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I. INTRODUCTION

This Article attempts to define the meaning of the word "religion" in the First Amendment. In doing so, this Article will not sidestep the debate over the emphasis on original meaning in constitutional interpretation, and instead draws upon the meaning attributed to the word "religion" in the Constitution by the Framers and Ratifiers of the First Amendment. While this Article contends that the criteria by which to judge the meaning of the text of the Constitution is the meaning attributed to the text by the Ratifiers, one must be mindful of the position taken by almost all constitutional scholars; that the original meaning of the text is important and is at least the starting point of constitutional interpretation.[1] The meaning sought is not the subjective meaning attributed by individual Ratifiers to the word religion, but rather the objectified meaning of the text as generally understood by all the Ratifiers.[2]

Research to establish the meaning of the word religion in 1791 was difficult because a definition was never laid out by anyone in the founding generation. Instead, it seemed that religion and Christianity were often used interchangeably.[3] There were also instances where questions arose where it seemed religion was used

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1. *See e.g.*, RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION (1996) (advocating interpreting the Constitution based on a moral reading of the Constitution's text); JUSTICE ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 37-41 (1997) [hereinafter SCALIA, INTERPRETATION] (identifying Justice Scalia's mode of interpretation which seeks to find, not the subjective intent of the Framers or Ratifiers, but the objective meaning of the text as was used by society when the text received its authority); LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 49-57 (3d ed. 2000) (stating that the original meaning of the text is the "starting point" of constitutional interpretation).

2. *See* SCALIA, INTERPRETATION, *supra* note 1, at 17 (stating "we do not really look for subjective . . . intent. We look for a sort of 'objectified' intent— the intent that a reasonable person would gather from the text of the law, placed alongside the remainder of the *corpus juris*").

3. This is likely because Christianity was viewed as a religion, and the far dominate religion at the time, so to use the two interchangeably does not necessarily imply that other non-Christian belief systems are not religions within the original meaning, only that Christianity was surely considered a religion.

in a more expansive manner to include other monotheistic religions. On the other hand, the Framers and Ratifiers, while seeking to prevent the domination of one Christian sect over all others in the new government, may have feared the "prostration" of Christianity to non-Christian religions — Judaism and Islam — and to atheists and pagans.[4] This fear would have led to a more narrow definition of religion.

It is the contention of this Article that "religion," in 1791, meant *at least* what we would think of today as a traditional theistic belief in a God with concomitant duties, which imply a future state of rewards and punishments.[5] In other words, while religion very likely meant something narrower than simply theistic belief systems, such as monotheism, religion did not reach any broader than theism. The original meaning thus seems to include under the rubric of religion only monotheistic beliefs such as Christianity, Judaism, or Islam. It also appears to be unlikely, given the historical evidence, that religion was thought to include polytheistic beliefs. It is clear that religion did not encompass atheism, or what the Court often refers to today as "irreligion."[6] Consequently, the original meaning of the word religion cannot offer an exact

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4. Joseph Story in his famous *Commentaries*, observed that the "real object of the [first] amendment was, not to countenance, much less advance Mahometanism, or Judaism, or infidelity, by prostrating christianity; but to exclude all rivalry among Christian sects . . . ." JOSEPH STORY, 2 COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 594 (2d ed. 1851).

5. The meaning of religion appears to have evolved from the definition given by this Article as the original meaning, to today's inclusion of non-theistic beliefs. *See e.g.*, JOHN KERSEY, DICTIONARIUM ANGLO-BRITANNICUM (1708 London) (1969 facsimile) (defining religion as "the Worship of a Deity"); NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828) (1970 facsimile) (emphasis added) (giving four definitions of religion: "1. Religion, in its most comprehensive sense includes a belief in the being and perfection of God, in the revelation of his will to man, in man's obligation to obey his commands, in a state of reward and punishment, and in man's accountableness to God. . . . It therefore comprehends theology as a system of doctrines and principles . . . *for the practice of moral duties without a belief in a divine lawgiver, and without reference to his will or commands, is not a religion*"); SAMUEL, JOHNSON & JOHN, WALKER DICTIONARY OF THE ENGLISH LANGUAGE (7th ed. London 1853) (stating "[v]irtue, as founded upon reverence of God, and expectation of future rewards and punishments; a system of divine faith and worship as opposite to others"); WEBSTER'S NEW UNIVERSAL UNABRIDGED DICTIONARY 1527 (2d ed. 1983) (including the definitions used in the 1828 Webster's, but also now "loosely" defining religion to include a "system of beliefs, practices, ethical, moral etc. resembling, suggestive of . . . such a system; as humanism is to religion"). As a result, while originally defined to include only what this Article asserts to be the original meaning of religion in the First Amendment, the meaning of religion as defined in dictionaries has expanded to include non-theistic beliefs.

6. Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet, 512 U.S. 687, 703 (1994). In one of the numerous letters to President Washington from the many denominations of the new nation, the Quakers wrote that they prayed to God that Washington would be an effective instrument in God's hands to suppress "Vice, Infidelity and Irreligion . . . ." Letter from George Washington to the Society of Quakers, *in* 4 THE ARTICLES OF GEORGE WASHINGTON 265-67 (W. W. Abbott & Dorothy Twohig eds., 1993) (October, 1789). The Quakers, like others of the era, distinguished and elevated religious belief, above "Irreligion," which was denigrated and seen as different in kind than religion and as something for government to actively suppress.

abstract definition. Nevertheless, original meaning interpretation in this instance[7] can offer a continuum whereby traditional mono-theistic beliefs, and certainly Christianity, are included as religions, while belief systems based on non-theistic views of the world — philosophy for example — are not included in the definition of religion.[8]

Consequently, a religion in the First Amendment context has several attributes: a religion is at least theistic, and likely monotheistic, the Supreme Being to whom the belief system claims adherence requires the believer to do and refrain from doing certain things, and the belief system must profess a future state of rewards and punishment.[9]

II. THE ORIGINAL MEANING OF "RELIGION" IN THE FIRST AMENDMENT SHOULD FORM THE BASIS OF RELIGION CLAUSE JURISPRUDENCE

A. Arguments for Originalism Generally

The debate over how to interpret the Constitution has been with us since the dawn of the Republic.[10] Today there are essentially two camps as to what is the proper[11] constitutional interpretative methodology: originalism and nonoriginalism. Within each school there are numerous divisions and subdivisions, but for purposes of this Article, the type of originalism adopted is that advocated by

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7. In relation to the question of what was the original meaning of the word religion in the First Amendment.

8. Richard Kay, in his article, *Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses*, 82 NW. U. L. REV. 226, 243-44 (1988), argues that judges do not need to know precisely the abstract definition or meaning of all the text in the Constitution for original intention interpretation to work. On the contrary, judges need only, in each specific case brought before them, decide which litigant's position is more akin to the original intent of the text. *Id.* This is a much easier proposition that requires only a "good faith judgement about which result is more likely consistent with the [original] intent." *Id.* Stated another way, the original meaning can be less than perfectly defined in the abstract and still be adequate because the judge has only to say which of two propositions offered by the litigants is more like or dislike the original meaning, and rule accordingly.

9. It also appears that a religion was also seen as possessing at least a rudimentary organization.

10. *See e.g.*, Robert N. Clinton, *Original Understanding, Legal Realism, and the Interpretation of 'This Constitution'*, 72 IOWA L. REV. 1177 (1987) (surveying the history of constitutional interpretation including the interpretative methodologies of the Framers and Ratifiers); H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1985) (asserting that the Framers did not want the courts to use originalist interpretation).

11. Or the just, or best, or most workable methodology.

Justice Scalia: original meaning interpretation.[12] Original meaning adjudication does not look to the subjective intent of the Framers or Ratifiers as a guide to the meaning of the Constitution.[13] Instead, judges must seek to ascertain the meaning of the text as generally understood by those who gave the text its authority, the Ratifiers and people of the states.[14] As Justice Scalia writes: "[w]e [originalists] look for a sort of 'objectified' intent — the intent that a reasonable person would gather from the text of the law, placed along side the remainder of the *corpus juris*."[15]

What follows is a preliminary and incomplete description of the debate surrounding constitutional interpretation. The argument for originalism and the normative values advanced by originalists are examined. Arguments against nonoriginalism are then briefly covered. The moral force of this Article then follows with an exposition of a new theory of moral justification for originalism based on the theory of the just state as the minimal state. Finally, the full force of the normative arguments for originalism, including this Article's moral theory undergirding originalism, will be applied to the debate surrounding religion and the First Amendment.

For the originalist, the dictionary is a useful tool to gain access to the meaning of the text contemporary to ratification.[16] The writings of the Framers, especially *The Federalist Papers*, are also useful to ascertain what the text meant.[17] In addition, one can look to the writings of contemporaries of ratification to ascertain how a particular word or phrase was used in context to better arrive at the general societal meaning attributed to the word or phrase. Finally, the originalist must be familiar with the historical background and circumstances that surrounded the ratification of the text in question to better ascertain its original meaning.[18]

Originalist writers support originalism with numerous different

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12. SCALIA, INTERPRETATION, *supra* note 1, at 17.

13. *See id.* at 38 (rejecting the use of the subjective intent of the Framers in constitutional interpretation).

14. *Id.* at 17.

15. *Id.*

16. *See supra* note 5 (giving dictionary definitions of religion contemporary to the ratification of the First Amendment); SCALIA, INTERPRETATION, *supra* note 1, at 23. Justice Scalia notes that in "sophisticated circles" resort to such mundane tools as dictionaries, contemporary writings and context seems "unimaginative." *Id.* While Scalia disputes this proposition, claiming that originalists must know history, context and theory, these so-called drawbacks of originalsim make it all the better to fulfill one of the major goals of originalism— cabin judicial discretion. *Id.*

17. *Id.* at 38.

18. *Id.* at 23.

normative claims. The standard and most mentioned are: stability, the rule of law, separation of powers and democratic theory (reducing judicial discretion and increasing the sway of popular voices), and protection of minority rights and equality. Justice Scalia argues initially that the principle of separation of powers, with the legislative branch being the lawmaking branch, requires the judiciary to limit its purview to the application of laws and the Constitution, and not to the creation of constitutional rights.[19] Essentially, with the legislature being directly elected by the people, in whom all sovereignty resides, and the judiciary being relatively isolated and not responsible to the people, the judiciary can only legitimately overturn a decision by the people when relying on and enforcing a prior authoritative act of the people — the Constitution.[20]

Originalism enhances stability over other, nonoriginalist methodologies by reaffirming that the text of the Constitution has a permanent meaning that does not change except through the Article VI amendment process.[21] With stability being of paramount importance to any civilized society,[22] and with a Constitution that was put in writing so as not to change,[23] the notice and peace of mind (for personal as well as business reasons) that come with knowledge that the meaning of our governing document does not change are important values to be weighed in the balance.[24]

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19. *Id.* at 9-10.

20. *Id.* at 9-10, 40-47. *See also* Kay *supra* note 8, at 289-90 (questioning how nonoriginalists overcome the counter-majoritarian difficulty).

21. *See* SCALIA, INTERPRETATION, *supra* note 1, at 41-47 (criticizing nonoriginalists for their lack of guiding principles as to what the meaning of the Constitution will change to). *See also* Kay, *supra* note 8, at 286-88, 291-92 (claiming that originalism increases stability).

22. *See generally* SAINT THOMAS AQUINAS, SUMMA THEOLOGICA at prima secunda, Qu. 97, Art. 2 (stating "the very fact of change in the law is, in a certain sense, detrimental to the public welfare").

23. *See* Marbury v. Madison, 5 U.S. (1 Cranch.) 137, 176 (1803) (stating "[c]ertainly, all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation").

24. For another view on how a form of stability can normatively support originalism see Clinton, *supra* note 10. According to Clinton, when courts are faced with a constitutional question they must first look for an answer in the original intent of the Constitution. *Id.* at 1264-78. This is because constitutional stability is advanced when society believes courts are indeed searching for the meaning of the constitution. *See id.* at 1259, 1261-63 (asserting that constitutional stability "has cultural, social, and economic importance" in that society is better able to function when all respect the constitutional decision handed down by courts). Professor Clinton proposes that judges look to other normative values when there is arguably no original meaning to control the disposition of the case at hand. *Id.* at 1264-76. Stability, as understood by Clinton, is not affected when modern problems facing society not envisioned by the Founders are resolved employing contemporary morality.

It is the emphasis on stability and notice that motivated Justice Scalia's Article, *The Rule of Law as a Law of Rules*.[25] In his Article, Justice Scalia notes that in a democracy the rule of law — rules promulgated by the people — is given preference.[26] Rules give notice to those governed by the rules, carry the imprimatur of the representative branches, lessen judicial discretion, and do "justice" to most that fall under the rule.[27] These rules include constitutional clauses and provisions because the same rule of law values that apply to legislatively enacted rules also apply to constitutional rules. Because of their clarity, rules are easy to criticize and replace if considered unjust as contrasted to judicial decisions, especially constitutional decisions, that rely on amorphous, ad-hoc balancing to determine the "just" outcome.[28] Rules also improve the equal application of the law because there is little room for judges of different persuasion to dispense punishment, as opposed to balancing, where the factors considered count for nothing or everything depending on the judge and the party appearing before him.[29]

Another, more ingenious tactic is the claim by originalists that a nonoriginalist methodology of interpretation can lead to a diminution of the protection afforded individual rights.[30] This is ironic because liberals generally presume that nonoriginalism leads to greater protection of rights as compared to originalism. While the extent of rights protection by the Bill of Rights under an originalist approach may not be as broad as liberals like,[31] the extent of protection cannot be diminished. This is in contrast to, let us say, a moral reading of the Constitution,[32] where, depending on

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25. Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989).
26. *Id.* at 1176.
27. *Id.* at 1176-78.
28. *Id.* at 1178.
29. *Id.* at 1182.
30. SCALIA, INTERPRETATION, *supra* note 1, at 41-47.
31. In fact, rights protection may be more comprehensive in many cases under an originalist methodology. Under an originalist interpretation, the clauses of the Bill of Rights, perhaps absolute in character, may provide much greater protection than is usually assumed. In other words, whereas under nonoriginalism a person's rights may be overcome by a compelling state interest, an original meaning interpretation would preserve the presumably absolute character of the rights in question.
32. For a moral reading of the Constitution see DWORKIN, *supra* note 1. Dworkin is criticized for the indeterminacy of his moral reading, and for the apparent conflict between Dworkin's adherence to a moderate form of originalism and his emphasis on the "best" interpretation of the Constitution. *See* Michael W. McConnell, *The Importance of Humility in Judicial Review: A Comment on Ronald Dworkin's "Moral Reading" of the Constitution*, 65 FORDHAM L. REV. 1269 (1997).

the particular philosopher/judge on the bench, individual rights may broaden or narrow. For example, one need only look to cases where restrictions on contracts were upheld, thus diminishing the protection afforded property and personal autonomy in the pursuit of greater social justice.[33] Nonetheless, if property and contract rights are not modern preferred personal rights entitled to greater constitutional protection, one must examine the case of *Maryland v. Craig*,[34] where the Court held that the absolutist language of the Sixth Amendment allowed an accuser to testify via television, and not face-to-face.[35]

Other writers have argued for other normative values that may underlie originalism and thus make it the most legitimate theory of constitutional interpretation. For example, Professor Randy Barnett advances the "writtenness" of the Constitution, and the values that that characteristic entails, to present a theory of adherence to the text of the Constitution.[36] The obligation to obey the Constitution's text, for Barnett, derives from the just procedures established by the Constitution's text.[37]

Judge Bork seeks to restrain judges from imposing their view of good public policy on society and to instead have judges only overturn the preferences of the people and their representatives when the Constitution so requires.[38] Bork discusses the Madisonian dilemma and the tension between the right of the majority to order its life and the rights of minorities, which the Constitution protects.[39] Bork finds that both the majority and minority are self-interested and are not worthy of trust to properly define the sphere reserved to each.[40] Consequently, to retain legitimacy, the Supreme Court must, when arbitrating disputes between the majority and minority, apply principles neutrally derived from the Constitution so as not to impose subjective beliefs of good public

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33. *See* Home Building & Loan Ass'n v. Blaisdell, 290 U.S. 398 (1934).

34. 497 U.S. 836 (1990).

35. *Id.* at 860.

36. *See* Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 LOY. L. REV. 611 (1999).

37. *Id.* at 640-43. The "writtenness" of the Constitution matters to Barnett because its performs "evidentiary, cautionary, . . . channeling" and "clarification" functions. *Id.* at 630-36. To deviate from the meaning attached to the text at the time the text was given authority would be to detract from the value of its "writtenness." *Id.* at 634.

38. ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 1 (1990) [hereinafter BORK, TEMPTING].

39. *Id.* at 139-41.

40. *Id.* at 139.

policy.[41] Bork then claims that because we will not give total control over society to the judiciary, judicial power must somehow be limited.[42] Society must limit the power of the judiciary or subject itself to rule by Platonic guardians.[43] Alternatively, if we do not retain an independent branch capable of delineating the power of the government over the individual, we may as well submit to pure majoritarianism.[44] Since neither alternative is acceptable, originalism offers the sole remaining theory entailing neutral principles by which the Court can restrain itself and still protect individual rights and the right of the majority to rule itself.[45]

A short but intriguing piece by professor John O. McGinnis claims that since the original Constitution was "premised on a correct view of essentially immutable aspects of human nature"[46] and thus creates the "principles and structure[s]" of government that most closely align with human nature, the Constitution should be interpreted in accord with the original meaning.[47] Since the Framers correctly adduced human nature and created a government that accordingly fit well with that nature, allowing man to best pursue happiness, the original Constitution should guide interpretation.[48] The original Constitution recognizes, McGinnis argues, that in the private sphere man's self-interest should be given free reign and accordingly does so.[49] In the public sphere, on the other hand, because man's self-interest would cause net harm to society (created by public action problems), it was contained by a Constitution that harnesses faction, places self-interest against self-interest, and uses federalism, bicameralism and separation of powers to raise the costs of exercising control over the entire government.[50] With the validation of the view of human nature as not infinitely malleable through government,[51] but instead consisting of inherited characteristics, a Constitution which recognizes

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41. *Id.* at 140-41.

