Yogi, 592 F.2d 197, 212 n.52 (3d Cir. 1979) (Adams, J., concurring) ("A more difficult question would be presented by government propagation of doctrinaire Marxism, either in the schools or elsewhere. Under certain circumstances Marxism might be classifiable as a religion—and an establishment thereof could result.").} However, applying the test later, Judge Adams would not find "Communism address[ing] ‘fundamental and ultimate questions’ at a level analogous to that in traditional religions." \textit{Arlin M. Adams \& Charles J. Emmerich, A Heritage of Religious Liberty, 137 U. PA. L. REV. 1559, 1668 n.429 (1989).} Perhaps this change of heart (for I fail to perceive any doctrinal difference between Marxism and Communism in the First Amendment context) indicates that Judge Adams has begun discovering flaws in his approach.

On Communism and its status under the proposed test, see \textit{infra} part IV.F.

\textsuperscript{24.} "Communism would probably qualify as a religion under the suggested test . . . ." \textit{Note, Defining Religion: of God, the Constitution and the D.A.R., 32 U. CHI. L. REV. 533, 553 n.101 (1965) (citing authorities) [hereinafter Chicago Note].}

\textsuperscript{25.} The state could establish neither theism nor nontheism in the public schools; it could not interfere with the creation, development, promulgation, or systematization of any religious doctrine whether theistic, agnostic, atheistic, secular, ethical, humanistic, or otherwise. [The proposed] interpretation would give Americans the breadth they need to have as many gods as they wish, from Yahweh, the tribal God of Israel, to such modern deities as science, social science, art, [and] the Gross National Product . . . .


\textsuperscript{26.} George Bernard Shaw provided a tongue-in-cheek example:

BARBARA: "By the way, papa, what is your religion? In case I have to introduce you again."

UNDERSHAFT: "My religion? Well my dear, I am a Millionaire. That is my religion."


\textsuperscript{27.} A surprising number of commentators are prepared to label atheism a religion. The Toscano quotation, \textit{supra} note 25, is representative of such thinking. A variant of this notion is to distinguish between "secular" and "religious" atheism, clearly a misnomer, \textit{see, e.g., George C. Freeman III, The Misguided Search for the Constitutional Definition of "Religion,"}
fact, religions. It is likewise a first step in determining whether to grant religious exemptions to laws of general applicability (which could affect peyote smokers, fortune tellers, snake-handlers, or goat-killers), or whether to protect anti-religious speech under the Free Exercise Clause. Granted, the definitional question does not squarely arise very often. However, as recent cases demonstrate, when it does, it presents an intellectual challenge to the courts.

Additionally, the Constitution itself requires that we provide a definition. It protects the free exercise and prohibits establishment of something called "religion." In adjudicating Commerce Clause cases, courts define "commerce." Similarly, in adjudicating Due Process

71 GEO. L.J. 1519, 1555-56 n.244 (1983) [hereinafter Freeman], or between "conscientious atheism," and, presumably, "unconscientious" atheism. Toscano, supra note 25, at 182 n.28 (citing Theriault v. Silber, 547 F.2d 1279, 1281 (5th Cir. 1977) (per curiam)).


30. A number of Southern cases held that snake-handling may be regulated even though the acts are part of religious rituals because of the overriding state interest in public safety. See, e.g., Lawson v. Commonwealth, 164 S.W.2d 972 (Ky. 1942); State v. Massey, 51 S.E.2d 179 (N.C. 1949), appeal dismissed, 336 U.S. 942 (1949); State ex rel. Swann v. Pack, 527 S.W.2d 99 (Tenn. 1975), cert. denied, 424 U.S. 954 (1976); Kirk v. Commonwealth, 44 S.E.2d 409, 412 (Va. 1947).


32. I am inclined to side with the non-protection. Obviously, the speech then will be protected under the Free Speech Clause.

However, if we assume that one of the goals of the Religion Clause was to prevent government from exercising power over matters concerning religion, it is a reasonable inference that this prohibition should be extended to anti-religion as well. This view is consistent with the Court's reading of the Establishment Clause. School Dist. v. Schempp, 374 U.S. 203, 222 (1963) ("[T]o withstand the strictures of the Establishment Clause there must be . . . a primary effect that neither advances nor inhibits religion.").

Since there is but one Religion Clause (the terms "Free Exercise Clause" and "Establishment Clause" are just two parts of the whole, and are used in this Article only in deference to convention), it is reasonable to read the Clause as encompassing both religion and anti-religion in establishment and free exercise contexts.

On the other hand, protecting anti-religious speech as speech is even more common, and perhaps is conceptually easier. See Douglas Laycock, Equal Access and Moments of Silence: The Equal Status of Religious Speech by Private Speakers, 81 NW. U. L. REV. 1, 13-14 (1986).

33. See Africa v. Pennsylvania, 662 F.2d 1025 (3d Cir. 1981), cert. denied, 456 U.S. 908 (1982) (finding the plaintiffs' beliefs not religious in nature thereby not requiring the commonwealth to supply a special diet); Malnak v. Yogi, 440 F. Supp. 1284 (D.N.J. 1977), aff'd 592 F.2d 197 (3d Cir. 1979) (determining the religious nature of a high school course where the adherents fought to avoid the label of religion in order to prevent an Establishment Clause challenge).

34. See, e.g., Wickard v. Filburn, 317 U.S 111 (1942) (growing wheat on your own land for your own consumption is commerce among the several states); Gibbons v. Ogden,
cases, courts define "life," "liberty," and "property." There is no reason to think that the procedure should be different for the First Amendment.

As a California court stated in a different context:

To exempt churches, one must know what a church is. Congress must either define 'church' or leave the definition to the common meaning and usage of the word; otherwise Congress would be unable to exempt churches. It would be impractical to accord an exemption to every corporation which asserted itself to be a church. Obviously Congress did not intend to do this.

Concededly, a number of objections have been raised to the very idea of a definition. For some, fashioning a general definition of religion seems impossible. For others, the very idea of a definition creates both free exercise and establishment problems. One author has argued that defining religion would violate religious freedom "in that it would dictate to religions, present and future, what they must
be . . . “39 Furthermore, such an attempt would exclude some religions, thus presenting an establishment problem. The same author observed that “religion is traditionally an area of faith and assent.”40 To allow self-definition, however, would be to allow a flood-gate of claims, some of clearly non-religious nature,41 and be “judicially unlimitable.”42

It is paradoxical to argue that we should not define religion, while asserting that religion should be protected, which depends upon a definition of religion. Because the First Amendment speaks of religion, defining this term appears inevitable.

This does not mean that defining religion would involve governmental prescription of the parameters of religious faith. To do so would obviously be constitutionally untenable. The dilemma may be resolved by recognizing, rather than prescribing, these parameters. The following requirements, taken from a philosophical study, are equally applicable to the quest for a legal definition:

The definition of religion . . . should, therefore, be one which notes not merely the characteristics of the definer’s own religion, but rather those which are common to all persons and groups who experience what they regard as religion. This description should be

39. Jonathan Weiss, Privilege, Posture and Protection. “Religion” In the Law, 73 YALE L.J. 593, 604 (1964). However, in an apparent contradiction, the author proceeded to define religious belief in the next paragraph as one “which asks for adherence on the grounds of religious truth, or one which is defined or spoken by its author as religious.” Id. Similar sentiments were expressed by the IRS:

An analysis of the First Amendment to the Constitution of the United States indicates that it is logically impossible to define “religion”. It appears that the two religious clauses of the First Amendment define “religious freedom” but do not establish a definition of “religion” within recognized parameters. An attempt to define religion, even for purposes of statutory construction, violates the “establishment” clause since it necessarily delineates and, therefore, limits what can and cannot be a religion. The judicial system has struggled with this philosophic problem throughout the years in a variety of contexts.

Gen. Couns. Mem. 36,993 (Feb. 3, 1977). Of course, this sentiment did not prevent the IRS from defining what churches are, thus defining the parameters of religion in a mediate, rather than immediate, way. On the 14 IRS criteria defining the term “church” that would have denied such recognition to early Christians, see infra text accompanying notes 334-37.

40. Weiss, supra note 39, at 604.


purely descriptive; that is, it should be quite neutral to the normative question whether religion as it has been bears any resemblance to religion as it ought to be. A proper descriptive definition, then, is neutral to all inquiries on whether religion is true or false, helpful or harmful, illusory or veridical.43

A definition based on these principles should not present either free exercise or establishment problems. On the contrary, it should be a useful and, as the following discussion illustrates, necessary tool in analyzing First Amendment religious controversies.

B. The Effects of Defining Religion

Different definitions of the term "religion" lead to different outcomes in a surprising number of cases. One of the most fertile fields for litigation is tax exemptions for churches.44 The Internal Revenue Service ("IRS") has won the overwhelming majority of these cases. One commentator noted that its treatment of mail-order ministries evinced "blatant discrimination," persuasively arguing that the IRS has used a "subjective, highly questionable . . . fourteen[-]point test" to determine whether an organization is a "church."45

Another area involves child-custody and adoption cases. The overriding principle governing custody decisions in the United States is "the best interests of the child."46 The rising incidence of reli-

44. Numerous taxpayers have attempted to avoid paying taxes by establishing mail-order churches. In 1986, for example, there were over 100 such tax protestor convictions in a nine month period in California. Bruce J. Casino, Note, "I Know It When I See It": Mail-Order Ministry Tax Fraud and the Problem of a Constitutionally Acceptable Definition of Religion, 25 AM. CRIM. L. REv. 112, 122 (1987) (quoting Peter Baker, IRS Says Nothing Certain but Death of Tax Protesting, L.A. TIMES, Oct. 8, 1986, § 5, at 1). One of the most frequent bodies involved in litigation was Universal Life Church. It has had its tax-exempt status granted, Universal Life Church, Inc. v. United States, 372 F. Supp. 770 (E.D. Cal. 1974), and revoked, Casino, supra at 124 n.88, and generated "scores, if not hundreds, of cases," Brown v. Commissioner, 51 T.C.M. (CCH) 1321, 1322 (1986). Another frequent target for prosecution was Life Science Church. Casino, supra, at 126-28 (listing cases).
45. Casino, supra note 44, at 153.
46. Id. at 139-46. See infra text accompanying notes 334-37 for discussion of the IRS criteria.
47. See generally Donald L. Beschle, God Bless the Child?: The Use of Religion as a Factor in Child Custody and Adoption Proceedings, 58 FORDHAM L. Rev. 383 (1989); see also Annotation, Religion as Factor in Adoption Proceedings, 48 A.L.R. 3d 383, 391-92 (1973). This principle is even more pronounced in adoption proceedings, because adoption, unlike divorce, was unknown at common law, and thus unburdened with the common-law precedent favoring paternal rights. Beschle, supra, at 383 n.3.
giously mixed marriage makes it increasingly likely that parents will have conflicting attitudes toward religion. Because the majority of marriages end in divorce, courts have attempted to create novel solutions, such as granting “physical” and “spiritual” custody to different parents. Additionally, even though religion may not be the primary factor in custody determinations, courts frequently do consider “moral” issues, as well as the child’s “spiritual” welfare. Non- and anti-religious attitudes present special difficulties in this context.

Even in the purportedly objective best interests of the child analysis, the definition of religion may be determinative. Some have argued that some measure of religiousness correlates with some measure of emotional health. However, studies indicate that reliance on traditional theism is not as important to emotional health as reliance on “transcendence, or the capacity to find purpose and meaning beyond one’s self and the immediate.” Thus, defining religion narrowly as traditional theism would not give rise to a valid presumption that a


49. Id. at 1121 (quoting from Gersovitz v. Siegner, 779 P.2d 883 (Mont. 1989)).


52. For example, in the nineteenth century atheism was used as evidence of human unfitness, relevant in custody determinations. See, e.g., Shelley v. Westbrooke, 37 Eng. Rep. 850 (Ch. 1817) (Percy Shelley deprived of custody of his children, following the suicide of their mother). Similar sentiments occasionally manifest themselves in this day and age as well. Thus, the late Cardinal of Boston described the enemy as “atheistic, socialist, godless Communism,” George V. Higgins, *Challenging the Kennedy Magic*, N.Y. TIMES, Aug. 3, 1986, at 22, prompting the former president of the ACLU to muse that the proper form of the epithet “godless Communists” really should be one word—“godlesscommunists.” Norman Dorsen, *The Religion Clauses and Nonbelievers*, 27 WM. & MARY L. REV. 863, 864 (1986). Regardless of terminology, religious and non-religious minorities in this country often experience overt and covert hostility. As noted by Professor Dorsen: “[w]e may be living through a new sort of McCarthyism, except unfortunately it is not so new. In many parts of the country there has long been deep antagonism toward those who announce that they do not believe in God or in the kind of god that most Americans profess to worship.” Id. at 866.


54. Id. at 408 (quoting Ellison, *Spiritual Well-Being: Conceptualization and Measurement*, 11 J. PSYCHOLOGY & THEOL. 330 (1983)).
religious upbringing is more consistent with the best interests of a child. However, a broad definition of religion would be consistent with evidence that it has a bearing on emotional and mental well-being. It is the thesis of this Article that "the capacity to find purpose and meaning" in life is the province of a discipline called "philosophy." If nonetheless, this capacity is called religion, obviously this will seriously affect child custody determinations.

Another area where different definitions of religion would affect outcomes is in the context of Title VII discrimination suits. Both Title VII of the Civil Rights Act of 1964 and the Civil Rights Act of 1991 prohibit job discrimination on the basis of religion. Presently, Title VII defines religion broadly, and, one might say, circularly. If atheism is deemed a "religion" under an overinclusive definition of religion advocated by some, atheists will be able to challenge job discrimination under a disparate-impact theory.

Finally, the definition of religion will frequently be outcome-determinative in a wide variety of other constitutional contexts. For

55. Id. at 410-11 (defining a broad view of religion as "commitment to some 'ultimate concern,' a coherent state of beliefs that transcend and give meaning to everyday existence").
56. Some have argued that religion snatched the role of interpreter from the philosophers:

The result of [the philosophers'] self-isolation has been an intellectual and moral void that religions have attempted to fill. Fundamentalism will win one victory after another as long as it is the only contender in the arena of basic questions. Fundamentalists may provide irrational answers to these questions, but they will always have more appeal than the philosopher who refuses to deal with the questions at all.

SMITH I, supra note 22, at 77.

Scientists also have decried the abandonment by modern philosophy of attempts to answer the fundamental questions of existence. Thus, Stephen Hawking, after describing Wittgenstein's position that modern philosophy should only concern itself with problems of language, makes the following comment: "What a comedown from the great tradition of philosophy from Aristotle to Kant!" STEPHEN W. HAWKING, A BRIEF HISTORY OF TIME FROM THE BIG BANG TO BLACK HOLES 175 (1988).

60. See infra text accompanying notes 329-31 for criticism of the Title VII definition.

61. An argument can be made that Title VII should protect atheists not because atheism is a "religion," but because, under the rationale of Title VII, courts should read the prohibition of discrimination based on religion as encompassing a prohibition against discrimination because of the absence of religion. This is not an unreasonable argument in the era when growing wheat on your own farm for your own consumption is considered interstate commerce. However, the attractiveness (to some) of this argument does not vitiate the need for a non-circular definition of religion.
example, in *Zorach v. Clauson* public school students requested release time to attend religious school. Administration of the program by government officials required a definition of what aspects of the program were "religious." Conversely, when an allegedly religious organization wanted to advance its practices through public schools, a definition was again required.

The definitional problem has manifested itself in other instances, namely the parental refusal of a child's medical care (in some states applicable only to Christian Scientists, and challenged on this ground) and public forum analysis of access to school facilities. This list is undoubtedly far from inclusive.

C. The Methodology for Defining Religion

In some two hundred years of haphazard attempts, American courts have vacillated between conventional (traditional theism) and modern (everything goes) definitions. Inevitably, such lack of focus has led to incongruous results.

63. *Id.* at 308.
64. *See id.* at 308, 315.
65. Malnak v. Yogi, 592 F.2d 197 (3d Cir. 1979) (addressing the teaching of transcendental meditation).
66. *Id.* at 199.
69. An example of a definition lacking in focus might be Justice Stewart's famous attempt at defining pornography—"I know it when I see it." *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring). Commentators, while disagreeing on anything else, appear in remarkable agreement in referring to Justice Stewart's statement. For example: An important thesis of this Note is that the courts and the IRS, faced with myriad constitutional difficulties in attempting to discern which religious organizations are legitimate, have abandoned a rigorous, constitutionally acceptable standard in favor of an undefined "I know it when I see it" approach.
70. One particularly absurd line of cases involves atheists labeled as religionists. *See*, e.g., *Welsh v. United States*, 398 U.S. 333 (1970); *United States v. Foran*, 305 F. Supp. 1322, 1324, 1326-27 (E.D. Wis. 1969) (holding that atheists receive conscientious objector status despite the congressional intention to exclude essentially political, sociological, or philosophical views, or merely personal moral codes from the reach of the Selective Service Act). *See infra* part IV.D. for discussion of *Foran*. 
The impetus for this Article was the famous (and most troubling to an atheist and theist alike) dictum in *Torcaso v. Watkins*, which equated "secular humanism" with religion. At a minimum, this seemed to necessitate a query into whether anything "secular" could ever be "religious," and what makes religion constitutionally different from any other philosophical or moral system.

This Article critiques current Supreme Court doctrine using an eclectic philosophical approach, relying in part on the linguistic insights of logical positivism (specifically, its analysis of meaningless terms), and on the epistemology of post-Objectivism. This is the first time this approach has been followed in the legal literature.

Part II of this Article deals with preliminary matters, such as the nature of Objectivism, whether and why religion occupies a special place in the scale of First Amendment values, whether a definition of religion is constitutionally necessary or desirable, whether it should be substantive, functional, or by analogy, whether recent attempts at defining religion have been successful, and the necessary prerequisites for a satisfactory definition. Part III traces historical attempts to define religion and proposes a new definition of religion. Finally, part IV analyzes a number of factual situations under the new definition, concluding that the proposed definition provides a better analytical tool than those currently used for determining whether a given system of beliefs is or is not "religion."

72. "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." *Id.* at 495 n.11.

As a "born-again" "secular humanist," I am perplexed at being lumped with assorted theists, deists, pantheists, and their kindred spirits; they, likewise, ought to be similarly perplexed at finding themselves in my company. *See infra* text accompanying notes 174-210 for discussion of the meaning ascribed to the term "secular humanism," as it is used now. The specific doctrine of "Humanism," as set out in Humanist Manifestos, is at best mildly religious (the signers of the first Manifesto in fact used the term "Religious Humanism;" many of them were Unitarians), and at worst inconsistent. However, currently this term is used typically as a euphemism for "atheism." The confusion has resulted from indiscriminate and untenable use of language. For clarification of all the relevant concepts, *see infra* notes 84-92, 188 and accompanying text.

73. Epistemology is "the study or theory of the nature, sources, and limits of knowledge." WEBSTER'S NEW WORLD DICTIONARY 458 (3d ed., 1991) [hereinafter WEBSTER'S].
74. As of October, 1993, a WESTLAW search of law reviews revealed only four references to Leonard Peikoff's comprehensive compilation of Objectivist philosophy. Similarly, Ayn Rand merited only thirty five citations. This is unfortunate, for Objectivist epistemology has much to offer to legal theory, especially in such fundamental areas as the validity of proofs, placement of their burdens, and concept formation.
II. PRELIMINARY CONSIDERATIONS

A. What Is Objectivism, and Why Use It?

The philosophy of Objectivism is in reality a subset of the philosophy of natural rights. It holds that rights—i.e., moral sanctions to act—are derived from the nature of humankind. Thus, it can properly be classified as a secular version of natural law.

Objectivism is generally considered hostile to religion. This is an exaggeration, however. Its founder, Ayn Rand, recognized the role religion played in preserving for our time the philosophical achievements of the ancient Greeks. Nevertheless, she did not see any

75. Its name refers to an objective reality. A better name for this philosophical movement would have been “existentialism” to indicate its assertion of the primacy of existence, but the term has been preempted by another philosophically incompatible school.

76. Other scholars endorse similar ideas. See, e.g., William T. Blackstone, The Relationship of Law and Morality, 11 GA. L. REV. 1359, 1386-87 (1977) (endorsing a “secular version of natural law,” which presupposes the value of human life and advocates that all be given conditions required to live a human life, and that the same general consideration of rights that one claims for oneself must then logically be affirmed for others).

This approach is far from new. The same ideas have been put forth by philosophers in the Locke-Spencer tradition on many an occasion. Perhaps their best and purest exposition was made by Auberon Herbert. See, e.g., Auberon Herbert, The Principles of Voluntaryism and Free Life, in THE RIGHT AND WRONG OF COMPULSION BY THE STATE 369 (Liberty Classics 1978) (1897).

77. Western culture is indebted to the Catholic Church and its Thomistic tradition for the preservation of the philosophy of Aristotle, for instance. While Rand had been quoted as saying that “the cross is the symbol of torture, or the sacrifice of the ideal to the nonideal. I prefer the dollar sign,” Rand herself claimed that this statement was apocryphal. It is likely, however, that Rand expressed similar sentiments, but they must be understood in the broader context of her rejection of forced self-sacrifice and reliance on faith.

Her specific sentiments concerning religion were best expressed in a Playboy interview:

Playboy: Has no religion, in your estimation, ever offered anything of constructive value to human life?
Rand: Qua religion, no—in the sense of blind belief, belief unsupported by, or contrary to, the facts of reality and the conclusions of reason. Faith, as such, is extremely detrimental to human life: it is the negation of reason. But you must remember that religion is an early form of philosophy, that the first attempts to explain the universe, to give a coherent frame of reference to man’s life and a code of moral values, were made by religion, before men graduated or developed enough to have philosophy. And, as philosophies, some religions have very valuable moral points. They may have a good influence or proper principles to inculcate, but in a very contradictory context and, on a very—how should I say it?—dangerous or malevolent base: on the ground of faith.


Likewise, as a former musician, I also cannot close my eyes to the role religion played in the development of Western musical culture. Up until and including at least the
need for religion in modern times, considering it an old and persistent superstition.

Defining religion from an Objectivist perspective has a fundamental advantage: this philosophy cannot be accused of obsequiousness to religion, even if the definition, such as the one proposed in this Article, turns out to be generally advantageous to religion. Conversely, defining religion from a religious perspective is unlikely to produce a workable definition for purposes of constitutional adjudication, and may tend to favor one brand of religious belief over another. Further, adopting a religious perspective would in and of itself be contrary to Establishment Clause values. A philosophy without a vested interest in promoting religion is uniquely suited for a cool-headed description of what constitutes religion, and provides the best vehicle for such an approach. An inclusive definition coming from this train of thought will carry added legitimacy.

A thorough presentation of post-Objectivist philosophy is beyond the scope of this Article. The following brief sketch will provide a helpful framework for the analysis.

Relying on the philosophy of Objectivism presupposes fundamental recognition of, and deference to, certain individual, "unalienable" rights, as opposed to the positivist notion that rights are granted by the state. Concomitant to this philosophy of natural rights is the strong preference for freedom of conscience, not surprisingly one of the most important underlying values of the Religion Clauses. Additionally, Objectivism rejects the skeptical doctrines of some modern philosophers and posits our ability to give meaning to concepts and words, the rational foundation of scientific inquiry,

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first half of the 18th century, Catholic and Protestant Churches played a dominant role in Western musical culture, primarily by being consumers of a vast number of liturgical compositions. The greatest of Western composers, Johann S. Bach, was in large part a church composer, especially during the late period of his life. Additionally, church libraries preserved invaluable manuscripts from the Middle Ages and Renaissance. At the present time, however, with minor exceptions, religion is largely irrelevant in the development of musical culture.


79. This, of course, is contrary to the inclinations of some of the Supreme Court's current and might-have-been Justices. *See, e.g.*, ROBERT H. BORK, *The Tempting of America* (1990); William H. Rehnquist, *The Adversary Society: Keynote Address of the Third Annual Baron de Hirsh Meyer Lecture Series*, 33 U. MIAMI L. REV. 1 (1978) (both arguing that rights, in essence, are granted by the "society" through the "state").

80. Historical evidence appears to support the view that the Framers meant to give protection to religious conscience, rather than conscience in general. My accounting of the underlying principles of the Religion Clauses is in accord with this notion. *See infra* part II.C.2.

