"RELIGION," BEFORE DARWIN

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ABSTRACT

The First Amendment singles out "religion" for special treatment, but the boundaries of that concept have always been difficult to describe. Nevertheless, there is a growing consensus that—at least as an original matter—"religion" in the First Amendment refers only to more-or-less theistic doctrines. But scholars have long struggled to explain why theistic doctrines would be worth treating differently than their alternatives.

This Article argues instead that the concept of "religion" in the late-eighteenth century must have been broader than it is today, referring more generically to something like "worldview." In the pre-Darwinian intellectual climate in which the First Amendment was written, all plausible worldviews were what we would today think of as "religious." "Religion" was not a concept bounded by, or an alternative to, "science," or a "secular lifestyle," or "non-religious doctrines." The concept necessarily encompassed all remotely plausible accounts of the nature of the universe and foundations of ethics. And although our understanding of "religion" has fundamentally changed, the First Amendment incorporates the earlier, broader understanding.

Reading "religion" in this broader way further helps explain contextual features of the First Amendment—its general purposes, its grammatical structure, and the nature of the rights its framers were trying to protect. And this interpretation lets us reckon with the purpose and contemporary relevance of the Religion Clauses, as a commitment not to privilege certain worldviews, but to ensure that questions about how we ought to live and why are a private, not governmental, concern.

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For Michael Ruse.

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INTRODUCTION

The First Amendment protects a certain freedom of "religion"—prohibiting its "establishment," ensuring its "free exercise."[1] But scholars and courts have long struggled to offer an affirmative account of the concept of religion to which the Amendment refers.[2] They are confident, though, that they know what it is *not*—"secular doctrines,"[3] "atheism,"[4]

1. U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . .").

2. *See, e.g.*, Christopher C. Lund, *Religion Is Special Enough*, 103 VA. L. REV. 481, 498 (2017) ("So many have spent so much time trying to find a single characteristic (or set of characteristics) that can cleanly and perfectly separate (all) religious commitments from (all) nonreligious commitments and can justify giving special protection to the religious commitments but not to the secular ones."); Richard W. Garnett, *Religious Accommodations and—and Among—Civil Rights: Separation, Toleration, and Accommodation*, 88 S. CAL. L. REV. 493, 495 (2015) ("'Religion' is famously difficult (some would say impossible) to define.").

3. Micah Schwartzman, *What if Religion Is Not Special?*, 79 U. CHI. L. REV. 1351, 1404–05 (2012) (summarizing scholarship suggesting that the original conception of "religion" does not encompass "secular doctrines").

4. Lee J. Strang, *The Original Meaning of "Religion" in the First Amendment: A Test Case of Originalism's Utilization of Corpus Linguistics*, 2017 BYU L. REV. 1683, 1697 (concluding that the original meaning of "religion" was theistic).

"nonreligious conscience."[5] Indeed, there is something of a scholarly consensus that religion refers to "theistic" worldviews (or those that are somehow comparably transcendental) but not to "secular" ones—that Catholicism is protected but not Kantianism; Methodism but not Marxism.[6] You are entitled, of course, to think that this makes no sense, and many do—but so, allegedly, speaks the plain text of the Constitution.[7]

Or does it? Of course, the First Amendment says "religion." *Today* that word obviously refers to a set of theistic-or-otherwise-transcendental worldviews, contrasted with "secular" ones grounded in "reason" rather than "faith."[8] But "the past is a foreign country: they do things differently there."[9] Indeed, they spoke a different language—perhaps all the more challenging for its superficial lexical similarity to our own and the subtleties of its semantic differences.[10] "[W]e cannot understand the meaning of the First Amendment until we first understand the forgotten language in which it was written."[11]

Understanding old texts, like the Constitution, is no parlor game of dictionary consultation, nor is it an effort confined to identifying the

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5. Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1496 (1990).

6. *See, e.g.*, Schwartzman, *supra* note 3, at 1405 ("[T]he commonly accepted understanding of the Religion Clauses is that they protected *religious* conscience rather than some more expansive conception."); Strang, *supra* note 4, at 1697; McConnell, *supra* note 5, at 1494. To be sure, some earlier scholarship suggested a broader understanding of the term "religion." *See, e.g.*, Tom Stacy, *Death, Privacy, and the Free Exercise of Religion*, 77 CORNELL L. REV. 490, 558 (1992) (arguing for a view that "interprets the free exercise guarantee as protecting responses to certain quintessentially religious questions, whether or not those responses may be traced in each case to a belief in the existence of a god or sacred reality"); DAVID A. J. RICHARDS, TOLERATION AND THE CONSTITUTION 107 (1986) (arguing that the "theory of the moral sense" on which the framers based the Religion Clauses "was not conceptually linked to theistic premises of God's will, let alone particular religious conceptions of that will").

7. *See, e.g.*, Schwartzman, *supra* note 3, at 1404–05 (arguing that to the extent the originalist consensus that the Religion Clauses do not cover "secular doctrines" is correct, the First Amendment is "morally defective"); Noah Feldman, *The Intellectual Origins of the Establishment Clause*, 77 N.Y.U. L. REV. 346, 426–27 (2002) ("Perhaps we *should* consider extending liberty-of-conscience arguments outside of religion itself. To expand liberty of conscience this way, however, we would need to recognize that our move would have consequences for the very logic of the constitutional arrangements that have emerged from the interpretation of the text." (footnote omitted)).

8. *See, e.g.*, *Religion*, MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/religion [https://perma.cc/4ERT-9K6Q] ("[T]he service and worship of God or the supernatural.").

9. L. P. HARTLEY, THE GO-BETWEEN 3 (1953); *see also* Jonathan Gienapp, *Historicism and Holism: Failures of Originalist Translation*, 84 FORDHAM L. REV. 935, 942 (2015) ("[T]he first key to understanding the American Founding is appreciating that it is a foreign world.").

10. *See* Jud Campbell, *Natural Rights and the First Amendment*, 127 YALE L.J. 246, 251 (2017) (noting that the language of the American founding is "filled with many concepts that bear only a deceptive resemblance to modern ideas").