42. *Id.* at 141.

43. BORK, TEMPTING, *supra* note 38, at 141. *See also* LEARNED HAND, THE BILL OF RIGHTS 73-74 (1958).

44. *Id.*

45. *Id.*

46. Namely, a self-interested nature.

47. John O. McGinnis, *The Original Constitution and Our Origins*, 19 HARV. J.L. & PUB. POL'Y 251 (1996).

48. *Id.* at 252.

49. *Id.*

50. *Id.* at 253-54.

51. Which was the Soviet's view and is the current basis for the liberal obsession with government programs.

this self-interest is best suited to govern.[52]

One argument not made, but applicable, is the argument from intertemporal equality. If the content of the law and the extent of constitutional protection afforded rights changes, then some litigants are receiving protection and some are not, even if the litigants are identical in all respects save the date they sought Supreme Court review. As a result, nonoriginalism, with its changing standard as to what qualifies, for example, as a constitutional right, leads to unequal treatment by the judiciary. Originalism, by maintaining the same content of protections afforded citizens, is not open to the same criticism from equality, ironically a value usually presumed the prerogative of nonoriginalists.

Proponents of originalism make numerous arguments for original meaning interpretation. Most rely on ideas about popular sovereignty (legitimacy), stability, the rule of law, and a few others scattered in the academic literature. The assertions are powerful because all the values put forward by originalists are necessary for a successful government. A government built on something other than popular sovereignty, Plato's Republic, is not democratic. Instability would threaten not only business and the economic success of our nation, but the personal lives of our citizens. If the content and extent of our rights and duties change very often, how is one to function? In addition, if it appears to the average citizen that the Court is simply making-up rights, respect for the Court and the Constitution would fail. Also, building on the stability argument, the rule of law virtues of notice, certainty, and rules made by the people's representatives are threatened when relatively isolated judges make law. Finally, as briefly alluded to, originalism avoids the problem of unequal treatment of litigants that nonoriginalism, with its ever-changing standards invites. In sum, it appears that originalists offer many normative values to support their adherence to the original meaning of the text of the Constitution.

B. Arguments Against Nonoriginalism

The arguments against a nonoriginalist interpretative methodology used by originalists are numerous. Clearly, one must ask, by what standard is the judge, who is unconstrained by originalism, supposed to decide what the Constitution means?[53] With originalism

52. McGinnis, *supra* note 47, at 256-59.

53. SCALIA, INTERPRETATION, *supra* note 1, at 44-47.

the answer, at least theoretically, is relatively simple; what did the text mean at the time it was ratified? For the nonoriginalist however, the principle, or lack thereof, by which the meaning of the Constitution is ascertained is idiosyncratic in that each judge applies his personal philosophy of the Good and what the Constitution *should* mean to the case at hand.[54] The nonoriginalist judge must offer some basis for imposing his will upon the rest of the nation.[55]

Secondly, originalists question the necessity of nonoriginalism in the first place. The general claim by nonoriginalists is that the Constitution must change with the times, that it must reflect contemporary morality.[56] If society really had changed as much as nonoriginalists claim, why would the less responsive Supreme Court have to intervene? One would assume that the more representative legislatures would act first from the assumed pressure that would arise from the changed society. Similarly, if one notes the nonoriginalist cases over the last fifty years, they include many instances where there was no majority popular will for the decision.[57] Thus, originalists argue the claim that the Constitution must change to meet the times is merely a cover for a more liberal agenda that cannot win in the legislatures and must resort to that branch of government more attune to the agenda.

Building on the previous point, many advocates of nonoriginalism seek to cabin the scope of influence of elected representatives to further values supported by the nonoriginalists. Ronald Dworkin,

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54. *See* Henry P. Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353 (1981) (criticizing nonoriginalists as wishing to impose their own personal view of what the Constitution should be, and passing their personal preferences off as constitutional imperative).

55. Ronald Dworkin offers the most compelling and coherent case for what is termed a moderate originalism but, as previously discussed, his open-ended invitation to judges to impose their own philosophical view of what is morally just in a case is open to the same criticism as other nonoriginalist claims. If only the Dworkinian judges could assure the nation that their moral views were correct, all would rest assured that justice was being done.

56. *See e.g.*, William J. Brennan, Jr., *The Constitution of the United States: Contemporary Ratification* (1985) *in* U.S. DEP'T OF JUSTICE, OFFICE OF LEGAL POLICY, ORIGINAL MEANING JURISPRUDENCE: A SOURCEBOOK, App. H (1987); William J. Brennan, Jr., *The Equality Principle in American Constitutional Jurisprudence*, 48 OHIO ST. L.J. 921 (1987); William J. Brennan, Jr., *Constitutional Adjudication and the Death Penalty: A View from the Court*, 100 HARV. L. REV. 313 (1986).

57. If one notes, *Brown v. Board of Educ.*, 347 U.S. 483 (1954), *Roe v. Wade*, 410 U.S. 113 (1973), *Romer v. Evans*, 517 U.S. 620 (1996), and even the recent Vermont case, *Baker v. Vermont*, 744 A.2d 864 (1999), requiring the legalization of homosexual unions, in each instance the courts took a nonoriginalist approach, without the populace clamoring for the change, and introduced a new rule of constitutional law.

for instance, seeks to use the Equal Protection Clause, and the "abstract moral principle" it contains, to reinforce democracy "properly understood."[58] Thus, judges must ensure that all citizens are treated with "equal concern and respect," as is demanded by the Fourteenth Amendment.[59] In effect, Dworkin seeks to prevent the legislatures of the nation[60] from not treating all with equal concern and respect. Never mind that what sounds nice and acceptable to all in principle is impossible to specify *a priori*, and thus judges are again imposing their own views of what equal concern and respect entails. In other words, since the definition and scope of "equal concern and respect" is infinitely malleable, the Dworkinean judge is able to give, as content to the principle of "equal concern and respect," his personal, subjective belief of the good. The goal of nonoriginalists in this instance is to prevent the more popular branches from violating the nonoriginalists' view of what a democracy is, "properly understood."

Briefly, nonoriginalists advance arguments to avoid application of the original meaning of the Constitution's text. Under scrutiny, these arguments fail. Nonoriginalists offer no transparent, neutral standard by which to judge constitutional litigation. Secondly, the claim that in a changing society originalism is too static ignores the reality that the values advocated by nonoriginalists are often themselves not supported by society, but only by the courts.

C. *Proposal of This Article to Ground Originalism in the Just State*

This Article seeks to offer another basis or foundation for original meaning interpretation. The most difficult aspect of justifying originalism is to show that people alive today owe allegiance, and are obliged to obey, the original meaning of the Constitution, but not the meaning of the Constitution as it has been interpreted away from that original meaning. The prior arguments in support of originalism are all open to the same objection; why not do justice in each instance?[61] In essence, this Article asserts

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58. DWORKIN, *supra* note 1, at 7-8. In one sense, then, Dworkin is an originalist because he claims to ground his interpretative theory in the text of the Constitution. *Id.* The principles he abstracts, however, are so ethereal that they contain no guiding principle as to what, in a concrete situation, is equal, and each judge will presumably have a different reading of what equality requires. Beyond these quibbles, however, one is forced to ask how a judge is to abstract a principle from the Constitution (and how far to abstract), and at what point the judge's search for a moral principle becomes so abstract that the judge is not really maintaining the fidelity to the Constitution that Dworkin requires. *See* Michael W. McConnell, *The Importance of Humility in Judicial Review: A Comment on Ronald Dworkin's "Moral Reading" of the Constitution*, 65 FORDHAM L. REV. 1269 (1997).

59. DWORKEN, *supra* note 1, at 8.

60. Actually, Dworkin seeks to prevent all government actors, down to the local garbage man, from treating citizens with a lack of equal concern and respect.

61. While the objection sounds and is totally unpractical, it does reveal the inadequacy

that *original meaning interpretation is required of judges because it leads to the just state.*[62] The prior objection, that justice is not done, is eliminated because original meaning interpretation leads to the just state, one to which any reasonable person would be obliged to obey, and a state which all, including judges, are morally required to bring about.[63] Without writing a summa of constitutional interpretation, the length a full exposition for the arguments briefly presented here would require, this Article will offer an outline to be fleshed-out in the future.

The just state is the minimalist state. The minimalist state is the state that provides protection for its citizens' rights without violating the rights of anyone.[64] This of course assumes that all persons have rights and that these rights are inviolable for any reason.[65] The minimalist state, then, is circumscribed in its just sphere of operation to the protection of rights from foreign and domestic rights violators. The state wields the executive power, delegated to it by the citizens of the state to escape the state of nature and obtain the benefits of a civil society.[66]

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of supporting an interpretative theory with one or a couple of normative values. The objection also reveals the power of Dworkin's theory of a moral reading, where the judge would attempt to do justice in each instance in the descriptive confines of the Constitution.

62. This Article does not make the claim that this justification for originalism is in any way definitive. As with all political theory, a final answer is never achieved, but hopefully this grounding of originalism in the just state will advance interpretative theories towards a more morally correct interpretative theory. The basis for this Article argued that the original meaning of the Constitution would lead to a minimalist state (or at least one that is more minimalist) and that the original meaning national government was such a minimalist state. In addition, it is assumed that the minimalist state is the just state. Finally, the argument made is based on the claim that what a reasonable person would be obliged to obey, does in fact obligate all persons regardless of consent or any other act of the will.

63. Judges are included in the group that is required to bring about just institutions and are thus obliged to use original meaning interpretation to resurrect the just state.

64. ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA at ix (1974) [hereinafter NOZICK, ANARCHY].

65. Rights are thus viewed as side constraints on society and the government (and other men). *See id.* at 29-35. Rights originate, depending on whom you ask— depending on the theorists asked— either from God or from the fact that man naturally has control over his body. Locke begins his analysis of rights finding that God creates all men equally free, with no man given dominion over another. JOHN LOCKE, TWO TREATISES ON GOVERNMENT §§ 4, 54 (Peter Laslett ed. 1967) [hereinafter LOCKE, GOVERNMENT]. *See also id.* § 87 ("Man being born . . . with a Title to perfect Freedom, and an uncontrouled enjoyment of all the Rights and Priviledges of the Law of Nature, equally with any other Man . . . hath by Nature a Power . . . to preserve his Property, that is, his Life, Liberty and Estate . . . .").

The extent of one's rights is determined by the labor theory of appropriation for both Locke and Nozick, *see* LOCKE, GOVERNMENT, *supra* §§ 27-28, but for Locke there is the added constraint against rights violators that persons cannot violate the natural law. For Nozick the only constraint is simply his theory of rights as being inherent and natural to man and inviolable.

66. *See* NOZICK, ANARCHY, *supra* note 64, at 113-15 (describing the evolution of the just state as a private association to which individuals delegated their executive power, which is the power to punish); LOCKE, GOVERNMENT, *supra* note 65, §§ 87, 89 (asserting that when men enter into civil society they delegate their power to punish to a presumably unbiased judge of rights violations).

The minimalist state is justified in taxing its citizens for the protection of every citizen's rights. In pursuit of preventing rights violations the state can take all necessary steps that do not themselves violate rights.[67] For example, the just state would create laws and adjudicate disputes concerning contracts, and the state would then be morally justified in enforcing its decision as to the rights of the disputants. The state could also prevent restrictions on the rights of persons to transact business and commerce.[68] In sum, restrictions on personal autonomy and the ability of persons to act as they please so long as the rights of others are not violated would be eliminated by the just national state in its sphere of sovereignty.

All persons have an obligation to uphold and bring about just institutions. In his landmark, *A Theory of Justice*, John Rawls argues for his two principles of justice, and in doing so establishes that persons are obligated to obey and bring about just institution "irrespective of [their] voluntary acts, performative or otherwise."[69] In fact, Rawls asserts, "the most important natural duty is to support and to further just institutions."[70] Thus, if the society or government is just, and applies to the man in question, that man is obliged to uphold that institution.[71]

When leaving the state of nature the rational man would choose that state which protects his rights and the rights of his fellows, knowing that an offense against the rights of one is an attack on the rights of all.[72] Persons choose the just, minimalist state, for

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67. This may include defining further those rights retained by the citizens vis-a-vis the government. Thus, a national government that creates a criminal justice system to better enable the government to protect the rights of its citizens, may specify the due process rights of accused. The government may also specify what punishment will fit what crime and what, exactly, is a crime or rights violation.

68. Here I have in mind the Commerce Clause, as originally understood.

69. JOHN RAWLS, A THEORY OF JUSTICE 294 (rev. ed. 1999). *See also* A. JOHN SIMMONS, MORAL PRINCIPLES AND POLITICAL OBLIGATION 147 (1979) (agreeing with Rawls that all have an obligation to bring about just institutions). Simmons does not agree, however, that we are obligated to obey just institutions merely because they "apply" to us absent some act of our own that would bind us. *Id.* at 148-52. Simmons's objections are not that persons do not owe obedience to just institutions, but that such a claim cannot be the basis of political obligation because all would owe a duty of obedience to all just institutions regardless of their nationality. *Id.* at 154-56. One could argue in response to Simmons that while we may owe allegiance to all just institutions, we can practically support just institutions while in our own country, and not oppose the creation of just institutions abroad. *See* Jeremy Waldron, *Special Ties and Natural Duties*, 22 PHIL. & PUB. AFFAIRS 3, 27 (1993). As a result, the obedience owed just institutions can be the basis of political obligation as discussed in this Article.

70. RAWLS, *supra* note 69, at 293. Rawls argues that the just state that will be supported is the state that adheres to his two principles of justice. *Id.* at 295. Contrary to Rawl's assumption, if the just state is the minimalist state, then regardless of the principles of justice one is still obligated to the just state.

71. *Id.*

72. LOCKE, GOVERNMENT *supra* note 65, § 88. In the state of nature, any individual could punish for transgressions of the natural law no matter who the victim. *See id.* §§ 6, 8.

their own and the protection of others' rights since all know that without choosing to live under the just institution each is worse off as each is the judge in his own case concerning rights violations.[73] Consequently, for each person's own well being, and the well being of others, the rational person seeks to support existing just institutions, but also seeks to bring about the existence of just institutions.

The state envisioned by the Constitution, properly interpreted using original meaning interpretation, is the minimalist, just state. We forget today, in an era of unrestrained and unenumerated powers, that the federal government was originally one of very few and limited powers with likewise limited purposes.[74] Hamilton argued in *Federalist 23* that the:

> principle purposes to be answered by the union are these — the common defense of the members; the preservation of the public peace, as well against internal convulsions as external attacks; the regulation of commerce with other nations and between the States; the superintendence of our intercourse, political and commercial, with foreign countries.[75]

Thus, the national government envisioned by Hamilton was one of protecting the rights of the citizens of the states and of facilitating the expression of those rights through the protection of commerce and other national activities. The national government was also one, first and foremost, of limited enumerated powers.[76] The powers delegated to the national government were for the purpose of effecting national goals, in the most efficient manner, so as not to give the national government more authority than was necessary.[77] Furthermore, the Necessary and Proper Clause conferred only those powers that, in the words of Hamilton, "would have been implied by necessity absent the Clause," and thus did not grant anything more than the ability to achieve the national government's limited goals. Consequently, the Necessary and Proper Clause did not make the national government

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73. *Id.* §§ 77, 87.

74. *See* Richard A. Epstein, *The Proper Scope of the Commerce Power*, 73 VA. L. REV. 1387 (1987) (discussing the structural and substantive constraints on the national government including the enumeration of powers).

75. THE FEDERALIST No. 23 (Alexander Hamilton).

76. *See e.g.*, FORREST MCDONALD, NOVUS ORDO SECLORUM, 202-03, 206, 262-63 (1985) (discussing the importance of and impetus for enumeration of powers); THE FEDERALIST Nos. 41-44 (James Madison) (supporting the view of a limited national government through enumerated powers by discussing the enumerated powers).

77. THE FEDERALIST No. 23 (Alexander Hamilton) (stating "[t]he necessity of a Constitution, at least equally energetic with the one proposed, to the preservation of the Union is the point at the examination of which we are now arrived"). The Congress retained the powers it possessed under the Articles and was delegated ten additional powers. MCDONALD, *supra* note 76, at 262-63. The Constitution explicitly reaffirmed the limited scope of the delegation to Congress in the Tenth Amendment.

non-minimalist.[78]

The national government was given the power over, as Madison stated: "1. Security against foreign danger; 2. Regulation of the intercourse with foreign nations; 3. Maintenance of harmony and proper intercourse among the States; 4. Certain miscellaneous objects of general utility; 5. Restraint of the States from certain injurious acts; [and] 6. Provisions for giving due efficacy to all these powers."[79] In sum, the national government was given the ability to protect rights from foreign and domestic threat[80] and to assist persons in transacting business. If one looks through Article I, Section 8, one will find that the Congress was given the authority to create the necessary background environment so that market transactions would be able to flourish. The power to regulate commerce, coin money, promote industry, and to punish those that interfered with the market through counterfeiting and piracy, are indicative of this purpose.[81]

Nevertheless, the power to "raise and support armies" may raise difficulties for the proposition that the originalist state was a minimalist state[82] In one sense, to require persons to defend the state may amount to involuntary servitude, that one labor for the benefit of another. On the other hand, by giving the state the executive power, that is, the authority to protect rights from transgression by foreigners, the state will need persons to fill, for example, the Army. It appears that if the state purchases the labor of individuals willing to sell their labor in the form of serving in the military, there is no transgression of rights. Thus, with the qualifier that the military consist of volunteers only, the power of the national government to raise and support armies is not inconsistent with, and is indeed required by, the minimalist state.[83] This qualifier may be unnecessary if one is persuaded that all in the just state have to provide their fair share towards the costs of maintaining its rights protections. Consequently, since the state may "force" its citizens to pay taxes for the rights-protecting mechanisms in the state, in effect taking their labor without their consent, the state may also be justified in requiring that some of its citizens directly donate their labor to the military.