81. *See infra* text accompanying notes 149-56.
DEFINING RELIGION

and, generally, the fundamental intelligibility of the universe. Objectivism's reliance on these principles has a special bearing on the problem of the defining religion.  

B. The Problems of Terminology

"God," "religion," and "family values," like "love" and "justice," belong to the category of most overused and misused terms. The different meanings given to these terms by their proponents and opponents often make the users difficult to understand. Thus it is imperative to define the terms used in this Article:

Although the failure to define a commonly used term sometimes reflects a general understanding of its meaning, the more reasonable conclusion in this case is that it represents and conceals various forms of misunderstanding and misinformation. This imprecise usage is not only a reflection of sloppy thinking but a cause of it as well. It is impossible to think clearly and argue convincingly when using language carelessly and imprecisely.

The imprecise usage is often amplified by a deliberately cavalier attitude toward the settled meaning. "One of the surest indexes of a mature and developed jurisprudence [is] not to make a fortress out of the dictionary," opined Learned Hand. Perhaps the unsure state of jurisprudential doctrine regarding the definition of "religion" is directly traceable to such attitudes.

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82. See infra text accompanying notes 106-20.

83. These principles were most recently summarized by George H. Smith in his definitive book on atheism. See GEORGE H. SMITH, ATHEISM: THE CASE AGAINST GOD (1974) [hereinafter SMITH II]. Although nominally concerned with a narrow topic, Smith, by way of laying out the foundation for his philosophical inquiry, gave a lucid exposition of the principles of Objectivism as they apply to matters of religion. I freely rely on his insights.


85. As an example, let us consider how one commentator dealt with the basic terminology: Professor Toscano mentions "nontheism" and "atheism" (without defining them), as if they were different. Toscano, supra note 25, at 177 ("Does religion refer only to some belief in God and the supernatural? Or does it refer to any belief system—whether theistic, nontheistic, atheistic . . . ?"). While one could surmise that, when Toscano refers to "atheism" he means "antitheism," this hypothesis is demolished immediately when in the same sentence he mentions "antitheism" right after "nontheism" and "atheism." Id. ("Does religion refer only to some belief in God and the supernatural? Or does it refer to any belief system—whether theistic, nontheistic, atheistic, or antitheistic?") (emphasis added). In this context, what exactly is the difference between "atheism" and "antitheism?"

86. Cabell v. Markham, 148 F.2d 737, 739 (2d Cir. 1945).
In attempting to define the terms and, ultimately, to define “religion,” it is important not to define arbitrarily, but to have some rational basis for the proposed definitions. To that end, this Article uses the term “nonreligious” as the opposite of “religious” in discussing the basic dichotomy of the First Amendment. “Religion” is, of course, an inclusive term. It encompasses theism, deism, polytheism, pantheism, etc., as well as those supposedly “nontheistic” religions that we intuitively know as being “religions,” such as Buddhism. “Nonreligion” encompasses a-theism, a-deism, a-polytheism, a-pantheism, etc. (“a” being a prefix of negation), as well as non-belonging to a “nontheistic” religion. Likewise, the terms “atheism” and “atheist” mean, respectively, the absence of any religious belief, whether theistic, deistic, polytheistic, or pantheistic, and a person without such beliefs.

By contrast, “anti-religious” means expressing negative views about the “religious.” A person with anti-religious views may be either non-religious (i.e., an atheist), or religious (i.e., holding theistic, deistic, polytheistic, pantheistic views, but hating or opposing religion for whatever reasons).

Using these terms, rather than emotionally charged labels of political invective, brings conceptual clarity to the First Amendment’s domain. Moreover, the use of the terms in this manner is firmly supported by the etymology of the terms themselves.


88. A word must be said about the problem of a-gnosticism. “Agnosticism” does not address the presence or the absence of religious beliefs. Far from being the middle ground between “religion” and “non-religion,” it refers to knowability or non-knowability of the supernatural. Theism and atheism, on the other hand, refer to the presence or absence of religious belief, and specifically existence of God or gods. Thus it is irrelevant to the issue at hand (i.e., what is a religious belief, and how do we recognize it if we come across one).


90. “Godless Atheists” and “Secular Humanists” come to mind. Etymology is “the origin . . . [and] tracing of a word or other from back as far as possible in its own language and to its source in contemporary or earlier languages.” WEBSTER’S, supra note 73, at 467.

92. George H. Smith, responding to the charge that the use of a term “atheist” in its broader meaning, i.e., as one without theistic beliefs, is arbitrary, points out that “[t]hough [i]t is a broader meaning than is usually accepted, it has a justification in the meaning of ‘theism’ and the prefix ‘a.’” SMITH II, supra note 83, at 14. For an example of a narrow,
C. Why Should Religion Be Singled Out?

By its terms, the First Amendment singles out religion. The Amendment even lists religion first, according it pride of place for purposes of constitutional adjudication. Accordingly, the Supreme Court gave preferential treatment to religion to the exclusion of other belief systems in controversial decisions *Sherbert v. Verner* and *Wisconsin v. Yoder*. Questions remain, however, whether religion should in fact receive this special status, and if it does, why.

On occasion, in seeming contradiction to the language of the First Amendment, some courts and commentators have contended that religion should not be singled out as such, but instead treated merely as one of many forms of protected speech. The Supreme Court itself has frequently treated claims of religious speech under the Speech Clause. One commentator observed that:

and improper, usage of the terms, see Michael W. McConnell, *Accommodation of Religion*, 1985 SUP. CT. REV. 1, 10 (stating that "[u]nbelief is, after all, a system of opinions regarding the existence of God . . . ")—failing to realize that little children, while holding no opinions regarding the existence of God, are still all "unbelievers," until introduced to the relevant concepts); see also Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DEPAUL L. REV. 993, 1002 (1990) ("For constitutional purposes, the belief that there is no God, or no afterlife, is as much a religious belief as the belief that there is a God or an afterlife."). Professor Laycock fails to see that theism and a-theism are not, strictly speaking, mirror reflections of each other. He continues: "[i]t is a belief about the traditional subject matter of religion, and it is a belief that must be accepted on faith, because it is not subject to empirical investigation." Id. Here Professor Laycock commits another fallacy, by presuming that a person without a belief must prove anything at all. The burden of proof, in fairness, should be on the one advancing a proposition. Of course, the verbal manipulation above was needed to reach the predictable conclusion that "the government cannot establish atheism." Id. This conclusion, however, has validity only if atheism is defined as an affirmative antithesis of religion, which it is not.

93. The courts and commentators in most instances accept what is obvious from the language of the First Amendment itself, *i.e.*, that religion is singled out for special treatment. Thus, one commentator argued that the symmetrical character of the Free Exercise and Establishment Clauses "single[s] out religion for special treatment," sometimes to its advantage, sometimes to its disadvantage. Michael W. McConnell, *A Response to Professor Marshall*, 58 U. CHI. L. REV. 329, 329 (1991) (giving examples of factual situations that either "favor" or "disfavor" religion).

At least one Justice of the current Court has specifically accepted McConnell's contention. "[T]he text of the First Amendment itself 'singles out' religion for special protections." Employment Div., Dep't of Human Resources v. Smith, 494 U.S. 872, 902 (1990) (O'Connor, J., concurring) (quoting McConnell).


95. 406 U.S. 205 (1972) (allowing a religious exemption from compulsory school attendance laws).

96. See, *e.g.*, Widmar v. Vincent, 454 U.S. 263 (1981) (applying the free speech analy-
Many of the Court’s most prominent free speech rulings—on such issues as prior restraint, fighting words, public forums, time-place-manner rules, and the permissibility of regulating or taxing the distribution of literature—in fact involve religious expression or such traditional religious activities as proselytization or solicitation. Similarly, there is no doubt that most rituals, rites, or ceremonies of religious worship—such as fasting, confessing, or performing a mass—that may be denominated as constituting “action” rather than “belief” or “expression,” fall squarely within the protection the Court has afforded to nonverbal “symbolic speech.”

However, such “reductionism” of free exercise claims to free speech claims causes more problems than it solves. Firstly, “plausible speech and free exercise claims may not always be of exactly equal strength.” Secondly, reductionism would lead to the bizarre result of allowing the state to prohibit religious speech altogether under some (un)free speech theories. As noted by one commentator, however:

Recognition that the free exercise clause undoubtedly protects religious speech is an important first step to understanding the ludicrousness of suggestions that the entire first amendment has no bearing on speech about nonpolitical moral values. The relegation of all speech issues to the free speech clause could blur the force of this insight.

Finally, and most persuasively, reductionism presents a fundamental constitutional difficulty: “[i]t denies what the text of the first amendment affirms, that there is a distinction between religion and other forms of expression.”

It thus appears undeniable that, for better or for worse, the Framers singled out religion in the constitutional framework. Accepting

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97. Choper, supra note 19, at 581-82.
99. For instance, Robert Bork has argued that the Free Speech Clause was meant to protect only political speech. Robert Bork, Neutral Principles and Some First Amendment Problems, 47 IND. L.J. 26-31 (1971). In fairness, it must be noted that Judge, and now Professor, Bork later changed his views on this issue.
100. Greenawalt, supra note 98, at 757 n.16.
this as a fact of life, is there also a modern rationale for treating religion in a special way, one that does not have its genesis in our half-hearted deference to the long-dead Framers?

1. What Is So Special About Religion?

*Now faith is the substance of things hoped for, the evidence of things not seen.*

*Only by examining the unique character and claims of religion as they are perceived by believers (and by non-believers who apprehend their power and importance) can we appreciate why the framers of our Constitution were so concerned that the federal government be precluded from meddling in this aspect of human life.*

The unique character of religion is brought about by its reliance on faith, rather than reason, as an allegedly valid means of cognition. Since modern philosophers have demonstrated that the traditional logical proofs of God's existence are not valid, faith today remains the only universally accepted means of affirming religious belief. This puts theistic and “non-theistic” religions on the same footing—as “manifestation[s] of human faith alone.”

Some commentators have argued that there is no distinction between faith and reason:

Laymen—and most of us in this highly technical world are laymen—are at the mercy of researchers and technicians who set themselves up to interpret their particular part of nature to us. Over the years, they—the high priests of science and technology—have convinced us that we should leave the fact finding to them. And to a large part we have. In return, they have promised to be “objective,” to tell the truth no matter how or whom it hurts. With the truth, freshly gathered from the mouth of the experts, politicians can make laws, and laymen can form opinions and make decisions with confi-

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102. *Hebrews* 11:1 (King James).
103. McConnell, *supra* note 93, at 331 n.15.
All is fine, until one of the experts decides that he knows more than the decision-makers and that he no longer need be objective. That he can be preacher as well as researcher.¹⁰⁶

According to this view, by making science appear "religious" and religion "scientific," the distinction between reason and faith is successfully blurred. Of course, this view is curiously contradictory, since it relies on the "rational" mode of the argument.¹⁰⁷ What this theory describes, however, is not religious science, but bad science. The possibility of unethical or self-interested behavior is always present in, but not confined to, science. However, a falsifier of data usually will not survive long in a professional world where peers stand ready to denounce offenders. Indeed, the peer-review system provides, for the most part, an efficient means of evaluation of research veracity. Even when it fails, the free press provides an additional level of defense. Numerous examples abound.¹⁰⁸ Nevertheless, the possibility of unethical behavior on the part of some scientists does not destroy a principled distinction between faith and reason.

A second argument advanced in support of equating religion and science is that all belief systems are religious. The following is an extreme example of this argument:

[All ideologies are fundamentally religious. They are grounded upon assumptions that are not susceptible of proof: they are matters of faith and preference. Of course, ideologies that rely upon the seen and unseen realities of this world for support (e.g., sensory experience, scientific data, theoretical constructs such as quantum physics, evolution, uniformitarianism, relativity, etc.) are different from those ideologies based on the unseen realities of another, spiritual world (e.g., special creation, redemption, union with the infinite, resurrection, angelic visitation, etc.). . . . They are, in fact, both religious.¹⁰⁹


¹⁰⁷. "The claim has been put forth that rationality is biased because it is a class-based or male or Western or whatever notion. Yet it is part of rationality to be intent on noticing biases, including its own, and controlling and correcting these." ROBERT NOZICK, THE NATURE OF RATIONALITY xii (1993).

¹⁰⁸. For example, Chicago-Tribune senior writer John Crewdson in a series of investigative reports almost single-handedly brought to the world's attention the controversy concerning the discovery of the AIDS virus. See, e.g., John Crewdson, Inquiry Hid Facts On AIDS Research, CHI. TRIB., Mar. 18, 1990, at CI.

¹⁰⁹. Toscano, supra note 25, at 200.
The author continued:

Secular ideas, it is contended, are premised on objective, verifiable, demonstrable data, while theistic notions are based on no data at all; or at best, data that is subjective, mystical, and nondemonstrable. Those who make this argument fail to see that mysticism, subjectivism, and faith undergird even the most objective of our knowledge and data, as well as our information-gathering methods. In the first place, all data must be interpreted: the bones, the numbers, the photos, the readings taken on delicate scientific equipment—all of the quantifiable and verifiable pieces take on meaning only when they are arranged within the meaning-giving framework of some hypothesis. Hypothesizing is, itself, a subjective, even mystical, process.  

This argument is highly unpersuasive. To suggest that there is no difference between religious and non-religious belief is to empty the term “religious” of its entire meaning. If everything is “religious,” then the term is superfluous, since it does not describe anything in particular.  

Third, the denial of the reason-faith dichotomy is arbitrary. Classical definitions of faith have always drawn this distinction. The truths of faith were the ones not provable by reason. For instance, John Locke, responding to a critic who argued that faith produces a greater certainty than reason, stated that faith was unable to produce certainty at all: “Bring it to certainty, and it ceases to be faith.” For Locke reason and faith were distinct. However, he insisted

110. Id. at 201-02. A shorter version of this argument was first (or perhaps last) advanced by Doctor Zaius, Minister of Science and Chief Defender of the Faith from the Planet of the Apes: “There is no contradiction between religion and science . . . True science.”

111. “If we cannot [distinguish religion from non-religion] it follows that everyone willy-nilly is committed to some kind of religion.” SIDNEY HOOK, RELIGION IN A FREE SOCIETY 10 (1967).


113. I find every sect, as far as reason will help them, make use of it gladly: and where it fails them, they cry out, It is matter of faith, and above reason. And I do not see how they can argue with any one, or ever convince a gainsayer who makes use of the same plea, without setting down strict boundaries between faith and reason; which ought to be the first point established in all questions where faith has anything to do.
that it was reason that had to determine what one accepted on faith (such as revelation): "Whatever God hath revealed is certainly true: no doubt can be made of it. This is the proper object of faith: but whether it be a divine revelation or no, reason must judge."\footnote{14}

Fourth, it is not true that all propositions require faith. Examples include the laws of logic (The Law of Identity, The Law of Excluded Middle, and The Law of Contradiction),\footnote{15} or facts that are empirically discovered by human reason. Reason, therefore, here, as contradistinguished to faith, I take to be the discovery of the certainty or probability of such propositions or truth, which the mind arrives at by deduction made from such ideas, which it has got by the use of its natural facilities; viz. by sensation or reflection.

Faith, on the other side, is the assent to any proposition, not thus made out by the deductions of reason, but upon the credit of the proposer, as coming from God, in some extraordinary way of communication.

\begin{quote}
2 JOHN LOCKE, AN ESSAY CONCERNING HUMAN UNDERSTANDING 415-16 (Dover reprint 1959).
\end{quote}

\footnote{14}{Id. at 425.}
\footnote{15}{For an explanation of these rules, see LIONEL RUBY, LOGIC: AN INTRODUCTION 255-60 (1950). For things, The Law of Identity asserts that "A is A," or "anything is itself." For propositions: "If a proposition is true, then it is true." For things, The Law of Excluded Middle asserts that "anything is either A or not-A." For propositions: "A proposition, such as P, is either true or false." For things, The Law of Contradiction asserts: "Nothing can be both A and not-A." For propositions: "A proposition, P, cannot be both true and false."}

The intellectual confusion inherent in the discussion of religion can be traced to the unfamiliarity of the participants with these basic logical concepts. Thus, the Eighth Circuit’s claim that a belief can be both secular and religious, flies in the face of The Law of Contradiction. Wiggins v. Sargent, 753 F.2d 663 (8th Cir. 1985) (involving a claim by prison inmates that prison officials violated their First Amendment rights by refusing to allow them to receive religious literature). The inmates belonged to the Church of Jesus Christ Christian, a church that shares its basic tenets (white supremacy) with the Aryan Nations, a secular organization. In this context, the court stated that "a belief can be both secular and religious. The categories are not mutually exclusive." \footnote{Id. at 666.}

While it is true that the belief in white supremacy was shared by both groups, that does not make it either religious or secular. Consider a belief that a fork will fall on the floor if bumped from a table. It does not pertain to either religion or non-religion. Thus, just because religionists and secularists believe in the law of gravity, it does not make this belief either religious or secular—it is neither. Similarly, a shared belief in white supremacy is neither religious nor secular. In philosophical terms, the belief is not essential and fundamental either to religion or non-religion; it is not causally significant. Compare with a truly religious belief, e.g., "Jesus Christ is God." This belief cannot be secular. Conversely, "There is no God" cannot be religious. See PEIKOFF, supra note 87, at 99-100 (discussing the role of fundamentality in clarification of essential characteristics).

Claiming that a religious belief is secular and vice versa is a common mistake made by televangelists. James Kennedy called secular humanism a "godless, atheistic, evolutionary, amoral, collectivist, socialist, communist religion." See Ingber, supra note 5, at 318 n.534 (quoting People for the American Way, in SECULAR HUMANISM AND PUBLIC EDUCATION 2 (1986)). Even legal training does not guarantee that one would not run afoul of The Law of Contradiction. Thus, Michael Farris, an attorney with Concerned Women for America, defined secular humanism as "a combination of atheism and Eastern religion." \footnote{Id. On Secular Human-
cally verifiable (such statements as “this rock exists”). Indeed, there is nothing “subjective, even mystical” about it.\footnote{116}

Stephen Hawking, arguably the most important theoretical physicist since Einstein, observed that:

[A scientific] theory is a good theory if it satisfies two requirements: It must accurately describe a large class of observations on the basis of a model that contains only a few arbitrary elements, and it must make definite predictions about the results of future observations . . . . Any physical theory is always provisional, in the sense that it is only a hypothesis: you can never prove it. No matter how many times the results of experiments agree with some theory, you can never be sure that the next time the result will not contradict the theory. On the other hand, you can disprove a theory by finding even a single observation that disagrees with the predictions of the theory . . . . Each time new experiments are observed to agree with the predictions the theory survives, and our confidence in it is increased; but if ever a new observation is found to disagree, we have to abandon or modify the theory.\footnote{117}

\footnote{116. Dr. Johnson, when confronted with the question of the existence of a rock, slammed it with his foot. Boswell’s account is as follows: After we came out of the church, we stood talking for some time together of Bishop Berkeley’s ingenious sophistry to prove the non-existence of matter, and that every thing in the universe is merely ideal. I observed, that though we are satisfied his doctrine is not true, it is impossible to refute it. I never shall forget the alacrity with which Johnson answered, striking his foot with mighty force against a large stone, till he rebounded from it, “I refute it thus.” JAMES BOSWELL, THE LIFE OF SAMUEL JOHNSON, LL.D. 134 (Great Books of the Western World, Robert M. Hutchins ed., 1980) (London 1791). One might say Dr. Johnson was an early Objectivist. Presumably, commentators refusing to recognize the reason-faith dichotomy would find themselves in agreement with a skeptic who asked: “How can I be sure that, every time I believe something, such as that there are rocks, I am not deceived into so believing by . . . a mad scientist who, by means of electrodes implanted in my brain, manipulates my beliefs?” PEIKOFF, supra note 87, at 140 (quoting W. Gerber reviewing Peter Unger, Ignorance: A Case for Skepticism in XXIX REVIEW OF METAPHYSICS 751 (June 1976)). However, the common-sense answer to this assertion is that: [a]ccording to this approach, we cannot be sure that there are rocks; such a belief is regarded as a complex matter open to doubt and discussion. But what we can properly take as our starting point in considering the matter and explaining our doubt is: there are scientists, there are electrodes, men have brains, scientists can go mad, electrodes can affect brain function. All of this, it seems, is self-evident information, which anyone can invoke whenever he feels like it. How is it possible to know such sophisticated facts, yet not know that there are rocks? PEIKOFF, supra note 87, at 140.}

\footnote{117. Hawking, supra note 56, at 9-10.
There is no predicate on faith in the Hawking method. If an observation contradicts the predictions of a theory, the theory must be abandoned. If faith and reason were the same, a non-complying observation should cause the faith adherent to abandon the faith. Clearly, this does not happen often. A more typical result is for the adherent to "distinguish" or simply ignore the non-complying observation.118

Finally, contemporary epistemology also mandates the maintenance of the dichotomy between faith and reason. The nature of the epistemological conflict is beyond the scope of this Article, but a brief sketch may be helpful. Epistemologically, the distinction between reason and faith is predicated on their different means of acquiring knowledge. Reason integrates the data provided by human senses; faith makes no such claim. Instead, faith claims to be an alternative means of acquiring knowledge, allowing us to know the unknowable. Since the unknowable is not perceived by human senses, clearly faith must use different means of turning this "unknowable" into "knowable."119 Since faith must use different means of acquiring "knowledge," then the unitary concept of faith and reason is impossible.120

To sum up: reliance on faith is a distinctive characteristic of religion. As we shall see, this reliance is what makes religion worthy of special protection.

2. Why the State Should Not Inhibit Religion

In his famous letter to the Danbury Baptist Association, Thomas Jefferson touched on reasons for excluding religion from the province

118. Recall how in the mid-1980s the fundamentalist camp was ablaze with reports of dinosaur and human footprints found in the same rock strata. To fundamentalists this represented a refutation of contemporary scientific thought that denies the chronography of the Bible and an affirmation of the account of creation. A movie "Footprints in Stone" was produced by the Films for Christ Association, heralding the discovery. However, on closer examination, the alleged human footprints turned out to have dinosaur toes. The film was quickly withdrawn, but no mass defections from the fundamentalist camp have occurred. See John Noble Wilford, Fossils of 'Man Tracks' Shown to be Dinosaurian, N.Y. TIMES, June 17, 1986, at 3; Dinosaur-Era 'Man Tracks' Disputed as Fundamental Mistake, CHI. TRIB., June 29, 1986, at 1.

119. I leave aside the question whether these means are valid.

120. Perhaps the most valuable part of the aforementioned book by George H. Smith is its chapter Reason, Faith and Revelation. The interested reader is advised to consult this chapter for a germinal discussion of the "reason-faith" dichotomy. SMITH II, supra note 83, at 93-218.
of governmental oversight: “religion is a matter which lies solely between man and his God . . . the legislative powers of the government reach actions only, and not opinions.”

While the thought-action distinction, having enjoyed some vogue with the Supreme Court, has been abandoned in recent years, Jefferson clearly thought religion was exclusively a private matter. As the following discussion illustrates, even proponents of non- and anti-religious belief systems should conclude that the Founders were correct in insisting that religion receive a “special protection[].”

The Supreme Court has indicated that, in matters of faith, the government is precluded from engaging in coercive actions. For example, in United States v. Ballard, the Supreme Court upheld mail fraud convictions in connection with a membership drive of the “I Am” movement. Discussing the trial court’s jury instructions, the Court held that, while the inquiry may focus on the sincerity of the professed belief, it may not focus on the content of the professed religious belief. Justice Douglas wrote that “[m]en may believe what they cannot prove,” and that they “may not be put to the proof of their religious doctrines or beliefs.”

Courts and commentators have also correctly perceived that to require a religious adherent to violate the tenets of his or her religion is to say to the adherents “damned if you do, damned if you don’t.”

121. Thomas Jefferson, To Messrs. Nehemiah Dodge and Others, a Committee of the Danbury Baptist Association, in the State of Connecticut, reprinted in THOMAS JEFFERSON, WRITINGS 510 (Merill D. Peterson ed., 1984) [hereinafter JEFFERSON]. Similar sentiments were expressed by James Madison. See, e.g., JAMES MADISON, MEMORIAL & REMONSTRANCE AGAINST RELIGIOUS ASSESSMENTS, appended to Everson v. Board of Educ., 330 U.S. 1, 67 (1947) (“[T]hat the Civil Magistrate is a competent Judge of Religious truth . . . is an arrogant pretension falsified by the contradictory opinions of Rulers in all ages, and throughout the world . . . .”).

