Legal Religion: Judicial Discourse and the Historical Underpinnings of the First Amendment

By Chaplain (Major) Patrick G. Stefan

The First Amendment of the American Constitution protects only those practices that are religious in nature; however, it nowhere defines what makes a practice religious. That question is left up to the courts. And because the United States was founded on the inalienable right of religious practice, the definition of religion is an academic exercise with significant impact on lived reality. The definition of religion determines how people within the American political sphere can or cannot act when their religious practice bumps up against laws of general applicability. American religious practice is intimately connected with religion in definition. In this article, I contend that how legal agencies define religion largely determines how individuals governed by those agencies practice religion.

The lack of a Constitutional definition of religion creates a seemingly never-ending dilemma for legal agencies: a practice must be religious to be Constitutionally protected, yet by defining what makes a practice religious the government steps into what scholars call the establishment trap because the demarcation of boundaries between acceptable and unacceptable religion is an exercise in the establishment of orthodoxy.[1] That is, once legally acceptable religion is defined, unacceptable religion is also defined. This dilemma is referred to in the study of religion as the impossibility of religious freedom: religion must be defined to be protected, but in defining religion it is also established. In the 1960s and 1970s, the Supreme Court dabbled in attempts to define without establishing, only to give up in 1973, leaving the remaining rulings in place.[2]

The assumption model is generally sufficient for everyday life – we know religion when we see it. Cases that challenge the assumption model often arise in the Army through the religious accommodation process. Commanders and lawyers must determine whether a practice is religious to warrant the approval of accommodation. I argue that a belief in a transcendent reality should be a requirement for a belief or practice to be considered religious.[3] I propose two different lenses for defining religion in the American context: a legal perspective of religion and a theoretical perspective of religion. These lenses are distinct but may overlap. Legal religion is protectable based on the precedent of case-law interpretations of the First Amendment of the Constitution. Theoretical religion is studied in the academy, especially in religion, anthropology, and sociology departments. All legal religion can also be observed through the theoretical lens, but not all theoretical religion qualifies as legal.[4]

The purpose of drawing this distinction between theoretical study and legal clarity is to understand what the First Amendment protects. To that end, a basic historical understanding of theoretical religion is important. The academic study of religion is a product of the Protestant Reformation, which in turn shaped the emergence of the categories of world religions in the context of the early twentieth century German Protestant universities.[5] This history provides the backdrop for the purpose and meaning of the First Amendment.

My distinction between theoretical religion and legal religion emerges from the lines drawn in the majority opinion *Kennedy v. Bremerton School District*, 2022.[6] In Justice Neil Gorsuch's majority opinion, the Court's reliance on *Lemon v. Kurtzman* 403 U.S. 602 (1971) was based on an "ahistorical [and] atextual" approach to discerning Establishment Clause violations. Instead, in the words of *Kennedy v. Bremerton*, the "Court has instructed that the Establishment Clause must be interpreted by 'reference to historical practices and understandings.'"[7] The legal precedent set by the most recent Supreme Court reading of the First Amendment requires attention be given to the historical question of what the Framers were seeking to protect. Given the reality that the Establishment Clause and Free Exercise Clause exist in the same amendment, it stands to reason that just as the former requires a reference to historical understandings, so too does the latter. To de-historicize the Free Exercise Clause in adjudicating matters of religious freedom is to act contrary to the current Supreme Court's logic.[8]

I suggest that a robust understanding of legal religion allows agencies broadly, and the Army specifically, to adjudicate on the protection of religious freedom in keeping with the most recent Supreme Court ruling in *Kennedy v. Bremerton School District*. I draw on the critique of religion's genealogy to show that the First Amendment's "historical practices and understandings" necessarily contain two elements for legal religion: belief and transcendence. I argue that like the Establishment Clause, what is legally protectable as a religious practice (contra a mere philosophical idea) under the Free Exercise Clause can also be "interpreted by 'reference to historical practices and understandings.'"[9]

What is Religion?

Religion has certain characteristics that distinguish it from philosophy, for example, ritual, architecture, or music. But must a religion have all these characteristics to be called religion or just some of them? And if it needs only some: which ones are vital, and which are expendable? These types of questions permeate the study and classification of religion in an endless stream of monographs, articles, and books.[10] Scholars identify a given phenomenon in the world and decide whether it is religious, often going down rabbit-trails of post-transcendent religion, civil religion, and many others. Some even discard the word religion altogether.[11] Meanwhile, as scholars contest the viability of religion as a category worth keeping, the average churchgoer, lawyer, or politician joins along with Justice Potter Stewart's statement about pornography: I know it

when I see it. There is a significant gap in legal definitions of religion. The First Amendment, as it concerns religious protection, protects only religious beliefs and practices; however, it nowhere defines what makes something religious, it merely assumes it. My aim is to attempt to fill that gap by drawing on the insight of the majority opinion of *Kennedy v. Bremerton School District* (2022).