Amendments to the Constitution do not pose a problem for a minimalist state hypothesis, except, perhaps, the national income tax provided for in the Sixteenth Amendment. This is because of

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78. In *Federalist 44* Madison defends the Convention's use of the Necessary and Proper Clause as necessary if the new national government was to be able to accomplish the many goals that the People were to entrust to it. THE FEDERALIST No. 44 (James Madison).

79. THE FEDERALIST No. 41 (James Madison).

80. Within the sphere of the national government's authority, of course.

81. *See* U.S. CONST. art. I, § 8.

82. U.S. CONST. art. I, § 8, cl. 12.

83. Whether this reservation is the original meaning of the Constitution is not clear.

the unrestrained use of the taxes raised for purposes other than the protection of rights or facilitation of voluntary exchange. Were tax revenues used only for the enforcement of rights protection and to facilitate the exercise of rights through the enumerated powers in Article I, the rights of none would be violated and no objection would be raised. Indeed, most of the amendments to the Constitution do not expand the power of the national government in the sense that they allow the national government to regulate its citizens unjustly. On the contrary, the amendments in the Bill of Rights are declarations of rights that the national government cannot interfere with, and many other amendments simply define the positive rights of citizens[84] and clarify the structure or workings of the government.[85] The Civil War Amendments prevent rights violations by the states. Taken together, the amendments to the Constitution do not expand the authority of the national government so as to infringe on individual's rights, but merely define rights or seek to protect rights.

In summary, the original meaning of the national government was of a minimalist state. The minimalist national government would protect and define rights within its sphere of supremacy and facilitate the exercise of those rights. There is little or no evidence that runs counter to a thesis that the national government, as originally intended, was nonminimalist.

Nonoriginalist interpretation has led to the emasculation of the purpose of enumerating powers for the national government. In other words, interpretative methods other than originalism have led to a state that is not minimalist, as envisioned by the Founders, but is instead large and bureaucratic, and have thus allowed the creation of a state that infringes upon the rights of its citizens. For example, *NLRB v. Jones & Laughlin Steel Corp.*,[86] when combined with the aggregation analysis of *Wickard v. Filburn*,[87] has led to the unprecedented and uncabined power of Congress under the title of the Commerce Clause.[88] The spending power has also been stretched beyond recognition. In *United States v. Butler*,[89] the Court ruled that Congress could spend its largess on anything it wished so long as the spending promoted the "general welfare."[90] The spending power was not limited to Congress's enumerated powers, and Congress could in fact achieve what would otherwise be prohibited to it through its spending power by enticing states to

84. Such as the 19th Amendment.

85. Like the 12th Amendment.

86. 301 U.S. 1 (1937).

87. 317 U.S. 111 (1942).

88. *See* Epstein, *supra* note 74 (detailing the failure of the structural constraints on the national government, especially under the guise of the Commerce Clause).

89. 297 U.S. 1 (1936).

90. *Butler*, 297 U.S. at 65-66.

accept federal money with strings.[91] Consequently, there is no area of life today that is theoretically off limits to the national government's power. The national government has become one of unlimited power, infringing upon rights in all manner of situations.

With it established that original meaning interpretation can lead to the minimalist state, which is the just state, one question remains: what to do in a situation when original meaning interpretation would not lead to more rights being protected and defined? For instance, what of rights defined against the federal government under the doctrine of substantive due process? The problem can be confronted in multiple ways. One is to deny that such rights declarations make a difference to the just state analysis. With a minimalist state that does not have the authority to violate rights, natural rights are not in jeopardy and would not be violated in any case, so such a definition of rights would be superfluous.

Another approach, which is the approach this Article will take, is to argue that the interpretative methodology of original meaning leads to the just minimalist state except, perhaps, in a few narrow instances. Since original meaning interpretation is generally correct, judges should not be permitted to vary from its methodology because the use of nonoriginalism can lead to results other than the just state. In other words, with originalism generally coming to the correct conclusion, more harm is wrought through the use of nonoriginalism than there is good gained in the specific instance. As a result, if a judge comes upon a situation where a nonoriginalist methodology *may* lead to the defining of more rights as against the state, the judge should adhere to the original meaning.[92]

Judges with the ability or moral scruples to apply a non-originalist methodology in situations where they feel nonoriginalism leads to the morally just results would undermine the legitimacy of the judiciary and decrease stability in the law. If the public[93] viewed judges as contravening an interpretative methodology that yielded consistently just results on the basis of the judges' own philosophical inkling of what is just in a given situation, the public's view of the judiciary as adhering to the law and striving for the just result could falter. Judges who feel unconstrained by a general methodology and who resort to nonoriginalism when they believe the situation warrants, undermine stability in the law by making the law hinge on each judge's concept of the Good.

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91. *See* South Dakota v. Dole, 483 U.S. 203 (1987).

92. If the original meaning in an instance would lead to an injustice, the amendment process is available to correct the fault. Then judges addressing problem cases where the amendment addresses the prior unjust situation would be required to apply the original meaning of the amendment.

93. Public can be defined as the general populace or more specifically as the legal community, who would believe originalism to be the only just interpretative methodology.

Therefore, if judges frequently enough are faced with situations where they feel that the just outcome is different from what the prevailing originalist theory would deliver (not unlikely) and resort to other methods of decision, that would result in less stability of the law and consequently a diminution of the security of rights.

With the extent of the government governed by the original meaning, the extent of rights protections should be construed in like manner. It would be incongruent to read parts of the Constitution differently. The original meaning governs the extent of the government and its ability to carry out the mandate of the just state. When that mandate comes into conflict with another section of the same founding document, that other section must be construed in like manner so the entire document, and the government created by the document, can fulfill its purpose.

Originalism, as we have seen, is the only moral interpretative methodology.[94] The foundation for originalism given in this Article is the just state. The state that does not violate rights is the legitimate state to which all owe obedience. Since original meaning interpretation leads to the just state, all are morally required to use originalism.

D. The Necessity of Applying the Original Meaning of Religion Today

With it established that the original meaning of the text of the Constitution is authoritative, this Article will turn to the impact of an originalist interpretation of "religion" on the Court's jurisprudence. Assuming, as will be shown in the next Part of this Article, that the original meaning of religion is of a belief system in one God, with concomitant duties towards God, and a future state of rewards and punishments, the courts of the United States are morally obliged to reject their recent jurisprudence that has drifted far from the shores of original meaning jurisprudence.

As in other contexts, the First Amendment, and especially questions concerning whether a belief system qualifies for protection as a religion, pose an opportunity for both originalist and nonoriginalist interpretation. As a hypothetical, assume that there is a belief system that clearly does not fit the original meaning of the Constitution, perhaps neo-Platonism. For nonoriginalists judges, the hypothetical poses all of the problems of indeterminacy, the lack of a standard or neutral principle by which

94. There are, perhaps, other methodologies that would lead to the just state, but they would not have the benefit of being relatively clear and stable in their application. In addition, such nonoriginalist methodologies could potentially lead to all of the aforementioned ills brought about by nonoriginalism. In sum, any other methodology does not have the normative benefits (outside of producing the just state), while potentially acquiring the deficiencies of nonoriginalism.

to judge the case, and how the neutral principle is derived and from what source that nonoriginalism poses in all contexts. The values advanced by originalism, including stability, rule of law values, democratic theory (including the legitimacy of the judiciary), rights protection, and equality are also imperiled by resort to nonoriginalism. Litigants do not know if the First Amendment protects their belief system and the lack of stability entailed by this uncertainty forces them to lead their lives in ways they otherwise would not.

In addition, there is no notice of whether there will be a change in the Court's jurisprudence because of the indeterminacy that accompanies the lack of visible and widely accepted standard in nonoriginalism. The populace will question whether the judiciary is legitimate when it seems that litigants prevail or fail based on some unknown standard that originates from nowhere other than the judge's bosom. Finally, the ability of courts to change the content of what is protected by the First Amendment, this time including neo-Platonism under the rubric of religion, certainly seems to indicate that the same institution can, in another case, decide that Anglicanism is not protected as a religion. In sum, all of the values put forward by originalist writers are implicated in the context of religion in the First Amendment.

Of course, the theory advanced by this Article, that original meaning interpretation is morally required, also powerfully leads to the conclusion that a neo-Platonist should not receive the protection of the Free Exercise Clause. The context of religion could lead to an instance where one would be tempted to apply a nonoriginalist methodology and find neo-Platonism to be covered as a religion. Firstly, in the minimalist state with enumerated power as envisioned, the government would theoretically have no power to infringe on religious freedom. This assumption is wrong. Presumably, there could be some religious belief system that prevented its adherents from paying taxes in any form, even if the taxes are to be justly used to support the rights protecting mechanisms of the state. As we have seen, the just state is the only state that is morally justified in requiring its citizens to pay the costs of protecting their rights. Consequently, the state is justified in requiring persons who religiously object to paying any taxes to either pay taxes or be punished.

If the neo-Platonist's claim is not so radical in that he simply wants an exemption from a law that infringes on his religious beliefs,[95] the judge must still follow the original meaning of the Constitution. Since originalism leads to the just state, the methodology must be applied in all instances. If originalism were

95. For example, the neo-Platonist may be a conscientious objector.

applied only when the judge believed the result to be just, the benefits of originalism and the just state would not arise. In other words, with originalism being the morally best interpretative theory, it should be applied in all instances.

While in the individual instance the denial of protection to the neo-Platonist may appear unjust, when the entire document of the Constitution and the rights-protecting apparatus is viewed, the same interpretative methodology must apply. Thus, for the minimalist government to carry out its assigned functions, when that government conflicts with claims other than those envisioned by the original meaning, those claims must give way to the necessary function of the state.

In sum, the normative values underlying originalism, when included with the just state basis of originalism advanced in this Article, require application of the original meaning of the word religion in the First Amendment.

III. Modern Definitions of Religion in Jurisprudence

A. *Jurisprudential Views*

Prior to the 1890 case, *Davis v. Beason*,[96] the Supreme Court had not explicitly addressed the meaning of religion in the Constitution. In *Davis* the Court stated that "the term 'religion' has reference to one's views of his relations to his Creator, and to the obligations they impose of reverence for his being and character, and of obedience to his will."[97] Essentially, the Court used a theistic view of religion, the same view proffered by this Article as the original meaning.[98] This theistic view held sway in the Court's jurisprudence

96. 133 U.S. 333 (1890). In the 1815 case, *Terrett v. Taylor*, 13 U.S. 43 (1815), Joseph Story, speaking for the Court, tangentially discussed religion when dealing with a controversy over the land held by the disestablished Episcopal Church. Justice Story took a stance on establishment that would allow the states to aid all religions equally. *Id.* at 48-49. Madison's Memorial and Remonstrance was quoted by Story to the effect that "religion can be directed only by reason and conviction," but that did not mean, Story wrote, that the citizens' free exercise is restrained "by aiding with equal attention the votaries of every sect to perform their own religious duties . . . ." *Id.*

97. *Davis*, 133 U.S. at 342. In the earlier Mormon polygamy case of *Reynolds v. United States*, 98 U.S. 145, 162-63 (1878), the Court found that the "word 'religion' is not defined in the Constitution. We must go elsewhere, therefore, to ascertain its meaning, and nowhere more appropriately, we think, than to the history of the times in the midst of which the provision was adopted." In a later case, *The Late Corporation of the Church of Jesus Christ of Latter-Day Saints v. United States*, 136 U.S. 1 (1890), the Court took the *Davis* definition one step further. The Supreme Court required that any practice claimed to be religious, to be considered religious for constitutional purposes, must not itself be "against the enlightened sentiment of mankind, notwithstanding the pretence of religious conviction by which they may be advocated and practiced." *Id.* at 50. In other words, any practice claimed to be religious, while arguably motivated by religious-type sentiments, must meet a certain level of enlightenment to be considered religious.

98. As the minimum or broadest original meaning definition.

up to the 1940s.[99]

The Second Circuit began the shift away from the Supreme Court's earlier theistic definition of religion to one that was at once more expansive and less clearly defined. In *United States v. Kauten*,[100] Judge Augustus Hand defined religion thus:

> Religious belief[101] 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 . . .
>
> . . . [It] 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.[102]

The definition contains much of what many would consider characteristics of a religion including the use of faith as opposed to reason, willingness to martyr oneself, and intensity of belief. Religion is not seen, however, as just the relation of a man to his God, but can now encompass man's relation to others and the greater truths of this life and universe. In essence, the Hand definition relied upon analogy to belief systems readily accepted as religions. Analogy to established religions was used to help define religion in the case at hand — is the psychological impact on the believer in this instance similar to the impact in a traditional believer?[103]

The Supreme Court, in a case involving mail fraud, implicitly expanded beyond theism the definition of religion.[104] The defendants in *United States v. Ballard*[105] were accused of defrauding others through the mails when they claimed they could heal disease.[106] The Court ruled that the jury was properly precluded from examining the truth of the defendants' claims stating that:

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99. *See* United States v. Macintosh, 283 U.S. 605, 633-34 (1932) (Hughes, C.J., dissenting) (stating that "[t]he essence of religion is belief in a relation to God involving duties superior to those arising from any human relation").

100. 133 F.2d 703 (2d Cir. 1943).

101. Religious belief being merely belief in a belief system that qualifies as a religion.

102. *Kauten*, 133 F.2d at 708.

103. Admittedly, the Second Circuit was interpreting the meaning of the religious exemption in the Selective Service Act of 1940, ch. 720, § 5(g), 54 Stat. 885 (current version at 50 U.S.C. §463 (2000)), but the definition was groundbreaking nonetheless.

104. United States v. Ballard, 322 U.S. 78 (1944).

105. 322 U.S. 78 (1944).

106. *Ballard*, 322 U.S. at 80.

> Freedom of thought, which includes freedom of religious belief, is basic in a society of free men. It embraces the right to maintain theories of life and of death and of the hereafter, which are rank heresy to followers of the orthodox faiths . . . Men may believe what they cannot prove. They may not be put to proof of their religious doctrines or beliefs. Religious experiences, which are as real as life to some, may be incomprehensible to others. Yet the fact that they may be beyond the ken of mortals does not mean that they can be made suspect before the law.[107]

In other words, "religion" does not necessarily have to include belief in a deity, and the bounds encompassed under the rubric of religion were expanded yet further to include almost anything.[108]

In 1961 the High Court further expanded the definition of religion. In *Torcaso v. Watkins*,[109] the Court struck down a centuries-old requirement of the Maryland Constitution that required all office holders to declare a belief in a God.[110] The definition of religion under the Establishment Clause was said to embrace belief and disbelief, religion and nonreligion, theistic and nontheistic beliefs, which included secular humanism.[111] Now firmly unmoored from its basis in the text of the First Amendment and history,[112] the meaning of religion was free to extend the protections of the Free Exercise Clause to acts motivated by any "moral" belief.

The context of conscientious objectors offered to the Court ample opportunity to extend the reach of religion. In *United States v. Seeger*,[113] the Court construed the congressional requirement of a belief in a "Supreme Being" to mean:

> whether a given belief that is sincere and meaningful occupies

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107. *Id.* at 86-87 (citation omitted).

108. *See also* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) (Frankfurter, J., dissenting) (quoting from *Kauten*'s expansive language concerning religion). The Court's unrestrained dicta in *Everson v. Bd. of Educ.*, 330 U.S. 1, 15-16 (1947), also committed the Court to an expansive reading of religion in the Establishment Clause context to include both "belief" and "disbelief" under the heading of religion. Understanding religion to include disbelief is hardly intuitive since religion is generally deemed to include a belief in something. *See* MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 988 (10th ed. 1993) (defining religion generally as a devotion to some belief).

109. 367 U.S. 488 (1961).

110. *Torcaso*, 367 U.S. at 496.

111. *Id.* at 495.

112. As will be shown in Part IV.

113. 380 U.S. 163 (1965).

> 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.[114]

Thus, purportedly to avoid the constitutional question of an establishment,[115] the Supreme Court ruled that analogy to traditional religious beliefs would be the guiding light of the meaning of religion in the First Amendment.[116] If one holds beliefs that are admittedly not religious in the traditional sense, in the sense the word religion was used by the Ratifiers and Framers of the First Amendment, the Court will still entitle those beliefs to the same protection as admittedly religious (or traditional) beliefs. The *Seeger* definition is broad enough to protect atheists.

Welsh v. United States[117] offered another opportunity in the conscientious objector context for the Court to include traditionally nonreligious beliefs within the meaning of religion. The *Welsh* Court ruled that an exemption must be granted to those whose beliefs were held, as under *Seeger*, with similar intensity to those of traditional religious beliefs.[118] Thus, only those beliefs that did "not rest at all upon moral, ethical, or religious principle but instead rest[ed] solely upon considerations of policy, pragmatism, or expediency" were not protected.[119] With the near infinite malleability of the content of what is "moral" or based on a "policy," the Court expanded the definition of religion to its farthest reach, encompassing all belief systems that are strongly held with only three ill-defined exceptions for beliefs that are pragmatic, expedient or based on policy.[120]

In sum, the Supreme Court radically changed the content of the religion clauses in the First Amendment. The Court initially determined religion to encompass theistic beliefs that motivated the believer in that instance[121] and has since expanded religion to

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114. *Seeger*, 380 U.S. at 166.

115. *See id.* at 188-93 (Douglas, J., concurring).

116. *Id.* at 166.

117. 398 U.S. 333 (1970).

118. *Welsh*, 398 U.S. at 342.

119. *Id.* at 342-43.