122. See Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States, 136 U.S. 1 (1890); Reynolds v. United States, 98 U.S. 145 (1878).


124. So that the reader will be fairly informed of any biases the author has, I do not possess a religious belief, and affirmatively maintain that religious propositions are not true. For a working definition of these and other terms, see supra text accompanying notes 84-92.

125. Smith, 494 U.S. at 902 (O’Connor, J., concurring).

126. 322 U.S. 78 (1944).

127. Proponents of the movement represented that they had the ability to heal disease by virtue of possessing certain supernatural powers. Id. at 80.

128. Ballard, 322 U.S. at 86. Commentators correctly read this decision as an affirmation by the Supreme Court that religion involves belief systems that are “inherently nonrational.” Merel, supra note 42, at 830.
Hence in *United States v. Kauten*, the Second Circuit observed that religious belief "categorically requires the believer to disregard elementary self-interest and to accept martyrdom in preference to transgressing its tenets." Adherents of religions usually view their principles as "authoritative," transcending the authority of the state.

Certain conclusions may be reached on the basis of these observations. Since religions rely on faith as the foundation of their tenets, rational discourse on these matters is, by definition, impossible. In the absence of rational discourse, a religious adherent, convinced of the righteousness of his or her cause, will never be able to rationalize a coerced abandonment of fundamental religious tenets. Further, the coerced abandonment will create a perpetual tension between two authorities: temporal and spiritual. Thus, from the theoretical standpoint one finds oneself in agreement with Justice Chase who, in *Calder v. Bull*, reasoned compellingly that such a result could not be correct, for it is impossible to assume that people would have entered into the social contract had they anticipated such a result. From

129. 133 F.2d 703 (2d Cir. 1943).
130. *Id.* at 708.
132. *See id.* (citing sources). Similar sentiments are expressed by Casino: "Because belief in the sacred or transcendent is, by definition, not knowable or verifiable in the physical world, government cannot dictate to or deny such beliefs or experiences and must refrain from regulating their expression." Casino, *supra* note 44, at 139; *see also* Choper, *supra* note 19, at 603 (arguing that religious beliefs are outside competence of the state).
133. 3 U.S. (3 DalI.) 386 (1798).
134. The purposes for which men enter into society will determine the nature and terms of the social compact; and as they are the foundation of the legislative power, they will decide what are the proper objects of it: The nature, and ends of legislative power will limit the exercise of it. This fundamental principle flows from the very nature of our free Republican governments, that no man should be compelled to do what the laws do not require; nor to refrain from acts which the laws permit. There are acts which the Federal, or State, Legislature cannot do, without exceeding their authority. There are certain vital principles in our free Republican governments, which will determine and over-rule an apparent and flagrant abuse of legislative power; as to authorize manifest injustice by positive law; or to take away that security for personal liberty, or private property, for the protection whereof the government was established. An *ACT of the Legislature* (for I cannot call it a law) contrary to the great first principles of the social compact, cannot be considered a rightful exercise of legislative authority. The obligation of a law in governments established on express compact, and on republican principles, must be determined by the nature of the power, on which it is founded. A few instances will suffice to explain what I mean. A law that punished a citizen for an innocent action, or, in other words, for an act, which, when done, was in violation of no existing law;
the pragmatic standpoint, such a result will not be conducive to civil peace. With these considerations in mind, one must conclude that the state should not inhibit religion.

Conversely, when the state inhibits belief systems other than religion, the magnitude of harm is less significant. Individuals who hold beliefs and ideologies based on allegedly rational principles of cognition are not placed in a “damned if you do, damned if you don’t” position. At least one “damned” is absent. As one commentator noted, “[t]he more ‘intellectual’ believer . . . can follow a distasteful government order without wrenching his identity.” The individual may be subject to the state’s coercion, but there will be no “extratemporal” sanctions looming over the horizon. Thus, the special treatment of religion is justified, since the only negative effect one would suffer would be the inability to do as one would have liked.

D. Structural Issues in Defining Religion

1. Unitary or Bifurcated?

Many commentators have argued for a bifurcated definition of religion—broad for the Free Exercise Clause and more restrictive for the Establishment Clause. Their reasoning, however, is unpersuasive. For instance, Professor Tribe at one point advocated the later repudiated expansion of the Free Exercise Clause:

\[\text{Beyond the closely bounded limits of theism to account for the multiplying forms of recognizably legitimate religious exercise.}\]

[However], a less expansive notion of religion was required for establishment clause purposes lest all “humane” programs of government be deemed constitutionally suspect. Such a twofold defini-

\[\text{a law that destroys, or impairs, the lawful private contracts of citizens; a law that makes a man a Judge in his own cause; or a law that takes property from A. and gives it to B: It is against all reason and justice, for a people to entrust a Legislature with SUCH powers; and, therefore, it cannot be presumed that they have done it.}\]

Id. at 388 (emphasis added in part and omitted in part).


136. One can argue cogently that an individual can be “wrenched” just as much by having to violate a non-religious, moral belief. What of being forced by the state to do an annual “execution duty,” for example? Before one cringes in disgust, consider that conscription is not much different. For a discussion of conscientious objectors, see infra part III.C.2.b.
tion of religion . . . may be necessary to avoid confronting the state with increasingly difficult choices . . . .

Tribe’s reasoning begs a question, however. To say that a particular exercise is “religious” is to make a mere conclusory statement. The question is, is it? Tribe did not explain why “multiplying forms” of allegedly religious exercises were, indeed, “religious,” and thus were “recognizably legitimate.”

There are two reasons why the bifurcated definition must be rejected. The first was best articulated by Justice Rutledge:

“Religion” appears only once in the [First] Amendment. But the word governs two prohibitions and governs them alike. It does not have two meanings, one narrow to forbid “an establishment” and another, much broader, for securing “the free exercise thereof.” “Thereof” brings down “religion” with its entire and exact content, no more and no less, from the first into the second guaranty, so that Congress and now the states are as broadly restricted concerning the one as they are regarding the other.

The other argument has been advanced by Judge Arlin Adams in his influential concurrence in Malnak:

[A bifurcated definition] would create a three-tiered system of ideas: those that are unquestionably religious and thus both free from government interference and barred from receiving government support; those that are unquestionably non-religious and thus subject to government regulation and eligible to receive government support; and those that are only religious under [the broad definition through the bifurcated interpretation of the Free Exercise Clause] and thus free from governmental regulation but open to receipt of government support.

Thus, the bifurcated approach would create an unwarranted special category of borderline religious beliefs that would be in a more advantageous position than old, clearly religious, movements. However, Judge Adams found no reason to favor this new, more equal than others, category: “If a Roman Catholic is barred from receiving aid from the government, so too should be a Transcendental

137. Laurence Tribe, American Constitutional Law 827-28 (1st ed. 1978). For Tribe’s later views, see infra note 141.


140. Id. at 212-13.
Meditator or a Scientologist if those two are to enjoy the preferred position guaranteed to them by the free exercise clause." 141 For the reasons articulated above, the bifurcated definition must be rejected.

2. Substantive or Functional?
A number of courts and commentators have argued for a functional, rather than a substantive, definition of religion. 142 A functional definition avoids inquiring into the content of belief, concerning itself only with the function of beliefs in a person's life, whereas a substantive definition concerns itself with the belief's substance.

As early as the 1940s, the Second Circuit in United States v. Kauten 143 articulated a functional definition. The case involved a person convicted for refusing to submit to the draft. The defendant, an atheist, claimed exemption as a conscientious objector. However, the applicable statute then, as now, allowed exemptions only on the basis of religious belief. 144

Although the court of appeals affirmed the conviction, it gratuitously proceeded to equate conscience with religious impulse: "[A] response of the individual to an inward mentor, call it conscience or...

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141. Id. at 213. Many recent commentators have found this reasoning persuasive. See, e.g., Gey, supra note 20, at 156; Inger, supra note 5, at 290; Clements, supra note 22, at 536; Eric C. Freed, Note, Secular Humanism, the Establishment Clause, and Public Education, 61 N.Y.U. L. Rev. 1149, 1160 (1986); Douglas Hayes, Note, Secular Humanism in Public School Textbooks: Thou Shalt Have No Other God (Except Thyself), 63 Notre Dame L. Rev. 358, 363-64 (1988). Some pointed out that Professor Tribe had offered no convincing reason for favoring the newer, unconventional belief systems over the older, traditional ones. Inger, supra note 5, at 290. In fairness to Professor Tribe it must be noted that he now rejects the bifurcated approach. He states that the bifurcated definition "constitutes a dubious solution to a problem that, on closer inspection, may not exist at all." Laurence Tribe, American Constitutional Law 1186 (2d ed. 1988). However, a brief discussion of his views is appropriate, since arguments for bifurcated definition are still occasionally advanced. While it is possible to argue that new vulnerable systems of belief deserve heightened protection, it is clear that the government cannot make them officially preferred beliefs. Yet, this would be the result of adopting bifurcated definitions of religion.


143. 133 F.2d 703 (2d Cir. 1943).

144. Nothing contained in this Act . . . shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form.

Selective Training and Service Act of 1940 § 10(a)(2), 50 U.S.C. app. § 305(g) (1942). See infra section III.C.2.b. for discussion of conscientious objector cases and the applicable standard.
God . . . is for many persons at the present time the equivalent of what has always been thought a religious impulse."\(^{145}\) Kauten was the first influential judicial opinion to focus on the role allegedly religious belief played in the adherent’s life.

Later commentators justified the reliance on functional definitions by raising the specter of bias against unfamiliar or unappealing religions. For them, content-based definitions created an unacceptable risk of excluding “beliefs that are unfamiliar to the definer.”\(^{146}\)

While most would agree that, in matters of religion,

> [d]elicacy in probing and sensitivity to permissible diversity is required, lest established creeds and dogmas be given an advantage over new and changing modes of religious belief, [and that] [n]either the trappings of robes, nor temples of stone, nor a fixed liturgy, nor an extensive literature or history is required to meet the test of beliefs cognizable under the Constitution as religious,\(^{147}\)

nevertheless, defining religion in functional terms is fundamentally flawed.

Defining religion functionally displays a bias of its own. The functionalist’s bias is anti-conceptual. Proponents of functional definitions assume that, just because a religion might be unfamiliar, a definer will not be able to conceptualize it as such. Starting from this premise, the functionalist adherent next posits that what cannot be conceptualized cannot be substantively defined. This assertion, however, flies in the face of human experience.

Human life is impossible without conceptualization. We know a chair as a “chair,” even though we may have never before seen that particular chair. Even when a chair does not resemble conventional chairs (such as a Scandinavian design whereby one sits on the knees in order to keep the spine straight), we still recognize it as a “chair” and not as a “table.” Thus, when a functionalist skeptic asserts that one is not able to conceptualize, and therefore define, an “unfamiliar” religion, he or she, in effect, makes an epistemological challenge that must be met head on.

A challenge to our ability to conceptualize is a challenge to our ability to acquire knowledge. A challenge to our ability to acquire knowledge is a challenge to our nature as humans:

\(^{145}\) 133 F.2d at 708.

\(^{146}\) Note, Religion and the State, 100 HARv. L. REV. 1606, 1623-24 (1987) [hereinafter Harvard Note II].

An animal knows only a handful of concretes: the relatively few trees, ponds, men, and the like it observes in its lifetime. It has no power to go beyond its observations—to generalize, to identify natural laws, to hypothesize causal factors, or, therefore, to understand what it observes. A man, by contrast, may observe no more (or even less) than an animal, but he can come to know and understand facts that far outstrip his limited observations. He can know facts pertaining to all trees, every pond and drop of water, the universal nature of man. To man, as a result, the object of knowledge is not a narrow corner of a single planet, but the universe in all its immensity, from the remote past to the distant future, and from the most minuscule (unperceivable) particles of physics to the farthest (unperceivable) galaxies of astronomy.¹⁴⁸

Therefore, in denying our conceptual ability, the skeptic commits a fundamental error.

Objectivist philosophy gives the following definition of “concept”: “[a] concept is a mental integration of two or more units possessing the same distinguishing characteristic(s), with their particular measurements omitted.”¹⁴⁹ As elaborated by another philosopher:

Man retains his knowledge in the form of concepts. Beginning with the perceptually given concretes of his sensory experience, man forms concepts through a mental process of abstraction and integration. He abstracts, or mentally ‘lifts out,’ common characteristics of observed existents, and integrates these characteristics into a single mental unit, a concept, which is used thereafter as an open-ended classification subsuming an unlimited number of concretes of a particular kind.¹⁵⁰

The open-ended nature of concepts is especially important in the context of the skeptic’s challenge. For, if concepts are open-ended, then it is indeed possible to formulate a substantive definition without the danger of underinclusiveness.¹⁵¹

¹⁴⁸ PEIKOFF, supra note 87, at 73-74.
¹⁴⁹ RAND, supra note 3, at 17.
¹⁵⁰ SMITH II, supra note 83, at 137 (emphasis added).
¹⁵¹ Rand addressed precisely this point:
It is crucially important to grasp the fact that a concept is an ‘open-end’ classification which includes the yet-to-be-discovered characteristics of a given group of existents. All of man’s knowledge rests on that fact . . . . Since concepts represent a system of cognitive classification, a given concept serves (speaking metaphorically) as a file folder in which man’s mind files his knowledge of the existents it subsumes. The content of such folders varies from individual to individual, accord-
Understanding the true "open-endedness" of concepts (an attribute inherent in the very concept of "concept") also allows us to understand that the fear of "conceptual bias" is totally unjustified.

Additionally, Objectivism has demonstrated that all knowledge is hierarchical: concepts are formed based on previously known concepts, etc. To give an example: first we form concepts "table" and "chair," then we proceed onto "furniture." But there is no infinite regress of concepts; instead, all knowledge can be visualized as a kind of "inverted pyramid." At the bottom of this pyramid there are what Rand described as "axiomatic concepts" or "irreducible primaries," i.e., certain fundamental underpinnings without which no conceptual knowledge is possible. Rand identified them as "existence," "identity," and "consciousness":

One can study what exists and how consciousness functions; but one cannot analyze (or "prove") existence as such, or consciousness as such. These are irreducible primaries. (An attempt to "prove" them is self-contradictory: it is an attempt to "prove" existence by means of non-existence, and consciousness by means of unconsciousness.)

Thus if the skeptic attempts to deny the validity of any concept (e.g., "furniture" or "religion"), he or she, in effect, denies his or her own existence, identity, and consciousness. This is so because all the concepts up the inverted pyramid necessarily rest on the three axiomatic concepts Rand identified, just as the higher concept "furniture" rests on such lower concepts as "table" and "chair." Any attempt to

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RAND, supra note 3, at 60-61.

152. Of course, the file folder (the concept) is not the same as the label (the definition) that identifies and condenses the folder's contents. See PEIKOFF, supra note 87, at 105. However, this distinction does not change the argument presented above.

153. SMITH II, supra note 83, at 138.

154. RAND, supra note 3, at 52.

155. Id.

156. Rand's revolutionary discoveries in the field of epistemology are beginning to be taken into consideration and applied to analysis of legal issues by legal academe. For a description of Rand's view of the primacy of existence, see Gary Lawson, Legal Theory: Proving the Law, 86 NW. U. L. REV. 859, 866 n.23 (1992) ("The primacy of existence is axiomatic, meaning that it is implicitly presupposed by any attempt to question, deny, or justify it.
deny conceptual knowledge is an attempt to write oneself out of existence. For the foregoing reasons, the conceptual obstacles to defining religion do not appear valid.

3. Definition by Analogy?

Others have proposed defining religion by analogy with other religions. This theory relies primarily on the Seeger-Welsh line of cases. In Seeger-Welsh the Supreme Court enunciated the "parallel belief" test. However, this approach has a fundamental flaw. Its acceptance of acknowledged religions as yardsticks for other religions, followed by the query of whether the claimed religion is a functional equivalent, renders it unintelligible: "[F]unctionally equivalent in what way?"

Clearly, depending on one's preferences, one can make the analogies wide or narrow. If the analogy is narrow, there will be a problem of underinclusiveness. Conversely, if the analogy is wide, there will be a problem of overinclusiveness, such as in the case of secular humanism. Thus, the result is bound to be arbitrary. The analogical test fails to bring clarity to the issue.

E. The Need for an Intelligible Definition of Religion

As a final step in preparing to define religion, a brief comment of the paramount goal is in order. Too often the difficulties that appear insurmountable in dealing with the parameters of religion are caused by imprecise use of language. Accordingly, the primary goal should be to make the definition intelligible—a goal that has not been achieved to date.

For example, some use the term "non-theist" in its non-religious meaning (i.e., non-theist as a person who does not subscribe to any religious system). However, this usage conflicts with the use of

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157. Greenawalt, supra note 98, at 762-76 (marshalling arguments and cases in support of the analogical approach).


159. Ingber, supra note 5, at 273.

the term in the context of describing a religion, such as the "nontheistic religion" of Seeger.\footnote{Seeger, 380 U.S. at 166, 174-75.} Another example that did not receive a satisfactory explanation from the commentators is the Supreme Court’s use of the phrase "religion of secularism."\footnote{School Dist. v. Schempp, 374 U.S. 203, 225 (1963). Both of these usages appear to run contrary to The Law of Contradiction. See supra note 115.}

One author, advising courts on determining whether a particular belief has a religious character, gives the following advice: Courts, in looking to a belief’s character, should “determine whether its ‘ultimate concern’ has ‘an object which transcends the empirical form and contents of the phenomenal world.’”\footnote{This and similar passages can be explained and justified only if we assume that the Supreme Court means “anti-religion” in the context of hypothesizing about the “religion of secularism.” Indeed, the reading of the First Amendment as prohibiting the establishment of religion and anti-religion is quite persuasive. See Merel, supra note 42, at 814 (arguing that the First Amendment was meant to limit state interference in religious matters, and that it should protect religious and anti-religious—“irreligious,” in Merel’s terminology—expression or belief “concerning fundamental matters of life and death, creation, and moral law”). However, one should be warned against reading “non-religion” into the Supreme Court language. Can one really establish something that is defined as what it is not, rather than what it is? That would be rather difficult.}

Needless to say, no information is given as to exactly how the object of ultimate concern would transcend our world, the existence of a world other than the phenomenal world, how the author perceives this non-phenomenal world, and if he does, how one can verify this claim. With so many gaps in its basic premise, the statement must be classified as unintelligible.

Still other commentators and courts\footnote{M. Elisabeth Bergeron, Note, “New Age” or New Testament?: Toward a More Faithful Interpretation of “Religion,” 65 ST. JOHN’S L. REV. 365, 386 (1991) (quoting with approval James McBride, Paul Tillich and the Supreme Court: Tillich’s “Ultimate Concern” as a Standard in Judicial Interpretation, 30 J. CHURCH & ST. 244, 270 (1988)).} recently began using the unintelligible term “transcendent reality” in the context of defining religion. However, we only know one reality, the one in which we live.\footnote{Smith v. Board of School Comm’rs, 655 F. Supp. 939, 980 (S.D. Ala.), rev’d, 827 F.2d 684 (11th Cir. 1987); EEOC v. Tree of Life Christian Sch., 751 F. Supp. 700, 712 (S.D. Ohio 1990).} Naturally, the same argument applies to those who think that

\footnote{Suppose for the sake of argument that, counting our reality as number one, and transcendent reality as number two, we refer to a “third,” “fourth,” or “fifth” reality, defining the fifth reality as the reality that follows the fourth reality in a hierarchy of realities above or parallel with the transcendent reality. It is obvious that the conversation about the fifth reality cannot proceed until we assign some meaning to the term I allege describes and modifies reality. See infra text accompanying note 169. Our definition does not fulfill this task,}
using "ultimate reality" instead of "transcendent reality" would rescue them from the epistemological quandary.

Still others talk about the "objective nature of the transcendent." This notion, of course, borders on the ridiculous. If the transcendent has an objective nature, it must be empirically verifiable and would cease to be a matter of faith.

Webster's defines "transcendence" as "extending or lying beyond the limits of ordinary experience," "being beyond the limits of all possible experience and knowledge," "being beyond comprehension," and, finally, "transcending the universe or material existence." Presumably, by using this term its users attempt to convey some information. Yet, by its own terms, "transcendence" indicates that it (whatever it is) is beyond human comprehension. Thus, by its own terms it cannot convey any information or have any meaning. As pointed out by J. Passmore:

The very . . . fact that it is logically impossible ever to say of a transcendental Being that he is here rather than there and so to refer to a situation as 'this' in which he is particularly present—makes [religious statements] unusable in explaining, predicting, describing and justifying.

All the examples above have a similar trait—language that is used in an internally inconsistent manner; words are used outside of proper contexts, attributes under discussion are not knowable nor do they provide a positive knowledge of the concepts they allege to describe, and they are not compatible with known facts. These approaches constitute a shaky foundation for building a constitutional definition of religion. This Article attempts to discard the contradicto-

since it involves yet more words without meaning in that context (i.e., "fourth," "fifth") and, as such, is unintelligible.

166. JOHN A. ROBINSON, HONEST TO GOD 29 (1963).
167. McBride, supra note 163, at 270.
168. Since no respectable scientist has ever claimed to have discovered, and empirically verified, the nature of "transcendence," it is safe to dismiss this argument out of hand. Of course, more sophisticated commentators prefer to cloak their confusion in an avalanche of words. Indeed, one scholar counted no less than thirty-five different kinds of transcendence. Freeman, supra note 27, at 1557. The transcendences listed ranged from "transcendence in the sense of loss of self-consciousness" and "transcendence of culture" to "transcendence [as becoming] divine or godlike" and "transcendence [as] . . . plateau-living." Id. (quoting ABRAHAM H. MASLOW, THE FARTHER REACHES OF HUMAN NATURE 269-79 (1971)).
170. JOHN PASSMORE, PHILOSOPHICAL REASONING 98 (1961).
171. SMITH II, supra note 83, at 61-62.
ry terms and to proceed by using the etymologically sound, and hopefully non-controversial, terms outlined in part II.B. First, however, the intelligibility principle may best be understood by applying it in three analytical settings.

1. Defining a Chair

A candidate for a faculty position at a prominent law school once gave a presentation, the thesis of which was that we could not be sure of our perception of reality. One of his listeners pointedly inquired, “Surely, you do not mean we can’t perceive this chair?” “How can you be sure it is a chair?” was the answer of the (as it turned out, unsuccessful) candidate.

Occasionally, the commentary in law reviews sounds as if the academe has finally welcomed the hapless candidate. Relevant to this analysis, however, is that the candidate’s own words undermined his skepticism. The premise that reality cannot be reliably perceived was contradicted by the candidate’s use of language, which had to be perceived by persons with whom he was attempting to communicate. The very process of discourse presupposes that reality can be reliably perceived. Thus, by attempting to state the premise, our candidate, in essence, refuted it.

Therefore, from this point, treating as self-evident the proposition that we can not only be sure it is a chair, but also that we can give an intelligible description and definition of it, we proceed to analyze more difficult examples.

2. Defining a “Secular Humanist”

For some, Secular Humanism is the root of all evil. While complaining about it is no longer in vogue, occasionally it is still raised as a paradigm of evil by the unsophisticated members of the religious right. Earlier, the House of Representatives, finding no better use for its time and the taxpayers’ money, wanted to expel its malev-

172. “[T]he words by which we signify ‘tables’ and ‘chairs’ are only somewhat arbitrary sounds, ... even the visible ‘furniture’ of the world is unsubstantial ... .” Gerald Graff, “Keep off the Grass,” “Drop Dead,” And Other Indeterminacies: A Response to Sanford Levinson, 60 Tex. L. Rev. 405, 405 (1982).

173. In Randian terms, this is known as “The Fallacy of the ‘Stolen Concept’”. See Peikoff, supra note 87, at 136-37.

volent presence from the nation’s public schools, to be joined by the Senate just a few years later. Former Secretary of Education William Bennett would deny it any place in American tradition, asserting that “[o]ur values as a free people and the central values of the Judeo-Christian tradition are flesh of the flesh and blood of the blood.”