Benson Saler's work on classifying religion is helpful for understanding how "historical practices and understandings" might be understood and interpreted today. Saler sharpens Ludwig Wittgenstein's account of family resemblances with prototype theory. Wittgenstein suggests that certain social phenomena can be compared based on family resemblances, i.e., one or more feature in common. From this, we can begin to construct the family of religion. The family of religion would quickly become too broad to be useful. Saler builds on this to suggest that there are better and worse exemplars of the family. For example, in studying the family of fruit one might say that apples or oranges are better examples than corn kernels, and thus deem them prototypes. Saler contends that religion should be conceptualized in graded form "on the model of 'tall person' or 'rich person.'"[12] Building on Saler, I suggest that the definition of legal religion must consider the Western construction of the category of religion as a prototype because of the legal precedent set by *Kennedy v. Bremerton* and its continued relevance considering the makeup of the Court. I am not proposing that religion entails transcendence or belief in the context of religious theory and study. Instead, I suggest that this prototype both informed the work of the Framers and might also guide government agencies as they craft policy.[13]

For a matter to be protected under the Free Exercise Clause, an individual must demonstrate that their religious practice is (1) sincere, (2) being burdened, and (3) religious in nature.[14] My focus is on the last requirement: a matter only warrants protection under the Free Exercise Clause—and by extension, the Religious Freedom Restoration Act (RFRA)—if that matter is religious. The Framers considered a clause protecting matters of conscience (as distinct from religion) but ultimately decided against it. For the Framers, practices stemming from religious expression are protected in a way that those stemming from conscience are not.[15] The deliberate decision to not protect matters of conscience informs my historical inquiry to identify the characteristics of the Framers' prototype of religion and why it deserved protection in the first place.

Where did Religion Come From?

The concept of religion that was operative in the drafting of the First Amendment was one that was informed by the Protestant Reformation. What the Framers sought to protect was something that generally looked like Protestantism. But why did the Framers choose to protect religion at all? And why did they choose to protect religion, but not other matters of conscience? The history of the development of religion as a category in connection with the rise of the modern nation-state suggests that the protection of religion was intertwined with a political purpose.[16] The modern Western category of religion grew up in a dichotomized house of two kingdoms: church and state, or the religious and the secular.[17] The former is run by God and the latter is run by the government (made up of the people).

The religious wars of post-Reformation Europe demonstrated to the Framers the dangers to a society when religion and state authority come into conflict. For this reason, the Constitution prohibits either establishing a religion (for that is only the business of God who is outside the state) or limiting the free exercise of religion (for those beliefs and laws come from God, not people). Indeed, the very existence of the problem of free exercise assumes a contestation of authority: the state directs one thing, and God (or a power parallel to that filled by the traditional God) directs a contrasting thing. When two laws bump up against each other, the Framers made clear that the laws that transcend the state will win because they exist from an entity outside of and beyond the state's control.[18] Eduardo Penalver suggests that "the Framers probably never considered the issue of defining religion for the First Amendment at all, because they thought the everyday meaning of the term was clear . . . [theism and religion] were, for the Framers, one and the same thing."[19]

Given the expansion of the idea of religion since the drafting of the Constitution, the courts have helpfully clarified that a particular theistic belief is not necessary for something to be classified as religion for the purpose of First Amendment protections.[20] However, they have also noted that for something to be a sincere religious belief, it must occupy a space in the person's life "parallel to that filled by the God of those admittedly qualifying for the exemption."[21] In fact, this statement by the Supreme Court is the last time the Court sought to define what makes a belief religious, and therefore protected under the First Amendment. For reasons unknown (one can speculate that it is due to the

very challenges already experienced in defining religion), from 1973 until the present the Supreme Court has assumed a matter of religion is religious in its First Amendment cases.