120. Unhelpfully, those beliefs labeled pragmatic, expedient and based on policy, are defined as those objections to war that do "not rest at all upon moral, ethical, or religious principle . . . ." *Id.*

121. *See* Davis v. Beason, 133 U.S. 333 (1890).

explicitly include religious and nonreligious, moral, philosophical, and other strongly held beliefs.[122]

B. Academic Commentary

The academic commentary on the transition to a more unrestrictive meaning of religion has been favorable. Generally, the commentators assume that the meaning of religion must change because of our changing society, and that the change is towards a more expansive reading. For example, Laurence Tribe, in his much admired treatise on constitutional law, asserted that while the definition of religion was "narrowly" defined theistically, the "changed circumstances" in the form of more religious pluralism made it "inevitable that the Supreme Court would modify the narrow understanding of 'religion.' "[123] The "demands of a definition" of religion required a more expansive view of what a

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122. In 1972, the Court faced *Wisconsin v. Yoder*, 406 U.S. 205 (1972), where it found that the Free Exercise Clause exempted Amish children above the eighth grade from Wisconsin's mandatory education laws. In doing so the Supreme Court placed great emphasis on the theistic nature of the Amish beliefs. *Yoder*, 406 U.S. at 215-16. The Court found that "if the Amish asserted their claims because of their subjective evaluation and rejection of the contemporary secular values accepted by the majority, much as Thoreau rejected the social values of his time . . . their claims would not rest on a religious basis." *Id.* at 216. This is because Thoreau's views were philosophical and not religious, and because nonreligious (philosophical) belief is not protected by the "Religion Clauses." *Id.* The Court went on to add that the Amish beliefs are "not merely a matter of personal preference, but one of deep religious conviction, shared by an organized group, and intimately related to daily living," thus implying that the trappings of traditional religion and intensity of belief aid religious exemption claims. *Id.*

123. LAURENCE TRIBE, 2 CONSTITUTIONAL LAW 1179-80 (2d ed. 1986) [hereinafter 2 TRIBE]. The early article by J. Morris Clark, *Guidelines for the Free Exercise Clause*, 83 HARV. L. REV. 327 (1969), maintains that any definition that is too narrow, as the original meaning definition would presumably be, "would mock common usage" by excluding groups many Americans normally think of as religions. Why this matters is not clearly explained. Would Clark also claim that since Americans would not normally think of the word "liberty" as encompassing rights as varied as abortion and to send one's children to private school, that *Roe* and *Pierce* are illegitimate? Clark's answer is to explicitly affirm the Supreme Court as a philosophical institution, and consequently, the Court should endeavor to protect "compelling conscientious belief . . . ." *Id.* at 344. In doing so, the Court must "balance" the individual's interest in doing what he believes is moral against the state's interest. *Id.* What weight is to be given to each interest is not stated, and the whole process is hopelessly vague. Clark understands that such a definition would protect nontheistic beliefs, but believes nonetheless that no distinction between theistic and nontheistic beliefs is permissible because of the threat of an establishment. *Id.* at 342. In essence, Clark asserts a broad definition of religion because to do otherwise might establish a religion— but is not that the point in contention? How can we establish a religion unless we know what a religion is? Clark's assertion boils down to the claim that by the very act of defining a religion the Court would be establishing a religion.

religion was.[124] Tribe still wanted the definition to exclude some belief systems, and reviewed the literature to find adequate theories to form a definition.[125] In the entire academic literature, a summary of which will follow, the proponent of a new definition rejected the original meaning definition as too constrained, and then struggled to arrive at a definition that is at once limited but not too constraining. Where and why the limits are set where they are is not stated because a principled definition of religion, divorced from the original meaning, is unattainable.

In the 1978 Note, *Toward a Constitutional Definition of Religion*, the two principles the religion clauses are said to embody are voluntarism and separatism.[126] Thus, it was asserted by the author that the Free Exercise Clause was designed to prevent any direct, or indirect, coercion in matters of conscience.[127] In declaring the purpose of the religion clauses, the author asserted that the "views of the Framers offer little guidance in fixing the meaning of the word 'religion.' "[128] Even if there was evidence of the original meaning, the Note claimed, without stating why, that the meaning of religion "must evolve as society and its needs change."[129] With regard to an evolving society, the author noted the diversification of religions and religious groups.[130]

The Note then set out to define for itself a proper definition of religion.[131] Again, the Note stated, without telling us where this core value arose, that the "core value" of free exercise is "inviolability of conscience." It then argues that any acceptable definition must be

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124. 2 TRIBE, *supra* note 123, at 1180.

125. *Id.* at 1181-82. Tribe discusses definitions by analogy and dismisses those that "focus on the externalities of a belief system or organization" because the resulting definition is not sufficiently broad. *Id.* at 1181. Tribe settles on definitions that work by analogy to the function religion plays in orthodox believers, as did the Note that follows. *Id.* at 1182.

126. Note, *Toward a Constitutional Definition of Religion*, 91 HARV. L. REV. 1056, 1058 (1978).

127. *Id.*

128. *Id.* at 1060.

129. *Id.*

130. *Id.* Such a claim, however, is dubious. The fact that there are more religions and religious groups does not mean the Founders and Ratifiers were not acquainted with religions not to be found in the United States, and religions not similar to the untraditional "religions" of today. Indeed, the United States at the time of the ratification of the First Amendment was the most religiously plural nation on Earth, with believers of different sects of Christianity, agnostics, atheists, Jews and native religions. In addition, so long as the general type of belief systems around today were in existence in 1791, the expanding number of sects does not matter because the Ratifiers and Framers would have been familiar with essentially the same form of belief system.

131. Note, 91 HARV. L. REV. at 1072-83.

broad enough to further the "core value" while at the same time narrow enough not to encompass all beliefs.[132] The author feared exclusion of nontraditional "religions" for "parochial reasons," and consequently argues for a definition based on "inductive reasoning" or "a priori" indicia of religion.[133]

The Note settled on a functional standard that is based on the "role played by a system of belief in an individual's life and seeks to identify those functions worthy of preferred status in the constitutional scheme."[134] This standard includes what are normally denoted secular or nonreligious beliefs, and essentially restates the Supreme Court standard iterated in *Seeger* and *Welsh*.

In his 1982 Note, *The Sacred and the Profane: A First Amendment Definition of Religion*, Timothy Hall assumed that the original meaning of religion was "well defined and quite narrowly limited" to traditional theistic beliefs, but then went on to assert that religion denotes a belief system in which there are both sacred and profane elements.[135] Hall criticized those definitions that would encompass within the protection afforded by the Free Exercise Clause belief systems that are "purely moral, ethical, political or other 'secular' expressions."[136]

Like the 1978 Note, Hall's Note sought to navigate between the shoals of exclusion of "nontraditional" religious belief and include activity not motivated by "true" religious belief.[137] As a result, Hall proposed a descriptive definition that would include those characteristics "common to all persons and groups who experience what they regard as religion."[138] The meta-characteristic Hall settled on was the sacred and profane dichotomy: "[a] religion is a unified system of beliefs and practices relative to sacred things . . . things

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132. *Id.* at 1072-73. It is the assertion of this Article that any "meaning" of religion created post hoc is subjective, value laden, and capable of infinite manipulation, while a definition based on the original meaning of religion serves many purposes, and legitimately restricts the scope of the word religion. Later the Note's author added a third criteria, that any acceptable definition cannot contravene a societal consensus on what religion means. *See id.* at 1073 n.101. Why a societal consensus on what constitutes a religion cannot exclude what society would generally not consider a religion (atheism), while at the same time a societal consensus can assure inclusion of what society considers a religion is not explained. Surely, the author would not let the values said to be imbedded in the Equal Protection Clause depend on the whims of society.

133. *Id.* at 1073.

134. *Id.* at 1075.

135. Timothy L. Hall, Note, *The Sacred and the Profane: A First Amendment Definition of Religion*, 61 TEX. L. REV. 139, 154, 159 (1982).

136. *Id.* at 160.

137. *Id.*

138. *Id.* at 161.

set apart and forbidden . . . which united into one single moral community called a Church," and those things labeled profane or natural.[139] Put another way, the sacred aspect of a religion is that which is "wholly other," or "transcendent," while the profane is that of the natural world, and each religion contains a belief system into which this sacred-profane dichotomy is present. The Note claimed that this descriptive definition has the virtue of being broad enough to encompass all truly religious belief and actions, while at the same time narrow enough to exclude philosophical, moral or other belief systems.[140]

More recently, Andrew Austin proposed a meaning for religion as belief systems based on faith and a higher power.[141] As with the other commentators discussed, Austin claimed, without providing any reasoning, that the original meaning of religion is irrelevant because "it is clear that today the [religion] clauses serve fundamentally different purposes in our society."[142] Thus, the definition for religion Austin proposed to create would be "flexible" to accommodate societal growth and change.[143] For Austin, such a definition must include all those belief systems that society accepts as religious,[144] the definition must enable courts to decide difficult cases, and it must not arbitrarily distinguish what is and is not a religion.[145] Defining religion as a belief system based on faith,[146]a

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139. *Id.* at 164 (citations omitted).

140. Note, 61 TEX. L. REV. at 172-73.

141. Andrew W. Austin, *Faith and the Constitutional Definition of Religion*, 22 CUMB. L. REV. 1 (1991).

142. *Id.* at 2. Oddly, given the fact that the Framers' society is vastly different from our own, Austin, when discussing the purposes and principles of the Free Exercise Clause, refers to the writings of Madison. *Id.* at 10. *See also id.* at 40-41 (stating that the Framers' view on the meaning of religion was "clearly theistic, and would not have protected many of the individuals that have been granted exemptions under current doctrine"). But why does it matter that many individuals would not be exempted by the original meaning, if the meaning does not exempt them? Austin's own definition is intended to exclude some but that does not detract from the definition unless the exclusion is wrong based on some other normative criteria. Consequently, the exclusion of what Austin believes to be a religion by the original meaning definition is wrong only if original meaning interpretation itself is wrong.

143. *Id.* at 6.

144. *Id.* Why what society thinks the meaning of a word has changed to should change the meaning of the text of the Constitution is not explained. Presumably, society could view the "equal" in the Equal Protection Clause more narrowly, thus excluding from its current protection many groups. In his discussion of the Court's jurisprudence Austin criticized the Court for creating too expansive a definition that includes beliefs "that in no way resemble what one would normally consider religion." *Id.* at 16. One must ask how this admonition squares with his previous assertion that any acceptable definition of religion must not exclude unorthodox beliefs. *Id.*

145. *Id.*

system that cannot be proven based on logical reasoning, fits these criteria for Austin.[147] A belief system that qualifies as a religion, apparently, is not rational or even, according to Austin, "internally []consistent" and thus fits his test.[148]

Jesse H. Chopper, in his Article, Defining "Religion" in the First Amendment, put forth a more restrictive content-based definition of religion.[149] Chopper tailored his definition of religion, like the other commentators, so as not to "exclude certain beliefs (or groups) that are reasonably perceived . . . as being religious" because that may lead to a violation of the Establishment Clause, since one religion may impermissibly be preferred over another.[150] Chopper also expressed his desire that the definition be capable of expansion to include nontraditional religions.[151] Like the other commentaries reviewed, Chopper also dismissed resort to the original meaning because the "ultimate form [of the definition of religion] must serve purposes beyond the specific visions of the framers . . ."[152]

Chopper's solution was to define religions in relation to those belief systems that contain beliefs in "extratemporal consequences."[153] If a believer is subject to the belief that his actions, or failure to act, can result in punishment not of this world, the state cannot legitimately place the believer in a position to choose between following the dictates of the state or eternal consequences.[154] These necessary, and apparently sufficient, criteria for a definition of religion are found, Chopper claimed, in the traditional justifications for a religious exemption and the Free

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146. At different times, Austin includes the caveat that the belief based on faith must be one in a "greater power." *Id.* at 43.

147. *Austin, supra* note 141, at 36.

148. *Id.* at 41-42. *See also* James M. Donovan, *God is as God Does: Law, Anthropology, and the Definition of "Religion"*, 6 SETON HALL CONST. L.J. 23 (1995) (attempting to derive a definition of religion based on insights offered by anthropology). Donovan, after reviewing the academic literature and federal court jurisprudence, finds that there have been advocated four types of definitions of religion including: content definitions, behavioral-performative definitions, mental definitions, and functional definitions. *See id.* at 70-91. Donovan settles for a definition that is a "generative functional one." *Id.* at 95. His proposed definition is "any belief system which serves the psychological function of alleviating death anxiety." *Id.*

149. Jesse H. Chopper, *Defining Religion in the First Amendment*, 1982 ILL. L. REV. 579.

150. *Id.* at 579-80.

151. *Id.* at 580.

152. *Id.* As usual, the reasoning behind this claim is lacking, but this Article assumes that the same "changing society" arguments confronted before are in play here.

153. *Id.* at 597-601.

154. *Chopper, supra* note 149, at 597-601.

Exercise Clause.[155] The proposed definition, Chopper argued, is sufficiently broad to contain most recognized religions, while at the same time excluding those belief systems that are not beyond the competence of government to control.[156]

George C. Freeman took a more radical approach to the definitional problem and argued that the pursuit of a definition of religion is flawed in and of itself.[157] Instead of a content-based definition, like that proposed by Chopper, or a functional definition, as advocated by the 1978 Harvard Note, Freeman offered a list of eight characteristics that he claimed all religions possess, though each religion may not have all characteristics.[158] The pursuit of a definition is inherently problematic for Freeman because there is no single essence of religion, no one word or idea or form, in the Platonic sense, that all belief systems commonly labeled "religions" have in common, and thus the pursuit of a definition is futile.[159]

Freeman is agnostic concerning the impact of the original understanding of the definition of religion, but did claim "most of the Founders equated religion with theism."[160] This is odd because in the related context of whether "religion" has a similar definition for both the Free Exercise and Establishment Clauses, Freeman asserted that any argument against a consistent meaning of religion must "be accompanied by an argument for why the Founders' views on the subject should be ignored."[161] In any event, Freeman ignored the original meaning of religion, opting instead for a list of descriptive characteristics of religion that are admittedly unhelpful.[162]

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155. *Id.* at 598-99.

156. *Id.* at 599-601.

157. George C. Freeman, III, *The Misguided Search for the Constitutional Definition of "Religion,"* 71 GEO. L.J. 1519 (1983). For another academic claiming that the search for a definition of religion is itself misguided and impossible, see Anita Bowser, *Delimiting Religion in the Constitution: A Classification Problem*, 11 VAL. U. L. REV. 163 (1977) (arguing that "[b]ecause classification cannot be carried on deductively the task is an inherently arbitrary one") (citation omitted).

158. *Freeman, supra* note 157, at 1553. The eight categories are:

> 1. A belief in a Supreme Being 2. A belief in a transcendental reality 3. A moral code 4. A worldview 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 8. Membership in a social organization that promotes a religious belief system[.]

Id.

159. *Id.* at 1152-53.

160. *Id.* at 1520.

161. *Id.* at 1524.

162. *Id.* at 1565.

The examples of academic commentary all have the same general flaw in that none give any coherent normative reason as to why their definition of religion should be chosen. In addition, the definitions offered the term religion are subjective and muddled. The authors propose definitions claiming that they do not want to exclude what is really religion without giving any reasons why or how, while also claiming that to include too many belief systems under the precept of religion would be equally wrong. In the end, having left the safe-harbor of the meaning attributed to the word religion by the Framers and Ratifiers, academia is unable to arrive at neutral principles to define religion.[163]

In summary, the commentators have generally argued that a definition of religion from 1792 is unworkable because today many belief systems some would consider religious would not receive protection under the Free Exercise Clause because the Framers' definition would assumedly be theistic and too narrow. In the stead of the original meaning these commentators offer different definitions of the meaning of religion varying in scope, but consistent in their indeterminacy and their subjective basis in the views of the commentator.

IV. The Original Meaning of Religion in the First Amendment

There are three plausible interpretations of what the word religion meant when ratified in 1792.[164] Religion could plausibly have meant: (1) a system of beliefs based on Christianity; (2) a monotheistic system of belief;[165] or (3) some expanding definition that included ever-greater types of beliefs from philosophic to moral to any system of beliefs. This Article will take the Ratifiers as the relevant group in relation to which this Article will judge the

163. *See* Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 Ind. LJ. 1 (1971) (arguing that to be legitimate (i.e. to comport with democratic theory) a theory of constitutional interpretation must employ neutral principles and not be based on the personal predilections of the interpreter).

164. This sentence refers to the results obtained by looking at the original meaning, and then other interpretative methodologies that take the original meaning into account but then offer other normative factors to move away from the original meaning. Thus, the first interpretation is the narrowest possible reading of the text based on the original meaning. The second interpretation, that religion means a monotheistic belief system, is the definition this Article finds to be the original meaning of the First Amendment. This second interpretation may, but is not likely to include, all theistic beliefs. Finally, the third interpretation is that of the nonoriginalist who disregards the original meaning for some definition of religion based on normative criteria wholly divorced from the text and history of the religion clauses.

165. This may include, if the original meaning is stretched, simply, theistic beliefs.

meaning of religion in the First Amendment. It is the contention of this Article that religion meant *at least* a system of beliefs based on a theistic view of the supernatural and *likely* encompassed only monotheistic belief systems including Christianity, Judaism and Islam (often referred to at the time as Mahometanism). To ascertain the meaning of the word religion in the Constitution this Article will look to the "objectified meaning"[166] of the word in an attempt to arrive at the authoritative meaning used when the First Amendment (and its text) was given authority by the Ratifiers, i.e., when it was ratified.

A. Background and Colonial Practice

The story is very familiar of how many of the first colonists who settled in what was to become the United States were devout Christians seeking refuge from persecution.[167] The New England colonies were founded, generally, by protestant dissenters from the Church of England and deigned to create for themselves a society based and regimented by their understanding of the Bible and its precepts.[168] The New England colonies were Congregationalist in character and established congregationalism as the colonial churches.[169] The Middle Atlantic states, including Virginia, Maryland,[170] and the Southern states of the Carolinas and Georgia, all, to a greater or lesser degree, had established the Anglican Church before the Revolution as the state supported and official church of the colonies.[171] The remaining states, New York and

166. *See* SCALIA, INTERPRETATION, *supra* note 1, at 37-41 (identifying Justice Scalia's mode of interpretation which seeks to find, not the subjective intent of the Framers or Ratifiers, but the objective meaning of the authoritative text as was used by society when the text received its authority).