For others, however, Humanism, and more broadly the principles of the Enlightenment, represent the best in humanity. For example, Professor Graeme Forbes responded to Secretary Bennett by stating:

Evidently, the Secretary thinks there is an intimate relationship between our values and those of that tradition, but most of his former colleagues [Secretary Bennett is a philosopher by education] would greet with derision the thesis that there is some conceptual or logical dependency of moral values or ethical principles upon the theological doctrines characteristic of the tradition. Stealing and killing are not wrong because God forbids them; presumably, God forbids them because they are wrong. The grounds of moral value do not lie in divine commands. Perhaps all Dr. Bennett meant was that in some historical or cultural way, the values that support the institutions of a free society are derived from the Judeo-Christian tradition. Among the central free-

175. In 1976, Representative John B. Conlan (R-Arizona) introduced an amendment to the Higher Education Amendments of 1976 stating, inter alia:

No grant, contract, or support is authorized under the foreign studies and language development portions of Title II of the bill for any educational program, curriculum research and development, administrator-teacher orientation, or any project involving one or more students or teacher-administrator involving any aspect of the religion of secular humanism.

122 CONG. REC. 13,532 (1976). The amendment passed by a vote of 222 to 174. Since a similar provision was not added in the Senate version of the bill, the provision was later dropped from the final version. See H.R. REP. No. 1701, 94th Cong., 2d Sess. 211 (1976), reprinted in 1976 U.S.C.C.A.N. 4713, 4912.


177. Susan F. Rasky, Bennett Vows Aid to Church Schools, N.Y. TIMES, Aug. 8, 1985, at A18 (quoting Bennett). But cf. infra note 254 (illustrating one objection to the use of the term "Judeo-Christian").
distinguish free societies from their opposites are freedom of inquiry, of expression and tolerance of a variety of philosophical, religious and political outlooks. The idea that we owe such values to the Judeo-Christian tradition is ludicrous. We owe them to the Enlightenment.178

Another defense of Humanism also came from the President of the American Civil Liberties Union ("ACLU"):

The ACLU has been accused of being antireligious. That is not true. [W]e have gone to court to defend free exercise of religion in dozens of cases. The overriding principle, as in the case of free speech, is that the liberty of all sectors of the community must be protected. One part is the religious community, and we shall continue to protect its rights. But there is another tradition—the tradition of the Enlightenment, of humanism. The Constitution requires us to recognize that the religion clauses protect the heirs to that tradition as well.179

In light of the disagreement, it is worthwhile to ask whether it is possible to define Secular Humanism. Several points must be addressed.

In the context of Establishment Clause challenges, Secular Humanism is usually defined not by secular humanists (whoever they may be), but by people who disagree with it as a belief system. To make their case, they ascribe to Secular Humanism many a deleterious effect. One otherwise sophisticated attack against Secular Humanism180 asserts that among its societal ramifications are totalitarianism, fascism, communism, racism, unethical capitalism, psychoanalysis, and the "relativist" judicial philosophy of Oliver Wendell Holmes.181


Addressing a Jewish group later, Secretary Bennett allowed that "one does not have to assent to the religious beliefs that are at the heart of our common culture to enjoy its benefits." Secretary of Education William Bennett, Address to the American Jewish Committee (May 15, 1982), reprinted in Dorsen, supra note 52, at 872 n.41 (the article is silent as to whether the Secretary was profusely thanked).

179. Dorsen, supra note 52, at 872-73 (citations omitted).

180. See Whitehead & Conlan, supra note 106; see also supra note 175 (illustrating the former Representative Conlan's responsibility for introducing the amendment to prohibit the teaching of Secular Humanism).

181. Whitehead & Conlan, supra note 106, at 55-61. David Rosenbaum pointed out that, to the religious right, "'secular humanism' has a definite meaning. It stands for everything they are opposed to, from atheism to the United Nations, from sex education to the theory of
However, as another scholar responded,\textsuperscript{182} "non-theists come in an almost infinite variety of forms, and generalizations about them are exceedingly dangerous."\textsuperscript{183} Clearly, the disregard for human rights inherent in totalitarianism, fascism, communism, and racism (I am inclined to let go of psychoanalysis) can be more logically ascribed to their disdain of individual rights, rather than reliance on ill-defined Secular Humanism. That atheism does not necessarily lead to disdain for individual rights can be easily demonstrated to anyone who takes the trouble to acquaint him- or herself with modern libertarian thought (historically heavily influenced by Objectivism).\textsuperscript{184} That theism does not necessarily lead to respect for individual rights is amply demonstrated by the examples of Iran, Iraq, Malaysia (the intolerance of which extends to musical works with inappropriate connotations\textsuperscript{185}), and a host of other countries, including the United States.\textsuperscript{186}


\textsuperscript{183} Id. at 55.

\textsuperscript{184} For a brief description of the strongly anti-religious and ardently pro-individual-rights philosophy of Objectivism, see supra text accompanying notes 75-83. For Objectivist analysis of allegedly unethical capitalism, see Ayn Rand, What Is Capitalism?, in \textit{Capitalism: The Unknown Ideal} 11-19 (1966); for racism see Ayn Rand, Racism, in \textit{The Virtue of Selfishness} 172 (1964) ("Racism is a barnyard . . . version of collectivism."). See generally Ayn Rand, The "Conflicts" of Men's Interests, in \textit{The Virtue of Selfishness} 57, 122 (1964); Ayn Rand, Man's Rights, in \textit{The Virtue of Selfishness} 122 (1964); Ayn Rand, Collectivized "Rights", in \textit{The Virtue of Selfishness} 135 (1964).

\textsuperscript{185} In 1984 the Malaysian government objected to the scheduled performance of Bloch's famous cello rhapsody "Schelomo" (portraying the meditations of King Solomon), leading to protests and the cancellation of the New York Philharmonic's tour. The work has been banned in Malaysia because of its overtly Jewish themes. See, e.g., Malaysian Dismisses Loss of Philharmonic, N.Y. Times, Aug. 14, 1984, at C14.

\textsuperscript{186} As noted by Judge Rovner, now of the Seventh Circuit:

Cases involving allegations of racial and gender-based discrimination, while now commonplace, rarely provoke the expressed defense that such discrimination is justified. In contrast, religious discrimination—including discrimination against those who do not believe in God—remains openly defended by some in a way that most of our society no longer tolerates with respect to other forms of discrimination.
It is also instructive to trace the history of the modern legal usage of the term Secular Humanism. It was adopted by Justice Black from the amicus curiae brief submitted by the American Humanist Association in *Torcaso v. Watkins* and authored by Joseph L. Blau, then Professor of Religion at Columbia University. Professor Blau apparently used the term to distinguish “secular” from “religious” humanists.

Thus, the use of the term was an attempt to avoid terminological confusion. In retrospect, this attempt was not successful. Leo

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This is true even though the concerns underlying the prohibition of religious discrimination stem from the Bill of Rights itself.


In the old days of the republic, atheists were routinely excluded from judicial processes. Thus, for the most part they could not vindicate their rights. This attitude is perhaps best exemplified by the Supreme Court of Tennessee:

> [O]ur conviction is, that not only all truth, both in speech as well as in conduct, must necessarily be largely dependent upon a sense of religious responsibility; but we may add, that the man who has the hardihood to avow that he does not believe in a God, shows a recklessness of moral character and utter want of moral sensibility, such as very little entitles him either to be heard or believed in a court of justice sitting in a country designated as Christian.

Odell v. Koppee, 52 Tenn. (5 Heisk.) 88, 92 (1871) (reversing the lower court, which insisted on interrogating the plaintiff regarding his alleged “want of religious belief,” rather than allowing the defendant to prove it by witness testimony).

Today this discrimination continues. See, e.g., Society of Separationists, Inc. v. Herman, 939 F.2d 1207, 1210 (5th Cir. 1991), aff’d on reh’g, 959 F.2d 1283 (5th Cir. 1992), cert. denied, 113 S. Ct. 191 (1992) (In *Society*, the presiding judge had jailed Robin Murray O’Hair, the granddaughter of Madalyn Murray O’Hair, for refusing to take either an oath or affirmation when called for jury duty. However the Fifth Circuit did find the judge’s action to be violation of the juror’s right to Free Exercise guaranteed by the First and Fourteenth Amendments.).

The most recent example of the disregard of individual rights by avowed theists involves domestic terrorism against “abortionists.” The latest shot in this campaign of murder and intimidation featured Rev. David Trosch advocating, as “justifiable homicide,” the killing of doctors performing abortions. See Martin E. Marty, *When Religion Calls, Healers or Killers May Answer*, CHI. TRIB., Aug. 27, 1993, § 1, at 23.


189. According to Dr. Russell Kirk, the term “secular humanism” was the result of a battle for the use of the term “humanism” between “ethical humanists” and “religious humanists.” Shockingly, the term “secular humanists” was eventually applied to religious humanists, to distinguish them from ethical humanists. See Smith v. Board of Sch. Comm’rs, 655 F. Supp. 939, 961-62 (S.D. Ala 1987).
Pfeffer, the noted constitutional attorney who argued Roy Torcaso’s case before the Supreme Court, wrote “Mr. Torcaso was an atheist and probably knew no more than I then did what was meant by ‘secular humanism.’” Pfeffer did not use the term in his brief. As a result, Secular Humanism now “appears to be nothing more than an elusive term of art used to describe anyone not believing in the literalness and comprehensiveness of the Bible.” Presently, critics of Secular Humanism discern the following “six principle tenets” of this alleged “religion”:

1) the denial of the relevance of a deity;
2) the supremacy of human reason;
3) the inevitability of progress;
4) science as a guiding force for progress;
5) the centrality and autonomy of man; and
6) adherence to the theory of evolution.

The critics analyze these six principal tenets and argue that 1) “the Secular Humanist finds his religion expressed in a heightened sense of personal life,” 2) “it is impossible to prove by reason alone that reason has the validity accorded to it by humanism,” 3) the evidence does not support the inevitability of progress (thus, presumably, this belief is essentially religious), 4) “science itself assumes a religious character” 5) “[i]n an, not God, controls the destiny of the human race” (it is not clear how this proves the religious nature of Secular Humanism), and 6) “neither theory of origin, creationism or evolutionism, is capable of scientific proof.” From these arguments the critics draw the conclusion that Secular Humanism is a religion.

Their conclusion, however, is misguided. The term “Secular Humanism,” as defined by its opponents for the purposes of converting it into a religion, is vague to the point of being unintelligible.

190. Leo Pfeffer, Letter to the Editor, N.Y. TIMES, June 19, 1985, at A22.
194. Id. at 38 (quoting O. GUINNESS, THE DUST OF DEATH 14 (1973)).
196. Id. at 42.
197. Id. at 45.
198. Id. at 53.
The futility of categorizing secular humanists as proponents of a single religion is illustrated by the following example: Most modern libertarians will meet all six criteria; so will most modern communists. Yet, these two groups would be as opposed to each other philosophically and politically as one can imagine.

William Safire traced the first use of the term to 1933, when it was used as an antonym to Catholicism. Currently, he defines it as:

1) a philosophy of ethical behavior unrelated to a concept of God;
2) a characterization of an emphasis on individual moral choices as having the common denominator of atheism;
3) an attempt to besmear political opponents by impugning their faith in God.

Therefore, one must conclude that most lawyerly attempts to define Secular Humanism are fundamentally flawed. The academics who fill law review pages with quotations from Humanist Manifestos, fail to perceive that, in real life, the term is used "as a linguistic bludgeon, a chance to beat over the head all who oppose 'the religious right' with a club incorporating all the issues." "[It] is a bare-knuckles fight," said Safire, "and etymology, lexicography and semantics are right in the middle of it."

The foregoing makes it clear why it would be straining the language to label Secular Humanism a religion. It is not enough to

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199. "In face of this secular humanism, the return of the Oxford leaders to Catholic doctrine and practice necessarily signified a criticism of the secular standpoint, and the provision of a positive alternative." William Safire, Secs Appeal, N.Y. TIMES, Jan. 26, 1986, § 6 (Magazine), at 7 (emphasis omitted) (quoting from Merriam-Webster's files). However, he considers the etymology and history of the term less important than its political implications: [S]ecular [H]umanism [was an] even more inviting target to preachers than atheism, because "godlessness" had been denounced so heatedly for so long. Here was a way to slam opposition to prayer in schools, to castigate sex education in schools, to blast abortion—all potent social issues—while mixing in disapproval of the drug culture, permissiveness, pornography, short skirts and live-in lovers, and tying all these in to a rejection of belief in God. The target was Heaven-sent, or heaven-sent, as you prefer.

Id. at 8.

200. Id. at 8.

201. One could say, they suffer from a sometimes terminal case of "ivorytoweritis." Compare observation by Orwell: "One has to belong to the intelligentsia to believe things like that: no ordinary man could be such a fool." George Orwell, Notes on Nationalism, in THE COLLECTED ESSAYS, JOURNALISM AND LETTERS OF GEORGE ORWELL 361, 379 (Sonia Orwell & Ian Angus eds., 1968).

202. Safire, supra note 199, at 8.

203. Id.

204. Unfortunately, even though the Torcaso statement was dictum, most courts treated it
say that it should be construed as a religion because it answers “ultimate” or “fundamental” questions, questions “regarding the purpose and meaning of life”—every respectable philosophy attempts to do just that. The confusion between humanisms religious and secular; the use of the term as political invective, rather than a descriptive label; the various meanings ascribed to it by its proponents and opponents—all make defining Secular Humanism as a religion nonsensical, and stem from our failure to define religion. To say that something “secular” is “religious” is to say that black is white.


The Supreme Court has never established a comprehensive text for determining the “delicate question” of what constitutes a religious belief for purposes of the first amendment, and we need not attempt to do so in this case, for we find that, even assuming that [S]ecular [H]umanism is a religion for purposes of the establishment clause, Appellees have failed to prove a violation of the establishment clause . . . .” Id. at 689.

205. Freed, supra note 141, at 1168-69.

206. For a discussion of the dereliction of modern philosophers to fulfill this professional obligation, see supra note 22.

207. Such as labeling it “morality without religion,” Schmid, supra note 192, at 383 (quoting with approval A. HARDING, RELIGION, MORALITY AND LAW 1 (1956)), and then arguing that it “falls within the legal definition of religion,” id. at 393, in apparent violation of The Law of Contradiction. See supra note 115.

208. In addition to the James Kennedy definition, “godless, atheistic, evolutionary, amoral, collectivist, socialist, communist, religious,” see supra note 115, and a definition given in a pamphlet, Is Humanism Molesting Your Child?, where Secular Humanism was defined as a belief in “equal distribution of America’s wealth . . . control of the environment, control of energy and its limitation . . . the removal of American patriotism and the free enterprise system, disarmament and the creation of a one-world government,” Ingber, supra note 5, at 318 n.534 (quoting Barringer, Department Proposes Rule to Curb Teaching of “Secular Humanism,” WASH. POST, Jan. 10, 1985, at A19), there is the Michael J. Rosenberg definition, “new label employed to indict anyone who opposes school prayer, believes in evolution, or disagrees with the religious right’s views on abortion,” see Safire, supra note 199, at 6, and the Roy R. Torcaso definition (Roy Torcaso of the Torcaso v. Watkins fame), “joyous service for the greater good of all humanity in this natural world and advocating the methods of reason, science, and democracy,” id. (quoting CORLISS LAMONT, THE PHILOSOPHY OF HUMANISM).

209. “[O]f or relating to worldly things as distinguished from things relating to church and religion; not sacred or religious; temporal; worldly . . . .” WEBSTER’S, supra note 73, at 1037. “Worldly, not religious or other-worldly,” Safire, supra note 199, at 8.

210. This, of course, would not be anything new. See JONATHAN SWIFT, GULLIVER’S
3. Defining a “Godless” (Yet Religious) “Atheist”

Even more absurd are attempts to define atheism out of existence by claiming that it is, fundamentally, a religion. Yet, this line of argument is consistently present in the legal literature.\textsuperscript{211}

One assertion, for example, is that atheists come in two varieties: religious and secular.\textsuperscript{212} A religious atheist supposedly believes in gods, but not in a Supreme Being.\textsuperscript{213} However, as should be clear from the foregoing discussion, any person who believes in “gods” is a theist, pure and simple. He or she may be a polytheist, but clearly is not non-religious, and thus not an a-theist.

Another line of reasoning adopts the view that any atheist should have the status “of a participant in religion.”\textsuperscript{214} One author would extend the definition of religion to encompass “nonreligious’ or even ‘antireligious’” views.\textsuperscript{215} Another “kitchen-sinks” theism, agnosticism, atheism, secularism, ethics, and humanism as “religious doctrine[s].”\textsuperscript{216} For good measure he adds such “modern deities as science, social science, art, [and] the Gross National Product.”\textsuperscript{217}

\textsuperscript{211} See, e.g., Estate of Hinckley, 58 Cal. 457, 512 (1881) (“As to the word ‘religion’ . . . [i]n its primary sense . . . it imports, as applied to moral questions, only a recognition of a conscientious duty to recall and obey restraining principles of conduct. In such sense we suppose there is no atheist who will admit that he is without religion.”). Modern cases continue singing the same tune. See Jaffree v. James, 544 F. Supp. 727, 729 (S.D. Ala. 1982) (“religion can be . . . atheism”); id. at 732 (“The religion[] of atheism . . . [has] escaped the scrutiny of the courts throughout the years, and make no mistake [it is] to the believers religion[,] . . . .”). But see Welsh v. Boy Scouts of Am., 742 F. Supp. 1413, 1434 (N.D. Ill. 1990) (“[A]theism is not a religion but, on the contrary, a position which is out to ‘undermine and destroy all religion . . . .’”).

\textsuperscript{212} Freeman, supra note 27, at 1555 n.244.

\textsuperscript{213} Id. at 1556 n.244.

\textsuperscript{214} Weiss, supra note 39, at 622-23 n.93. This is a popular view among student-authors. One student author affirmed a sweeping earlier observation that “atheism is a religion.” Craig A. Mason, Note, “Secular Humanism” and the Definition of Religion: Extending a Modified “Ultimate Concern” Test to Moertz v. Hawkins County Public Schools and Smith v. Board of School Commissioners, 63 WASH. L. REV. 445, 453 n.57 (1988) (referring to, among others, “Christian Atheism” and “Muslim Atheism”) (citing from 2 THE ENCYCLOPEDIA OF RELIGION AND ETHICS 173-90 (1922)). To another student author it is “clear that atheists (as that term is commonly understood) . . . could be religious.” Chicago Note, supra note 24, at 552-53.


\textsuperscript{216} Toscano, supra note 25, at 207.

\textsuperscript{217} Id.
To understand such a contradictory line of thought, one has to consider these statements in their historical context. As with those who advocate a broad definition of Secular Humanism, the driving force behind the “let’s say it’s a religion” sentiment is the desire to allow more religious activity in public education, on the theory that to disallow it is to “indoctrinate” students in the alternative “religions” of Secular Humanism, ethics, or science. Having failed to reverse the tide of secularization in schools and in society at large, some parents use the only avenue of protest left open to them.

Sympathy with their plight is understandable. It is clear that their rights not to have their children indoctrinated by the state are being violated, just as the rights of atheist parents were violated until the historic religion decisions of the Supreme Court.¹¹⁸ However, to resolve this problem, one must consider whether it is possible to institute a non-indoctrinary system of public education.¹¹⁹ The problem is not going to be solved by arguing that atheism is a religion and thus should be subject to the strictures of the Establishment Clause. For, if we accept the theory that atheism is a religion, nothing else will satisfy the proponents of this theory as a true-blue non-religion in a constitutional context.

Having considered the preliminary matters of philosophical foundations, terminology,¹²⁰ reasons for singling out religion for special constitutional treatment,¹²¹ the necessity for and the kind of a needed definition,¹²² and having disposed of some of the most egregious cases of misdefinitions,¹²³ the remainder of this Article is an attempt to create a new definition of religion, one that will take account of the pitfalls identified above. Part III describes the historical attempts previously made by dictionaries, Framers and other historical

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²¹⁹. See, e.g., Clarence J. Karier, Foreword to, THE PUBLIC SCHOOL MONOPOLY: A CRITICAL ANALYSIS OF EDUCATION AND THE STATE IN AMERICAN SOCIETY (Robert B. Everhart, ed., 1982) (arguing that it is not possible to institute a non-indoctrinary system, and quoting, among others, Daniel Webster, as defining public education as a “wise and liberal system of police, by which property and life, and the peace of society are secured,” id. at xv-xvi, and Mill, who foresaw public education leading to “despotism over the mind,” id. at 549); see also id. at 225-68.
²²⁰. See supra part II.A.
²²¹. See supra part II.B.
²²². See supra part II.C.
²²³. See supra part II.D.
²²⁴. See supra part II.E.
III. DEFINING RELIGION

Faced with the delicate task of defining religion, one has two options: to treat "religion" as a term of art, encompassing whatever the definer chooses it to encompass,225 or to give the term its common sense meaning.226

The Constitution was framed by people well versed in common law and its rules of construction.227 The common law preferred common sense, rather than an artful interpretation of terms.228 It permitted looking beyond the words of a document only if the text was defective on its face. In view of the problems inherent in the "term of art" method, and in view of the preference of the common law to a "plain import of words" construction, this Article adopts the common sense method, modifying it sufficiently to accommodate the non-orthodox,229 after first considering the prior attempts.

A. Dictionaries

Every investigation into the meaning of a term must start with a dictionary definition. One should, of course, always keep in mind the

225. In some instances, this approach leads to defining religion as encompassing non-religion. See, e.g., Merel, supra note 42.

226. The former approach obviously is fraught with problems in that it may bring constitutionally innocuous pursuits, such as scientific research, within reach of the establishment challenge. The latter approach is not without problems either—common sense parochialism may lead one to define religion so narrowly, as to exclude all but the most orthodox.

227. See, e.g., Alexander Hamilton, Final Version of an Opinion on the Constitutionality of an Act to Establish a Bank (1791), reprinted in 8 PAPERS OF ALEXANDER HAMILTON 97, 111 (Harold C. Syrett ed., 1965) (referring to "the usual and established rules of construction").

228. Thus, even though when interpreting written documents the law had to consider intent of the parties, it did so by applying the parties’ words “to that which, in common presumption, may be taken to be their intent.” 1 J. POWELL, ESSAY UPON THE LAW OF CONTRACTS AND AGREEMENTS 244 (Oxford 1790) (emphasis added); see also 2 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND 379 (William S. Hein & Co. 1992) (1765) (“the construction must . . . be . . . agreeable to common understanding”). In moments of lucidity, similar sentiments were also expressed by the Supreme Court. Mapp v. Ohio, 367 U.S. 643, 657 (1961) (“[t]here is no war between the Constitution and common sense”).

229. As stated by Professor Greenawalt, “[u]nless powerful reasons of a legal or social dimension dictate noncorrespondence, [one’s] approach should tie the constitutional concept of religion to concepts in more general use.” Greenawalt, supra note 98, at 757.
caveat of Dr. Johnson, who warned that "dictionaries are like watches; the worst [are] better than none, and the best cannot be expected to go quite true." Merriam-Webster’s definition of the term “religion” is:

1a: the state of a religious;
1b: (1) the service and worship of God or the supernatural; (2) commitment or devotion to religious faith or observance;
2: a personal set or institutionalized system of religious attitudes, beliefs, and practices;
3: scrupulous conformity;
4: a cause, principle, or system of beliefs held to with ardor and faith.

Of these, only one—"the service and worship of God or the supernatural"—can be considered primary. Definition 1b(2) defines religion by referring to "religious faith," yet we still are not elucidated as to what separates "religious" faith from any other. Definition 1a defines religion as being "religious." This is again not helpful. Similarly, definition 2 refers to "religious attitudes," again failing to explain what they are. Definition 3 is a derived usage, not relevant to this inquiry, and definition 4 allows any committed Republican to claim Republicanism as a religion, perhaps correctly describing political zeal, but, as we intuitively know, not tenable philosophically. Thus, we are left with 1b(1) only, which posits that the idea of religion must be inexorably associated with the idea of "god," or the supernatural.