11. *Id.* at 256.

concrete referents the authors of the language might have had in mind.[12] It is a task, instead, of seeking to understand what the language *really meant*—what a reasonable speaker of American English at the time would have understood it to communicate in the context in which it was ratified, which linguists typically call its "communicative content."[13] This is quite literally a project of translation from an earlier dialect of English to our own.[14]

This Article argues that the concept of "religion" when the First Amendment was written was necessarily different, and broader, than it is today. The concept was not delimited—as it is now—by its contrast with "science," or "rationality," or a "secular" lifestyle, by "atheism," "materialism," or "naturalism."[15] Instead, in an intellectual world before Darwin in which it was implausible *not* to believe in *some* transcendent force beyond matter—and indeed virtually everyone did—"religion" must have referred more broadly to something like "theory of the nature of the universe and our place in it," what today we might refer to as "worldview."[16]

The interpretive mistake of First Amendment scholarship thus far has been its failure to reckon with the radical change in intellectual history that took place in the second half of the nineteenth century, following the 1859 publication of *The Origin of the Species*—one of, if not *the*, most significant shifts in human thought in the entirety of our history.[17] This is an interpretive mistake, because among the chief objects of this shift was the concept denoted by the English word "religion."[18] For the first time in human history, the theory of evolution by natural selection offered a plausible (indeed, compelling) explanation for the *obvious design* of biology that was consistent with philosophical materialism—an explanation of design that did not posit a supernatural designer.[19] As it quite literally never could be before, the "greatest of all mysteries"[20]—that of the origins of the "endless

12. *See, e.g.*, Jack M. Balkin, *Commerce*, 109 MICH. L. REV. 1, 4 (2010) ("[F]idelity to original meaning does not require fidelity to the original expected applications of text and principle."); Lawrence B. Solum, *The Fixation Thesis: The Role of Historical Fact in Original Meaning*, 91 NOTRE DAME L. REV. 1, 21 (2015) ("[T]he communicative content of the constitutional text is fixed at the time of framing and ratification, but the facts to which the text can be applied change over time." (emphasis removed)).

13. *See infra* notes 66–68 and accompanying text.

14. *See infra* Part I.B.

15. *See infra* Part II.C.

16. *See infra* Part II.

17. *See, e.g.*, MICHAEL RUSE, THE DARWINIAN REVOLUTION ix (1979) ("The arrival of the *Origin* changed man's world.").

18. *See* DANIEL C. DENNETT, DARWIN'S DANGEROUS IDEA: EVOLUTION AND THE MEANINGS OF LIFE 21 (1995) ("If I were to give an award for the single best idea anyone has ever had, I'd give it to Darwin, ahead of Newton and Einstein and everyone else."); RICHARD DAWKINS, THE BLIND WATCHMAKER 4 (1986) (describing Charles Darwin as "one of the most revolutionary thinkers of all time").

19. *See* MICHAEL RUSE, DARWINISM AS RELIGION: WHAT LITERATURE TELLS US ABOUT EVOLUTION 1 (2017) (discussing the historical difficulty of explaining biology without a designer).

20. DAWKINS, *supra* note 18, at ix.

forms most beautiful" all around us[21]—could be answered without reference to transcendent forces.

The Darwinian Revolution—a chasm of thought between us and the founding—changed our use of language as much as anything else.[22] For the first time, it made "science" a contrastive concept with "religion," which it cabined to the traditional theories that natural selection has largely but not entirely displaced. To write about "religion" in the late-eighteenth century was to write about something fundamentally different than today. Today, contrasted to and delimited by "science," "religion" refers to an alternative, anti-naturalist set of worldviews. But then, when no one saw such contrasts (or indeed, saw any reason for them), the term necessarily meant something more like "remotely plausible theory of how we ought to live and why."

This claim is, of course, about the so-called "original public meaning" of the Constitution's text. The precise contemporary legal effect that eighteenth-century communicative content ought to have is much debated.[23] But virtually all constitutional theorists—both so-called "originalists" and "living constitutionalists"—accept that when the concept to which a word in the Constitution refers has undergone a fundamental shift since the founding, the earlier sense ought to govern.[24] And indeed, this is particularly so here, where reading the broader concept of "religion" in the First Amendment makes more normative sense anyway.[25]

The specific doctrinal implications of importing a pre-Darwinian concept of "religion" into First Amendment jurisprudence depend also on the boundaries of the Religion Clauses' other concepts—"establishment" and "free exercise." And while reading "religion" as "worldview" does not resolve voluminous debates about the meaning of these guarantees, it tells us some important things about their necessary scope and purpose.[26] For example, understanding "religion" as "worldview" means that the test for "establishment" cannot draw a sharp distinction between "religious" and "secular" motivations—as, at least until recently, it has.[27] And a broader understanding of "religion" suggests, if it doesn't compel, an interpretation of "free exercise" that does not grant individualized exemptions from generally applicable laws.[28]

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21. CHARLES DARWIN, THE ORIGIN OF SPECIES 507 (Signet Classics 2003) (1859).
22. *See infra* Part II.B–C. *See generally* RUSE, *supra* note 19 (noting the influence of Darwinism on literature).
23. *See infra* Part I.A.
24. *See infra* Part I.A.
25. *See infra* Part III.E.
26. *See infra* Part IV.A.
27. *See infra* Part IV.B.
28. *See infra* Part IV.C.

Regardless of how these doctrinal debates turn out, reconfiguring the Religion Clauses' coverage to the broader concept of "worldview" is of profound contemporary significance. We have found ourselves in a country deeply divided among competing, mutually incompatible, views of how we ought to live and why that way and not some other.[29] We disagree fundamentally, deeply, evidently irreconcilably, about the most important things that matter in our lives.[30] We hate each other for it.[31] We're growing more violent about it.[32] The stakes of politics have become extraordinarily high.[33]

Reading "religion" in its original sense helps us see that the framers—familiar as they were with the origins of the political philosophy of liberalism in centuries of sectarian bloodshed in Europe and then-recent efforts to impose worldview on the colonies—had a solution to *precisely this problem, and they wrote it in the First Amendment*. Our different worldviews are exactly what the First Amendment has *always* been getting at with the term "religion."[34] It is only the orthogonal linguistic drift of the past two centuries that has prevented us from seeing this clearly. This Article, then, offers a rediscovery of the First Amendment's basic liberal commitment, to foreswear—no matter how deeply and universally we believe our worldview to be right—the coercive apparatus of the state to evangelize; to grant our fellow citizens some legal modicum of respect for their theory of what matters in life, no matter how deeply we may think them wrong.

The argument proceeds as follows. In Part I, I discuss interpretive methodology. Overwhelmingly, contemporary theories of interpretation grant some role to the "original public meaning" of constitutional text. And because of the phenomenon of linguistic drift, in seeking to understand that original meaning, we must translate the language its authors used to our

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29. *See* Eli J. Finkel et al., *Political Sectarianism in America*, 370 SCIENCE 533, 533 (2020) (comparing political polarization to religious sectarianism); *see also* ANDREW KOPPELMAN, DEFENDING AMERICAN RELIGIOUS NEUTRALITY 167 (2013) ("Many issues of cultural politics in contemporary America, such as debates over abortion, gay rights, sex education, the roles of men and women, and . . . the role of religion in public life, are rooted in different systems of moral understanding.").

30. *See, e.g.*, Laura Silver & Patrick van Kessel, *Both Republicans and Democrats Prioritize Family, but They Differ Over Other Sources of Meaning in Life*, PEW RSCH. CTR. (Nov. 22, 2021), https://www.pewresearch.org/fact-tank/2021/11/22/both-republicans-and-democrats-prioritize-family-but-they-differ-over-other-sources-of-meaning-in-life/ [https://perma.cc/7SA9-5NNR].