167. *See e.g.*, J. HECTOR ST. JOHN DE CREVECOUEUR, LETTERS FROM AN AMERICAN FARMER, 70-77 (Penguin Classics Ed. 1986) (describing the religious nature of Americans in the late 18th Century); PAUL JOHNSON, A HISTORY OF THE AMERICAN PEOPLE, 1-109 (1997) (surveying the founding of the American nation and the religious nature of its people); MCDONALD, *supra* note 76, at 1-57 (discussing the intellectual origins of the Constitution including the religious background of the American people); Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409 (1990) (giving a detailed background of the history of the Free Exercise Clause including a description of religious life in pre-Revolutionary America).

168. *See* JOHNSON, *supra* note 167, at 28-117 (discussing the Puritan experiment).

169. *McConnell*, *supra* note 167, at 1421-23.

170. Lord Baltimore had originally established Maryland as a haven for prosecuted Catholics but after the Protestants took control of the colony Maryland became one of the harsher oppressors of Catholics and established the Church of England. *See* JOHNSON, *supra* note 167, at 55-61; *McConnell*, *supra* note 167, at 1424-25.

171. *McConnell*, *supra* note 167, at 1423-24.

Pennsylvania, while generally tolerant of all persons, declared their belief in God.[172] In all, nine colonies had religious establishments of one church or sect,[173] while all colonies, except Rhode Island, expressed a belief in God.[174]

The colonists were intimately familiar with the establishment and extent of religious freedom in the mother country,[175] which was the basic reason for much of the emigration to the New World.[176] In England, of course, the Crown was also the head of the national church.[177] The establishment entailed the Test Act of 1672, which permitted only Anglicans to hold public office.[178] In addition, all who held public office were required to deny the doctrine of transubstantiation, affirm the supremacy of the king over the Church of England, and show that they had taken communion according to the rights of the Anglican Church within the previous year.[179] Protestant dissenters were accorded less harsh treatment than Catholics based on the belief that Catholics had mixed allegiances, with at least some fealty directed towards the Pope as a foreign potentate.[180] The most stringent treatment was meted out to apostates and heretics, those who renounced Christianity by becoming atheists or the adherent of a "false" religion, and those who "publicly and obstinately" denied the essential tenets of Christianity.[181]

Thus, the English background from which the majority of the colonists originated was one firmly Christian and mainly Anglican.

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172. *Id.* at 1424-25. New York was somewhat odd, with four of its more populous counties having established the Anglican Church. *Id.* Indeed, not infrequent disputes arose when the royal governor would try to extend the establishment to other counties. *Id.*

173. *See* ROBERT CORD, SEPARATION OF CHURCH AND STATE 4 (1982).

174. *See* 2 STORY, *supra* note 4, at 592. For example, Penn's charter for Pennsylvania protected all religious belief that was theistic but restricted office to those who expressed assent to a minimal Christianity. *See McConnell, supra* note 167, at 1430.

175. *See* MCDONALD, *supra* note 76, at 42-47 (discussing the changes made by the colonies generally towards more tolerance than was shown of dissenting religions in England).

176. *McConnell, supra* note 167, at 1421-23.

177. *See* 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *235-36, *279-80 (John F. Hargrave ed., 21st ed. 1844).

178. *Id.* at *58-59; *McConnell, supra* note 167, at 1421.

179. *McConnell, supra* note 167, at 1422.

180. *See* 2 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *53-58 (John F. Hargrave ed., 21st ed. 1844) (setting forth the different restriction on protestant dissenters and Papists).

181. *Id.* at *43-50. The penalty for apostasy was lessened from being burnt alive to other lesser civil penalties, and heretics, if they publicly proclaimed their heresy, would receive the same fate. *Id.*

In addition to proscriptions on belief and worship of non-Anglicans, there were also restrictions on blasphemy, swearing and cursing, witchcraft, breaking the Sabbath prohibition on work, and assorted other offenses of immorality.[182] In sum, a specific sect of Christianity was protected. Although the laws of England were cognizant of other Christian sects, Judaism, and Islam, which were relatively tolerated, little is said of polytheism (only perhaps in reference to "heathens") or of nonbelievers (except in reference to apostates and atheists who deny all religion). In fact, the listing of crimes by Blackstone began with those offenses against "Almighty God" and the "true religion."[183] The discussion of apostasy describes those who do not believe in a "Supreme Being as not having the virtue of belief in a future state, in the duties towards God and fellow man, and the virtue inculcated by Christianity, which leads one to the conclusion that a religion includes all that apostates deny."[184]

The colonists, through their charters, selective grants and restrictions on religious freedom, and their establishments favored theism, often explicitly favored belief in a Christian God, and in many cases explicitly granted privileges or withheld restraints to those who believed in Jesus. In addition, in some colonies, the belief in Jesus had to be of the sort established by the colonial religion. Through their selective use of language in describing the extent of religious freedom and establishment, it appears that the colonists often equated religion with a theistic belief in a Christian God, and at least with a monotheistic belief.

The story of the Pilgrims, virtually known to all, is that after two months out to sea they formed the Mayflower Compact, the document that was to govern their new society.[185] The Compact offered the colonists "just and equal laws" based on their religious beliefs to form a society based on Biblical precepts.[186] These Puritans were "spiritual pilgrims" intent on leaving the corruption of the Old World behind and beginning a new society.[187] Symbolically, God was a co-signatory of the Compact, emphasizing

182. *Id.* at *59-86.

183. *Id.* at *43.

184. *Id.*

185. *See* JOHNSON, *supra* note 167, at 25-30 (describing the Pilgrims' purpose, their voyage, the forming of the Compact and their settlement).

186. *Id.* at 25.

187. *Id.* at 25-30.

His place as part of the overall plan.[188] The Compact stated the purpose of the Pilgrims more succinctly: "having undertaken for the glory of God, and advancement of the christian faith, . . . a voyage to plant the first colony in . . . Virginia."[189] The Pilgrims and the Mayflower Compact are a clear example of this early, all-encompassing Christianity.

The earliest colonial foundations were often specifically attributed to God — a Christian God — and His divine Providence. The 1662 Charter of Connecticut granted by Charles II finished its proclamation by stating the numerous purposes for which the colony was created including bringing to the Indians "the Knowledge and Obediance of the Only True God, and the Saviour of Mankind and the Christian Faith."[190] Of course, Massachusetts with its firm grounding in Puritan theology ascribed its purpose to God. The Crown stated that the purpose of the colony was to "advance the in Largment of Christian Religion, to the Glory of God Almighty," and to convert "the People in those Parts unto the true Worship of God and Christian Religion."[191]

The religious fervor for Christianity was not limited to New England's faithful. Virginia's First Charter, from 1606, also listed the spread of Christianity as a purpose of the colony and gave thanks to God for his providential guidance.[192] The First Charter of North Carolina of 1663 repeatedly urged as the purpose for the colony the "Propogation of the Christian Faith," and support of the "Christian Religion."[193]

Even the reportedly tolerant Pennsylvania required that on the "Lord's Day" all persons should refrain from work in proper emulation of the "Primitive Christians."[194] This would, according to Pennsylvania's Laws Agreed Upon in England, help everyone better worship and understand God.[195] As we can see, the colonies were settled for religious purposes where religion was narrowly drawn in Protestant, Christian terms.

Many of the colonial charters and founding documents, while

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188. *Id.* at 25.

189. THE COMPLETE BILL OF RIGHTS 52 (Neil H. Cogan ed., 1997).

190. *Id.* at 14.

191. *Id.* at 18-19. The Charter of Massachusetts Bay Colony of 1628 ordained that the "principle end of" the colony was "obediance of the onely true God and saviour of Mankind, and the christian faith . . . ." *Id.* at 20.

192. *Id.* at 43.

193. *Id.* at 26.

194. THE COMPLETE BILL OF RIGHTS 31.

195. *Id.*

providing for freedom of religion, restricted that freedom to certain Christian sects, or to theists, or, as in the case of Massachusetts, specifically excluded certain groups such as Catholics. The Massachusetts colonial charter forbid any person entry "suspected to affect the Superstition of the Chh of Rome . . ."[196] The 1692 Charter of Massachusetts Bay promised protection for liberty of conscience to all Christians "except Papists."[197] Even more tolerant New York joined in opposition to "popery," declaring that no rights to freedom of worship shall extend to "Persons of the Romish Religion," while giving all others who believed in Jesus Christ, as God's only son, freedom in matters of "Religious Concernment."[198] Vermont limited protection of religious freedom to Protestants and required everyone observe Sunday and pay tithes to the church of his choice.[199] New Jersey refused to extend protection to atheists or the "Irreligious."[200]

Otherwise, the level of protection for religious conscience or exercise varied by time and geography.[201] William Penn's Delaware tolerated free practice and individual conscience so long as the person acknowledged "One Almighty god, the Creator, Upholder and Ruler of the world."[202] In Maryland, originally founded as a refuge to persecuted Catholics, the 1649 Act Concerning Religion guaranteed to all those who believed in Jesus Christ "free exercise" of religion.[203] New Jersey originally gave unqualified protection in matters of religious practice.[204] Later, however, in the 1683 Fundamental Constitutions for East New-Jersey, the scope of protection was limited to those who believed in one God.[205]

The extent of religious liberty in the Carolinas was interesting because of its expansive exemptions provided to non-Anglicans.[206] The original charter of the colony, in 1663, established the Church

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196. *Id.* at 19.

197. *Id.* at 20.

198. *Id.* at 25.

199. THE COMPLETE BILL OF RIGHTS 41-42.

200. *Id.* at 24.

201. *See McConnell, supra* note 167, at 1421-30 (offering four different modes of church-state relationship from a mode of one exclusive established church early in Virginia, to one with no explicitly established church in Pennsylvania).

202. THE COMPLETE BILL OF RIGHTS 15. In Pennsylvania, religious liberty was granted on the same grounds as in Delaware. *Id.* at 31.

203. *Id.* at 17. This was the first instance of the term "free exercise" being used in an American document. *See McConnell, supra* note 167, at 1425.

204. THE COMPLETE BILL OF RIGHTS 23-24.

205. *Id.* at 24.

206. *See id.* at 26-30, 35-39.

of England but allowed for "Indulgencies and Dispensations" in the case of those who, because of their conscience, could not conform to the liturgy of the Anglican Church.[207] Later, in the 1669 Fundamental Constitutions of Carolina, the colony required that any freeman who wished to reside in the colony had to declare his belief in God and in the public worship of God.[208] The exemption for dissenters was also made more explicit both in extent and reasoning. The 97th Constitution (what today would be called the 97th article) allowed that when any seven "Jews, Heathens, and other dissenters from the purity of the Christian religion" applied, they would be granted their own church to which they would pay tithes and publicly worship God.[209] The colonists professed that they did not want to exclude non-believers, but to make them intimately familiar with the colonial brand of "pur[e]" Christianity so they would be enticed to convert.[210] However, there were three beliefs to which all dissenters must agree: "That there is a God . . . That God is publicly to be worshipped . . . That it is lawful and the duty of every man . . . to bear witness to the truth . . . in the presence of God [such as by] kissing the Bible."[211] The extent of religious freedom varied in the colonies, but the common core was theistic and usually in a monotheistic Christian sense.

Restriction on public office was commonplace and often more rigorous than the requirements for protection of one's religious beliefs and actions. In Pennsylvania, for example, while one had only to believe in one God to obtain protection for religious exercise, to enter into public office one was required to believe in Jesus Christ as Savior of the World.[212] New Jersey also gave religious freedom to all who believed in one God, but required men in office to believe in Jesus Christ.[213] Connecticut was even stricter, requiring all public servants be members of the established church.[214] Thus, in places of authority, even the most tolerant of the colonies, those who granted religious freedom to theists, limited office to Christians.

As briefly discussed above, establishments were numerous in the

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207. *Id.* at 26-27.

208. *Id.* at 29.

209. THE COMPLETE BILL OF RIGHTS 29.

210. *Id.*

211. *Id.* at 29-30.

212. *Id.* at 31-32. Delaware had a similar dichotomy because of Penn's proprietorship of both colonies. *Id.* at 15.

213. *Id.* at 24.

214. THE COMPLETE BILL OF RIGHTS 13.

colonies. Massachusetts, as did Connecticut, New Hampshire, and Vermont, established the Calvinistic Congregational church.[215] The establishments varied in intensity from that in Massachusetts where dissenters were actively prosecuted,[216] to the multi-establishment in New Hampshire where each town was required to have an established church, but the majority of the town chose the specific denomination.[217] The familiar Church of England was established in Virginia, Maryland (after the initial religious tolerance), the Carolinas and Georgia.[218] In New York (except where the Anglican Church was established in four counties), New Jersey, Rhode Island, Pennsylvania and Delaware, de facto tolerance of Christian sects reigned.[219] The number and level of establishments give an insight into the view of the colonists' as to the importance of religion and what they viewed as a religion, with all established sects being Christian.

The discussion above details the extent of religious feeling in the colonies, their practices, and official judgements on religion. Religious toleration was generally expanding, but at base only theism, and generally Christian theism, was protected. In areas of special concern, the colonies restricted even further the reach of what was an acceptable religion. Finally, most colonies still established specific Christian sects.

The intellectual background with which the Founders and Ratifiers were familiar was as deep as it was varied. The Founders knew the writings of the ancients, as well as the works of more recent political theorists such as Locke,[220] Montisque, Burke,[221] and

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215. *McConnell, supra* note 167, at 1436.

216. *Id.* at 1422-23.

217. *See* LEONARD W. LEVY, THE ESTABLISHMENT CLAUSE: RELIGION AND THE FIRST AMENDMENT 42-43 (2d ed. 1986).

218. *McConnell, supra* note 167, at 1423.

219. *Id.* at 1424-25.

220. *Id.* at 1430. Locke's influence on the Founders and Ratifiers in the subject of religion was marked by belief in a social contract and natural rights, but little understanding of what Lockean theory entailed in the particulars. Richard Henry Lee, when discussing the proposed Constitution, referred to it as a "Social Compact." Richard Henry Lee, *in* 1 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 337 (Merrill Jensen ed., 1976). John Leland's objections (Leland being a prominent Baptist minister) to the Constitution were enclosed in a letter to James Madison from Joseph Spencer. Letter of Joseph Spencer to James Madison, *in* 8 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 424-25 (J. Kaminski & G. Saladino eds., 1988) (Feb. 28, 1787). Leland's first objection was to a lack of a Bill of Rights, which, he claimed, "whenever Number of men enter into a State of Society, . . . there should always be a memorial of those not surrendered otherwise every natural & domestic Right becomes alienable . . . ." *Id.* at 425. While not totally accurate Lockean theory, the language and concepts used are unmistakably Locke.

others. The influence of the writings of John Locke upon the Founders is well noted.[222] Locke posited that in the world of actions, the world governed by the civil government, the government and its determinations were supreme.[223] As a result, the government that was instituted to protect and prevent infringement of rights could do so at the expense of a person's religious beliefs, but since another's beliefs cannot, in a Lockean sense, harm another, the government has no right to interfere with beliefs.[224] If an individual's beliefs urged him to disobey a law, Locke argued that since the sphere of religion is not that of the world of actions, and since there is no higher power on Earth to whom the objector can appeal to, the dissenter must obey his conscience and suffer the penalties inflicted by the magistrate.[225]

It is interesting, however, to find that Locke also advocated a mild religious establishment where the government could use

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When urging a bill of rights be amended to the Constitution, *An Old Whig V* proposed a clause affirming that those rights not delegated remain in the people and, as an example, stated that liberty of conscience was one of those inherent, natural rights that "indeed [the people] have not even the right to surrender." *See An Old Whig V, in* 13 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 538-39 (J. Kaminski & G. Saladino eds., 1983) (originally published in the Pennsylvania Independent Gazetteer on Nov. 1, 1788). The argument was obviously based on Locke's consent theory in that only those rights that the people consent to surrender are relinquished. One has to question, however, whether the right to religious liberty was a right that was unalienable with one's consent. See, however, LOCKE, GOVERNMENT, *supra* note 65, § 131 (stating "the power of the Society . . . can never be suppos'd to extend farther than the common good . . . .").

Brutus, on January 17, 1788, asserted, as did Locke, that the "design of civil government is to protect the rights and promote the happiness of the people." *See Brutus IX, in* 15 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 393 (J. Kaminski & G. Saladino eds., 1984) (Originally printed in the New York Journal on Jan. 17, 1788). The quoted phrase is like Locke's reasoning in why men enter society: "The great end of Mens entering into Society, being the enjoyment of their Properties in Peace and Safety . . . ." *See* LOCKE, GOVERNMENT, *supra* note 65, § 134.

221. *See* RUSSELL KIRK, THE CONSERVATIVE CONSTITUTION (1990) (emphasizing the fact that the Founders were familiar with and inclined towards Burke's political views).

222. *See e.g.*, MCDONALD, *surpa* note 76, 7 (referring to, as an example of Locke's influence, the numerous references to his theories in the Federal Convention); GARY ROSEN, AMERICAN COMPACT: JAMES MADISON AND THE PROBLEM OF THE FOUNDING 5 (1999) (noting that scholars have found Locke's influence on Madison's thinking "determinative"); *McConnell, supra* note 167, at 1430 (stating "[Locke's influence on the Founders] was most extensive and . . . his influence on the Americans and the first amendment was most direct"). *See also McConnell, supra* note 167, at 1430-32 (discussing different examples of Locke's influence on the different Founders, including references found in Jefferson's, Madison's, and Isaac Backus's (an influential Baptist preacher) writings).

223. *John Locke, A Letter Concerning Toleration* 9-19, *in* 6 THE WORKS OF JOHN LOCKE (London 1823).