Black’s Law Dictionary defines religion as:

Man’s relation to Divinity, to reverence, worship, obedience, and submission to mandates and precepts of supernatural or superior beings. In its broadest sense includes all forms of belief in the

232. Somehow Democrats always fail to generate the same level of enthusiasm.
233. The statement “[r]epublicans are always right, and I shall always prefer them in my dealings with other people’ could conceivably guide a person’s daily actions; nonetheless, it seems clear (to this author, at least) that this would not be a religion.” Terry L. Slye, Rendering Unto Caesar: Defining “Religion” for Purposes of Administering Religion-Based Tax Exemptions, 6 HARV. J.L. & PUB. POL’Y 219, 231 (1983).
234. Throughout this Article the term “God” refers to the specific deity of Christianity, whereas the term “god” refers to a general idea of a supernatural being.
existence of superior beings exercising power over human beings by volition, imposing rules of conduct, with future rewards and punishments. Bond uniting man to God, and a virtue whose purpose is to render God worship due him as a source of all being and principle of all government of things.\textsuperscript{235}

This definition, derived from a New York case,\textsuperscript{236} differs in several important respects from Merriam-Webster's.\textsuperscript{237} Most notably, it fails to differentiate between the concepts of supernaturalness and superiority.\textsuperscript{238}

It is not inconceivable that beings intellectually or physically superior to humans exist. However, this rationally explainable superiority would be no more mysterious than in the case of a human and an ant. It is the impossibility of an explanation as a matter of principle that makes superiority worthy of consideration in a religious context. Having discarded the superfluous, we are left again with “Man’s relation to Divinity,”\textsuperscript{239} (i.e., presumably, god or gods), or “the service and worship of God or the supernatural.”\textsuperscript{240}

\textbf{B. The Framers, Their Predecessors and Successors}

Some of the thinking on religious matters coming from the Framers and other historical figures was surprisingly enlightened.

\textsuperscript{235} BLACK'S LAW DICTIONARY 1292 (6th ed. 1990) (hereinafter BLACK’S).
\textsuperscript{236} Nikulnikoff v. Archbishop of Russian Orthodox Greek Cath. Church, 255 N.Y.S. 653 (Sup. Ct. 1932). The contract dispute in Nikulnikoff involved, inter alia, a determination of whether the services performed by the plaintiff priest were of religious nature. Id. at 661.
\textsuperscript{237} See supra text accompanying note 231.
\textsuperscript{238} It equates the two by talking about “supernatural or superior,” (emphasis added). See supra text accompanying note 235. An example will be helpful to clarify the point:
A boy is clearly superior to a dog. Well-behaved dogs revere, obey, submit, and just about “worship” their masters. They also submit to the mandates of these “superior” beings. Is a boy a “god” to his dog? If so, is the dog a “god” to an ant?

If superiority is sufficient for classification as a “god,” then how much superiority does one have to possess to be classified as such? The guards in Nazi concentration camps were, as a practical matter, superior (in a physical sense, if the inmates were sufficiently starved) to their victims, exercising practically unlimited power over them and “imposing rules of conduct, with future rewards and punishments.” However, we know intuitively that the superior parties in both examples are not “gods.”

\textsuperscript{239} See supra text accompanying note 235. Parenthetically, none of BLACK'S definitions of religious terms are to be trusted. I successfully challenged BLACK'S editors on account of religious discrimination in the sixth edition of the dictionary, extracting from them a promise to remove the offending entries in the next edition. Letter from Kenneth G. Heimbach, Managing Editor, West Publishing Corp., to Dmitry N. Feofanov (Nov. 16, 1990) (on file with author).
\textsuperscript{240} See supra text accompanying note 231.
While "the definitional issue was largely unforeseen by the Founders,"241 their attempts compare favorably with the rigidity displayed by the 19th century Supreme Court.

For example, Roger Williams disputed the prevailing justifications for governmental authority in matters of conscience. For him, such authority violated God's command that "the most Paganish, Jewish, Turkish, or Antichristian consciences and worships, bee [sic] granted to all men in all Nations and Countries."242 Although this statement was made in the context of an appeal for freedom of conscience, it provides a telling example of the breadth of Williams' thinking.243 Similar thinking would be echoed by Jefferson over a hundred years later.244

However, Williams' broadmindedness in the matters of conscience did not influence the subsequent definitions of religion. Definitional efforts representative of majority thinking in the 18th century include the ones by Franklin (religion is a belief in "the Deity; [and] that he made the world, and govern'd it by his Providence")245 and even the otherwise non-orthodox Thomas Paine (religion is a "man bringing to his Maker the fruits of his heart")246.

Surprisingly, in the question of definition James Madison belonged to the conventional school, defining religion as "[t]he duty which we owe to our Creator."247 However, contrast this with Madison's dislike of official religion and churches:

What influence in fact have ecclesiastical establishments had on

243. In a letter from Williams to the town of Providence (1655):
   There goes many a ship to sea, with many hundred souls in one ship, whose weal and woe is common, and is a true picture of a commonwealth, or a human combination or society . . . . [A]ll the liberty of conscience, [that] I ever pleaded for, turns upon these two hinges, that none of the Papists, Protestants, Jews, or Turks be forced to come to the ship's prayers or worship, nor compelled from their own particular prayers of worship, if they practice any.
244. For Jefferson's statement concerning the purposes of the Virginia Act for Establishing Religious Freedom, see infra text accompanying note 252.
Civil Society? In some instances they have been seen to erect a
spiritual tyranny on the ruins of Civil authority; in many instances
they have been seen upholding the thrones of political tyranny; in
no instance have they been seen the guardians of the liberties of the
people. 248

At the end of his life Madison was firmly in the camp of protes-
tors against ecclesiastical influences that still exist today: "The estab-
lishment of the chaplainship to Congress is a palpable violation of
equal rights, as well as of Constitutional principles." 249 Furthermore,
in an intriguing allusion to the famous "wall of separation" metaphor
of Jefferson, Madison, the drafter of the First Amendment, also used
the word "separation," writing: "Strongly guarded as is the separation
between Religion and Gov't in the Constitution of the United States,
the danger of encroachment by Ecclesiastical Bodies may be illustrat-
ed by precedents already furnished in their short history." 250

Among the Framers, Thomas Jefferson was in a class by himself.
He was extremely tolerant in matters of religion. Well known is his
libertarian affirmation that "[t]he legitimate powers of government
extend to such acts only as are injurious to others. But it does me no
injury for my neighbor to say there are twenty gods, or no god. It
neither picks my pocket nor breaks my leg." 251 This is a remarkable
sentiment.

Jefferson attempted to define religion broadly in the Virginia Act
for Establishing Religious Freedom. In his Autobiography he relates a

248. Id. at 303.
249. James Madison, Monopolies, Perpetuities, Corporation, Ecclesiastical Endowments, in
Elizabeth Fleet, Notes and Documents: Madison's "Detached Memorandum," 3 WM. & MARY
Q. 534 (1946), quoted in O'Malley v. Brierley, 477 F.2d 785, 792 n.7 (3d Cir. 1973).
250. See FRANK SWANCARA, THE SEPARATION OF RELIGION AND GOVERNMENT (1950)
(reproducing a photostatic facsimile of Madison's "Declaration of Separationism," in James
Madison, Monopolies, Perpetuities, Corporations, Ecclesiastical Endowments). The essay is
reproduced in full in the following publications: Fleet, supra note 249, at 534; Galliard Hunt,
Aspects of Monopoly One Hundred Years Ago, a hitherto unpublished Essay by James Madi-
son, HARPER'S MAGAZINE, Mar. 1914, at 489. The Everson Court refers to the essay as well.

Of course, this is not to say that some of the Founders could not be exceedingly
intolerant. Writing in 1788, Oliver Ellsworth, a member of the Constitutional Convention who
later served as Chief Justice of the Supreme Court, stated: "[W]hile I assert the rights of
religious liberty, I would not deny that the civil power has a right, in some cases, to inter-
fere in matters of religion . . . . I heartily approve of our laws against drunkenness, profane
swearing, blasphemy, and professed atheism." 1 AUSON P. STOKES, CHURCH AND STATE IN
THE UNITED STATES 535 (1950).
251. JEFFERSON, Notes on the State of Virginia, supra note 121, at 285 (non-capitalized
"god" in the original).
telling story of its adoption:

[A] singular proposition proved that it's [sic] protection of opinion was meant to be universal. Where the preamble declares that coercion is a departure from the plan of the holy author of our religion, an amendment was proposed, by inserting the word [sic] "Jesus Christ," so that it should read "a departure from the plan of Jesus Christ, the holy author of our religion." The insertion was rejected by a great majority, in proof that they meant to comprehend, within the mantle of it's [sic] protection, the Jew and the Gentile, the Christian and the Mahometan, the Hindoo, and infidel of every denomination.252

Again, the reference to "denomination" lends credence to the hypothesis that Jefferson would define religion very broadly,253 definitely

252. JEFFERSON, Autobiography, supra note 121, at 40 (emphasis added).
253. The consensus in scholarly literature is that Jefferson was a (perhaps unconventional) theist, or, at most, a deist. Many commentators refer to Jefferson's public pronouncements, such as "Almighty God hath created the mind free; . . . [he is the] holy Author of our religion . . . being lord both of body and mind." See JEFFERSON, A Bill for Establishing Religious Freedom, supra note 121, at 346. These commentators fail to consider, however, that Jefferson was first and foremost a "reasonable man" and a consummate politician, with keen knowledge of what was and was not possible in public life. Thus, on many an occasion he asked for less in proposed legislation than his principles demanded, explaining it later by his realization that, had he asked for more, he would not have gotten even the minimum asked for:

I proposed the demolition of the church establishment, and the freedom of religion. It could only be done by degrees; to wit, the Act of 1776 . . . exempted dissenters from contributions to the church, and left the church clergy to be supported by voluntary contributions of their own sect; was continued from year to year, and made perpetual 1779 . . . I prepared the Act for religious freedom in 1777, as part of the revisal, which was not reported to the Assembly till 1779, and that particular law not passed till 1785, and then by the efforts of Mr. Madison. JEFFERSON, A Memorandum (Services to My Country), supra note 121, at 702 (emphasis added).

Additionally, see Jefferson's description of the adoption of his proposal of the act for apportioning of crimes and punishments: "The public mind was ripe for this in 1796, when Mr. Taylor proposed it, and ripened chiefly by the experiment in Philadelphia; whereas, in 1785, when it was proposed to our assembly, they were not quite ripe for it." Id. at 703. Moreover, the original version of the Declaration of Independence contained considerably fewer references to the Almighty than it presently has. JEFFERSON, Autobiography, supra note 121, at 323.

Of course, Jefferson's statements calling into question the very existence of his professed religious belief are considerably less well known. See, for example, Jefferson's advice to a young friend to "[q]uestion with boldness even the existence of a god, because, if there be one, he must more approve of the homage of reason, than that of blindfolded fear." JEFFERSON, Letters, supra note 121, at 902 (letter to Peter Carr, Aug. 10, 1787) (non-capitalized "god" in the original).
outside the narrow confines of traditional "Judeo-Christianity."\textsuperscript{254}

It is then fair to conclude that, while the Framers were predominantly conventional, there existed a definite libertarian strain among some of them. This should not be surprising for men thoroughly steeped in the philosophy of the Enlightenment.

However, by the 19th century the intellectual climate changed. The intellectual consensus prevalent at that time (including, arguably, the falsification of history) is best exemplified by Joseph Story, Justice of the Supreme Court from 1811 to 1845:

Proba[bly at the time of the adoption of the [C]onstitution, and of the amendment to it . . . the general, if not the universal sentiment in America was, that [C]hristianity ought to receive encouragement from the state, so far as was not incompatible with the private rights of conscience, and the freedom of religious worship. An attempt to level all religions, and to make it a matter of state policy to hold all in utter indifference, would have created universal disapprobation, if not universal indignation.

. . . .

But the duty of supporting religion . . . is very different from the right to force the consciences of other men, or to punish them for worshipping God in the manner which they believe their accountability to him requires. It has truly been said, that "religion, or the duty we owe to our Creator, and the manner of discharging it, can be dictated only by reason and conviction, not by force or violence. . . ."

The real object of the amendment was, not to countenance, much less to advance Mahometanism, or Judaism, or infidelity, by prostrating [C]hristianity; but to exclude all rivalry among Christian sects, and to prevent any national ecclesiastical establishment, which should give to a hierarchy the exclusive patronage of the national government.\textsuperscript{255}

The language regarding duties owed "to our Creator" directly antici-
pates the restrictive and parochial thinking pervading Supreme Court jurisprudence for the following century.

C. Courts

The Supreme Court and lower courts on several occasions have attempted to provide constitutional definitions of religion, but each time these efforts have proven unsatisfactory.

1. Traditional Restrictive Definitions
As pointed out by Professor Tribe, "[a]t least through the nineteenth century . . . 'religion' referred to theistic notions respecting divinity, morality, and worship, and was recognized as legitimate and protected only insofar as it was generally accepted as 'civilized' by Western standards."256

Thus, in 1890, in Davis v. Beason257 the Supreme Court gave the following definition: "The term 'religion' has reference to one's views of his relations to his Creator, and to the obligations they impose for reverence for his being and character, and of obedience to his will."258 The obligations the Court mentioned were meant to be the obligations of a good Christian; this led the Court to deny that Mormonism was a legitimate religion.259

Such thinking continued as late as 1931, when Chief Justice Hughes, in United States v. Macintosh,260 still wrote in a similar vein: "The essence of religion is belief in a relation to God involving duties superior to those arising from any human relation."261 Howev-

256. TRIBE, supra note 137, at 826.
257. 133 U.S. 333 (1890).
258. Id. at 342.
259. Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States, 136 U.S. 1, 50 (1890) (holding that the Charter of the Mormon Church was repealed because it was not a religious corporation, since polygamy was a "pretense" according to "the enlightened sentiments of mankind").
261. Macintosh, 283 U.S. at 633-34. Not surprisingly, similar thinking prevailed in most lower courts. See Estate of Hinckley, 58 Cal. 457, 512 (1881) ("[T]he word 'religion' . . . [i]n its primary sense . . . imports . . . a recognition of a conscientious duty to recall and obey restraining principles of conduct.") (citations omitted). But see In re Walker, 66 N.E. 144, 147 (Ill. 1902) (stating that the Illinois constitution guarantees "absolute freedom of thought and faith, whether orthodox, heterodox, Christian, Jewish, Catholic, Protestant, liberal, conservative, Calvinistic, Armenian, Unitarian, or other belief, theology, or philosophy"); Ex parte Jentzsch, 44 P. 803 (Cal. 1896):
er, the new notion of what was "civilized" was fast overcoming the old.

2. Modern Practice
   a. Courts Before Seeger

   It is unnecessary to attempt a definition of religion; the content of
   the term is found in the history of the human race and is incapable
   of compression into a few words.\textsuperscript{262}

   The philosophical foundation of the modern judicial doctrine was
   well developed before its adoption by the Supreme Court. For exam-
   ple, William James, a philosopher active at the beginning of the cen-
   tury, defined religion as "the feelings, acts, and experiences of indi-
   vidual men in their solitude, so far as they apprehend themselves to
   stand in relation to whatever they may consider the divine."\textsuperscript{263}

   One may justifiably complain that as a definition this passage is
   not helpful, and uncharitable commentators might even term it incom-
   prehensible. However, one must acknowledge that, philosophically,
   such language was more advanced than the conventional theism em-
   ployed by the Supreme Court at that time.

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Liberty of conscience and belief is preserved alike to the followers of Christ, to
Buddhist, and Mohammedan, to all who think that their tenets alone are illumined
by the light of divine truth; but, it is equally preserved to the skeptic, agnostic,
atheist, and infidel, who says in his heart, "There is no God."

\textit{Id.} at 803-04 (striking Sunday law restrictions on barbers as violative of California constitution); \textit{In re Knight's Estate}, 28 A. 303, 303 (Pa. 1894) ("[I]n its broadest sense religion
comprehends all systems of belief in the existence of beings superior to, and capable of exer-
cising an influence for good or evil upon, the human race, and all forms of worship or
service intended to influence or give honor to such superior powers."); \textit{Board of Educ. v.
Minor}, 23 Ohio St. 211, 248 (1872). In \textit{Minor}, the court asserted that:

[w]hen Christianity asks the aid of government beyond mere impartial protection, it
denies itself. Its laws are divine, not human . . . . United with government, relig-
ion never rises above the merest superstition; united with religion, government
never rises above the merest despotism; and all history shows us that the more
widely and completely they are separated, the better it is for both.

\textit{Id.} at 248. The court also gave protection to "the religion of man, and not the religion
of any class of men." \textit{Id.} at 246.

\textsuperscript{262} United States v. Kauten, 133 F.2d 703, 708 (2d Cir. 1943).

\textsuperscript{263} \textit{William James, The Varieties of Religious Experience} 31 (Martin E. Marty
Circuit, James's use of the word "divine" was "in its broadest sense as denoting any object
that is godlike, whether it is or is not a specific deity." United States v. Sun Myung Moon,
(citing \textit{James, supra}, at 34).
Although the Supreme Court was slow to react, the upheaval brought about by the Second World War resulted in an increase in social interaction and tension between the heretofore homogenous and tightly-knit groups populating the United States. It is not surprising, then, that the first cracks in the otherwise solid wall of orthodoxy appeared during the war.

In 1943, in *United States v. Kauten*, the Second Circuit decided what otherwise was a fairly conventional case of conscientious objection attempted by an atheist. The court affirmed the conviction, but added a highly significant dictum:

Religious belief arises from a sense of the inadequacy of reason as a means of relating the individual to his fellow-men and to his universe . . . . It is a belief finding expression in a conscience which categorically requires the believer to disregard elementary self-interest and to accept martyrdom in preference to transgressing its tenets . . . .

. . . [Conscientious objection] may justly be regarded as a response of the individual to an inward mentor, call it conscience or God, that is for many persons at the present time the equivalent of what has always been thought a religious impulse.265

The *Kauten* language was quoted with approval in Justice Frankfurter's dissent in *Board of Education v. Barnette*, the same case in which Justice Jackson, writing for the Court, made a classic statement concerning freedom of thought: "[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." Just a year later, the Supreme Court took the Second Circuit's invitation and broke the mold of orthodoxy in *United States v. Ballard*:

[Freedom of religion] embraces the right to maintain theories of life and of death and of the hereafter which are rank heresy to followers of the orthodox faiths . . . . Men may believe what they can not prove. They may not be put to the proof of their religious doctrines or beliefs. Religious experiences which are real as life to some may be incomprehensible to others. Yet the fact that they may be beyond

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264. 133 F.2d 703 (2d Cir. 1943).
265. Id. at 708.
266. 319 U.S. 624, 658-59 (1943) (Frankfurter, J., dissenting).
267. Id. at 642.
the ken of mortals does not mean that they can be made suspect before the law.\footnote{268}

The tables were now reversed; having taken the invitation of the lower courts to broaden the standard, the Supreme Court issued them an invitation of its own. However, the question of the definition of religion struck at the very core of religious belief, and it took the lower courts over a decade to begin a more detailed examination of the question.

A very expansive definition of religion was adopted by a California appeals court in \textit{Fellowship of Humanity v. County of Alameda}\footnote{269} in 1957. Its four criteria were:

1. a belief, not necessarily referring to supernatural powers;
2. a cult, involving a gregarious association openly expressing the belief;
3. a system of moral practice directly resulting from an adherence to the belief; and
4. an organization within the cult designed to observe the tenets of belief.\footnote{270}

The problem with this test is that even a group of fanatical Objectivists,\footnote{271} despite their vehement opposition to any religion, would qualify as a religion under it. Objectivists have a very strong set of beliefs, thus meeting requirement (1). Their associations are very cult-like, with a certain hierarchy\footnote{272} and their own equivalents of excommunication, thus meeting requirement (2). Objectivism is first and foremost a moral philosophy, requiring its adherents to act in certain ways, thus meeting requirement (3). Finally, there is even a formal organization, The Ayn Rand Institute, meeting requirement (4), bringing the entire Objectivist movement under the rubric of "religion."\footnote{273} This result is manifestly absurd and casts doubt on the va-
lidity of the Fellowship of Humanity test.

Thus, while the Fellowship of Humanity attempt resulted in a long-overdue test breaking the conventional mold restricting the definition of religion theretofore, in doing so it went too far. The same criticism can be levelled against the Supreme Court, which, in *Torcaso v. Watkins*, made a sweeping statement regarding the alleged religious nature of, inter alia, secular humanism. The stage was now set for *Seeger*.

b. The Watershed—United States v. Seeger and Welsh v. United States

*The ground of the opinion of the Supreme Court in Seeger's case, that any belief occupying in the life of its possessor a place parallel to that occupied by belief in God in the minds of theists is religion, prompts the comment that parallels, by definition, never meet.*

Most of the intellectual disorder in the present definitional jurisprudence can be traced directly to the *United States v. Seeger* and *Welsh v. United States* decisions of the Supreme Court. Although the decisions were given in the context of statutory construction, most commentators assume that they are relevant in the constitutional context as well. Both cases provoked spirited discussions and a volu-

true calling as Christian missionaries . . . . Some people find Jesus Christ, others find Karl Marx, and still others find Ayn Rand—but true believers everywhere, whatever the object of their belief, are unwilling to criticize their deity. Thinking for oneself is hard work, so true believers recite catechisms and denounce heretics instead.

**SMITH I, Objectivism as a Religion, supra note 22, at 213-14.** Nevertheless, after describing and discussing different varieties of "religious" Objectivists, Smith comes to a common-sense conclusion that a philosophy, however intolerant it may be, "is just that—a philosophy, not a religion." *Id.* at 215. Moreover, in the case of Rand, a humanist concerned in her ethics primarily with human happiness, religious Objectivism is no less than "an affront to the spirit of [her] philosophy." *Id.* at 229.

275. See supra note 72.
279. See, e.g., Harvard Note I, supra note 135, at 1064 n.56 ("Commentators have generally recognized that Seeger lays down a constitutional principle."); see also Judge Adams's influential concurrence in *Malnak v. Yogi*, 592 F.2d 197, 204 (3d Cir. 1979) (Adams, J., concurring) ("Although Seeger and Welsh turned on statutory interpretation, . . . they remain constitutionally significant."); Freeman, supra note 27, at 1526 n.45 (providing a list of commentators and cases maintaining the same position, as well as a few authorities with the
minous outpouring of commentary. Only a short recapitulation of the basic points is needed here. *Seeger* was decided first. It involved an individual’s request for conscientious objector status, despite the more or less philosophical nature of his objections.280

The *Seeger* Court for the first time enunciated what has come to be known as the parallel belief test:

> We have concluded that Congress, in using the expression “Supreme Being” rather than the designation “God,” was merely clarifying the meaning of religious training and belief *so as to embrace all religions* and to exclude essentially political, sociological, or philosophical views. We believe that under this construction, the test of belief “in a relation to a Supreme Being” is whether a given belief that is sincere and meaningful occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God of one who clearly qualifies for the exemption. Where such beliefs have parallel positions in the lives of their respective holders we cannot say that one is “in a relation to a Supreme Being” and the other is not.281

The parallel belief test certainly solved one problem—Mormons would have been safe under its protection. Its broad confines, however—if they existed at all—defined no legible criteria for distinguishing religion from non-religion.

In creating this standard, the Court was influenced by modern liberal theological thought, most notably that of Paul Tillich. Tillich’s writings, rather than dealing with a traditional “God,” instead equated an individual’s “ultimate concern” with “religion.”282 An oft-cited Tillich passage explains:

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281. *Seeger*, 380 U.S. at 165-66 (emphasis added). This text has much in common with the *Fellowship of Humanity* test, developed some years earlier:

> [T]he only inquiry . . . is the objective one of whether or not the belief occupies the same place in the lives of its holders that the orthodox beliefs occupy in the lives of believing majorities, and whether a given group that claims the exemption conducts itself the way groups conceded to be religious conduct themselves. The content of the belief, under such test, is not a matter of governmental concern. *Fellowship of Humanity v. County of Alameda*, 315 P.2d 394, 406 (Cal. Dist. Ct. App. 1957). Additionally, the *Fellowship of Humanity* test imposed a requirement of a parallel conduct that the *Seeger* Court did not adopt. *Id.* at 410.