31. *See* Emily A. West & Shanto Iyengar, *Partisanship as a Social Identity: Implications for Polarization*, 44 POL. BEHAV. 807, 807 (2022); Douglas Laycock, *Religious Liberty and the Culture Wars*, 2014 U. ILL. L. REV. 839, 879 ("Each side is intolerant of the other; each side wants a total win.").

32. *See* Rachel Kleinfeld, *The Rise of Political Violence in the United States*, 32 J. DEMOCRACY 160, 160 (2021) ("[A]cts of political violence in the United States have skyrocketed in the last five years.").

33. *See* sources cited *supra* note 29.

34. *See* RICHARDS, *supra* note 6, at 149 ("To a large extent, the worries that actuated the antiestablishment clause remain our worries.").

own, a project which requires attention to both the changed semantic content and the context in which the words were uttered.

Part II presents the bulk of the novel interpretive work, arguing that the term "religion" has quietly undergone an essential shift in meaning over the past two centuries—from referring generally to something like "worldview" to specifying a non-materialistic subset of worldviews, driven by the radical shift in thought of the Darwinian Revolution.

In Part III, I argue that this broader understanding of the concept of "religion" is further supported by considering the nature of the rights the framers thought they were protecting and the alternative phrases they could have used, as well as more atmospheric considerations such as the general purpose of the First Amendment and "religion's" placement among the other rights it protects. And even if the historical evidence is ultimately only suggestive, the presumption that the framers were reasonable people, and that the apparatus they were trying to build was at least normatively coherent, supports the broader reading.

Finally, in Part IV, I briefly discuss the implications of this reading of the Religion Clauses. Of course, much will turn on the precise contours of "establishment" and "free exercise," which have been the subject of a great deal of debate and are not the focus here. Nevertheless, a clear sense of the constitutional concept of "religion" offers a path forward.

I. INTERPRETING THE CONSTITUTION

Constitutional interpretation, uncontroversially, starts with the text. And although there is a great deal of dispute about the precise extent to which the so-called "original meaning" of the text ought to constrain contemporary constitutional law, virtually all constitutional theorists accept that fundamental shifts in the meaning of a constitutional term since the founding ought to be accounted for in at least some way in contemporary constitutional law.

In this Part, I first discuss interpretive methodology, and the implications—in broad strokes—of a claim about the original meaning of the constitutional concept of "religion" for today's law. Next, I discuss the phenomenon of linguistic drift, and why understanding the communicative content of the Constitution is inevitably and quite literally a project of careful translation. Finally, I discuss the role that contemporaneous contextual factors—what linguists call "pragmatics"—play in understanding the communicative content of legal texts.

A. Constitutional Text and Constitutional Interpretation

Constitutional interpretation is, of course, a notoriously contested domain.[35] But for the most part—notwithstanding the interminable debates between the camps that travel under the labels "originalism" and "living constitutionalism," and their variations[36]—it has always been uncontroversial that any interpretation of the Constitution must start with its text, or at least make sense of it.[37] And to accept that the original meaning of "religion" matters for contemporary law requires only the relatively uncontroversial assumption that the communicative content of constitutional text plays some role in constructing it—whether that communicative content is (as originalists would have it) determinative, or (as living constitutionalists would have it) that it is merely a relevant datapoint.[38] Almost everyone agrees.[39]

Indeed, virtually all constitutional theorists accept that the text of the Constitution ought to play some role in constitutional law as applied by judges.[40] And if we can agree that the text ought to play some role in

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35. *See* Lawrence B. Solum, *Intellectual History as Constitutional Theory*, 101 VA. L. REV. 1111, 1115 (2015) ("Constitutional theory is a large and diverse field . . . .").

36. *See* André LeDuc, *Striding Out of Babel: Originalism, Its Critics, and the Promise of Our American Constitution*, 26 WM. & MARY BILL RTS. J. 101, 105 (2017) ("The debate has been sustained and voluminous, and it shows no sign of subsiding."); *see also* Lawrence B. Solum, *Originalism Versus Living Constitutionalism: The Conceptual Structure of the Great Debate*, 113 NW. U. L. REV. 1243, 1244 (2019) (describing the "great debate" between "originalism" and "living constitutionalism").

37. *See* Thomas E. Baker, *Constitutional Theory in a Nutshell*, 13 WM. & MARY BILL RTS. J. 57, 70 (2004) ("Nearly everyone believes that the text of the Constitution—the four corners of the document as amended—is the necessary beginning place of constitutional interpretation." (footnotes omitted)); Solum, *supra* note 12, at 8 ("Most constitutional theorists would agree that the linguistic meaning of the Constitution should make some contribution to the legal content of constitutional doctrine." (footnote omitted)).

38. *See, e.g.*, Michael C. Dorf, *Integrating Normative and Descriptive Constitutional Theory: The Case of Original Meaning*, 85 GEO. L.J. 1765, 1772 (1997) ("[C]onstitutional *text* matters because of the widespread contemporary acceptance of the text as a necessary starting point for interpretation."); *see also* City of Boerne v. Flores, 521 U.S. 507, 519 (1997) ("[W]e begin with [the] text."); Adam M. Samaha, *Dead Hand Arguments and Constitutional Interpretation*, 108 COLUM. L. REV. 606, 644 (2008) ("[A]ll [extant interpretive methodologies] claim to respect the text.").

39. *See, e.g.*, Victoria Nourse, *Reclaiming the Constitutional Text from Originalism: The Case of Executive Power*, 106 CALIF. L. REV. 1, 3 (2018) ("As Justice Elena Kagan has noted, we are all constitutional textualists and originalists now . . . ."); Peter J. Smith, *How Different Are Originalism and Non-Originalism?*, 62 HASTINGS L.J. 707, 723 (2011) (noting that for both originalism and living non-originalism, "the original meaning generally provides the starting point for any act of constitutional interpretation"); RONALD DWORKIN, LAW'S EMPIRE 358 (1986) ("Justices who are called liberal and those who are called conservative agree about which words make up the Constitution as a matter of preinterpretive text."); Thomas C. Grey, *The Constitution as Scripture*, 37 STAN. L. REV. 1, 1 (1984) ("We are all interpretivists; the real arguments are not over whether judges should stick to interpreting, but over what they should interpret and what interpretive attitudes they should adopt.").