224. *Id.*

225. *Id.* at 43.

religion and religious arguments to improve the citizens of the commonwealth and "thereby draw the heterodox into the way of the truth, and procure their salvation . . ."[226] In addition, while Locke advocated tolerance of different religious views (because Locke's theories limited the sphere to which religious views were applicable, namely one's own conscience), the same tolerance was not extended to Catholics and atheists.[227] Like Blackstone (or rather, Blackstone like Locke), Locke justified placing restrictions on Catholics because of their mixed allegiance, and justified not extending tolerance to atheists because atheists do not have the moral scruples to be trusted in a civil society where rights are viewed as having derived from God, and because the atheist has no fear of a future state of punishment.[228]

Locke also forbade interference by the state in matters of religion because, "obedience is due in the first place to God, and afterwards to the laws" of man.[229] Also, since each person, according to Locke, who believed in God was unable to demonstrate the veracity of those beliefs, there was no basis upon which the civil government could *force* the believer to change his beliefs.[230] Thus, government could not interfere in the sphere of faith and religion because the authority for the beliefs was of a higher authority than the civil government, not a product of individual will, and because the civil government could not prove that the beliefs were necessarily wrong.

The intellectual foundation provided by Locke to the Founders and Ratifiers carried with it a view of religion based on belief in a God, a Christian God, belief in whom carried with it duties and the threat of punishment for transgression of those duties. So while Locke scaled back the purported sphere of influence of religion in society to the individual, and increased the sphere of authority for the civil government, Locke also retained a thoroughly monotheistic, and in some sense a Christian, view of religion.

In summary, the experiences of the colonies in relation to religion was one of a more expansive view over time, but on the eve of the revolution, the legal, social and theoretical climate was still thoroughly Christian and theist.

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226. *Id.* at 11.

227. *Id.* at 46-47.

228. *John Locke, A Letter Concerning Toleration* 46-47, *in* 6 THE WORKS OF JOHN LOCKE.

229. *Id.* 43.

230. *Id.* at 139-43.

B. Post Revolutionary Experience

The people of the new nation remained religious with new vibrant evangelical sects cropping-up throughout the new states. The Great Awakening was the response of these evangelical sects, especially the Baptists, to what was viewed as a general decline in the moral standard of Americans.[231]

During and after the Revolution the newly independent states experimented with broader provisions in their new constitutions pertaining to religious freedom and narrowed establishments by allowing multiple establishments, by completely exempting some from the requirements of the establishment, or by eliminating their establishments all together. The states of Georgia,[232] South Carolina,[233] North Carolina, and New York all disestablished the Anglican Church within two years after the Revolution.[234] Virginia followed in 1785 while Maryland's legislature retained formal control over the established church but offered no support.[235] The New England Congregational establishments fared better because of their initial and continued opposition to the Crown and because, unlike where the Church of England was established, the churches of the New England states were creatures of popular support.[236] Pennsylvania, New Jersey, Rhode Island and Delaware maintained their no establishment policy.[237]

The dismemberment, or reduction in the severity, of many established churches reflected the growing variety of religious opinion in the states.[238] But while nearly all establishments were either broadened or done away with, the states protected in their religious freedom clauses only theistic beliefs. One consistent theme among all the states and their provisions for religious

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231. *See* J.C. FURNAS, THE AMERICANS: A SOCIAL HISTORY OF THE UNITED STATES 323-31 (1969) (describing the religious fervor of America).

232. While Georgia disestablished the Anglican Church it did allow the legislature to tax each person to support the religion of his choice. *McConnell, supra* note 167, at 1436.

233. South Carolina did establish the "Protestant religion" in its constitution but offered no support — the establishment was merely hortatory. *Id.*

234. *Id.*

235. *Id.* The Maryland Declaration of Rights from 1776 permits the legislature to "lay a general and equal tax for the support of the christian religion . . . ." that allowed each person to appoint the church of his choosing as the beneficiary of his taxes. THE COMPLETE BILL OF RIGHTS 17.

236. *McConnell, supra* note 167, at 1437.

237. *Id.* at 1436.

238. *See* LEONARD W. LEVY, THE ESTABLISHMENT CLAUSE: RELIGION AND THE FIRST AMENDMENT ch. 2 (2d ed. 1986) (discussing the movement towards disestablishment and multi-establishments).

freedom was the emphasis on the understanding that freedom was granted only as to a belief in "Almighty God." Some states, like South Carolina, went further and protected only those who worshipped a Christian God. In either scenario, the protection fits well with a Lockean view of the role of government vis a vis religion.[239] Namely, that government had no business in the affairs of religion but could support a mild establishment and exclude from religious protection atheists and Catholics.

The different states often adopted provisions for religious freedom. The Delaware Declaration of Rights, enacted in 1776, stated in section two that "all men have a natural and unalienable right to worship Almighty God . . . and that no man . . . can be compelled to attend any religious worship . . ."[240] In section three the Declaration provides that "all persons professing the Christian religion . . . unless, under colour of religion, any man disturb the peace" shall be treated equally.[241] Section two was the state's free exercise clause while section three was a sort of equal protection clause for religious faiths. Section two equates religion with worshipping one "Almighty" God, and section three restricts equal protection explicitly to Christians.[242] Pennsylvania likewise protected those who acknowledged "the being of a God."[243]

The Maryland Declaration of Rights, also from 1776, like the Delaware Declaration parallels the worship of one "God" to "religious liberty," but also again restricts equal protection of religions to Christians.[244] Massachusetts was more explicit in its making a belief in one "**SUPREME BEING**, the Great Creator and Preserver of the Universe" synonymous with religion.[245] Consequently, the 1780 Massachusetts Constitution provided for religious freedom to those "worshipping **GOD**" who did not disrupt

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239. *See supra* notes 220-30, and accompanying text (discussing the impact of Locke on the Founding generation). In the provisions in the state constitutions guaranteeing religious freedom, the clauses inevitably speak in Lockean terms of inherent, natural and unalienable rights. *See generally* the state provisions of Delaware, New Hampshire, North Carolina, Pennsylvania, Vermont, and Virginia *in* THE COMPLETE BILL OF RIGHTS 15-46.

240. THE COMPLETE BILL OF RIGHTS 15. It appears that "worship" was a subset and an integral part of a religion. *See e.g.*, *id.* at 26 (N.Y. CONST. art. 38 (1777)) (protecting religious "Profession and Worship").

241. *Id.*

242. *Id.*

243. *Id.* at 32. The 1790 Constitution of Pennsylvania protected the "right to worship Almighty God," and went on to discuss that which no such believer could be forced to do including be compelled to attend worship, support a ministry, or any other "religious" establishment. *Id.* at 33.

244. *Id.* at 17.

245. THE COMPLETE BILL OF RIGHTS 20-21.

the public peace.[246] New Hampshire, in its 1783 constitution, protected the "worship of GOD" and of the "DEITY."[247] New Jersey restricted religious freedom to Protestants in Article XIX, but in Article XVIII protected those who desired to worship "Almighty God."[248] In either case, a belief in one God was protected and equated with a religion. Virginia, with its well-entrenched established church granted the "free exercise of religion" so that "religion, or the duty which we owe to our Creator," would not be infringed.[249]

While the Carolinas had originally provided for an elaborate system of multi-establishments by allowing dissenters to pay their duties to their own church if their belief system met three requirements,[250] North and South Carolina took separate paths after the Revolution. North Carolina protected the right to worship of those who believed in "Almighty God"[251] and disestablished the Anglican Church, while South Carolina protected only those who professed a belief in "one God, and a future state of Rewards and Punishments, and that God is to be publicly worshipped."[252] In addition, South Carolina declared the "Christian Protestant Religion" to be the established religion, thus creating a multi-establishment so long as the different Protestant sects adhered to five articles of faith.[253] In both cases, though, religion at least meant a belief in one God.

In sum, following the Revolution and the gaining of

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246. *Id.* Vermont protected the right to "worship Almighty God" so that no such person could be forced to "attend any religious Worship . . . or support any Place of Worship." *Id.* at 41. In other words, religious worship was equivalent to the worship of God. Vermont still required, in its 1777 Constitution, that all observe the Sabbath and support the church of his choosing "most agreeable to the revealed Will of God." *Id.* at 41-42.

247. *Id.* at 22-23.

248. *Id.* at 25.

249. *Id.* at 44.

250. *See supra* notes 201-06, and accompanying text (discussing the original scheme of the Carolina religious establishment).

251. THE COMPLETE BILL OF RIGHTS 29.

252. *Id.* at 39.

253. *Id.* at 40. The five articles were:

> That there is one eternal God, and a future State of Rewards and Punishments. . . . That God is publickly to be worshipped. . . . That the Christian Religion is the true Religion. . . . That the Holy Scriptures of the Old and New Testaments are of Divine Inspiration, and are of the Rule of Faith and Practice. . . . That it is lawful, and the Duty of every Man, being thereunto called by those that govern, to bear witness to the Truth.

Id. The five articles are similar to the three original articles of faith dissenters were obliged to believe with the addition of professing that the Christian religion is the one true religion, and that the Scriptures are of Divine inspiration. *Id.* at 38, 40.

independence, the states reacted with varying degrees of willingness towards religious freedom. All states, however, only protected belief in a God, almost always a belief in one God, and often only a belief in a Christian God. The extent of protection varied per state, with most extending the bulwark of religious freedom only to religious worship[254] while others also protected religious exercise. It seems, however, that religion was generally seen as entailing worship, thus the exemption.

The new states often maintained religious tests (some well after the First Amendment was ratified) that were more specific and narrow than were their free exercise clauses. Tolerant Pennsylvania in its 1776 Constitution restricted legislators to those who could maintain a belief in God, a God who rewards and punishes, and believed that both the Old and New Testaments are of Divine inspiration.[255] Likewise, the state of New Jersey, otherwise moderate in its treatment of dissenters, required office holders to state their adherence to a Protestant sect.[256] Maryland required no other test for public office than that the person swear that he has a belief in the "christian religion."[257] Massachusetts required an oath to the effect that the person believed in "the christian religion" for all offices in the executive and legislative branches.[258]

After the Revolution, while many states were, to a greater or lesser extent, expanding the scope of religious freedom,[259] many of the most "tolerant" states continued to restrict office to those who

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254. *McConnell, supra* note 167, at 1460 (listing eight states as confining their protection to worship).

255. THE COMPLETE BILL OF RIGHTS 33. The 1790 state constitution still required office holders to state a belief in a God who rewards and punishes, but no longer required a profession in the Divine inspiration of the Bible. *Id.*

256. *Id.* at 25.

257. *Id.* at 18.

258. *Id.* at 22. Vermont required members of the legislature to proclaim their conviction that God was the creator of the universe, that He rewards good and punishes evil, that the Bible is Divinely inspired, and that he is an adherent to the "Protestant Religion." *Id.* at 42.

259. There was a general trend among Americans to be more accommodating of other sects and even other religions. Benjamin Rush, for example, noted with satisfaction the Fourth of July Parade in 1788 in Philadelphia, and the arrangement of the different ministers and religious leaders. *See Benjamin Rush: Observations on the Fourth of July Procession in Philadelphia, in* 18 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 265 (J. Kaminski & G. Saladino eds., 1995) (Originally printed in the Pennsylvania Mercury on July 15, 1788). The clergy marched arm-in-arm, with those ministers the most dissimilar in beliefs paired together. *Id.* Rush referred to the "Rabbi of the Jews, locked in the arms of two ministers of the gospel," as a "most delightful sight." *Id.* Rush then added, that the ban on religious tests would further this toleration of religions because offices would be open "not only to every sect of Christians, but to worthy men of *every* religion." *Id.* Clearly, Judaism was recognized by Rush to be a religion.

would swear to a belief in a Biblical God who punished and rewarded, and sometimes more narrowly to those who were Christians, and sometimes even more narrowly to Protestants. The emphasis on a monotheistic belief in a God, belief in Whom required performance of duties and entailed a belief in an afterlife, was a consistent refrain. In addition, it is clear that the God in question was a Biblical God.

The states, before, during and after the Revolution, maintained prohibitions on blasphemy and other offenses against God and Christianity. Virginia, for example, proscribed swearing and cursing stating that "if any person or persons shall profanely swear or curse, or shall be drunk . . . [they] shall forfeit [money]."[260] In the famous 1811 case by Chancellor Kent, the English common law that had clearly proscribed blasphemy was held applicable to New York, even though there was no established church, because blasphemy tends "to the dissolution of civil government."[261] Blasphemy was defined as "maliciously reviling God, or religion," but in the context of the United States, the religion in question was Christianity.[262] Since the defendant's actions caused Christianity to fall into disrepute, they threatened society and could be prohibited.[263] The enforcement of sanctions against defiling Christianity brings to light the thorough strength of sentiment in the nation around the time of the Constitution and the First Amendment in reference to the high repute with which religion and particularly Christianity was held. These prohibitions also give insight into the Christian background surrounding the Ratifiers and Framers.

James Madison's famous and oft-quoted Memorial and Remonstrance was given in opposition to a bill "establishing a provision for Teachers of the Christian Religion."[264] Madison used numerous arguments, some drawn directly from Locke. He claimed that since religious doctrines were unprovable, the civil government had no basis upon which it could intermeddle in religious affairs, and that each individual had an inherent right to religious

260. Virginia Revised Laws, c. 142 (Statute of 1792), *in* JOHN T. NOONAN, JR., THE BELIEVER AND THE POWERS THAT ARE 133 (1987).

261. The People v. Ruggles, 8 Johns. 225 (N.Y. 1811), *in* JOHN T. NOONAN, JR., THE BELIEVER AND THE POWERS THAT ARE 134-35.

262. *Id.* at 134.

263. *Id.* at 134-35.

264. 8 THE ARTICLES OF JAMES MADISON 298-301 (Robert A. Rutland et al eds. 1996).

freedom.[265] Madison also claimed that since religion "is a duty towards God," the civil government could not interfere with religious beliefs: "[t]his duty is precedent, both in order of time and degree of obligation, to the claims of Civil Society."[266] Madison, therefore, viewed religion as entailing a belief in God and the believer's duty to the "Universal Sovereign" took precedence over the claims of government.[267]

The Constitutional Convention in Philadelphia adopted, with little discussion, a ban on religious tests for office in the new national government.[268] Thus, while all would be required to swear or affirm their intent to support the Constitution,[269] no one would be excluded because of their religious beliefs. Those who did not like the proposed Constitution derided the exclusion as allowing non-Protestants or non-Christians or even non-theists to gain office in the new national government, while the defenders argued that religious test clauses were ineffectual and an engine for tyranny. In making their arguments, both sides give insight to what characteristics they believed a religion to posses.

Generally, the argument for religious tests was the necessity of keeping out of office those who were not Christians, or at least those who did not believe in an afterlife and thus ensure principled, like-minded officers. One proposed religious test offered in the New Haven Gazette would have required the oath-taker swear in the name "of the all-seeing DEITY" that he would, among other things, consider himself subject to the "Almighty Lawgiver

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265. *Id.* at 299-300.

266. *Id.* at 299.

267. *Id.* at 299-300.

268. *See e.g.*, 1 ELLIOT'S DEBATES 271 (Jonathan Elliot ed., 1891) (noting that "[i]t was moved and seconded to add the following clause to the 20th article: 'but no religious test shall ever be required as a qualification to any office or public trust under the authority of the United States;' which passed unanimously in the affirmative"); *McConnell, supra* note 167, at 1473-76 (discussing the radical departure that the religious test ban created from past practice). *See also Luther Martin: Genuine Information XII, in* 16 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 89 (J. Kaminski & G. Saladino eds., 1986) (Originally printed in the Baltimore Maryland Gazette on Feb. 8, 1789) (stating that although the ban on religious tests passed by "a very great majority" in the Federal Convention, "there were some members so unfashionable as to think that a *belief in the existence of a Deity*, and of a *state of future rewards and punishments* would be some security for the good conduct of our rulers, and that in a Christian country it would be at *least decent* to hold out some distinction between the professors of Christianity and downright infidelity or paganism"). Martin did not agree with the sentiments of those he deemed unfashionable, but he did recognize (as presumably did those criticized by Martin) that a religion was a belief in a God who commanded obedience to His laws.

269. U.S. CONST. art VI, cl 3.

and Judge," and devote himself to the service of "GOD."[270] Many contemporaries wished to see at least some mention of religion — "of a God, His perfections, and His providence"— so William Williams proposed a test that required a belief in "one living and true God, the creator and supreme Governor of the world," the worldly authority of God's laws, and that all rightful authority is derived from God.[271] Both proposed tests offer a view of religion in which there is one God who requires believers to act in accord with His law on threat of penalty or promises of reward. A revised Constitution offered by the antifederalist Society of Western Gentlemen included a religious test that required office holders to affirm "a belief in the one only true God, who is the rewarder of the good, and the punishment of the evil."[272] Again, this test equated a belief in one God who imposed duties on His believers with religion.

Many who desired a religious oath were emphatic in their belief that God would forsake the new nation because of the refusal to require a belief in Him for office.[273] Thomas Wilson feared that the nation would have "infidels" in office because of the Constitution's failure to mention God's name in a religious requirement.[274] *Cincinnatus III* invoked God's blessing on the new enterprise because of the Constitution's failure to protect religious liberty.[275] *Cincinnatus* feared that the ban on religious tests implied that the federal government otherwise had the power to regulate religion,

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270. 3 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 588 (Merrill Jensen ed., 1978) (originally published in the New Haven Gazette, Jan. 31, 1788).

271. William Williams to the Printer, *in* 3 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 589 (Merrill Jensen ed., 1978) (originally published in the American Mercury, Feb. 11, 1788). Williams went on to disavow any desire to exclude any particular sect of Christians, implying that he wanted only to exclude only non-Christians from office, but his proffered oath could easily be taken by a Jew or Muslim. *Id.*

272. The Society of Western Gentlemen Revise the Constitution, *in* 8 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 771 (J. Kaminski & G. Saladino eds., 1990) (originally published in the Virginia Independent Chronicle, April 30, 1787).