The name of this infinite and inexhaustible depth and ground of all being is *God*. That depth is what the word *God* means. And if that word has not much meaning for you, translate it, and speak of the depths of your life, of the source of your being, of your ultimate concern, of what you take seriously without any reservation. Perhaps, in order to do so, you must forget everything traditional that you have learned about God, perhaps even the word itself. For if you know that God means depth, you know much about Him. You cannot then call yourself an atheist or unbeliever. For you cannot think or say: Life has no depth! Life itself is shallow. Being itself is surface only. If you could say this in complete seriousness, you would be an atheist; but otherwise you are not. He who knows about depth knows about God.283

In a simplified form, the test becomes: "In the absence of a requirement of ‘God,’ . . . an individual’s ‘ultimate concern’ whatever that concern may be—[is] . . . his ‘religion.’ A concern is ‘ultimate’ when it is more than ‘intellectual.’"284 Unfortunately, no court scrutinized Tillich’s analysis with sufficient vigor.

First, the passage is incomprehensible. To use the term “depth” in such a context is to divorce it from any commonly understood meaning. One might as well say “This armadillo (or gutbucket, or zoisite) is what God means.” Further, Tillich’s use of the term “being” itself presents unsurmountable difficulties:285

The trouble . . . is to know what “being” means. We are aware of how we use the verb “to be,” when we say such things as “Tomorrow is Friday” and “There is a green hill far, far away.” We use the verb sometimes as a copula, to join predicate to subject, sometimes in an existential sense. (“There is a . . .” means “A . . . exists.”) But does it make any sense to take the present participle and use it as a label for something? It seems just bad grammar, masquerading as philosophical profundity. Consider what would happen if we treated other little words in our language with the same seriousness. What of “of,” and “and,” and “if”? Why not talk about “ofness,” “andness,” “ifity”? Such locutions would be nonsensical.286

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286. NINIAN SMART, THE PHILOSOPHY OF RELIGION 61 (1979); see Paul Edwards, *Professor Tillich’s Confusions*, 74 MIND 192, 195 (1965) (finding Tillich’s philosophy “meaningless” and “unintelligible”).
Second, it seems obvious that a concern might not be "ultimate," and yet an individual might be religious. Thus, in a sense, the test is too restrictive! "Common experience teaches that among 'religious' individuals some are weak and others strong adherents to tenets." Should not the right of religious free exercise be protected for the churchgoer who attends services only on Christmas or Easter? Further, it is difficult to see how the ultimate concern would protect an adherent who is not completely committed to his or her beliefs. Yet, the Supreme Court indicated that religious beliefs should be given their proper weight even when an adherent admits "to struggling" with his position.

Third, different people have very different ultimate concerns, some clearly non-religious:

To some people the most important thing is God; to others it may be the categorical imperative, the pleasure or pain that humans (and animals?) feel, human rights, national glory, the U.S. Constitution, the free market, the class struggle, the battle of the sexes, the liberation of an oppressed racial or ethnic group, the love of power or fame, the life of the mind, artistic or athletic excellence, the bottle, or the needle. If the appropriate set is beliefs about ultimate reality, as the Supreme Court majority seems to have thought in Seeger, then those opinions about that reality that we conventionally label as "religious" seem to constitute an arbitrarily defined subset. Thus, the text is not only too restrictive, but also simultaneously too broad!

Clearly, in Seeger, the Court's reliance on Tillich was misplaced. Tillich, aware of contradictions inherent in traditional fundamentalist views, through verbal acrobatics attempted to erase the difference between religious belief and non-belief. The fundamental fault of

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290. Johnson, supra note 10, at 834 (footnote omitted).
291. Consider yet another oft-cited passage:

The fundamental symbol of our ultimate concern is God. It is always present in any act of faith, even if the act of faith includes the denial of God. Where there is ultimate concern, God can be denied only in the name of God. . . . [H]e who denies God as a matter of ultimate concern affirms God, because he affirms ultimate in his concern.
Tillich’s and the Supreme Court’s “conversion by definition”\(^2\) is the annihilation of the difference between religion and non-religion.

Shortly thereafter, a plurality of the Court in \textit{Welsh} extended the statutory conscientious-objector exemption even further.\(^2\) While Seeger was at least arguably mildly religious, Welsh was an outright atheist. The relevant statute\(^2\) allowed objector classification only if one’s objection to war sprang from religious beliefs. Welsh’s objections to war were of a more ethical nature.\(^2\) Yet, the Court extended the exemption so as to (1) cover a person who “originally characterized his beliefs as nonreligious,” but later declared that his beliefs were “certainly religious in the ethical sense of that word,”\(^2\) and (2) not “exclude those who hold strong beliefs about our domestic and foreign affairs or even those whose conscientious objection to participation in all wars is founded to a substantial extent upon considerations of public policy.”\(^2\)

The Court added that, while “a registrant’s characterization of his own belief as ‘religious’ should carry a great weight,”\(^2\) this does not imply that “his declaration that his views are nonreligious should be treated similarly.”\(^2\) It then proceeded to justify its holding, which allowed Welsh to be exempted, by claiming that “very few registrants [were] fully aware of the broad scope of the word ‘religious,’”\(^2\) as used in the applicable statute.

Indeed, very few people were fully aware of the broad scope of the word “religious,” as construed by the Court. A reading of the statute, however, casts doubt at the Court’s assertion. It states that “religious training and belief” does not include essentially political, sociological, or philosophical views, or a merely personal moral code.\(^2\)

\begin{thebibliography}{9}
\expandafter\ifx\csname bibfont\endcsname\relax\else\font{bibfont}=\thebibliography font\fi
\bibitem{Tillich} Paul Tillich, \textit{Dynamics of Faith} 45-46 (1957) (emphasis added).
\bibitem{Smith} Smith II, \textit{supra} note 83, at 34.
\bibitem{Welsh} Welsh, 398 U.S. at 333-34 (finding that “deeply held moral, ethical or religious beliefs” qualify for conscientious-objector status) (emphasis added).
\bibitem{WelshII} Welsh, 398 U.S. at 341-44 (plurality opinion).
\bibitem{Id} \textit{Id.} (seemingly equating religion and ethics and making one of the two terms superfluous).
\bibitem{Id} \textit{Id.} at 341-42.
\bibitem{Id} \textit{Id.} at 341 (emphasis added).
\bibitem{Id} \textit{Id.} (emphasis added).
\bibitem{Id} \textit{Id.}
\bibitem{SelectiveServiceAct1967} 50 U.S.C. app. § 456(j) (1982) (corresponding to Selective Service Act of 1967 which removed the requirement that religious training and belief stem from an individual’s religious training and belief).}

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Ordinarily, absent ambiguity or irrational result, the literal language of a statute must control. The Act plainly excluded non-religious views from its reach. To fully appreciate the radical departure accomplished, however, a brief look at the statute’s legislative history is helpful.

Nothing in the legislative history of the initial 1948 Selective Service Act, or the amendments thereto, supports the expansive definition of “religious training and belief.” If anything, the 1948 Act contemplates a narrow standard, referring to a “Supreme Being” (the reference still being in the statute when Seeger was decided).

The 1967 amendments, which deleted the “Supreme Being” language, had been a response to the Seeger decision. At the House and Senate conference, the Senate conferees “concurred in the desire of the House... to more narrowly construe the basis for classifying registrants as ‘conscientious objectors.’” The recommended House language required that “the claim... be based upon ‘religious training and belief’ as had been the original intent of Congress...” The Senate conferees would at least have codified Seeger:

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302. Absent ambiguities, it is improper to consult legislative history to discern congressional intent. See generally Burlington N.R.R. v. Oklahoma Tax Comm’n, 481 U.S. 454, 461 (1987); United States v. Locke, 471 U.S. 84, 95-96 (1985). This has been a consistent admonition from the United States Supreme Court throughout the years:

[W]here the language of an enactment is clear and construction according to its terms does not lead to absurd or impracticable consequences, the words employed are to be taken as the final expression of the meaning intended. And in such cases legislative history may not be used to support a construction that adds to or takes from the significance of the words employed.


303. The legislative history of the statute was in no way inconsistent with its plain meaning. It should have been an “open and shut” case:

In cases of statutory construction, this Court’s authority is limited. If the statutory language and legislative intent are plain, the judicial inquiry is at an end. Under our jurisprudence, it is presumed that ill-considered or unwise legislation will be corrected through the democratic process; a court is not permitted to distort a statute’s meaning in order to make it conform with the Justices’ own views of sound social policy.

Industrial Union Dep’t v. American Petroleum Inst., 448 U.S. 607, 688 (1980) (Marshall, J., dissenting) (citing Tennessee Valley Auth. v. Hill, 437 U.S. 153 (1978)). It was, however, the Supreme Court’s interpretation that created the irrational result, thus justifying our examination of the legislative history.


306. Id.
[Congressional intent in this area would be clarified by the inclusion of language indicating that the term "religious training and belief" as used in [the] section . . . does not include "essentially political, sociological, or philosophical views, or a merely personal moral code."\footnote{307}

Yet, the \textit{Seeger} Court narrowed the exclusion from conscientious objector status (and thus expanded the definition of religion) to those whose beliefs were "political, sociological or economic."\footnote{308} After the Supreme Court was done with \textit{Welsh}, the exception was finally reduced to "policy, pragmatism, or expediency,"\footnote{309} and the term religion became almost all-encompassing.

It is conceivable that the Court strained its reading of the Act to avoid confronting squarely the Act's blatant discriminatory intent in favor of adherents of religious faiths, quite possibly in violation of the Establishment Clause.\footnote{310} However, in the process of doing so, the Court sowed the seeds of the present "confusion."\footnote{311} Justice Harlan was correct when he objected in \textit{Welsh} to the Court living in "an Alice-in-Wonderland world where words have no meaning."\footnote{312} Clearly, when a term used in constitutional analysis becomes so dis-

\begin{footnotes}
\footnotetext{307. Id.}
\footnotetext{308. United States v. \textit{Seeger}, 380 U.S. 163, 173 (1965).}
\begin{quote}
One could easily accuse the Court (and Tillich) of circular logic. If every man's "ultimate concern" is by definition his religion, then every man is religious. The Court would then be holding that Congress intended to extend the exemption to every conscientious objector, of whatever stripe. This would have the effect of reading Congress' requirement of a religious basis for conscientious objection out of the statute.
\end{quote}
\footnotetext{310. Justice Douglas in his concurrence in \textit{Seeger} explicitly stated that he believed the Court's construction of the statute was necessary to save it from unconstitutionality. \textit{Seeger}, 380 U.S. at 188 (Douglas, J., concurring). And in \textit{Welsh}, Justice Harlan, who cast the deciding fifth vote, characterized \textit{Seeger} as a "distortion to avert an inevitable constitutional collision." \textit{Welsh}, 398 U.S. at 354 (Harlan, J., concurring); see also United States v. \textit{Foran}, 305 F. Supp. 1322, 1325 (E.D. Wis. 1969) ("to construe the statutory language more narrowly would bring into question the constitutionality of the statute under the First and Fifth Amendments"); Greenawalt, supra note 98, at 760 ("Commentators reasonably supposed that the Court's interpretation of statutory language defining religious training and belief was guided by strong constitutional doubts about the lines Congress had tried to draw.").}
\footnotetext{311. See \textit{Ingber}, supra note 5, at 233.}
\footnotetext{312. \textit{Welsh}, 398 U.S. at 354.}
\end{footnotes}
tant from its common-sense meaning as to flatly contradict it, it is
time to rethink the usage of the term.

Consequently, the Seeger-Welsh doctrine is not tenable, as having
no foundation in law and being contrary to the plain meaning of
words. Far from solving the constitutional problem, Seeger-Welsh only
exacerbated it, and should be abandoned entirely.

c. Courts After Seeger

Subsequently, the Supreme Court began a gradual and
unilluminating retreat from the unworkable standards enunciated in
Seeger and Welsh. In Wisconsin v. Yoder, the Court noted in dictum
that philosophical and personal beliefs, as opposed to religious beliefs,
are not to be protected by the First Amendment. In the Court’s
view, the philosophy of Thoreau, as opposed to the religion of the
Amish, would not be protected, even though the standards of
Seeger and Welsh seem to demand at least this much. The Yoder
Court also attempted to characterize a “religious” belief or practice
entitled to constitutional protection as “not merely a matter of per-
sonal preference, but one of deep religious conviction.” However,
because this attempt was hopelessly circular, it did not clarify the
situation.

More recently, in Thomas v. Review Board, the Court crypti-
cally asserted that some beliefs may be “so bizarre” as to be “clearly
nonreligious in motivation.” The Court did not articulate any stan-
dards for distinguishing religious from “nonreligious” claims, or nor-
mal from “bizarre” beliefs. Finally, the recently decided Church of

313. 406 U.S. 205, 216 (1972) (exempting the Amish from compulsory public education
beyond the eighth grade).
314. “Thoreau’s choice was philosophical and personal rather than religious, and such
belief does not rise to the demands of the Religion Clauses.” Id.
315. Id. at 215-16.
317. Id. at 715.
318. In Burwell v. Commissioner, 89 T.C. 580, 598 n.21 (1987), the Tax Court happily
embraced the notion that religious tax protestors are bizarre, and that their views do not
deserve discussions on the merits. (“The time has arrived when the Court should deal sum-
marily and decisively with [tax-exemption] cases without engaging in scholarly discussion of
the issues or attempting to soothe the feelings of the petitioners by referring to the supposed
‘sincerity’ of their wildly espoused positions.”) (quoting McCoy v. Commissioner, 76 T.C.
1027, 1029-30 (1981), aff’d, 696 F.2d 1234 (9th Cir. 1983)). Compare with a more enlight-
ened view:

Neither this Court, nor any branch of this Government, will consider the merits or
fallacies of a religion. Nor will the Court compare the beliefs, dogmas, and prac-
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*the Lukumi Babalu Aye, Inc.* completely ignored the definitional issue.

The lower courts, confronted with the inadequacies of the Supreme Court's approach, continued developing their own tests. One of the most talked-about attempts in recent years was made by then Judge Arlin Adams of the Court of Appeals of the Third Circuit:

First, a religion addresses fundamental and ultimate questions having to do with deep and imponderable matters. Second, a religion is comprehensive in nature; it consists of a belief-system as opposed to an isolated teaching. Third, a religion often can be recognized by the presence of certain formal and external signs [such as hierarchy, ritual, and ceremony].

Commentators, however, identified a number of problems with the Adams test. First, it excluded less conventional beliefs. Indeed, some anarchic traditions of Christianity eschewed ceremony and hierarchy and thus would not have qualified. Another problem inherent in the Adams test is that it did not provide any guidance for instances when some, but not all, criteria were present. Third, it required a fairly intrusive inquiry by the courts into allegedly religious beliefs—something that appears to be prohibited by the entanglement prong of *Lemon v. Kurtzman.* Overall, the Adams test was inventive, but not quite successful.

Another test was formulated by Judge Roney of the Fifth Circuit, dissenting in the late 1970s: "the 'religious' nature of a belief depends on (1) whether the belief is based on a theory of 'man's nature or his place in the Universe,' (2) which is not merely a personal

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319. 113 S. Ct. 2217 (1993).
321. See, e.g., Anabaptism, in 1 THE ENCYCLOPEDIA OF RELIGION AND ETHICS 406-12 (1922).
322. 403 U.S. 602 (1971). "This kind of state inspection and evaluation of the religious content of a religious organization is fraught with the sort of entanglement that the Constitution forbids." *Id.* at 620. The same argument may be raised against inquiries to the sincerity, ultimateness, and parallel position which is the very action that the *Seege-Welsh* test seems to contemplate. See Slye, *supra* note 233, at 233.
preference but has an institutional quality about it, and (3) which is sincere." While there should be no quarrel with element (3), the preceding two are more troublesome. Element (2) would exclude any emerging religion, while element (1) would encompass science and philosophy, as well as religion. Nevertheless, the reference to "man's nature or his place in the Universe" is highly significant, for here the court homes in on the all-encompassing nature of religious beliefs.

The Adams test gained international acceptance in 1983 when the Australian equivalent of the Supreme Court, relying on Malnak v. Yogi, came up with a two-fold definition of religion in a tax context: two judges held that religion must include (1) belief in a "supernatural Being, Thing or Principle," and (2) an acceptance of canons of conduct giving effect to that belief. This definition shares some problems with the Adams test; most notably, it does not account for religions that do not have canons of conduct (such as that of the ancient Greeks). Indeed, the existence of religious duties is a poor determinative factor for branding something a religion. First, some religions impose no duties, and second, strongly held

324. Other courts continued to rely on the Seeger test. Thus, in International Soc'y for Krishna Consciousness, Inc. v. Barber, 650 F.2d 430 (2d Cir. 1981), the Second Circuit relied explicitly on the Seeger test in finding Krishna Consciousness a religion. Id. at 440. Of course, Krishna Consciousness, being an old and respectable religion—at least in India, see A.C. BHAKTVEDANTA SWAMI PRABHUPADA, THE SCIENCE OF SELF REALIZATION (1977), in which the author compiled interviews with prominent political, religious, and scientific leaders, each of whom gave tribute to the religion of Krishna Consciousness—would have met even more restrictive tests, such as that of Judge Adams. Similarly, in Grove v. Mead Sch. Dist. No. 354, 753 F.2d 1528 (9th Cir. 1985), the Ninth Circuit sounded distinctly Seeger-ish in holding that religion was "a comprehensive belief system laying claim to ultimate truth and supported by a formal group." Id. at 1537 (quoting Malnak v. Yogi, 592 F.2d 197, 212 (1979)). Again, Objectivists could have qualified.
326. This has been the case even in some primitive versions of Christianity. For example, at the turn of the century, Russian peasants treated religion primarily as a matter of appeasement and sponsorship:

In fact, the Russian peasant was ready to believe anything. For his religion was less a moral matter than a mystery. It was not in obedience to the precepts of Christ that he was patient, docile, hospitable and charitable, but from a natural inclination to be indulgent. This quite evangelical kindness did not prevent him, if he was deceitful, envious or debauched, from sincerely asking for the blessing of a certain saint for the success of his ventures. Having only a dim idea of evil, he sought powerful accomplices in heaven.

philosophical beliefs may be said to impose duties (to act in a certain way). A commentator pointed out that:

[t]hough most modern religions both give answers to major questions of existence and offer an overarching focus for people's lives, some belief systems, commonly regarded as religious, have existed that do not make such claims. In these systems, how life should be lived has been determined on some other basis; and religious worship has been mainly a matter of placating the gods or enlisting their help for projects with preestablished value.\textsuperscript{27}

All in all, it must be admitted that, despite some valiant attempts, the post-Seeger courts also have been unsuccessful in developing a workable definition of religion.

D. Government and its Agencies

Initially, there was a general congruence between governmental and judicial definitions of religion. For example, the Bill of Rights of the Virginia Constitution of 1776 defined religion as “[t]he duty which we owe to our Creator, and the manner of discharging it.”\textsuperscript{328} Obviously, all criticisms leveled against the restrictive definitions of the Supreme Court would be equally applicable here.

However, while the Supreme Court began expanding the boundaries of what it was prepared to accept as religious expression, the other branches of government for the most part did not follow.

Congress's definition was circular and question-begging\textsuperscript{329} in Title VII: “[t]he term ‘religion’ includes all aspects of religious observance and practice, as well as belief.”\textsuperscript{330} As interpreted by the Office of the Secretary of Defense, the definition adopts a familiar Seeger look: religion is any belief that is “sincere and meaningful” and that “occupies in the life of its possessor a place parallel to that filled by the God of another” in the traditional theistic religions.\textsuperscript{331}

The Equal Employment Opportunity Commission (“EEOC”) was more up-to-date, basing its definition on the latest precedent: “moral

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\textsuperscript{27} Greenawalt, \textit{supra} note 98, at 809.
\textsuperscript{28} VA. \textit{CONST.} of 1776, art. XVI (1776), \textit{reprinted in} \textit{7 AMERICAN CHARTER CONSTITUTIONS AND ORGANIC LAWS} 3812, 3814 (Francis N. Thorpe ed., 1909).
\textsuperscript{29} One court called the definition “unenlightening.” Brown \textit{v.} Pena, 441 F. Supp. 1382, 1384 (S.D. Fla. 1977).
\textsuperscript{31} 32 C.F.R. \textsection 75.3(b) (1992).
or ethical beliefs as to what is right and wrong which are sincerely
held with the strength of traditional religious views.\footnote{332}

The Department of Justice definition is much more narrow:
"[B]eliefs that are based upon and emanate from either a duty to trans-
cendent reality or an acknowledgment of extratemporal consequences
for temporal actions."\footnote{333}

However, the worst offender is the Internal Revenue Service
("IRS"). Although formally defining what is a "church," and not a
"religion," the IRS in effect defined religion indirectly,\footnote{334} and in an
extraordinarily restrictive way. To qualify for a tax exemption, the
IRS requires churches to meet the following criteria:

1) a distinct legal existence;
2) a recognized creed and form of worship;
3) a definite and distinct ecclesiastical government;
4) a formal code of doctrine and discipline;
5) a distinct religious history;
6) a membership not associated with any other church or denomina-
tion;
7) a complete organization of ordained ministers ministering to their
congregations;
8) ordained ministers selected after completing prescribed courses of
study;
9) a literature of its own;
10) established places of worship;
11) regular congregations;
12) regular religious services;
13) Sunday Schools for the religious instruction of the young; and
14) schools for the preparation of its ministers.\footnote{335}

The shortcomings of this definition are apparent. Under the enu-
umerated criteria early Christian organizations would not have qualified
as churches (nor, presumably, Christianity as religion).\footnote{336} This alone

\begin{itemize}
  \item \footnote{332. 29 C.F.R. § 1605.1 (1990).}
  \item \footnote{333. DEP'T OF JUSTICE REP., RELIGIOUS LIBERTY UNDER THE FREE EXERCISE CLAUSE iv (1986).}
  \item \footnote{334. "[T]he IRS has attempted to define the term 'church,' and the effect has been si-
multaneously to define religion, or at least, one subset of religious activity." Slye, supra note 233, at 288.}
  \item \footnote{335. Jerome Kurtz, Difficult Definitional Problems in Tax Administration: Religion and Race, 23 CATH. LAW. 301, 304 (1978) (speaking to the Practicing Law Institute, Seventh Biennial Conference, Mr. Kurtz, while he was IRS Commissioner, enumerated the 14 criteria).}
  \item \footnote{336. Early Christian churches did not have (1) a distinct legal existence, or (2) a recog-
nized (by the Romans) creed and form of worship, or (3) a definite and distinct ecclesiastical}
\end{itemize}
A final word must be said about the United Nations' ("UN") role in defining religion. The United Nations Commission on Human Rights defined "religion or belief" as including "theistic, non-theistic, and atheistic beliefs." The UN attempt is laudable for its intentions (i.e., elimination of religiously-based discrimination, especially against atheists), but its terminological indiscriminateness is unfortu-

government, or (4) a formal code of doctrine and discipline, or (5) religious history to speak of, or (6) membership not associated with any other church (Jesus himself was associated with an unrecognized dissident movement of Judaism), or (7) an organization of ordained ministers (Jesus was not ordained), or (8) selection of ministers after prescribed courses of study (the most recent historical evidence indicates that Jesus did not even earn a high-school diploma, and some of his disciples were tax collectors—making one commentator observe that "perhaps all hope is not lost for the IRS," Casino, supra note 44, at 144), or (9) a literature of their own (some Christian scripture was not written until hundreds of years later), or (10) established places of worship (Jesus and his disciples moved all around Palestine), or (11) regular congregations, or (12) regular services, or (13) Sunday Schools, or (14) schools for preparation of ministers (Jesus, like David Koresh, apparently was largely self-taught).

For a thorough point-by-point rebuttal of the IRS criteria, see Casino, supra note 44, at 141-46 (marshalling numerous sources, including creeds and practices of non-Western religions, and making persuasive arguments in favor of the proposition that all 14 IRS points are "hopelessly flawed" and should be abandoned).

Even if one accepts Western Christianity as the paradigm of religions, the Third Circuit's reasoning is questionable. Because holidays and scriptures presumably commemorate events in a religious group's past, it seems manifestly unfair to hold a nascent religion to the same standard as, for example, a religion that has existed for several millennia. Even if these factors should be determinative, a more fair comparison would be to the initial holiday and scriptural practices of recognized religions. The celebration of Christmas, for example, does not appear to have been general until well into the fourth century. Similarly, the formation of the canon of the New Testament occurred only at the end of the fourth century, after heated debate.