40. *See, e.g.*, Cass R. Sunstein, *There Is Nothing That Interpretation Just Is*, 30 CONST. COMMENT. 193, 206 (2015) ("[I]t is true that any theory of interpretation has to be textualist—not in the sense that it must always 'follow' the text, or may never depart from its ordinary meaning, but in the

constitutional law, surely we can agree that its communicative content when it was written is at least a relevant consideration.[41] If we care about the "text," it *must be* because we care about what the text *says*, not as a collection of odd markings on an old piece of paper.[42]

After all, there is simply no normative reason to import arbitrary and exogenous linguistic drift into the law.[43] The framers wrote "chuse," which we read as "choose" and "any Thing" which we gloss as "anything."[44] This is uncontroversial, and to do otherwise would be to revere the Constitution not as law—something for people, by people—but arbitrary markings held inexplicably sacrosanct.[45] Surely if we'd all come to speak French by now, we would explicitly translate the Constitution's text before attempting to apply it. Accepting this is all that is required to take seriously the argument that we have been misreading the word "religion" in the First Amendment.

All this might be otherwise, and there may be good normative reasons to question whether the text of the Constitution ought to govern us—none of

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sense that it must always make the text the foundation for interpretation."); Samaha, *supra* note 38, at 615–16 ("No reputable interpretive method avoids the dead hand issue because no reputable method disregards constitutional text."); Michael S. Moore, *Do We Have an Unwritten Constitution?*, 63 S. CAL. L. REV. 107, 113 (1989) ("In other words, no one should wish to defend a non-text-based view of constitutional law.").

41. *See, e.g.*, Solum, *supra* note 12, at 1 ("The Fixation Thesis is obvious."); MICHAEL J. GLENNON & ROBERT D. SLOANE, FOREIGN AFFAIRS FEDERALISM: THE MYTH OF NATIONAL EXCLUSIVITY 79 (2016) ("[N]o one regards the original meaning of the text as irrelevant to constitutional interpretation and adjudication . . . ."); Gerard V. Bradley, *Beguiled: Free Exercise Exemptions and the Siren Song of Liberalism*, 20 HOFSTRA L. REV. 245, 258 (1991) ("No one—not judge, commentator, or academic—denies [the original public meaning's] relevance to constitutional law.").

42. *See* Corey Rayburn Yung, *Constitutional Communication*, 96 B.U. L. REV. 303, 339 (2016) ("Whether those texts are given substantial weight (as in originalist theories) or little value (as in living constitutionalist theories) the constitutional reader must venture through time to uncover meaning.").

43. *See* Christopher Birch, *The Connotation/Denotation Distinction in Constitutional Interpretation*, 5 J. APP. PRAC. & PROCESS 445, 458 (2003) ("The drift or slippage between meanings, and the signs in English used to represent them does not bring about some automatic updating of the Constitution; rather, it is part of the noise or static which impedes our properly understanding the meanings to be conveyed by the text."); *see also* Jack M. Balkin, *Original Meaning and Constitutional Redemption*, 24 CONST. COMMENT. 427, 430 (2007) ("Suppose we did not follow this practice. Then, if the commonly accepted meaning of the words changes over time, the legal effect of the statute will change as well, and it will change not because of any conscious act of lawmaking by anyone in particular, but merely because of the changes in how language assigns concepts to words.").

44. U.S. CONST. art. I, § 2 ("The House of Representatives shall chuse their Speaker . . . ."); Russell Spivak, *Anybody's Gavel: Why Congress Can Choose a Speaker from Outside Its Ranks*, 2019 U. ILL. L. REV. ONLINE 9, 9 ("The Constitution stipulates . . . that the House may choose its own leader, or Speaker."); U.S. CONST. art. VI (". . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding"); Turlock Irrigation Dist. v. FERC, 786 F.3d 18, 28 (D.C. Cir. 2015) ("[F]undamental to our system of government is the notion that the laws of the United States 'form the supreme law of the land, "anything in the constitution or laws of any state to the contrary notwithstanding."'" (quoting McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 406 (1819))).

45. *See* Richard Ekins, *Objects of Interpretation*, 32 CONST. COMMENT. 1, 17 (2017) ("Maintaining the rule of law, and recognizing *authoritative* texts as such, requires more than lip service to a form of words.").

whom had any hand in composing or ratifying it—at all.[46] But *that* is the proper domain of dispute—not whether, having accepted that the text of the Constitution is the binding foundation of our law, we must care about what it says in some way.[47] And we can set this theoretical challenge to the side. As a matter of descriptive fact, everyone—or at least all judges and the overwhelming majority of constitutional theorists—accept that, for better or worse, the constitutional text is the foundation of our law.[48]

And although there may be strong arguments sounding in consent against the idea of perpetual constitutions, no one seriously thinks that unelected judges ought to be the ones revising them.[49] In other words, while there may be strong arguments that democratic majorities or supermajorities ought to be permitted to update the Constitution as necessary, there are no compelling arguments that unelected and unaccountable judges ought to be writing constitutional principles based on their own values and aspirations.[50] So there are, at least, always straightforward reasons to constrain *judges* to the meaning of foundational texts.[51]

Self-identified originalists of any stripe should find this all basically anodyne—but they would of course already have been inclined to hear an argument that we've misinterpreted the original meaning of a constitutional term.[52] It is worth, however, briefly spelling out how this Article's claim might fit with living constitutional theories, of which we'll take Dworkin's "moral reading" theory as emblematic.[53]

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46. *See* Samaha, *supra* note 38, at 608 ("Nor is it completely obvious, to many academics anyway, why we choose to perpetuate the federal constitutional text as law.").

47. *See, e.g.*, Balkin, *supra* note 43, at 438 ("Interpreting the Constitution as members of a political community presupposes a desire to be faithful to it. If we do not seek to be faithful to the Constitution, we may be trying to improve the Constitution, but we are not trying to interpret it.").

48. *See, e.g.*, Samaha, *supra* note 38, at 609 ("However intriguing, dead hand arguments about the Constitution might be purely academic. Our legal culture now firmly accepts the constitutional text as law without indication of softening in the future.").

49. *See, e.g.*, Sunstein, *supra* note 40, at 200 ("[L]egal systems do much better—and even count as legal systems—if judges are faithful to authoritative texts. If they do not, the rule of law is itself in jeopardy, because judges would appear to be empowered to do whatever they want."); Ekins, *supra* note 45, at 22 ("The continuity of law and the importance of self-government over time both provide very powerful reasons to consider the original meaning of the Constitution decisive.").

50. *See, e.g.*, Moore, *supra* note 40, at 113 ("[I]n a democracy there is no legitimacy to noninterpretive decisions by unelected, marginally accountable officials that overturn the decisions of more democratically selected and retained officials.").

51. *See, e.g.*, Thomas W. Merrill, *Legitimate Interpretation—or Legitimate Adjudication?*, 105 CORNELL L. REV. 1395, 1396 (2020) ("As a matter of theory, the originalists appear to be winning, based on powerful arguments grounded in the consent of the governed and the nature of communicative acts more generally.").