Importantly, the RFRA does not seek to define religion either, it also assumes it. In *Employment Division v. Smith*, Justice Antonin Scalia declared that in those instances when the dictates of one's religion (outside of the state) conflict with the laws of general applicability for the state, the dictates of one's religion does not transcend the state's power.[22] In a remarkably bipartisan demonstration of disapproval with the passage of the RFRA, lawmakers made clear that the only time religious dictates do not transcend the state's power are when there is a clear and compelling interest for the government, and even then, it must limit the religious dictate in the least restrictive means to further that compelling government interest. For a matter to fall under the RFRA's scope and definition it must first pass the test of being qualified for First Amendment protections as a religious matter. Once it passes that test, it can fall under the scope of the RFRA and all that needs to be decided by adjudicating authorities is whether there is a burden and if so, is there a compelling government interest, and if so, is the least restrictive means necessary being applied.

I am not arguing that the historical understanding of religion for the Framers in drafting the First Amendment was Protestant-centric (though it was) therefore only those religions that look in essence like Protestantism warrant protection. Instead, I am saying that based on the Protestant-centric backdrop of the First Amendment, the Framers intended to protect those practices, beliefs, and dictates that stem from a system that transcends, or stands outside of the state. Understanding this historical background should help identify the elements of the prototype of religion to limit what constitutes legal religion. An individual or group cannot simply attach the label religion onto a belief or practice. Instead, for a practice to be religious an individual needs to demonstrate that it stems from a system of belief that finds its source in something that transcends the state. Allowing beliefs and practices that do not transcend the state into the world of religious liberty risks undermining the basic social compact that is required for an organized group of people to function properly.

For the Framers, religious liberty relieves pressure when the dictates of one's religious conviction conflict with the state. The Framers created a path out of conflict. This is just as true in the Army. A Soldier's religious practice is accommodated when they believe that their religious dictates conflict with Army policy. For Soldiers stuck in a moral dilemma between religious requirements and Army authority and policy, commanders can provide a way out of this dilemma through religious accommodation. But when the dictates of one's mere conscience conflict with the state, the allowance of divergence undermines the harmony necessary for society to function because it makes the individual more authoritative than the state.

Conclusion

From a theory of religion perspective, questions of whether non-transcendent systems and groups qualify as a religion or not, and what their system does to shape cultural understandings of religion can be endlessly examined. However, I argue that the legal definition of religion should be grounded in a family resemblance analysis by introducing a prototype. That prototype should be the one used to frame the First Amendment. It is a well-recognized point in scholarship that the prototype of religion for the Framers was a general idea of Protestant Christianity. The Framers rightly emphasized the importance of protecting the free exercise of religion. In those instances when the dictates of God conflict with those of the state, the state allows the individual to defer to God. A philosophical idea or practice, if not sourced from an entity that transcends the state does not qualify for the same protection. Philosophical ideas and matters of conscience arising from a group or individual member of the state must by necessity defer to the state. But when those dictates or practices come from a source that transcends the state's authority the Framers built in a safety valve to prevent a replication of the religious wars in Europe.

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NOTES

1 See Winnifred Sullivan, *The Impossibility of Religious Freedom* (Princeton: Princeton University Press, 2018).

2 See esp. Torcaso v. Watkins (1960); U.S. v. Seeger (1965); and Wisconsin v. Yoder (1972).

3 This point is made clear in U.S. v. Seeger (1965) where the Court is wrestling with the validity of a conscientious objector's request that does not include belief in the traditional type of God. The Court, in deciding that a belief that comes from a source outside the person that is sincere and "fills the same place as a belief in God in the life of an orthodox religionist, is entitled to exemption," also assumes a relationship between "an avowedly irreligious person or as an atheist."

4 As a disclaimer, I am not speaking from an authoritative legal position. Instead, this article follows the direction of theoretical academic discourse.

5 I acknowledge that the use of the general term "Protestant" flattens a very diverse and complex period of history and that not all Protestant movements thought similarly. However, the general observations of Protestantism that I rely on throughout this article are those that became dominant throughout Europe and the creation of the modern nation-state. My understanding of the relationship between Protestantism and American understanding of religion is heavily dependent on the work of Tamoko Masuzawa in *The Invention of World Religions* (Chicago: University of Chicago Press, 2005).

6 Kennedy v. Bremerton School District is an Establishment Clause case that considers a school employee's public prayers after a sporting event. The school district understood the employee's actions as a violation of the Establishment Clause. The Supreme Court disagreed. In the majority opinion, the Court rejects the use of the "Lemon Test" which was commonly employed to determine Establishment Clause violations. The Lemon Test was a three-part test developed in 1971 following *Lemon v. Kurtzman*. For a law to comply with the Establishment Clause it must have (1) a secular purpose; (2) a predominantly secular effect; and (3) not foster excessive entanglement with the government and religion.