Id. at 1628 n.102 (citations omitted).

Elimination of All Forms of Religious Intolerance at 8, U.N. Doc. A/8330 (1971) (draft convention). Compare Myres S. McDougal et al., The Right to Religious Freedom and World Public Order: The Emerging Norm of Nondiscrimination, 74 MICH. L. REV. 865 (1976) (describing hardships historically imposed upon those who refused to accept the established religion) with International Covenant on Civil and Political Rights, Dec. 19, 1966, art. 18 § 1, 178 U.N.T.S. 171 (1966) ("Everyone shall have the right to . . . manifest his religion or belief in worship, observance, practice and teaching."). Again using the terms "religion" and "belief" interchangeably, as confirmed by the clause's permission to manifest either one in "worship," "observance," "practice," and "teaching"—the terms, with the exception of the last, are more commonly associated with religion, rather than with non-religious beliefs. Accord European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. IX § 1, 312 U.N.T.S. 221 (1950) ("Every man has the right . . . to manifest his religion or belief in worship, teaching, practice and observance.").
nate. At this point there is no need to reiterate why atheism cannot possibly be a "religion," or why even labeling it a "belief" still presents a problem. One is compelled to conclude that in defining religion governments did not fare much better than the courts.

E. Commentators

Not surprisingly, it is among the commentators that there is a full variety of opinions. Regrettably, the quantity of proposed definitions does not translate into a quality answer to the problem at hand. Most commentators seem more intent on arguing with each other than on solving the puzzle of a constitutional definition of religion.

For example, John Haynes Holmes defined religion as "the consciousness of some power manifest in nature which helps man in the ordering of his life in harmony with its demands . . . [it] is the supreme expression of human nature; it is man thinking his highest, feeling his deepest, and living his best." While judicial and governmental definitions, though arguably deficient in some respects, were at least comprehensible, this one is not. What does "man thinking his highest, feeling his deepest, and living his best" mean? Some would say "It's when I am on drugs, man," and others might vouch for sex. It is not much help, however, to a judge confronted with a prison inmate demanding a special diet.

Other definitions are very underinclusive. Jesse Choper proposes an "extratemporal consequences" definition. This definition would grant "officially approved" status to any religion that can show that its adherents, if forced to act against their beliefs, will suffer extratemporal (meaning, not of this world) consequences. The problem with the Choper definition is that it excludes Eastern religions that do not have conceptions of afterlife comparable to Western religions and thus are not concerned with extratemporal consequences.

On the other side of the spectrum are commentators who, in their zeal to protect freedom of conscience, or, perhaps, to challenge the "pagan" or "new age" religions on establishment grounds, advocate the broadest definition possible, stretching their credulity. Thus, Professor Toscano proposes the following definition of religion:

339. See supra text accompanying notes 84-92 and 211-17.
342. Choper, supra note 19, at 599.
[Religion is] any belief, theory, or viewpoint that either (1) occupies in the mind of its adherent the place of a religion, or (2) addresses itself to a fundamental, a priori question that bears upon God, the purpose of the universe, the foundations of knowledge, the destiny of man, or that otherwise attempts to provide answers that are beyond proof—matters of faith or ideological preference.343

There are problems with both subsets. Part (1) is too subjective, allowing anyone to claim anything as religion and presenting a court with the necessity of inquiring into the true place of a belief in the mind of its adherent. Part (2) is overinclusive: Science, among others, deals with fundamental questions pertaining to the universe; philosophy, among others, deals with fundamental questions of the foundation of knowledge and destiny of humans; and “ideology as religion” would allow Communists to seek protection under religious clauses—a per se absurd result.344 Toscano’s definition therefore must be rejected.

Between these extremes there are numerous examples of scholarly quest. Thus, Merel defines religion as “any multidimensional system of beliefs that an individual claimant sincerely asserts to be religiously held.” In free exercise analysis,345 that involves “duties and obligations to conform to the standards of a unified belief system that cuts across and directs more than a single aspect of an individual’s life.”346 This definition presents a by now familiar problem; Merel’s framework of duties and obligations so limits religion as to exclude

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343. Toscano, supra note 25, at 207.
344. Additionally, Toscano’s reading would be squarely against historical evidence demonstrating that the Framers did not mean to include freedoms of conscience under the umbrella of religious protection. The original version of the First Amendment read: “The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or on any pretext, infringed.” 1 ANNALS OF CONG. 451 (Joseph Gales ed., 1789). However, in the last three versions and in the final version of the amendment the freedom of conscience provision was omitted.

While some commentators attempted to explain the omission away by arguing that freedoms of conscience may have been subsumed under freedom of religion (see, e.g., Ingber, supra note 5, at 277 & n.276, citing Thomas Jefferson in support of this proposition), this explanation does not prove that the Framers intended to protect conscience per se. Of course, the other explanation, more devastating for the proposition, may be that the freedom of conscience provision was dropped precisely because the Framers did not consider it as important as protecting religion.

345. Merel, supra note 42, at 834.
346. Id. at 831.
the Greeks and pantheists. Additionally, it is circular, because it defines religion by reference to beliefs "religiously held."

Professor Freeman proposes a veritable hodge-podge of criteria reminiscent of the fourteen point test of the IRS, all in the context of arguing that it is impossible to define religion:

1) a belief in a Supreme Being;
2) a belief in a transcendent reality;
3) a moral code;
4) a world view that provides an account of man's role in the universe and around which an individual organizes his life;
5) sacred rituals and holy days;
6) worship and prayer;
7) a sacred text or scriptures; and
8) membership in a social organization that promotes a religious belief system.347

They present a score of familiar problems: element (1) is too restrictive, element (2) is incomprehensible, element (3) is generally agreed as not being a necessary feature of religion, element (4) would include any comprehensive philosophy, element (5) begs the question: which rituals are sacred, and which days are holy?,348 element (6) is too restrictive, and may exclude Eastern religions, element (7) excludes new religions, element (8) would disqualify anyone who lives in Alaska, where the nearest neighbor may be a hundred miles away and would also exclude the non-affiliated Christian, a result unanimously rejected by the Supreme Court.349

Professor Ingber, in a substantial and otherwise reasonable article, proposed a definition that was too restrictive: religion involves a "higher authority."350 "A religion can be nonanthropomorphic, nontheistic, or even have a membership of one as long as the claimed religious obligations are imposed by or under the influence of some sacred force."351 The criticisms leveled against MereI352 would

347. Freeman, supra note 27, at 1553.
348. For example, atheists generally are pretty sore with religionists, whom they accuse of taking perfectly decent pagan rituals and trappings—such as pantomimes, decorated trees, mistletoe wreaths, flaming puddings, and songs of snow—and appropriating them for an overwhelmingly Christian celebration. Jon Murray, who took over as a leading American atheist from his mother Madalyn Murray O'Hair, admits to celebrating winter solstice, tree and all. Jon Anderson, Even for Atheists, 'Tis the Season, CHI. TRIB., Dec. 19, 1991, at 1, 3.
349. See Frazee v. Illinois Dep't of Employment Sec., 489 U.S. 829, 834 (1989) (denying unemployment compensation on the ground that appellant's refusal to work was not based on tenets of a particular denomination violates the Free Exercise Clause).
350. Ingber, supra note 5, at 287.
351. Id.
apply here as well. In another place Professor Ingber defines religion as a “unified system of beliefs and practices relative to sacred things.”353 While it is difficult to find much to fault him with here, this definition does not really explain what “sacred” is, and thus is not likely to be helpful.

Professor Gey, in a brilliant article on accommodation of religion, defines religion as “the subordination of the individual will to the unchallengeable dictates of an extra-human, transcendent force or reality.”354 This presents a familiar problem—“transcendence” is unintelligible, and therefore incomprehensible.355

Gey also fails to consider that some “religions” involve blind and illogical faith, but do not derive statements of this faith from any authoritative source; to the contrary, to derive them from an authoritative source would be to deny their nature as articles of faith.

Gey correctly points out that “[t]o withstand analysis . . . any definition of religion must accord with our intuitive judgments.”356 He admits that his narrow definition seems incapable of recognizing the religious significance of pantheistic beliefs, or Eastern religions, such as Hinduism and Buddhism.357 Surely, as starting point in First Amendment jurisprudence, we are obligated to construct a definition of religion that does no less. Thus, his definition ultimately fails.

Jonathan Weiss attempted to formulate his definition as follows: To make a common sense decision whether a movement is a religion and a claim clearly religious, we look in general to:

a) whether the movement claims through an asking for assent (a rigorous proof of religion would probably refer to grounds of assent);

b) ‘supernatural’ claims traditionally connected with religion;

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352. See supra text accompanying notes 345-46.
354. Gey, supra note 20, at 167.
355. See supra text accompanying notes 163-71. Gey later elaborates on three key aspects of religion: (1) religious principles are derived from a source beyond human control; (2) religious principles are immutable and absolutely authoritative; and (3) religious principles are not based on logic or reason, and, therefore, may not be proved or disproved. Gey, supra note 20, at 167. This expanded definition is too narrow. The biggest problem is with the first element: it seems to imply traditional theism. Buddhism, for example, does not involve any reference to “external authority,” id., and thus presumably will fail as a religion under Gey’s definition.
356. Gey, supra note 20, at 170.
357. Id. at 169-70.
c) whether the traditional customary activities and trappings of ‘religion’ are present.\textsuperscript{358}

Again, this definition is open to familiar criticisms: it is too conventional, too Western-oriented, and would discriminate against any religion that does not possess the “customary activities” and “trappings” of religion—exactly the result that made the Supreme Court uncomfortable with orthodox definitions.

Professor Mansfield attempted to define religion as “the affirmation of some truth, reality, or value” that “addresses itself to basic questions to which man has always sought an answer, questions about the meaning of human existence, the origin of being, the meaning of suffering and death, and the existence of a spiritual reality.”\textsuperscript{359} This definition is clearly overinclusive, allowing in every comprehensive philosophy.

A student author argued that religion should be defined in terms of “sacred” and “profane”—“religion consists of beliefs or practices based upon a perception of reality as being composed of both sacred (‘wholly other’) and profane (natural) elements.”\textsuperscript{360} “Sacred” for the author is what “transcends experience in the natural environment.” Conversely, “profane” is everything “natural.”\textsuperscript{361} As pointed out by another commentator, all such definitions “do little to illuminate the difference between religion and other ‘secular,’ philosophical or moral, belief systems.”\textsuperscript{362}

Finally, there are different “ultimate concern” variations that should be rejected for the reasons stated above:\textsuperscript{363} “a comprehensive belief system that addresses ultimate concerns of imponderable inquiries”,\textsuperscript{364} ultimate concern, which might be political, economic, or cultural;\textsuperscript{365} religion, as opposed to “pseudo religion,” must meet four criteria: it must be a response to “what is experienced as Ulti-

\textsuperscript{358} Weiss, \textit{supra} note 39, at 606.
\textsuperscript{361} \textit{Id.} at 164-65.
\textsuperscript{363} \textit{See supra} part III.C.2.b.
\textsuperscript{364} Schmid, \textit{supra} note 192, at 368.
\textsuperscript{365} Harvard Note I, \textit{supra} note 135, at 1071. Professor Ingber leveled devastating criticism against this definition. \textit{See} Ingber, \textit{supra} note 5, at 268-70.
mate Reality”; it must be a total response of the integral person; it must be an intense experience, “the most powerful, comprehensive, shattering, and profound experience” of which individuals are capable; and it must “issue an action”366 (a more sophisticated argument, but still failing because of its explicit reliance on, among other things, duty).

Hence, in the face of almost universal failure to construct a satisfactory constitutional definition of religion, it is time to make an immodest proposal.

F. Proposed Definition

As evident from the preceding discussion, a modern definition must meet several criteria: (1) it must be unitary in order to account for the language of the First Amendment;367 (2) it must strike a delicate balance between over- and underinclusiveness;368 (3) it must be substantive, and not functional or analogous, lest religions not fitting the analogy be excluded;369 (4) it must be intelligible to anyone, including non-adherents of religion;370 and, (5) it must agree with our intuitive notions of what is and is not religion.371

I therefore propose the following test:

Religion is a manifestly non-rational (i.e., faith-based) belief concerning the alleged nature of the universe, sincerely held.

This test has a number of advantages over more traditional ones. It is unitary, substantive, intelligible, and does not rely on the presence of organizational structures. Whether it is over- or underinclusive and in conformity with our intuitive notions of what is and is not “religion” will be examined in part IV of this Article. Most importantly, it focuses on non-rationality as a distinguishing characteristic of religion.

367. See supra section II.D.1.
368. See supra sections III.C.1-2.
370. See supra section II.E.
371. See supra section II.B.
1. The Elements
   a. The Belief Must Be *Manifestly* Non-Rational

   The first element in the proposed definition of religion is that its non-rationality be manifest. "Manifest" is defined as "objectively evident to any[one]." Thus, the element will exclude beliefs that clearly rely on intellectual bases. On the other hand, it sets a high threshold concerning the non-rationality of a belief, thus giving content to the First Amendment values of minimizing state interference in matters of religion.

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b. The Belief Must Concern the Nature of the Universe

Intuitively, we are aware that religions address themselves, in some fashion or another, to the question of the nature of universe, with concomitant questions of our place in it, the meaning of life and death, etc.\(^3\) Therefore, non-rational beliefs concerning tomorrow's weather, or that eating cat food contributes to spiritual and physical well-being,\(^3\) should not, without more, qualify as religions.

c. The Belief Must Be Non-Rational

In order for a belief to be religious, it must be non-rational. This is the principal distinction between religious and non-religious beliefs. Attempting a rational explanation, one would ascertain facts and formulate hypotheses by using reason as the means of cognition. The use of reason as the means of cognition is exemplified by legitimate scientific research techniques.\(^3\) Attempting a non-rational explanation one would appeal to non-scientific means of ascertaining facts and formulating hypotheses. In this instance, the belief will be faith-based.

Accordingly, this element will necessitate inquiry into what constitutes rational proof. This question was addressed in *Daubert v. Merrell Dow Pharmaceuticals*, where the Supreme Court established a new standard for admission of expert scientific testimony in federal trials.\(^3\) The Court held that, in order to qualify as "scientific knowledge" under Rule 702 of the Federal Rules of Evidence, an inference or testimony "must be derived from the scientific method."\(^3\) Factors bearing on whether the proposed testimony is "scientific knowledge" include: (1) whether the theory or technique has been tested; (2) whether the theory or technique has been subjected to

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\(^3\) In the words of *The Hitchhiker's Guide to the Galaxy*, they ask the Ultimate Question about "Life, the Universe, and Everything"; the answer to which, as everyone knows, is "forty-two." DOUGLAS ADAMS, *The Hitchhiker's Guide to the Galaxy*, in THE MORE THAN COMPLETE HITCHHiker'S GUIDE 113, 120 (1989).

\(^3\) For discussion of *Brown v. Pena*, see infra text accompanying notes 467-69.

\(^3\) An important case addressing the question of what constitutes legitimate research techniques was Seattle Times Co. v. County of Benton, 661 P.2d 964 (Wash. 1983). In that case a newspaper reporter challenged a decision denying him access to the county's confidential juvenile files. The county denied the reporter access on the grounds that the newspaper articles were not "legitimate research." *Id.* at 965-66. The court in *Seattle Times* articulated standards for legitimate research, defining it as "studious inquiry or examination within the purview of recognized principles or accepted rules and standards." *Id.* at 967.

\(^3\) 113 S. Ct. 2786 (1993).

\(^3\) *Id.* at 2795.
Thus, any explanation of the universe using accepted scientific methodology, in accordance with the standards established in Daubert, would not qualify as religion. Secular Humanism, to the extent it relies on accepted scientific methodology, cannot be classified as a religion. However, movements such as Hinduism and Buddhism will qualify. There are no rationally provable aspects to the concepts of "nirvana," or the sacredness of cows (as opposed to, say, sheep). No doubt, these concepts are intimately connected with explanations of the nature of the universe and our place in it. However, one accepts these tenets only via non-rational arguments, primarily based on faith. Therefore, Hinduism and Buddhism should receive First Amendment protection under the test as true religions.

The reliance on non-rationality as a sine qua non of religion on occasion has been explicitly recognized by the Supreme Court. One of the most lucid statements on the subject was made by the dissenting Justice Jackson in a famous statement: “[b]elief in what one may demonstrate to the senses is not faith. All schools of religious thought make enormous assumptions, generally on the basis of revelations . . . .” It is a fair assumption that Justice Jackson was using the term “faith” to imply “religion.” This assumption is buttressed by the next sentence of his statement, in which he makes a transition from “faith” to “schools of religious thought,” as if referring to the same concept. It is unfortunate that the Court has not followed through on this insight.

(i) Religion Cannot Be Proved Rationally

As has been noted by commentators previously, it is well established that all attempts to prove religion rationally have been shown to be logically flawed. At best, such logical proofs of religion succeed in demonstrating the invalidity of some scientific hypothesis.

378. Id. at 2796-97. The Court specifically noted that “[w]idespread acceptance can be an important factor in ruling particular evidence admissible, and ‘a known technique that has been able to attract only minimal support within the community’ . . . may properly be viewed with skepticism.” Id. (citation omitted).
380. Id.
381. See supra note 104 and accompanying text.
It is a long stretch, however, from demonstrating the invalidity of a positive statement to establishing the validity of another purported statement of fact. Non-rationality thus becomes the chief distinguishing characteristic of any "religious" belief.

(ii) The Non-Rational Nature of Belief Is What Makes it Worthy of Extra Protection

Accepting this, a theory of cognitive dissonance provides a justification for more extensive protections for religion than are accorded other, rational belief systems. Modern psychology postulates an unavoidable connection between action and belief. According to the theory, a certain tension is created when individuals are compelled to behave in ways inconsistent with their beliefs. The dilemma is most often resolved by conforming beliefs to the conduct.\textsuperscript{382}

Obviously, this danger is not present in cases of rationally based beliefs. Such beliefs are open-ended—open to challenges, input of new data, verification, and, ultimately, change. If the justification for compelled action is rationally grounded, the initial belief may be modified without psychological trauma.

The situation is different with non-rational, faith-based beliefs. Such beliefs \textit{are not} open to rational challenges, input of new data, or change. For example, most major religions have changed little in their fundamental tenets since their inception. Whatever changes have occurred may be attributed to the inherent tension between non-rational and rational belief systems, and continual challenges from rationalists.\textsuperscript{383} Insofar as religions did change, the change was inconsistent with their foundational principles.\textsuperscript{384} There was, in any event, very little state action coercion that was involved in such changes in American history.\textsuperscript{385} If non-rational believers are forced to conform their conduct, and ultimately their beliefs, to a state-mandated ratio-

\textsuperscript{382} For a collection of sources on the theory of cognitive dissonance, see Ingber, \textit{supra} note 5, at 247 n.78.

\textquoteleft\textquoteleft{He loved Big Brother.} With these concluding words, Orwell’s 1984 gave a classic example of conforming beliefs to the conduct of the novel’s spiritually broken protagonist, O’Brien. \textit{George Orwell, 1984} 245 (New American Library Inc., 1961) (1949).

\textsuperscript{383} This especially applies to modern liberal Protestantism, with its attempts to “demythologize” the Scripture and to base its belief system on a more rational grounding.

\textsuperscript{384} Consider, for example, the change that occurred in religious cosmology, specifically in the understanding of the position of Earth in relation to the Sun.

\textsuperscript{385} With the exception of the disgraceful episode with the Mormons, which resulted in martyrdom of the founder of the faith, Joseph Smith.
nality, the result will be inconsistent with the most fundamental notions of liberty and self-ownership, the struggle for which has been the dominant theme of Western liberal political thought. In the final analysis, this is the best justification for leaving religion alone.

d. The Belief Must Be Sincerely Held

The last element requires that, in order for a belief to be religion, it must be sincere. The sincerity element, although present in Supreme Court’s statutory jurisprudence,93 has not been extensively treated in the constitutional context. The requirement that a claimant sincerely hold the alleged religious belief has been inferred from Ballard,94 and many lower courts have read Ballard this way.95 However, since Ballard, the Supreme Court has treated the sincerity of beliefs in an off-hand manner, perhaps because it considered it non-controversial.96 Indeed, one can hardly imagine a serious argument against a sincerity requirement. That a belief is sincerely held obviously must be established before an inquiry into the beliefs nature may proceed.

2. Advantages of the New Definition

The proposed definition has a number of advantages. It is in conformity with dictionary definitions,97 insofar as it gives “flesh and meaning” to the admittedly vague term “supernatural.” It is basically intelligible, insofar as it does not refer to “gods” or the “supernatural”—terms that are by their nature vague and evasive.

On the practical side, the new definition will have bearing on cases that favor believers over nonbelievers, such as in cases of conscientious objectors. It will force the courts to address the issue of religion versus nonreligion directly, rather than within a smoke-screen

386. See United States v. Seeger, 380 U.S. 163, 185 (1965) (“while the ‘truth’ of a belief is not open to question, there remains the significant question whether it is ‘truly held’”).
387. 322 U.S. 78 (1944).
389. Thomas v. Review Bd., 450 U.S. 707, 716 (1981) (“petitioner terminated his work because of an honest conviction that such work was forbidden by his religion”) (emphasis added); Wisconsin v. Yoder, 406 U.S. 205, 235 (1972) (“the Amish in this case have convincingly demonstrated the sincerity of their religious beliefs”) (emphasis added).
390. See supra section III.A.
of artful linguistic deceptions. Another practical advantage would be enabling public schools to teach moral values, since moral convictions will no longer be in danger of being labeled as "belief-as-religion."

But would it work? Will it lead to results that do not offend our intuitive judgments and sense of justice? These questions are dealt with in part IV of this Article.

IV. APPLICATION OF THE NEW DEFINITION

"Any theory is supposed to be able to handle the easy cases." An easy case in the context of defining religion would involve the Mormon Church. The Mormons have earned the right to be called one of the great religions of Western civilization through their uncompromising adherence to the doctrines of the Mormon Church and through their unquestioned success as a community. Their adherence remained constant for a historically significant period of time. Few people today will deny the Mormons their religious status. Yet, this is exactly what the United States Supreme Court did in 1890, in a Free Exercise equivalent of Korematsu. Let us apply the test and see if it guides us to the proper result.

A. Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States

In Late Corp. of the Church of Jesus Christ of Latter-Day Saints the Supreme Court repealed the Charter of Mormon Church, claiming the Church was not a religious or charitable organization. The

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391. One commentator described the Supreme Court as forcing itself into "semantic contortions" while trying to save the Seeger statute. Chicago Note, supra note 24, at 553.
394. As early as the 1960s, the Mormon Church became the wealthiest per capita church in the world. William J. Whalen, The Latter-Day Saints in the Modern Day World 150 (1964). Its university became a living testimony to Mormons' respect for education, and, as early as the 1960s, surpassed in size all other church-related universities. Id. at 258.
397. 136 U.S. 1 (1890).
398. Id. at 48-50, 63-64.
Court seemed to be particularly offended by the Mormon practice of polygamy, which it labeled a "pretence" (it is not quite clear why—the Mormons seemed to be quite sincere in their adherence to it). More significantly, the Court did not find polygamy to be in accordance with "the enlightened sentiment of mankind." This sentiment was consistent with the Court's nineteenth century practice of according First Amendment protection only to "civilized" religions.

Applying the proposed test, we naturally find that Mormonism should be accorded full First Amendment protection. Their belief is manifestly non-rational. Its main tenets are contained in The Book of Mormon, which describes a visit to the North American continent by Jesus Christ. The Book is prefaced by a story of gold tablets (containing the Book) that were allegedly discovered and translated by the founder of the faith, Joseph Smith. Although the preface is supported by two affidavits attesting to its veracity, not surprisingly the Mormon Church is not able to produce the tablets. Consequently, since there is no concrete basis for their belief, it must be pronounced non-rational.