52. *See generally, e.g.*, Balkin, *supra* note 12, at 5 (offering an originalist argument in favor of a broad understanding of "commerce" untethered from the commercial domain).

53. Of course, there are many "living constitution" theories, of which, perhaps, one—"common law constitutionalism"—would not purport to be governed, in any ultimate sense, by the constitutional text. *See, e.g.*, Samaha, *supra* note 38, at 616 (describing the relationship between common law

Ronald Dworkin characterized his theory of constitutional interpretation as non-originalist, and he believed that the substantive guarantees of the Constitution can lawfully shift in application over time.[54] His argument draws on a philosophical distinction between "concepts" and "conceptions."[55] A concept is a general idea that many people use in more or less the same way, with more or less the same normative stakes.[56] A conception is a particular theory of the substance and nature of that concept.[57] So the idea of a "person" in philosophy is a concept—everyone agrees that the term refers to the class of things with the highest moral status.[58] But there are a number of different conceptions of personhood, from those grounded in sentience to those that require a relatively thick sense of narrative identity.[59]

Dworkin argues that the text of the Constitution often refers to concepts—"equal protection of the laws," "cruel and unusual punishment," "the freedom of speech"—without dictating conceptions.[60] From this perspective, if, as the result of moral development, we have come to accept a different conception of the content of the "equal protection of the laws" since that phrase was written, it is consistent with the Constitution to apply

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constitutionalism and constitutional text as "difficult to assess" but a possible "alternative to text"). Common law constitutionalism holds that precedent developed in the common law method is and ought to be the final source of law in our system. *See, e.g.*, DAVID A. STRAUSS, THE LIVING CONSTITUTION 3 (2010) (outlining a theory of common law constitutionalism not ultimately constrained by the text of the constitution). Of course, you can't win them all and, at least in theory, common law constitutionalists might have no particular reason to care about an argument that the term "religion" referred to a very different concept at the founding than it does today. But most common law constitutionalists *do* accord the text of the Constitution at least some degree of respect. *See, e.g.*, *id.* at 104 (arguing that, even under common law constitutionalism, the text is the starting point that provides "common ground" for judicial resolution of constitutional controversies). And in religion jurisprudence in particular—which hardly anyone would stoop to defend as an exemplar of the reason immanent in common law adjudication—common law constitutionalists ought to consider that many of the doctrine's problems might arise from a descriptive semantic error in the late nineteenth century. *See infra* Part III.E.

54. *See, e.g.*, Ronald Dworkin, *Hard Cases*, *in* TAKING RIGHTS SERIOUSLY 103, 147 (rev. ed. 1997); DWORKIN, *supra* note 39, at 90; *see also* Ekins, *supra* note 45, at 13 ("But key to Dworkin's argument, at least in its mature form, is that the framers of the Constitution did in fact intend to convey abstract formulations, intending and contemplating that the vague formulations would be applied to matters as they arose. To this extent, Dworkin just is an originalist . . . .").

55. *See generally* W. B. Gallie, *Essentially Contested Concepts*, 56 PROC. ARISTOTELIAN SOC'Y 167 (1956) (outlining the concept/conception distinction).

56. *See id.* at 168.

57. *Id.* 183–84; *see also* Solum, *supra* note 12, at 43 ("[W]hen I say that the alleviation of unnecessary suffering is good, you understand what I mean. But it may be that you and I differ on the criteria for the application of the term 'good.' . . . We share the concept of 'good,' but we have different conceptions of what constitutes a good life.").

58. *See, e.g.*, James Toomey, *"As Long as I'm Me": From Personhood to Personal Identity in Dementia and Decision-Making*, 4 CANADIAN J. BIOETHICS 57, 58 (2021) ("Although there is substantial controversy in philosophy of the *content* of the term [personhood], there is widespread agreement on the role that it plays in the debate.").

59. *Id.* at 58–61 (summarizing alternative conceptions of personhood).

60. *See* Ronald Dworkin, *The Arduous Virtue of Fidelity: Originalism, Scalia, Tribe, and Nerve*, 65 FORDHAM L. REV. 1249, 1253 (1997).

our conception, rather than that of those who wrote the language.[61] In other words, Dworkin's argument is essentially that the constitutional text commits our law to a suite of basic and highly general normative principles, the particular content of which is the subject of continuous revision.[62]

But what Dworkin does *not* claim is that judges are entitled to adopt their own *concepts*.[63] And so if a word used in the text of the Constitution has come to refer to a different *concept* than it did at the time it was written, we would have no justification for applying it in today's sense. Note that Dworkin argues from words and phrases like "liberty" and "equal protection," and not "domestic violence."[64] With respect to the former, it is entirely plausible that while we have developed new conceptions, the basic concepts of "liberty" and "equal protection" have been consistent since they were written. The same cannot be said for "domestic violence," which refers to a fundamentally different concept now than it did at the time.[65]

In short, although there is a great deal of controversy in constitutional theory about the precise extent to which today's judges ought to be constrained to the communicative content of the text of the Constitution at the time it was written, there is relatively little controversy about the weaker claim that the communicative content is *relevant in some way* to constitutional adjudication. That weaker claim is all that is required to find legally significant this Article's central claim—that the word "religion" in 1791 referred to a different, broader concept than it does today.

B. Semantic Shift and Constitutional Translation

If you're with me so far, you will accept that the "original meaning" of the constitutional text—or the way the text would have been understood at the time it was written—ought to play some role in contemporary law. But what *is* that "meaning," and how are we to find it? Linguists and theorists of interpretation generally elaborate that what is meant by the "meaning" of a text is its "communicative content"—the ideas the utterance would have

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61. *See id.*

62. *See id.* ("We have to choose between an abstract, principled, moral reading . . . and a concrete, dated reading . . . .").

63. *See, e.g.*, Balkin, *supra* note 43, at 432–33 ("[T]he argument for contemporary meaning rests on a subtle confusion. . . . [L]iving constitutionalists . . . are usually thinking of the abstract or vague phrases of the Constitution . . . .").

64. *See id.*; Lawrence B. Solum, District of Columbia v. Heller *and Originalism*, 103 NW. U. L. REV. 923, 945–46 (2009) (discussing the shift in the meaning of the phrase "domestic violence" since the founding).