7 In this case, the Court returns to a historical reading of religion in adjudicating Establishment Clause issues, provides "objectivity and predictability to [religious] analysis," and effectively kills the Lemon test. See Daniel L. Chen, "*Kennedy v. Bremerton School District*: The Final Demise of *Lemon* and the Future of the Establishment Clause," *Harvard Journal of Law and Public Policy* 21 (2022).

8 It should be noted that there is much controversy surrounding whether the intent of the Framers is the most relevant factor in determining the meaning of the Religion clauses, see Christopher L. Eisgruber and Lawrence G. Sager, "The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct" 61 *University of Chicago Law Review* 61 (1994): 1245, 1270. It should also be noted that the current makeup of the Supreme Court holds to the Constitutional theory of originalism. This article is not arguing for or against originalism as an interpretive concept, rather it is arguing that the current makeup of the Court (and that of the foreseeable future) requires the use of originalism in determining how one reads the First Amendment.

9 Kennedy v. Bremerton School District (2022).

10 See esp., Jonathan Z. Smith, *Relating Religion: Essays in the Study of Religion* (Chicago: University of Chicago Press, 2003); Russell McCutcheon, *Manufacturing Religion: The Discourse on Sui Generis Religion and the Politics of Nostalgia* (Oxford: Oxford University Press, 2003); Daniel Dubuisson, *The Western Construction of Religion* (Baltimore: John Hopkins University Press, 2003); *Timothy Fitzgerald, The Ideology of Religious Studies* (Oxford: Oxford University Press, 2003); Tamoko Masuzawa, *The invention of World Religions* (Chicago: University of Chicago Press, 2005).

11 Benson Saler, *Conceptualizing Religion: Immanent Anthropologists, Transcendent Natives, and Unbounded Categories* (New York: Berghahn, 2000), ix.

12 Saler, *Conceptualizing Religion*, xiii.

13 My use of Saler's conceptual model builds on Jonathan Z. Smith's observation that the Supreme Court, in the absence of any formal definition of religion, operates on an underlying prototype of what religion is and that prototype is Protestant Christianity. See, Jonathan Z. Smith, "God Save this Honorable Court," in *Writing Religion* (University of Alabama Press, 2015).

14 42 USC ch 21b. Religious Freedom Restoration Act, Section 2000bb.

15 See Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1410, 1481 (1990); for the historical record see 1 Annals of Cong. 757-59, 796 (Joseph Gales ed. 1789). See also Stanley Ingber, "Religion or Ideology: A Needed Clarification of the Religion Clauses" 41 *Stanford Law Review* 41 (1989): 252.

16 See Brent Nongbri, Before Religion: *A History of a Modern Concept* (New Haven: Yale University Press, 2013) for a masterful analysis of how this concept of religion came to mean what it presently does. See also Masuzawa, *World Religions*; Markus Dressler and Arvind-Pal S. Mandair, eds, *Secularism and Religion-Making* (New York: Oxford University Press, 2011); and Talal Asad, *Formations of the Secular: Christianity, Islam, Modernity* (Stanford: Stanford University Press, 2003) as representative of the scholarship that has elucidated the rise of the modern notion of religion. See also William T. Cavanaugh, "A Fire Strong Enough to Consume the House: The Wars of Religion and the Rise of the State" in *Modern Theology* 11 (1995): 402-403 for the relationship between the religious wars post-Reformation and the creation of religion in relation to the modern nation-state.

17 This is a brief overview of a very complex history. For a broader account see Malcolm D. Evans, *Religious Liberty and International Law in Europe* (New York: Cambridge University Press, 1997) and John D. van der Vyver and John Witte Jr., eds, *Religious Human Rights in Global Perspective* (The Hague: Kluwer Law International, 1996).

18 This general dichotomy of authorities, between religious and secular, is seen clearly in 4 Jonathan Eliot *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* in which a delegate debates the importance of the lack of religious test for office in Article VI as leaving "religion on the solid foundation of its own inherent validity, without any connection with temporal authority [so that] no kind of oppression can take place" As quoted in Torcaso v. Watkins, 367 U.S. 488 (1961).

19 Eduardo Penalver, "The Concept of Religion," *The Yale Law Journal* 107 (1997-1998): 791-822.

20 Torcaso v. Watkins, 367 U.S. 488 (1961).

21 Wisconsin v. Yoder, 406 U.S. 205 (1972).

22 Employment Division v. Smith, 494 U.S. 872 (1990).