273. Letter of Thomas Wilson to Archibald Stuart, *in* 8 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 145 (J. Kaminski & G. Saladino eds., 1988) (Nov. 4, 1787). Others believed just as strongly that God sanctified the Constitution. *Americanus II* stated that the "Foederal Constitution is, in one respect, like the Christian religion, the more minutely it is discussed, the more perfect it will appear." *Id.* at 244-47 (originally printed in the Virginia Independent Chronicle, Dec. 19, 1787). The Constitution "certainly received the solemn sanction of Heaven . . . ." *Id.* at 245. In fact, the "Constitution, like our holy religion, knows no invidious distinctions." *Id.* at 247.

274. *Id.*

275. *Cincinnatus III: To James Wilson, Esquire, in* 14 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 124-25 (J. Kaminski & G. Saladino eds., 1983) (originally published in the New York Journal on Nov. 15, 1788).

so he implored Heaven to "have mercy on the world and on us."[276]

Edmund Pendleton questioned why the Federal Convention even included an oath at all if, as was argued by the proponents of the ban on religious tests, the oath in Article VI was really a religious test for those who believed in God and a future state.[277] Thus equating religion with God and a future state, Pendleton asserted that "since a belief of a Future State of Rewards & Punishments, can alone give consciensious Obligation to observe an Oath, [i]t would seem that [a religious] Test should be required or Oaths abolished."[278]

In a letter to President Washington, John Armstrong urged that a religious test was necessary to preserve Christianity.[279] In the letter Armstrong argued that the test need not be specific, so as to allow all Christians entry into office, but a test must declare a belief in the "One living & true God, [and] who . . . shall judge us righteously at the end of the world."[280] While Washington apparently disagreed with Armstrong's sentiment concerning a religious test, Armstrong did believe religion, and a belief system with one God and a future state, to be synonymous.[281]

Madison's defense of the test ban was premised on the reasoning

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276. *Id.* at 125.

277. Letter of Edmund Pendleton to James Madison, *in* 10 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 1773-75 (J. Kaminski & G. Saladino eds., 1988) (Oct. 8, 1787). In Washington's farewell address, he reminded the American People of the importance of religion in national and private life. "Where is the security," he asked, "for property, for reputation, for life, if the sense of religious obligation *desert* the oaths which are the instruments of investigation in the courts of justice?" George Washington Farewell Address, *in* JOHN T. NOONAN, JR., THE BELIEVER AND THE POWERS THAT ARE 132 (1987) (September 17, 1796). Washington believed that the future state of rewards and punishment to which the religious believer ascribed were essential to the virtuous, free society.

278. Letter of Edmund Pendleton to James Madison, *in* 10 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 1774 (J. Kaminski & G. Saladino eds., 1988) (Oct. 8, 1787).

279. Letter from John Armstrong to George Washington, *in* 1 THE PAPERS OF GEORGE WASHINGTON 253-57 (W.W. Abbot ed., 1987) (January 27, 1789).

280. *Id.* at 254. *See also id.* at 255 (defining religion as a belief in one God to whom we are finally accountable). Armstrong did not think highly of Jefferson who, building on Locke, did not care if his neighbor believed in "'One God, twenty gods, or no God at all,'" because belief of another alone would not harm him. *Id.* at 256. Armstrong was aghast that Jefferson would so nonchalantly toss aside what had been the bedrock of Christianity — belief in one true God. *Id.*

281. A letter from the Presbyterian Ministers of Massachusetts and New Hampshire showed their desire to restrict to believers in Jesus and God the ability to hold office. *See* Letter from the Presbyterian Ministers of Massachusetts and New Hampshire to George Washington, *in* 4 THE PAPERS OF GEORGE WASHINGTON 274-75 (W. W. Abbott & Dorothy Twohig eds., 1993) (November 2, 1789). The ministers advocated a religious test that would limit office to the broadest scope of Christianity.

that any oath requirement was inherently religious because if the person is religious and fears in the retribution of God, he will abide by the oath and if not then not.[282] In addition, Madison proffered the much-used argument that a nonreligious person would take a religious oath and lie anyway so religious oaths have no value.[283] Assumed by Madison is the idea that if a person is religious they believe in a God who rewards and punishes.

The defenders of the ban, while arguing against the efficacy of religious tests, still adhered to the common understanding of what a religion was. Oliver Ellsworth of Connecticut wrote that the ban on religious tests prevented persecution based on religious belief and ensured that "every man has a right to worship God in that way which is most agreeable to his own conscience."[284] Ellsworth thus equated religious tests and religion with a belief in and worship of God.[285]

Others supported the ban arguing that the secular oath that remains, while not explicitly religious, is still a religious test to the effect that those who swear to uphold the Constitution and are believers in a "God who is the Avenger of Perjury" will take the oath as a religious oath.[286] Oliver Wolcott argued that such an oath is an appeal to God and acknowledgement of a future state like any religious test, and had the added benefit of not excluding anyone because of their religious "sect."[287] The religion Wolcott referred to was monotheistic, and required duties of believers in God.

Another argument used to buttress the ban on religious test was that all "wise and good citizen[s]" would be allowed to hold the public trust regardless of their affiliation with a particular sect.[288]

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282. Letter of James Madison to Edmund Pendleton, *in* 8 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 125-26 (J. Kaminski & G. Saladino eds., 1988) (Oct. 28, 1787).

283. *Id.* at 126.

284. *Ellsworth, A Landholder VII*, *in* 14 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 448, 449 (J. Kaminski & G. Saladino eds. 1983) (originally published in the Connecticut Courant, Dec. 17, 1787).

285. *But see, Federal Farmer: An Additional Number of Letters to the Republicans*, *in* 17 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 310 (J. Kaminski & G. Saladino eds., 1986) (May 2, 1789) (including as religions when discussing the benefits of the religious test ban: Christians, Pagans, Mohametans, and Jews). The inclusion of Paganism as a religion may possibly include polytheism, but the vast majority of references to religion found were monotheistic.

286. Oliver Wolcott, *in* 3 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 558 (Merrill Jensen ed., 1978) (originally published in the Connecticut Courant, Jan. 14, 1787).

287. *Id.*

288. *Tench Cox, An American Citizen IV: On the Federal Government*, *in* 13 THE

The well-known Federalist, Tench Cox, argued that, unlike in the Catholic nations of Europe where no Protestant can hold office, and in England where no Catholic can hold office, under the new Constitution all men of virtue would be admitted to public trust.[289] In making his argument, Cox reaffirmed that any other course of action (allowing use of religious tests) was a "trespass on the Majesty of Heaven."[290] Even if Cox did not think religious tests wise policy, he still acknowledged his belief in God and Heaven.

In response to an objector to the ban who proposed that the Constitution explicitly refer to and affirm God's Divine providence; a writer named Elihu did not dispute the religious devotion of Americans.[291] Instead, he urged that such a declaration was as unnecessary as it was not useful.[292] Since all believe in God, "it is calculated to exclude from office fools only, who believe there is no God."[293] Besides, the author contended, the Framers knew and understood the providential hand of God was involved in the development of the nation and the Constitution, so no explicit acknowledgement of God was necessary.[294] However construed, Elihu's arguments are based on an understanding of religion as encompassing a belief in God.

Another tactic used to defend the ban on religious tests was the argument from faction, employed by Madison in Federalist Ten,[295] and others. Edmund Randolph in the Virginia Ratification Convention expressed the sentiment when he stated that he was "a friend of a variety of sects, because they keep one another in order."[296] The innumerable number of relatively equally strong sects

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DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 432 (J. Kaminski & G. Saladino eds., 1983) (originally published in the Pennsylvania Gazette on Oct. 21, 1788).

289. *Id.*

290. *Id.*

291. Elihu stated that "all universally are agreed [that] everybody believes there is a God; not a man of common sense in the United States denies or disbelieves it." Elihu, *in* 3 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 591 (Merrill Jensen ed., 1988) (originally published in the American Mercury, Feb. 18, 1788).

292. *Id.* at 591-92.

293. *Id.* at 592 (emphasis deleted).

294. *Id.*

295. 10 THE FEDERALIST ARTICLES (James Madison).

296. Edmund Randolph, *in* 8 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 1100-01 (John P. Kaminski & Gaspare J. Saladin eds., 1988) (June 10, 1788). *See also* James Madison in the Virginia Convention, *in* 10 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 1223-24 (John P. Kaminski & Gaspare J. Saladin eds., 1993) (June 12, 1788) (reiterating his argument about the benefit of numerous religious factions found in Federalist Ten: "no one sect will ever be able to out number the rest").

would prevent any one sect from creating an establishment.[297] In a letter to Thomas Jefferson, James Madison stated in slightly different terms his Federalist argument stating that faction may be based on religious differences, which was good by adding to the variety of factions.[298]

The defenders of the religious test ban saw the ban as allowing those of all religions access to government office. In his sermon, preached August 24, 1788, Manasseh Cutler stated that "[n]o one kind of religion, or sect of religion, is established . . ."[299] Cutler's claim is that religion is broader than Christianity alone and encompasses other belief systems, but Cutler also seemed to believe that a religion must at least entail a belief in a God.[300] Cutler also argued that Christianity did not need the protection of a religious test because of its truth.[301]

Our first President, upon his election, was offered congratulations by numerous religious denominations to which he often responded in thanksgiving to God and with reassurance that the national government would not intermeddle with the affairs of the sect that had addressed him. For instance, in the famous exchange with the Hebrew Congregations of Philadelphia, New York, Charleston and Richmond, President Washington reassured the small Jewish population of the nation that their belief system was also to be given the protections afforded the Christian denominations.[302] Washington noted the influence of the "Almighty" in the Revolution.[303] He also assured the Jews of their continuing security in matters of religion:

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297. *Randolph*, *supra* note 296, at 1101.

298. James Madison to Thomas Jefferson, *in* 13 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 448-49 (J. Kaminski & G. Saladino eds., 1983) (Oct. 24, 1788). In that same letter Madison questioned the efficacy of religious tests referring to the innumerable acts committed by legislatures that had taken religious oaths and argues that if asked to do the same act separately, their individual consciences would have prevented the legislators from doing so. *Id.*

299. Manasseh Cutler Sermon, *in* 18 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 341-42 (J. Kaminski & G. Saladino eds., 1995) (Aug. 24, 1788).

300. *Id.* at 341 (praising the beneficence of God and His grace showered on the United States).

301. *Id.*

302. Letter from George Washington to the Hebrew Congregations of Philadelphia, New York, Charleston, and Richmond, *in* 7 THE PAPERS OF GEORGE WASHINGTON 61-63 (Dorothy Twohig ed. 1998) (December 13, 1790); *see also* Letter from George Washington to the Hebrew Congregation in Newport, *in* 6 THE PAPERS OF GEORGE WASHINGTON 284-86 (Dorothy Twohig ed., 1996) (August 18, 1790) (exchange with the Hebrew Congregation of Newport).

303. 7 THE PAPERS OF GEORGE WASHINGTON 61-63.

> All possess similar liberty of conscience and immunities of citizenship. It is now no more that toleration is spoken of, as if it was by the indulgence of one class of people, that another enjoyed the exercise of their inherent natural rights. For happily, the Government of the United States, . . . gives to bigotry no sanction.[304]

In other words, Washington viewed Judaism as a religion like Christianity. While the personal subjective views of one person on what a word meant are not determinative to original meaning interpretation, the usage of a word by a person acquainted with it is evidence of what the word meant. In this context, where Washington is expounding upon the "liberality of sentiment" in relation to every "religious denomination of men in this Country," his inclusion of Judaism as one of the religions is demonstrative of the larger meaning used by society.[305]

In a letter to the Commissioners to the Southern Indians, Washington commended missionaries to the tribes.[306] By teaching the tribes Christianity, Washington believed the Indians would learn the "great duties of religion."[307] In his first Thanksgiving Proclamation, Washington asked God to "pardon [the] nation['s] . . . transgressions."[308] Washington was asking God to pardon the nation for failing to live up to the duties God had imposed and for transgressing God's laws. Like Judaism, which Washington recognized as a religion, Washington viewed religion as encompassing duties towards God.

The Revolution caused a further expansion of religious freedom through the enactment of religious freedom guarantees, and caused the dismemberment of many of the church establishments. In doing

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304. 6 THE PAPERS OF GEORGE WASHINGTON 284-86 (Dorothy Twohig ed., 1996) (August 17, 1790) (exchange with the Hebrew Congregation of Newport).

305. In a letter to the Quakers, President Washington iterated his theistic view of religion, charging that the individual is responsible only to his "Maker" for his religion. *See* Letter from George Washington to the Society of Quakers, *in* 4 THE PAPERS OF GEORGE WASHINGTON 265-67 (W. W. Abbott & Dorothy Twohig eds., 1993) (October, 1789). Thus, all could "worship Almighty God agreable to their Consciences." *Id.* at 266. In a later letter to the Jews of Savannah, Washington repeatedly praised the "Deity" while assuring the Hebrew Congregation that all who show "reverence to the Deity" will be protected in their religious exercise. Letter from George Washington to the Savannah Hebrew Congregation, *in* 5 THE PAPERS OF GEORGE WASHINGTON 448-49 (Dorothy Twohig ed. 1996) (October, 1789).

306. Letter from George Washington to the Commissioners to the Southern Indians, *in* 3 THE PAPERS OF GEORGE WASHINGTON 558 (W. W. Abbott ed., 1989) (August 29, 1789).

307. *Id.*

308. Thanksgiving Proclamation, *in* 4 THE PAPERS OF GEORGE WASHINGTON 131-32 (W. W. Abbott ed., 1993) (October 3, 1789).

so, however, the newly independent states restricted religious protection to theists and often only to Christians, and even where the official churches were disestablished, Christianity still received protection and many states continued less exclusive establishments.

C. *Enactment of the First Amendment*

One of the main arguments used by the Anti-Federalists and others opposed to the new Constitution was the lack of a Bill of Rights securing the peoples' inalienable rights to ensure that the national government would remain a government with a limited sphere of influence.[309] *Philadelphiensis VI*, arguing that the American experiment would fail without protection of the fundamental rights of Americans, held up the Ottoman Empire as the end result of no rights protection.[310] Labeled "bigotted infidels," it was argued that their religion taught them to "murder without

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309. *See* MCDONALD, *supra* note 76, at 269-70; SAMUEL ELIOT MORISON, THE OXFORD HISTORY OF THE AMERICAN PEOPLE 319 (1965). Madison resisted the movement for a Bill of Rights out of fear that any enumeration of rights would imply two ideas: that the federal government had authority over the area that the enumerated rights exempted even though Madison believed that the enumeration of the federal government's powers restricted the scope of federal power so as not to be able to infringe on rights, and that the enumeration of rights would imply that other rights, not enumerated were not protected and were within the authority of the national government to infringe. *See* LEONARD LEVY, ORIGINAL INTENT AND THE FRAMERS' CONSTITUTION 153-59 (1988). During the national debate on whether to ratify the Constitution and whether a Bill of Rights was necessary Madison wrote a revealing letter to Jefferson offering Madison's view of what the society at the time understood the term religion to encompass. Madison wrote:

> I am sure that the rights of Conscience in particular, if submitted to public definition would be narrowed much more than they are likely ever to be by an assumed power. One of the objections in New England was that the Constitution by prohibiting religious tests opened a door for Jews, Turks, & infidels.

Letter from James Madison to Thomas Jefferson, October 17, 1788, *in* 11 THE PAPERS OF JAMES MADISON 297 (Rutland ed.). Madison, then, understood the popular definition of religion, here used synonymously with "Conscience," to exclude religions other than Christianity. Interestingly, the New Englanders Madison refers to did not believe that only one denomination of protestant Christianity was included under the definition of religion, and that Catholicism was included as a religion. *Brutus*, one of the more famous of the Anti-Federalists, wrote in opposition to the national power to maintain a standing army in times of peace. He wrote against another who had asserted that standing armies were no threat because of the habits of the American people such that one might as well try to establish the "Mahometan religion" as try to have a standing army the opponent claimed. *Brutus IX*, *in* 15 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 393 (J. Kaminski & G. Saladino eds., 1984) (Originally printed in the New York Journal on Jan. 17, 1788). Brutus quoted his opponents' phrase "Mahometan religion" recognizing that Islam was accepted as a religion, although not one commonly adhered to in the United States.

310. *Philadelphiensis VI*, *in* 15 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 106 (J. Kaminski & G. Saladino eds., 1983) (Originally printed in the Philadelphia Freeman's Journal on Dec. 26, 1788).

remorse."[311] While the historical accuracy of the claim is suspect, what is clear is that *Philadelphiensis* acknowledged Islam as a religion.

The different state conventions proposed amendments to the Constitution to protect religious liberty. Of the seven states that proposed amendments, five proposed amendments protecting religious freedom,[312] with North Carolina and Rhode Island closely following the formulation of Virginia's religious freedom amendment.[313] North Carolina, Rhode Island, and Virginia found religion equivalent to a belief system that included a duty to the believer's creator: "[t]hat religion or the duty which we owe to our Creator," being the opening phrase of the proposed amendments.[314] The Virginia proposal, in turn, was drawn from the Virginia Declaration of Rights of 1776.[315]

The debates over the language of what was to become the First Amendment are almost thoroughly unenlightening as the meaning of what was protected — religion. At one point in the debate, Madison proposed adding the word "national" in front of religion so as to better "point the amendment directly to the object it was intended to prevent" which was that "one sect might obtain pre-eminence, or two combine together and establish a religion."[316] In a sense, then, what Madison and what the "people feared" was the obtaining of power by one subgroup of the larger Christian religion. While the purported object, prevention of domination by one Christian sect, does not necessarily imply that the word religion in the First Amendment meant only the Christian religion, it does urge that what motivated the Ratifiers was not a threat posed by any religion other than Christianity, and that in the context of the First Amendment the word religion may have taken on a narrower meaning.[317]

At different times in the debates the dichotomy of "conscience"

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311. *Id.* See also *Pennsylvania Packet, in* 18 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 377-78 (J. Kaminski & G. Saladino eds., 1995) (June 10, 1788) (calling Muslims the "Mohamidan impostures of religion").