65. *See* Glenn E. Chappell, *The Historical Case for Constitutional "Concepts,"* 53 U. RICH. L. REV. 373, 415–16 (2019) (discussing this example).

transmitted from speaker to hearer.[66] This communicative content is, in the first instance, constituted by the semantic content of the words of the utterance in the grammatical structure in which they are presented.[67] In other words, the "meaning" of the text for which we are searching is in part a function of the semantic content of words, phrases, and sentences.[68]

As a threshold matter, the semantic content of words is not merely the sum total of possible applications a reader at the time might conjure to mind.[69] The fact that, say, the framers could not have pictured airplanes doesn't mean that the semantic content of the phrase "regulate commerce" does not include them; "[t]he semantic content of the term 'furniture' can be fixed, even though new kinds of furniture are invented."[70] Philosophy of language has long understood that the meanings of words (which linguists typically call their "sense")[71] are different from, and indeed far more than, the sum total of imagined concrete applications or referents.[72] Words often refer to concepts—like "commerce," or "furniture," and new or unanticipated kinds of objects may fall within those concepts' extensions.[73]

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66. *See, e.g.*, Ekins, *supra* note 45, at 4 ("Language use consists in one person's attempt to convey an intended meaning by uttering some words in some context, which meaning other persons should try to recognize."); Yung, *supra* note 42, at 310 ("The framers communicated . . . to future courts, legislatures, executive officers, and the general public about the meaning of the Constitution through the document that was ultimately ratified."); Lawrence B. Solum, *Communicative Content and Legal Content*, 89 NOTRE DAME L. REV. 479, 480 (2013) ("The phrase 'communicative content' is simply a precise way of labeling what we usually call the 'meaning' or 'linguistic meaning' of the text.").

67. *See* Solum, *supra* note 12, at 1 ("If you want to know what [an old] letter means (or more precisely, what it *communicates*), you will need to know what the words and phrases used in the letter meant at the time the letter was written. . . . And meaning is not just a function of the meaning of individual words and phrases; it is also a function of syntax (or grammar)."); Ekins, *supra* note 45, at 22 ("[T]he philosophy of language does tell us something very important about the nature of language use, viz. that persons use texts (semantic content) to convey their intended meaning-content.").

68. *See, e.g.*, Solum, *supra* note 65, at 945 ("One can only understand an ordinary letter written between 1066 and the fifteenth century that employed the term 'deer' by looking to the term's conventional semantic meaning at the time of writing . . . ."); *see also* McConnell, *supra* note 5, at 1437 ("To determine the meaning of the religion clauses, it is necessary to see them through the eyes of their proponents . . . .").

69. *See* Solum, *supra* note 12, at 21 (describing the view that meaning is fixed by contemplated applications as "implausible"); Bradley, *supra* note 41, at 249 ("Originalists should not care (though some do) what this or that Framer would say about peyote use, drug laws, and religious beliefs.").

70. Solum, *supra* note 12, at 34.

71. *See* Christopher R. Green, *Originalism and the Sense-Reference Distinction*, 50 ST. LOUIS U. L.J. 555, 563–574 (2006) (distinguishing between "sense" and the concrete referents speakers may have had in mind in linguistics).

72. *See, e.g.*, Melvin Fitting, *First-Order Intensional Logic*, 127 ANNALS PURE & APPLIED LOGIC 171, 175–76 (2004); Gottlob Frege, *Über Sinn und Bedutung*, 100 ZEITSCHRIFT FÜR PHILOSOPHIE UND PHILOSOPHISCHE KRITIK 25, 27 (1892); *see also* Birch, *supra* note 43, at 456 (observing that "sense" means "something like mode of presentation of reference, or way of thinking of something"); Ekins, *supra* note 45, at 15 (describing the "widely shared scholarly view that expected applications should not be decisive, precisely because they are distinguishable from original meaning").

73. *See* Solum, *supra* note 12, at 33–34.

It is this contemporaneous *sense* of the words—an empirical question—that we are seeking.[74]

The senses of words evolve all the time, a phenomenon known as "linguistic drift," or "semantic shift."[75] Because of this, in seeking to understand the meaning of constitutional words or phrases (as words or phrases in any old text), we cannot unreflexively rely on today's usage.[76] Instead, we have to engage in a descriptive, historical exercise of understanding the sense of the terms at the time they were used, in context.[77] So if the framers wrote "awful," but at the time that term referred to what we later would have called "awe*some*," and now "awe-*inspiring*," we would read the word as something more like "awe-inspiring" than "horrible."[78] If the framers directed measures to be taken against "young fr[ies] of treachery,"[79] we would interpret "fry" as referring to "progeny"[80] rather than a crispy potato-based foodstuff. This is really no different than, say, annotating a Shakespeare play with contemporary language.[81]

Understanding the meaning of constitutional text, then, is quite literally an exercise in translation—translation from the earlier dialect of American English in which the framers were writing to our own. The framers were writing in a different dialect than the one we speak—with a lexicon closely related to contemporary American English, of course, but one that is not in fact the same as contemporary American English. "The interaction between the framers and today's Americans is a relationship between differing cultures based upon constitutional text and related documents."[82] "[T]he first key to understanding the American founding is appreciating that it is a foreign world."[83]

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74. *See, e.g.*, *id.* at 12 ("Interpretation is an empirical inquiry."); *see also* Balkin, *supra* note 43, at 433 ("What living constitutionalists really object to is being limited by the original *expected application* of these abstract terms and vague clauses. They are right to object, for reasons I have given in my article, and I agree with them that the original expected application is not binding on later generations. But this is not an objection to being bound by original *meaning*.").

75. *See* Solum, *supra* note 12, at 17 (defining "linguistic drift" as the phenomenon that "[w]ords and phrases acquire new meanings over time").

76. *See id.* at 1.

77. *See, e.g.*, Balkin, *supra* note 12, at 16 ("[I]t is the broader, eighteenth century meaning and not the narrower, contemporary meaning that should determine Congress's powers today."); Solum, *supra* note 12, at 12 ("The communicative content of a text is determined by linguistic facts . . . and by facts about the context in which the text was written.").

78. *Cf.* Sunstein, *supra* note 40, at 205–06 ("In the eighteenth century, the word 'goal' meant 'jail,' and if we read an eighteenth-century legal text using that word, we might well insist on the original public meaning to interpret it.").

79. WILLIAM SHAKESPEARE, MACBETH, act 4, sc. 2, l. 95.

80. *See 'What You Egg', Meaning & Context*, NO SWEAT SHAKESPEARE, https://nosweatshakespeare.com/quotes/famous/what-you-egg/ [https://perma.cc/U7YM-T5JD].

81. *See, e.g.*, *No Fear Shakespeare*, SPARKNOTES, https://www.sparknotes.com/shakespeare/ [https://perma.cc/J272-6GBW].