399. Id. at 50.
400. Id.
401. See supra text accompanying notes 256-59.
402. The Book of Mormon (Joseph Smith trans., The Church of Jesus Christ of Latter-day Saints 1920) (1830).
403. Id.
404. Id.
405. Thus, one is left with the two options described by Thomas Paine:
If . . . we see an account given of . . . [a] miracle by the person who said he saw it, it raises a question in the mind very easily decided, which is, is it more probable that nature should go out of her course or that a man should tell a lie? We have never seen, in our time, nature go out of her course; but we have good reason to believe that millions of lies have been told in the same time; it is, therefore, at least millions to one, that the reporter of a miracle tells a lie.

THOMAS PAINE, THE AGE OF REASON 95 (Citadel Press 1974) (1796). A similar sentiment was expressed by Percy Shelley, obviously influenced by Paine:
Evidence of a more imposing and irresistible nature is required in proportion to the remoteness of any event from the sphere of our experience. Every case of miracles is a contest of opposite improbabilities, whether it is more contrary to experience that a miracle should be true, or that the story on which it is supported should be false: whether the immutable laws of this harmonious world should have undergone violation, or that some obscure Greeks and Jews should have conspired to fabricate a tale of wonder.

Mormonism also concerns itself with the alleged nature of the universe, insofar as the Mormons adopt by reference the Biblical account of creation. Clearly, there can be no doubt that Mormonism is a religion; if it is not, then Christianity itself is not either.

So far, in an easy case, the test produced no surprises. The test, however, aspires to handle not just easy, but even border-line cases. One such case was *Malnak v. Yogi*.

**B. Malnak v. Yogi**

The usual case addressing the definition of religion involves an adherent who wants his or her beliefs declared a religion in order to receive First Amendment protections. In *Malnak v. Yogi*, however, the proponents of the "Science of Creative Intelligence" ("SCI") wanted to teach SCI in public schools, and did *not* want it declared a religion. The "science" purported to explain what occurs within a person’s mind while undergoing transcendental meditation ("TM"). A group of plaintiffs that included parents, clergymen, and public organizations, both sympathetic and unsympathetic to religion, challenged the teaching of these beliefs in New Jersey public schools. The fundamental question for the courts was whether this "science" was a religion.

The defendants—despite numerous mentions of "unmanifest and unbounded field[s] of pure creative intelligence", "fourth," "fifth," "bliss," and "cosmic" states of consciousness; "ultimate constituent"; "impelling life force"; "omnipresent," "eternal," "unbounded," "illimitable," and "infinite" creative intelligence, etc., in the SCI/TM materials—claimed that the materials were "not intended or understood as an [sic] religion, reli-

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408. Id. at 1289.
409. Id.
410. Id. at 1290.
411. Id. at 1295.
412. Id. at 1298.
413. Id. at 1292.
414. Id.
415. Id. at 1294.
416. Id. at 1295.
417. Id.
418. Id.
419. Id.

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gious study or study of God.” Instead they claimed that SCI/TM was a “philosophical study.”

The trial court was not swayed, it held that SCI/TM was a religion, and therefore, the teaching of SCI/TM in New Jersey schools violated the Establishment Clause. The Third Circuit affirmed in a brief decision, which contained a scholarly and thoughtful concurrence by Judge Adams outlining his definitional test.

Applying the proposed test, it is apparent that SCI/TM concerns itself with the alleged nature of the universe. It makes certain factual claims about the universe, such as the existence of the above-mentioned multiple states of consciousness or levitation (courses which are offered at Maharishi International University, a fully accredited school in Fairfield, Iowa, founded by the defendant in Malnak).

420. Id. at 1297.
421. Id. During meditation, the students were supposed to recite the following mantra:

Guru Dev, Shri Brahmananda, bliss of the Absolute, transcendental joy, the Self-Sufficient, the embodiment of pure knowledge which is beyond and above the universe like the sky, the aim of ‘Thou art That’ and other such expressions which unfold eternal truth, the One, the Eternal, the Pure, the Immovable, the Witness of all intellects, whose status transcends thought, . . . to Shri Guru Dev, I bow down.

The blinding darkness of ignorance has been removed by applying the balm of knowledge. The eye of knowledge has been opened by Him and therefore, to Him, to Shri Guru Dev, I bow down.

Offering a handful of flowers to the lotus feet of Shri Guru Dev, I bow down. Id. at 1307.

422. “Although defendants have submitted well over 1500 pages of briefs, affidavits, and deposition testimony in opposing plaintiffs . . . defendants have failed to raise the slightest doubt as to . . . the religious nature of the [SCI/TM].” Id. at 1327.
423. Id.
424. See 592 F.2d 197, 207-10 (3d Cir. 1979); see also text and accompanying notes 320-22.
425. The University offers courses in levitation, which it modestly labels “first stage of flying,” along with pictures of “levitating” students in the school catalog, MAHARISHI INTERNATIONAL UNIVERSITY BULLETIN 370 (1988-90). The Bulletin described the course in the following words:

In one aspect of the TM-Sidhi program, called the flying technique, at the moment of maximum coherence in brain wave activity, the body lifts up and begins to hop (the first stage of flying). Simultaneously, the person experiences waves of exhilaration and profound stabilization of the silent level of awareness. In this way the flying technique accelerates evolution to enlightenment—the state of fulfillment free from suffering and problems.

Id.

Among other activities, the University sponsors the “Super Radiance Program.” Through meditating for the program the participants claim to influence the movements of stock markets, incidence of infectious diseases, and number of traffic fatalities. Id. at 358-60.
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Clearly, these are factual claims: either there are seven states of consciousness or not; either humans can levitate or they cannot.

However, no student or professor of Maharishi Yogi University has ever presented a convincing demonstration of either the fifth state of consciousness or levitation. Consequently, such beliefs, in the absence of scientific proof, must be considered non-rational. This decisively brings SCI/TM within the realm of "religion."426

C. Africa v. Pennsylvania427

In Africa v. Pennsylvania, Judge Adams, who wrote the concurrence in Malnak in 1979, applied the principles outlined in that important and influential decision just two years later. The Africa case presents perhaps, the most perplexing problem—and exciting challenge—in the area of defining religion.

The facts of Africa are well known. Frank Africa, who claimed to be a "Naturalist Minister" for the MOVE organization, was incarcerated in Pennsylvania on criminal charges. As a part of the dogma of his organization, he wanted to eat only raw foods. The administration of the prison where Africa was held before he was sentenced provided him with such a diet.428 However, after his sentencing, Africa was transferred to another prison. The administration of the new prison refused to accommodate him, citing primarily considerations of convenience.429

The University claims that the effects created were "scientifically verified." Id. at 360. The University is looking forward to elimination of conflicts and wars between nations and to securing for the world "a state of peace and a heavenly life for all mankind" through the program. Id.

426. This is not to say that there is no rational basis underlying the SCI/TM dogma. Stripped of its religious surplusage, meditation turns out to be an effective technique for dealing with daily stresses of life and various psychological and physical ailments.

According to the latest research, meditation consists of two basic elements: the silent repetition of a sound, or "mantra," to minimize distracting thoughts; and the passive disregard of intruding thoughts, followed by a return to the repetition. Using words such as "one," "peace," or "love" for meditation turns out to work just as well as old-fashioned prayer-like mantras. See supra note 421 (providing an example of religious aspects of meditation). Such repetition produces certain beneficial physiological changes and a sense of well-being that researchers dubbed the "relaxation response." Can Your Mind Heal Your Body?, CONSUMER REP., Feb. 1993, at 107, 110. Interestingly, similar meditation elements are present in religious practices of numerous religions, which may account for their appeal. For a report on the latest in the field of scientific research of meditation, see id.


428. Id. at 1025-26.

429. Among the reasons cited by the superintendent of the prison were fears that other
The case turned on the issue of whether the belief-system espoused by Africa was a religion. Presumably, if it were, the prison officials still would have been able to argue some legitimate penological reasons why Africa should not have been accommodated. Ascertaining whether MOVE was or was not religion, however, was a threshold question. 430

Africa described MOVE as a “revolutionary” organization “absolutely opposed to all that is wrong,” 431 which strove to “bring about absolute peace, . . . to stop violence altogether, to put a stop to all that is corrupt.” 432 Among its tenets was the non-consumption of processed or cooked foods. 433 It cloaked its message in the trappings of religion, claiming that every act of life for the MOVE members was invested with “religious” meaning ant that “religion” was practiced by the members by engaging it into all everyday acts of life. 434 This set of beliefs came to Africa from his father, who established the “religion.” 435

Judge Adams held that these beliefs did not constitute a religion. Particularly troubling in his reasoning were constant references to “matters of personal morality” 436 and ethics, 437 demonstrating a bias toward the tenets of conventional Christianity. 438 Equally troubling was his reliance on the absence of structural characteristics, such as “formal services, ceremonial functions, the existence of clergy, structure and organization, efforts at propagation, observance of holidays and other similar manifestations associated with the traditional religions.” 439

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430. Id. at 1029-30.
431. Id. at 1026.
432. Id.
433. Id. at 1027-28.
434. Id. at 1027.
435. Id. at 1026.
436. Id. at 1033.
437. Id. at 1028.
438. As is clear from the preceding discussion, morality and ethics are not present in all religions, and Judge Adams’ reliance should not have been relevant to the issue at hand.
439. Id. at 1035 (emphasis added) (quoting Malnak v. Yogi, 592 F.2d 197, 209 (3d Cir.)
Yet, was it a religion? One cannot be entirely sure. Perhaps it is not possible to make this determination on the facts of the decision. Undoubtedly, a requisite degree of non-rationality is present in one who declared:

Water is raw, which makes it pure, which means it is innocent, trustworthy, and safe, which is the same as God . . . . Our religion is raw, our belief is pure as original, reliable as chemical free water, . . . nourishing as the earth's soil that connects us to food, satisfying as the air that gives breath to all life.  

But is it about the nature of the universe, or rather about the conditions of this "degenerating . . . civilization,"  whose air and water are "perverted," whose food, education, and governments are "artificial," and whose words are "gibberish"? Applying the proposed test, one may come to a conclusion that Judge Adams reached the correct result, albeit for the wrong reasons.

It may be, however, that this question must remain unanswered for now. Perhaps in the future the availability of the "nature of the universe" test will allow judges to probe further into the beliefs of an adherent in order to make the requisite determination.

D. United States v. Foran

In United States v. Foran, the defendant was charged with "willfully and knowingly" refusing induction into the armed forces. Prior to induction, he had requested conscientious objector classification. The local draft board, and later the appeal board and Justice Department, argued that the defendant should not be granted conscientious objector classification. The government based its argument primarily on the fact that the defendant was "an avowed atheist,"
thus not qualifying for conscientious objector classification under the now-familiar Selective Service Act of 1967. 448

The district court held for the defendant. For the court, the only issue was whether the defendant’s opposition to war was based on the “religious training and belief” standard of the Selective Service Act. 449 The court applied a Seeger-derived test to ascertain if it was so:

To qualify as a conscientious objector, an individual must have a sincere belief that is the basic elemental motivating force in his life, to which all else is finally subordinate, and which has the same place in the life of the objector as does an orthodox religious belief in the life of a normally religious individual. 450

Aside from some unfortunate choices of words (does reference to “normally religious” individuals imply that there are abnormally religious individuals?), the test fairly paraphrases Seeger. Applying the test, the court found that the defendant had held such beliefs. It is clear, however, that the case was wrongly decided.

Applying its test, the court found that being brought up Catholic imbued the defendant with “strong moral aversion to violence of any type,” 451 a belief that the court characterized as “basically religious.” 452 To the court, “real, pervasive, durable and commendable . . . marshalling of priorities” 453 also implicated religion, as did the fact that the defendant’s “table of ultimate values [was] moral and ethical.” 454 Finally, as to the “occupying the same place” part of the test, the court found that the defendant was “as genuinely and profoundly governed by his conscience [from which he derived his views], as would have been a martyr obedient to an orthodox religion.” 455

The court disposed of the obstacle of the defendant’s atheism by asserting that it was “in part a product of [his] faith,” 456 and by

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448. For discussion and analysis of the Selective Service Act and its legislative history, see supra text accompanying notes 301-07.
449. Foran, 305 F. Supp. at 1324.
450. Id. at 1325.
451. Id. at 1326.
452. Id.
454. Id. at 1326.
455. Id. at 1326 (quoting Sisson, 297 F. Supp. at 905).
456. Id. at 1327.
pointing out the connection between his present views and "normal religious doctrine, like the ten Commandments." Thus, the court held that the defendant's aversion to war was based on "religious training and belief."

Defendant should not have been found to possess "religious training and belief." First, the statutory language referred to "training and belief," not "training or belief." It may be the case that the defendant had had religious training. However, the crucial element ought to have been the presence of religious belief, and that is what the defendant's avowed atheism called into question.

Could it have been that the defendant possessed religious belief despite his professed atheism? The court thought so. The court's mistake was common and understandable. It correctly perceived that, in addition to being an atheist, defendant held a number of deeply felt positive beliefs. The court zeroed in on moral and ethical beliefs, bearing strong resemblance to some traditional religious teachings. However, the presence of positive moral beliefs does not, in itself, qualify them as "religious." The resemblance of such beliefs to traditional religious beliefs again does not automatically qualify them as "religious" (for they may be arrived at via rational means). Thus, the religious nature of the defendant's beliefs was by no means proved by pointing out their possible derivation from, and resemblance to, the traditional tenets of Catholicism.

Then, there is a problem with the application of the second part of the court's test. The court committed another common mistake, equating morality with religion. For the court, a moral system had to occupy the same place in a defendant's life as would an orthodox belief in God in the life of a religious person, if the defendant was sufficiently earnest. However, the court overlooked, or was forced by the Seeger test to overlook, the fact that any comprehensive moral system would "occupy the same place in [one's] life as an orthodox

457. Id. at 1326.
458. Id. at 1327.
459. As I have argued, properly construed, atheism, to be an antonym of "theism," must encompass not only denials but also absences of belief in God or gods. See supra text accompanying notes 87-92.
460. In addition, they were not that traditional. Most Catholics have no problems participating in wars, finding solace in the doctrine of "just war," developed by, among others, Catholic theologians. The doctrine was first developed by Augustine under the influence of Cicero, and was consequently refined further by yet another saint, Aquinas. Eventually it became a part of canon law. THE INTERNATIONAL LAW DICTIONARY 335-36 (1987).
461. Foran, 305 F. Supp. at 1326.
belief in God plays in the life of [a religious person].” \(^{462}\) Again the distinction between morality and religion dissipates.

Applying the proposed test to the facts, we must ask, “Was the defendant’s belief non-rational?” If not, it should not qualify as a religious belief, despite the presence of any other elements. As if in response, the defendant during his trial stated “that objective principles of morality [could] be deduced from the order of the universe.” \(^{463}\) The reference to “objective” principles of morality expresses reliance on a rational, rather than non-rational, mode of thinking, prior religious influences notwithstanding.

The defendant’s belief was probably manifest (at least it so appeared to impress the court during the trial \(^{464}\)), and it concerned itself with the nature (“order,” in his own words) of the universe. However, since his beliefs, by his own admission, and also objectively, were based on rational grounds, this conclusion appears to be at odds with the court’s conclusion that the defendant’s beliefs “were not essentially the product of the application of reason, or . . . philosophical views.” \(^{465}\) One does not become a critical atheist \(^{466}\) through the non-use of reason. One does not grow to abandon a Catholic background without substantial philosophical grounds. For these reasons such views should not have been declared “religious beliefs,” and Mr. Foran should not have qualified for conscientious objector classification.

E. Brown v. Pena \(^{467}\)

The plaintiff in Brown v. Pena sued the director of the EEOC over the prior dismissal of two employment discrimination charges the plaintiff filed with a local EEOC office. The charges alleged religious discrimination. The plaintiff claimed that it was his “personal reli-

\(^{462}\) Id. For discussion of the role of philosophy in human life, see supra note 22.

\(^{463}\) Id. at 1326 (paraphrasing defendant).

\(^{464}\) “Defendant's testimony at trial reflected an honest and unprepared mind, not hear-rehearsed or memorized language of court decisions. The record as a whole nowhere indicates that the beliefs of the defendant were not 'truly held and keenly felt,' . . . nor does the Government direct the court's attention to any evidence to the contrary.” Id. (citations omitted).

\(^{465}\) Id.

\(^{466}\) A term of George H. Smith. A critical atheist is an atheist who not only does not possess a theistic belief for whatever reason, but who also positively affirms that theism is factually incorrect. See Smith II, supra note 83, at 17-18.

\(^{467}\) 441 F. Supp. 1382 (S.D. Fla. 1977), aff'd, 589 F.2d 1113 (5th Cir. 1979).
gious creed’ that ‘Kozy Kitten People/Cat Food . . . contribut[ed] significantly to [his] state of well being’ by increasing his energy.” The EEOC did not find jurisdiction under Title VII, claiming that “plaintiff failed to establish a religious belief generally accepted as a religion.”

While the EEOC reasoning may appear troublesome (the “generally accepted” language is particularly open to challenges), the holding of the case (i.e., that the plaintiff’s personal preference did not amount to “religion”) is not. Without getting into a complicated discussion regarding the rationality of such a belief, it is obvious that it does not concern itself with the “alleged nature of the universe.” The whole of creation was not the plaintiff’s concern. This result comports with our intuitive notions of what religion is and is not.

F. Other Applications

Brown v. Wainwright

In Brown v. Wainwright, an inmate in a Florida prison brought an action alleging violation of his constitutional rights in the form of a regulation that required prisoners to be clean shaven. To that end, he alleged that he was a “demi-god, ‘an offspring of a God and Mortal.’” Additionally, he alleged that he was “an established religion . . . .” The court, decided the case without oral arguments, and upheld the regulation based on the necessity of personal cleanliness of inmates and personal identification of inmates by prison authorities.

It is likely that this case belonged to the category where adherents want their beliefs declared religious in order to receive some preferential treatment. The proposed definition quickly disposes of such nuisance suits: because the belief was not sincerely held (it was simply a ruse to thwart prison regulations), the inquiry should stop there.

However, despite its absurdity, this case raises a larger issue. How should the judiciary deal with claims of self-worship, especially in the “creation of the universe” context? That is, what are we to do

468. Id. at 1384.
469. Id.
470. 419 F.2d 1376 (5th Cir. 1970).
471. Id. at 1376.
472. Id.
473. Id. at 1377.
with a modern-day Jesus, claiming to have created the universe, being one with his Father and the Holy Spirit? Such a belief will meet the formal elements of the test. It would be illogical to deny constitutional protection to its adherents while protecting adherents of a similar dogma, solely by virtue of the two originating some two thousand years apart. However absurd it may seem to people brought up in the rational atmosphere of today, such beliefs should be given constitutional protection under the Religion Clauses, provided they are truly sincerely held.

Wiccans

On July 24, 1992, Christine Jones, a Wiccan, appeared on Larry King Live to describe employment discrimination she allegedly suffered. Ms. Jones, a registered nurse, was not hired because of her "religion." Appearing with Ms. Jones was Lou Sheldon, representing the Christian Traditional Values Coalition. He defended discrimination against Ms. Jones by advancing two contradicting arguments: (1) that Wiccan "religion" was not really a religion, and (2) that Wiccan "religion" (which he seemed to equate with witchcraft) did not have any redeeming values.

Setting aside the second line of argument, which does not in any way impact on the availability of constitutional protection for a religion, the question remains: Is the Wiccan "religion" a religion? Since the Wiccan invocation of "Mother Earth" indicates that it is mostly just the old-fashioned pantheism, it clearly is a religion. Again, the formal elements of the test are met, pantheism being a non-rational explanation for the nature of the universe.

Communism (Socialism, Marxism, Leninism, Maoism, and Other "Isms")

A court in Alabama was not alone in its sentiment that "[r]eligion can be Christianity, Judaism, Mohammedanism, Buddhism,

474. The first draft of this Article was written over a year before the events involving David Koresh and the Branch Davidians in Waco, Texas.
476. Id. Mr. Sheldon was particularly upset by the animal sacrifices Wiccans allegedly perform, which was vehemently denied by Ms. Jones. Mr. Sheldon in his ignorance probably confused Wiccans with adherents of Santeria, who do indeed engage in animal sacrifices. See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 113 S. Ct. 2217 (1993). The Santeria, being a mixture of Christianity and African native religions, indisputably qualifies as a religion under the test. "[Santeria] is an ancient religion that originated almost 4000 years ago with the Bantu people . . . ." Id. at 1469.
Atheism, Communism, Socialism, and a whole host of other concepts. The argument that Communism is a religion is still occasionally advanced. However, the Communist political philosophy and movement could not be considered a religion under the test: Communism uses allegedly rational means of ascertaining and describing reality. While an argument may be made that such self-characterization should not be determinative, it is clear that such self-characterization precludes finding that the belief is manifestly non-rational. Even mere appeal to rationality should be sufficient to find minimal rationality and thus defeat the stricture of this element. Insofar as Communism's (or any other "ism's") conclusions are not supported by the evidence, it is a faulty and unprincipled philosophy, but not a religion.

Satanism
The Church of Satan, established by Anton Szandor LaVey on Walpurgisnacht, 1966, achieved a certain notoriety since its formation. Surprisingly, however, in LaVey's own writings and in his authorized biography, LaVey's motivations appear mostly atheistic, rather than Devil-worshiping. His authorized biography described his motivations in these words:

How was he to believe that there was some plan to such senseless carnage, that God was in his heaven watching over all these people? What possible reason could there be for giving such pain and suffering to innocent souls? There could be no God. People must be made to answer to other men rather than depend on some supreme deity to dole out justice—no such God existed.

LaVey himself was more direct:

There is no God. There is no supreme, all-powerful deity in the heavens that cares about the lives of human beings. There is nobody up there who gives a shit. Man is the only god. Man must be taught to answer to himself and other men for his actions.

479. Id. at 59.
LaVey had a peculiar notion of what a Church of Satan should be:

We established a *Church* of Satan—something that would smash all concepts of what a ‘church’ was supposed to be. This was a temple of indulgence instead of the temples of abstinence that had been built up until then. We didn’t want it to be an unforgiving, unwelcoming place, but a place where you could go to have fun.\(^{481}\)

Other authors have noted “a rational and even a partly scientific basis for his beliefs and rites.”\(^{482}\)

LaVey seemed to have wanted for the Church of Satan to become home to all unsatisfied paranormalists:

[T]he Church of Satan could easily become a psychical Ellis Island of refugees and emigres from the occult scene. Displaced persons who have left their covens, 90-day Magi weary of pondering the Enochian Keys and Crowleyanity, chasuble queens who couldn’t make it in the Catholic Church, woebegone wiccans who find that the Goddess’s bosom has run dry, Egyptoids who’d be better off as Shriners or in Laurel and Hardy’s *Sons of the Desert*, pyramid sitters who’ve gained nothing but claustrophobia, Altanteans who get seasick, UFO-ites who’ve redefined gravitational law but can’t chin themselves, witless wizards, sex-starved witches, destitute diviners, pshort-psighted psychics—all the growing residue of a phenomenon that, because of its very popularity, HAD to lose the magic it pur- ported to have.\(^{483}\)

All in all, the Church of Satan appears to be more of a publicity stunt, designed to shock the establishment, rather than a serious attempt to establish a religion. In a sense, it is similar to Communism insofar as LaVey used, and claimed to use, trappings of rationality while talking about nonsensical concepts. For the same reasons as Communism, it should fail the test for a religion.

\(^{481}\) BARTON, supra note 478, at 88-89 (quoting Anton LaVey).

\(^{482}\) WOLFE, supra note 480, at 216.

\(^{483}\) Anton LaVey, *The Church of Satan*, Cosmic Joy Buzzer, reprinted in BARTON, supra note 478, at 249.
V. CONCLUSION

Religion Clauses jurisprudence will continue to suffer from the infirmities identified earlier. While the proposed definition may not be the final word on the subject, it, along with the background information and conceptions this Article provides, should serve as a useful analytical tool for practitioners, allowing them to tackle the Religion Clauses controversies.

By raising conceptually sound arguments in cases concerning religion we should be able to clarify the law and force judges and legislatures to face difficult questions of protecting religious and non-religious thought and behavior. As the Supreme Court itself recognized, "[I]liberty finds no refuge in a jurisprudence of doubt." When the scope of constitutional protection is in doubt, the liberty of all, religious and non-religious, is ultimately at risk.

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