312. *McConnell, supra* note 167, at 1480.

313. THE COMPLETE BILL OF RIGHTS 12-13.

314. *Id.* at 12.

315. *Id.* at 44.

316. *Id.* at 2.

317. *See also id.* at 12-13 (listing the proposed amendments by the state ratification conventions in which New York, North Carolina, Rhode Island and Virginia all proposed amendments that would have restrained Congress from establishing one "particular religious sect"). *See also* 2 STORY, *supra* note 4, at 594 (supporting a narrow meaning of religion in the First Amendment).

and "religion" would appear.[318] The First Congress eventually settled on using "free exercise" of "religion," opting for the broader protection afforded by "religion."[319] Religion connotes a "community of believers" and allows for protection of the "corporate or institutional aspects of religious belief."[320] The Framers consequently chose to extend protection to religion, a term seen as having a basis in theistic beliefs, as opposed to "conscience" which may have had secular undertones.[321] This was done, as Representative Samuel Harrington said, "to secure the rights of conscience, and a free exercise of the rights of religion, but not to patronize those who professed no religion at all."[322]

The purpose of exempting free exercise of a religious nature was "rooted in the prevailing understandings . . . of the difference between religious faith and other forms of human judgement."[323] In other words, if a religious believer felt obligated to obey God as opposed to a command of the earthly sovereign, the conflict was not brought on by the individual believer (as would be understood today where all beliefs are seen as a product of individual will) but was a conflict between God and the sovereign where the believer could not but choose to follow God, the highest sovereign.[324] As a result, religious beliefs were ordered differently than beliefs based on other, secular, rationale. Madison, building on Locke's separation of the religious and civil spheres[325] in his *Memorial and Remonstrance*, argued for religious freedom based on the conflict of sovereigns' rationale.[326]

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318. THE COMPLETE BILL OF RIGHTS 1-9. Conscience, the basis of the Protestant Reformation, is in respect to the relationship between the individual and God. *See McConnell, supra* note 167, at 1490. Conscience was defined by Webster in 1807 as "natural knowledge, or the faculty that decides on the right or wrong of actions in regard to one's self." NOAH WEBSTER, A DICTIONARY OF THE ENGLISH LANGUAGE 301 (New Haven 1807). This definition does not cage "conscience" to any necessarily religious or theistic basis. To most Americans, and in most references, however, conscience is a shorthand reference to freedom of religious beliefs or one's religious views of God. *See McConnell, supra* note 167, at 1493-94 (offering examples of the common understanding of conscience).

319. *See McConnell, supra* note 167, at 1490-1500 (outlining the growth and effect of the distinction between conscience and religion).

320. *Id.* at 1490.

321. *Id.* at 1495.

322. *Id.* (quoting 1 ANNALS OF CONGRESS 779 (Gales & Seaton eds., 1834).

323. *Id.* at 1496.

324. *See McConnell, supra* note 167, at 1496-97.

325. *See supra* notes 220-30 and accompanying text for Locke's treatment of conflict between religion and civil government.

326. *McConnell, supra* note 167, at 1497 (citing J. MADISON, *Memorial and Remonstrance, Against Religious Assessments*, in 2 THE WRITINGS OF JAMES MADISON 183 (G.

There are two clauses relating to religion in the First Amendment: the Establishment and Free Exercise Clauses. The general purposes underlying the two clauses are comparable in that both are aimed at excluding the federal government from intermeddling with the religious beliefs or practices of citizens of the states, either through the direct infringement of the individual's freedom[327] or through harm to the state's established religion.[328] The Free Speech Clause, despite much controversy surrounding the extent of its protection, likely was intended to codify the common law of sedition, or perhaps expand the protections afforded the defendant in common law sedition trials.[329] The purpose behind the Free Speech Clause was the product of the new conception of sovereignty under the Constitution: "[t]he people, not the

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Hunt ed. 1901).

327. *See id.* at 1415 (finding that the purpose of the Free Exercise Clause was to broadly protect expressions of religious faith).

328. *See* ROBERT L. CORD, SEPARATION OF CHURCH AND STATE: HISTORICAL FACT AND CURRENT FICTION (1982) (promoting a nonpreferentialist interpretation of the Establishment Clause such that aid which neutrally aids all religion is not prohibited). *But see* LEONARD W. LEVY, THE ESTABLISHMENT CLAUSE: RELIGION AND THE FIRST AMENDMENT xvii (2d ed. 1994) (rejecting Cord's interpretation and asserting that the Establishment Clause "meant to its framers and Ratifiers that there should be no [direct] government aid for religions"). Levy places much emphasis on the use of "respecting" in the Establishment Clause, finding "respecting" equivalent to concerning or touching. *Id.* at xxi. This is coupled with the fact that Levy broadly reads "establishment" to mean nearly any aid to religion. Thus, the Establishment Clause means that government may not aid religion.

329. The truth would be a defense to the charge and the jury would determine, not merely whether the defendant had said or printed the words underlying the offense, but whether, in fact, the defendant was guilty of common law sedition. *See* LEONARD LEVY, LEGACY OF SUPPRESSION: FREEDOM OF SPEECH AND PRESS IN EARLY AMERICAN HISTORY 195 (1960) (discussing the correspondence of John Adams and Chief Justice Cushing dealing with the Alien and Sedition Acts where Adams argued that under the Constitution the Acts were constitutional because of their liberal allowances for truth as a defense and because the jury decides guilt) [hereinafter LEVY, LEGACY]. While it is true that Levy more recently, revised the thesis of *Legacy of Suppression*, he still maintained that "the revolutionary generation did not seek to wipe out the core idea of seditious libel, that the government may be criminally assaulted by mere words . . . that English libertarian theory usually stayed in the vanguard of American theory . . . and that the first amendment was as much an expression of federalism as of libertarianism." Leonard W. Levy, *The Legacy Reexamined*, 37 STAN. L. REV. 767 (1985). Levy conceded that the practice of the press at the time of ratification of the First Amendment was much less constrained than a vigorously enforced law against sedition would allow. *Id.* at 768. David Rabban criticized Levy for failing to "recognize that is was possible for the framers of the first amendment, influenced by republican political theory, to expand the protection for freedom of expression well beyond the narrow boundaries of the English common law while retaining some conception of seditious libel." David M. Rabban, *The Ahistorical Historian: Leonard Levy on Freedom of Expression in Early American History*, 37 STAN. L. REV. 795, 796 (1985) (book review). Rabban claims that the First Amendment preserved some law of seditious libel while expanding beyond the common law understanding of free speech. *Id.* at 801.

government, possessed 'the absolute sovereignty' and placed the legislature as well as the executive under limitations of power by constitutions that were paramount to legislative acts."[330] As a result, free speech was instrumental (not an end in itself) in allowing the people to make the best decision possible when electing representatives.[331] This rationale was cabined, however, by the desire to preserve the government and society from the supposed threat posed by seditious libel — libel that threatened to bring the government into disrepute in the minds of its citizens.[332] Consequently, the narrow original purpose of free speech has no application to the definition of religion or the purposes of the religion clauses.

The purpose grounding the Free Exercise Clause, the protection of the individual's expressions of religious faith, does not expand the definition of which belief systems qualify as religions under the First Amendment. As previously discussed, the protection of religious exercise originates from Locke and his notion that since religious belief is motivated by God, the civil magistrate has no authority over the exercise of that belief in this world unless and until the religious exercise interferes with the rights of another.[333] If one is motivated to act by non-religious beliefs, there is no imperative that the civil authorities in this world allow such actions because the person motivated is not subject to punishment in the next world for failure to act.[334] In addition, as Madison argued in his *Memorial and Remonstrance*, it was immoral to make the

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330. *See* LEVY, LEGACY *supra* note 329, at 274-75 (1960) (quoting James Madison, 4 ELLIOT'S DEBATES 569). *See also* Rabban, *supra* note 329, at 805-06, 816-19 (discussing the purpose behind free speech).

331. LEVY, LEGACY *supra* note 329, at 236-37. *See also* Thomas I. Emerson, *Colonial Intentions and Current Realities of the First Amendment*, 125 U. PA. L. REV. 737, 741-42 (1977) (claiming that since the Constitution and the United States was based on a theory of the consent of the governed, the governed must have the freedom to arrive at individual judgements as to who is the best representative to serve them).

332. LEVY, LEGACY *supra* note 329, at 237.

333. *See John Locke, A Letter Concerning Toleration* 9-19, *in* 6 THE WORKS OF JOHN LOCKE (London 1823). One example of the different treatment accorded religiously motivated behavior and politically motivated actions can be found in the Virginia Statute of Religious Freedom of 1785, where the author, Jefferson, inserted an overt acts test to determine the extent to which religious exercise would receive protection — to the extent the religious exercise did not "pick[] my pocket [or] break[] my leg," as Jefferson later stated. Thomas Jefferson, *Notes on the State of Virginia* 159 (W. Peden ed. 1955).

334. *See* McConnell, *supra* note 167, at 1453 (quoting James Madison, Memorial and Remonstrance at 183-84) (noting "this duty to the Creator is 'precedent both in order of time and degree of obligation, to the claims of civil society' and 'therefore that in matters of Religion, no man's right is abridged by the institution of Civil Society' ").

religious adherent choose between following the dictates of God and of the state, when the state could accommodate the religious action motivated by God.[335] Without the religious imperative of God's commands to the individual, there is no reason for the state, which is supreme in this world, to grant an exemption to the individual or protect his actions from otherwise generally applicable laws. Thus, it is the nature of the religious command (duties) from God, and the future state of rewards and punishment that motivates the Free Exercise Clause.[336]

The purpose behind the Establishment Clause, the preservation of state establishments, also does not argue for a broader definition of religion. The Establishment Clause is simply a recognition of the state establishments existing in 1791, and was intended to prevent the federal government from interfering with those establishments. The historical evidence does not point to a bifurcated definition of religion since the establishments in existence in 1791 were all of the type that the definition of religion offered by this Article would encompass. The purpose of the Establishment Clause was narrow in the sense that it was to prevent the federal government from interfering in this one area, religious establishments, of a state's jurisdiction.

There does not appear to have been much public debate surrounding the proposal and ratification of the First Amendment itself. Perhaps because the guarantee was asked for by numerous states and was thus expected and invited, and certainly because of the lack of documentation, there is little said concerning religion in the First Amendment itself. What little that does appear from the debates surrounding the adoption of the Amendment itself or from other contemporaneous sources, generally places religion in the context of a monotheistic belief, with, as in Madison's *Memorial and Remonstrance*, duties on the believer.

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335. *See id.*

336. This purpose could be argued to expand the definition of religion to all theistic beliefs, and not limit the definition of religion to monotheistic beliefs alone. The purpose underlying the Free Exercise Clause could not be used, however, to expand the definition of religion to non-theistic belief systems. The difficulty of expanding the definition to include all theistic beliefs is that the purposes underlying originalism are not then served. The theory of the just state drives the originalist to look to the contemporary meaning of the words of the Constitution, not its underlying purposes. Also, the other normative values advanced by originalists, especially stability and democratic theory, caution against allowing the judiciary to expand the definition of religion as it sees fit based on what it perceives to be the purpose of the Free Exercise Clause.

V. Impact of the Original Meaning of Religion on Current Jurisprudence

So far, this Article has made two interrelated claims: (1) that the original meaning of the text of the Constitution is morally binding on judges; and (2) that the original meaning of religion is a monotheistic belief system, such as Christianity, that holds true to a future state of rewards and punishments and thus imposes duties on believers in this world. In contexts where a citizen seeks the invalidation of a non-neutral or non-generally applicable law,[337] where a citizen seeks a statutory religious exemption (assuming the exemption is keyed to the original meaning),[338] where citizens claim that a religion is being established,[339] or where the government uses the Establishment Clause as a defense,[340] application of the original meaning will affect the Court's jurisprudence. The more restrictive definition of religion provided by originalism will not affect many areas of religious life because of the broad reading of other rights protected by the Bill of Rights. Thus, the jurisprudentially established right to free speech and expression will cover many

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337. *See, e.g.*, Employment Div. v. Smith, 494 U.S. 872 (1990). Smith greatly changed the Free Exercise landscape, especially as far as the original meaning definition is concerned. Religion and what is a religion will only rarely come into play as few laws today target religions and would thus fall under the suzerainty of the Free Exercise Clause. *Id.*

338. *See, e.g.*, Welsh v. United States, 398 U.S. 333 (1970); United States v. Seeger, 380 U.S. 163, 166 (1965).

339. *See, e.g.*, R.I. Fed'n of Teachers v. Norberg, 630 F.2d 850 (1st Cir. 1980) (rejecting the plaintiff parents' claim that the public schools of Rhode Island necessarily advance a moral system, which in this case would be secular humanism); Smith v. Bd. of Sch. Comm'rs of Mobile County, 655 F. Supp. 939 (S.D. Ala. 1987) (finding that the Alabama public schools had established Secular Humanism as the official religion), overruled by Smith v. Bd. of Sch. Comm'rs of Mobile County, 827 F.2d 684 (11th Cir. 1987) (finding that the Alabama public schools had not established secular humanism as a religion even assuming secular humanism is a religion within the meaning of the First Amendment); Peloza v. Capistrano Unified Sch. Dist., 37 F.3d 517 (9th Cir. 1993) (ruling against the plaintiffs' claim that the teaching of evolution is establishment of a religion, finding that the teaching of evolution is not considered a religion for Establishment Clause purposes); Fleisherfresser v. Dirs. of Sch. Dist. 200, 15 F.3d 680 (7th Cir. 1994) (finding parents' claim that the books used in the public school established secular humanism was unsupported); Doe v. Human, 725 F. Supp. 1503, 1508 n.2 (W.D. Ark. 1989) (declining to address whether the textbooks used in the defendant's schools established secular humanism as a religion).

340. Rosenberger v. Univ. of VA, 515 U.S. 819 (1995), is an example of the government using the Establishment Clause as a reason or defense to exclude religion. In *Rosenberger*, however, the religion being excluded was a traditional Christianity that would be covered by the original meaning and would thus have no affect on the litigation or the school's defense. Only where the government attempts to exclude a "religion" that does not fall within the framework of the original meaning, such as secular humanism, would its defense be precluded.

instances where the expression is religiously motivated.[341]

In the Free Exercise context, while *Smith* has obviated the need for a constitutional definition of religion in many cases,[342] there will still be situations where laws are perhaps targeted at a religion, thus invoking the protections of the Free Exercise Clause.[343] In *Church of the Lukumi v. Hialeah*,[344] the Supreme Court faced what is reasonably described as a non-monotheistic belief system, which did not ascribe to a future state of rewards and punishment, and that did impose duties on its adherents. The Court did not explicitly address whether the Santeria faith was in fact a religion, but treated it as a religion in finding that its free exercise rights had been violated.[345]

In the realm of the Establishment Clause, persons who sue claiming that the government has established a religion, when the religion is secular humanism, would not prevail under the original meaning of the Constitution.[346] Secular humanism is a belief system that places individual autonomy as the penultimate belief, and claims that value is individual relative, guided by human reason. With these beliefs, secular humanism is not considered a religion by even the most attenuated originalist definition, and thus persons seeking to prevent the government from espousing such beliefs would not succeed under the original meaning of religion.

Finally, if the government seeks to exclude certain groups that are religious in the modern, broad sense, from access to fora that religious groups (traditionally understood) are admitted to does not constitute discrimination in violation of the establishment clause. If a group's belief system does not conform to the original meaning of a religion, that group has no establishment clause claim.[347] The exclusionary government would not have the defense, however, of avoiding Establishment Clause problems in a free speech claim by the excluded group.

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341. *See, e.g.*, W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) (upholding, under the Free Speech Clause, the right of Jehovah Witness children not to pledge allegiance to the United States Flag).

342. Employment Div. v. Smith, 494 U.S. 872 (1990).

343. *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993) (finding that a city ordinance targeted at the plaintiff church's religion violated the Free Exercise Clause because the ordinance was neither neutral nor of general application).

344. 508 U.S. 520 (1993).

345. *Church of the Lukumi Babalu Aye*, 508 U.S. at 531.

346. *See supra* note 339 (listing cases where such claims were made).

347. The group may, depending on the Court's jurisprudence, have a claim of free speech rights.

In summation, depending on the extent of the originalist transformation of the Supreme Court's jurisprudence outside of the religion context, the moral imperative to use the original meaning of religion may have a more or less pronounced affect on the claims of putatively religious groups.

VI. Conclusion

This Article has presented a variety of arguments supporting original meaning interpretation. Without relying on one or another normative value to support originalism, this Article has proposed to base originalism in the just state, making originalism a moral prerequisite to constitutional interpretation. As we have seen, the moral state is the minimalist state where all have a duty to bring about and uphold just institutions. Original meaning interpretation leads to the original minimalist state, and hence, judges are morally obligated to use original meaning interpretation.

The definition ascertained as the original meaning of the word religion in the First Amendment has the virtue of being clear and readily applicable. In addition, since the definition is faithful to what the Ratifiers believed the word religion to mean, enforcement by the Supreme Court is morally required. Finally, the definition provided by the original meaning fulfills the purposes originally intended for the religion clauses in the First Amendment without resorting to value laden, subjective, amorphous definitions that broaden (or narrow) the scope of religion out of proportion to its purposes.

This Article has run the gamut of history searching for clues as to the meaning attributed to the word religion in the First Amendment by the Framers and Ratifiers. America has its origins and basis in the Protestant, Christian experience. While there was some expansion to the term religion during and after the Revolution, it appears that religion to the Framers and Ratifiers remained a monotheistic belief in one God, with duties towards that God, and a future state of rewards and punishment.