82. Yung, *supra* note 42, at 324.

83. Gienapp, *supra* note 9, at 942.

Translation, as any translator knows, is never an easy, algorithmic task. After all, the senses of words may or may not be fully captured by dictionary definitions.[84] You and your friends might be a "group," a "clique," or a "gang"—the same referent (that is, the same people), very different senses.[85] Any good translator knows that there's more to translation than substituting the literal, dictionary definition of words to their best fit in other languages.[86] Consider the English "pain" and the French "*douleur*"—often thought of as direct analogues.[87] But indeed, despite being defined nearly identically in many dictionaries, each word has subtly a different sense—"pain" is thought of as more localized and less extreme, where "*douleur*" is generalized and of greater intensity.[88] For this reason, it is often descriptively *wrong* to translate "*douleur*" as "pain." For example, in James Grieve's translation of *In Search of Lost Time*, most instances of *douleur* are translated as something other than "pain"—"anguish," "ache," "forlorn," "affliction," or "mourned."[89]

Similarly, a thorough understanding of the sense of a word often requires understanding the *other* words that it is thought of in opposition to or in contrast from.[90] Where English does not have a particular term for a hurt less significant and more localized than "pain," French does—"*douleur*" derives much of its meaning from its contrast with "*mal*," the word typically used for the pain of, say, a pinch.[91] Understanding the existence and limits of "*mal*," then, helps us understand the boundaries of "*douleur*"—the choice of "*douleur*" in French *means* something that the choice of "pain" in English does not. This is a general characteristic of language—the meanings of

84. *See, e.g.*, CLIFF GODDARD & ANNA WIERZBICKA, WORDS AND MEANINGS: LEXICAL SEMANTICS ACROSS DOMAINS, LANGUAGES, AND CULTURES 210–11 (2014) (observing that, in English, "illness" and "disease" have subtly different connotations not well-captured in their dictionary definitions—where they are defined in terms of each other); *see also* Solum, *supra* note 12, at 20 ("If we want to know what a text means and the text was not written very recently, we need to be aware of the possibility that it uses language somewhat differently than we do now.").

85. *See* Keith Allan, *The Pragmatics of Connotation*, 39 J. PRAGMATICS 1047, 1049 (2007) ("[I]t is rare to find words, which are synonymous enough that they can substitute for one another in every context; each takes on distinctive connotations from the various contexts in which it is used.").

86. *See* Marta Dahlgren, *Connoting, Associating and Inferring in Literary Translation*, 38 J. LITERARY SEMANTICS 53, 59 (2009) ("When translating, it is important to preserve all the possible inferences triggered by an utterance or by an interaction in a dialogue, but it is also important not to make the inference explicit if it is not spelled out in the original.").

87. *See* GODDARD & WIERZBICKA, *supra* note 84, at 145 ("At first sight, the French *douleur* may seem identical in meaning to the English *pain*.").

88. *Id.* at 146–47.

89. *Id.* at 148.

90. *See id.* at 211; Alessandra Barotto & Caterina Mauri, *Constructing Lists to Construct Categories*, 30 ITALIAN J. LINGUISTICS 95, 126 (2018) ("The term 'contrast' refers to those linguistic elements in the context that establish a contrast with the list members and thus help the hearer to identify their common property by negation." (citation omitted)).

91. *See* GODDARD & WIERZBICKA, *supra* note 84, at 146.

words are often delimited by their alternatives.[92] It is impossible to completely understand what "infatuation" means except in its contrast to "love"; "tipsy" as delimited by "drunk" and "wasted"; "happiness" in its relation to "pleasure," "contentment," and "ecstasy."

In short, because of semantic drift, constitutional interpretation is always a project of translation. And this task is no rote matter. It requires a real understanding of the subtleties of language—not just the affirmative meanings of words themselves, but the implications of the choice of a specific word as against its contemporaneous alternatives, and of the ways in which a word is understood to be used. Not just translation, but *good* translation.

C. Pragmatics and Constitutional Interpretation

The semantic content of words—always a subtle thing to describe—changes over time, and any account of the meaning of constitutional text must take these shifts into account. But there is even more to a thorough understanding of the communicative content of constitutional utterances than precise explication of their semantic content.

Linguists argue that the communicative content of an utterance is not merely its semantic content—not just the sum total of the semantic content of its words as presented by their grammatical structure.[93] The communicative content of the phrase "I haven't had breakfast" is, of course (under ordinary conditions) that the speaker hasn't had breakfast *today*; but its semantic content is that the speaker hasn't had breakfast *period*.[94] Context matters.[95] Linguists use the word *pragmatics* to refer to the non-semantic, contextual factors that give utterances their full meaning.[96]

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92. *See* Allan, *supra* note 85, at 1049. Linguists call this the "blocking principle." *See, e.g.*, Adrienne Lehrer, *Blocking and the Principle of Conventionality*, 5 PROC. W. CONF. ON LINGUISTICS 183, 183 (1992).

93. *See, e.g.*, Mira Ariel & Caterina Mauri, *Why Use* Or*?*, 56 LINGUISTICS 939, 945 (2018) ("Language is underdetermined, which is why interpreting utterances more often than not combines the compositional meaning with pragmatic inferences. Pragmatic inferences play a crucial role in deriving speakers' intended messages." (citation omitted)); Kent Bach, *Context* ex Machina, *in* SEMANTICS VERSUS PRAGMATICS 15, 15 (Zoltan Gendler Szabo ed., 2005) ("[I]t is now a platitude that linguistic meaning generally underdetermines speaker meaning.").

94. *See* Barry C. Smith, *Meaning, Context, and How Language Can Surprise Us*, *in* EXPLICIT COMMUNICATION 92, 92 (Belén Soria & Esther Romero eds., 2010) (discussing this example).

95. *See* Barotto & Mauri, *supra* note 90, at 128 ("'[W]hat-is-said' . . . is crucially dependent on context."); *see also* ANDREI MARMOR, THE LANGUAGE OF LAW 35 (2014) ("In countless instances of ordinary speech, some communicative content is implicated, though not quite asserted, by the speaker in the particular context of his utterance.").

96. *See* Bill Watson, *Literalism in Statutory Interpretation: What Is It and What Is Wrong With It?*, 2021 U. ILL. L. REV. ONLINE 218, 220 ("When an utterance's context augments what a speaker asserts in this way, philosophers of language say that the utterance's . . . content is *pragmatically*

Pragmatics play an essential role in understanding the communicative content of legal texts, just as they do with any utterance.[97] For example, the interpretive canon *expressio unius et est exclusio alterius*—the implication that listing specified alternatives implies the exclusion of those not expressed—is justified on pragmatic grounds.[98] Nothing about the semantic meaning of listing certain alternatives on their own conveys (and no maxim of logic requires) the exclusion of those not listed.[99] But context, particularly the context of *legislative* communication, enhances the content of a statutory or constitutional utterance to exclude that which is not stated—"[w]e can reasonably expect a legislature always to speak felicitously and never to use literary devices for dramatic impact or social manipulation[and a]ccordingly, we can rely on its . . . always covering all but only all the persons and actions it intends to . . . ."[100]

The same goes for the *ejusdem generis* canon, under which open-ended, general words are understood to apply to things similar to those specifically listed.[101] And legal texts are rife with the pragmatic features of presupposition and implicature—when the Ninth Amendment states that "[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people,"[102] it presupposes that there *are* such other rights retained by the people; when the Constitution states in Article 1, § 9 that "[n]o Bill of Attainder or ex post facto Law shall be passed," it implicates the content "by Congress."[103]

Shared understandings and background knowledge between speakers and listeners can serve as a vector of pragmatic enrichment.[104] In constitutional interpretation, "intellectual history may provide both methods

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enriched."); Solum, *supra* note 35, at 1126 ("'Pragmatics' is the word used by philosophers of language and theoretical linguistics to refer to the role of context in enabling speakers and authors to create content richer than conventional semantic meanings."); Scott Soames, *Interpreting Legal Texts: What Is, and What Is Not, Special About the Law*, *in* PHILOSOPHICAL ESSAYS: NATURAL LANGUAGE: WHAT IT MEANS AND HOW WE USE IT 403, 404 (2009); Moore, *supra* note 40, at 116.

97. *See* Soames, *supra* note 96, at 408–09 ("Since *the content of the law* includes everything asserted and conveyed in adopting the relevant legal texts, meaning is sometimes merely a guide to interpretation, to be supplemented by other things."); *see also* Watson, *supra* note 96, at 221 ("Statutes, I will assume, are speech by a legislature that function roughly as everyday speech does.").

98. *See, e.g.*, M.B.W. Sinclair, *Law and Language: The Role of Pragmatics in Statutory Interpretation*, 46 U. PITT. L. REV. 373, 415–17 (1985) (explaining the *expressio unius* canon on pragmatic grounds).

99. *Id.*

100. *Id.* at 416.

101. *Id.* at 410–11.

102. U.S. CONST. amend. IX.

103. *See* Lawrence B. Solum, *Originalist Methodology*, 84 U. CHI. L. REV. 269, 286–91 (2017) (discussing these and other pragmatic factors applicable in constitutional interpretation).

104. *See* Andrei Marmor, *The Pragmatics of Legal Language*, 21 RATIO JURIS 423, 426 (2008) ("The assertive content of speech is often determined by contextual factors that are supposedly shared by the parties to the conversation. The contextual background is often rather general and shared by a certain population, and sometimes it is very specific to the conversational parties/context.").

and knowledge relevant to understanding the background assumptions of the authors of the constitutional text," whether or not those presuppositions fall within the semantic content of the text, narrowly understood.[105]

Consider, for instance, Jud Campbell's argument that the Speech Clause of the First Amendment refers to a natural right "to make well-intentioned statements of one's thoughts."[106] He does not reach this conclusion from semantic analysis of the phrase "the freedom of speech" alone. Instead, he offers a thorough contextual account, drawing on intellectual history, to show how people understood the idea of rights at the time—how they would, for example, understand a metaphysical difference between natural and positive rights.[107] This intellectual context—necessary as a matter of pragmatics to an understanding of the communicative content of the Speech Clause—is alien to us but would have been obvious (indeed, so obvious it *literally* went without saying) semantically at the time.[108]

Scholars are still working out the precise implications of pragmatics for legal interpretation, and indeed the boundaries between the semantics and pragmatics themselves.[109] And everyone agrees that the semantic content of utterances is invariably indispensable to their communicative content—pragmatics, context, and intellectual history do not *determine* communicative content.[110] But utterances—including legal utterances—are made in contexts, based on intellectual presuppositions. Understanding their communicative content—*really* understanding their communicative content—may require putting oneself, as best one can, into the intellectual world in which they were composed. That is what we shall now endeavor to do.

II. DARWIN AND "RELIGION"

This Part argues that, as written in the First Amendment and in historical context, "religion" necessarily referred to a broader concept than it does today—something more like "worldview, in general" or "theory of how we ought to live and why," rather than merely a theistic or transcendentalist subset of those theories. First, we start by looking at dictionary definitions

105. *See* Solum, *supra* note 35, at 1160.

106. Campbell, *supra* note 10, at 283.

107. *Id.* at 252–53, 280.

108. *See id.* at 269 ("For the Founders . . . mentioning a 'freedom to do something' naturally alluded to natural rights, without any need for further clarification or consistent terminology.").

109. *See, e.g.*, Marmor, *supra* note 104, at 442–45 (arguing that some implications that are sometimes considered "pragmatic" are in fact "semantically encoded" by convention and syntax).

110. *See, e.g.*, Watson, *supra* note 96, at 221 ("[T]he semantic content of the sentence uttered still constrains what the utterance's objective content can be (there is no context in which I could use 'I have nothing to wear' to objectively assert in standard English that the Tampa Bay Buccaneers won the Super Bowl)."); Bach, *supra* note 93, at 38 ("Context doesn't *determine* anything . . . .").

contemporaneous with the founding. But to make sense of those definitions, we need to understand the pre-Darwinian intellectual context in which they were written. By putting ourselves in that context—in a world in which there was no plausible naturalistic explanation for the origins of life—we can understand references to divinity in discussions of "religion" at the time as referring to *all* remotely plausible theories. Darwinism made intellectually defensible for the first time a materialist alternative and narrowed our usage of the term "religion."

A. *Contemporaneous Dictionary-Meaning*

We can start—but not finish—our inquiry with dictionaries roughly contemporaneous with the founding. Giles Jacob's law dictionary, published in 1729 and familiar to the framers,[111] defines "religion" as "[p]iety, [d]evotion, and the [w]orship of God."[112] It further notes that "[r]eligion and [m]orality" are "the [f]oundation[s] of [g]overnment."[113] Samuel Johnson's Dictionary of the English Language, first published in 1755, defines "religion" as "virtue, as founded upon reverence of God, and expectation of future rewards and punishments."[114] The Oxford English Dictionary offers as examples of use of the word "religion" broadly contemporaneous with the framing to include: (1) "[s]o very [s]lender a [s]ecurity as the probity and religion of the inferior officers of revenue" (1776)[115] (2) "the best part of religion is to imitate the benevolence of God to man" (1832)[116] (3) "[i]t keeps a lively Sen[s]e of Religion upon our Minds" (1704);[117] (4) "there are no [s]ignes . . . of [*r*]*eligion*, but in [m]an onely" (1651).[118]

These dictionary definitions and usages are similar to efforts to define the term in American writing from the same time period. For instance, George Mason and James Madison defined religion as "the duty which we

111. *See, e.g.*, Julia Rudolph, *That "Blunderbuss of Law": Giles Jacob, Abridgment, and Print Culture*, 37 STUD. EIGHTEENTH-CENTURY CULTURE 197, 197, 209 n.3 (2008).

112. *Religion*, GILES JACOB, A NEW LAW DICTIONARY 664 (1729).

113. *Id.*

114. *Religion*, SAMUEL JOHNSON'S DICTIONARY *644, https://johnsonsdictionaryonline.com/views/search.php?term=religion [https://perma.cc/GDV2-MZVT].

115. 2 ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS, ¶ 474 (London, n.p. 1776).

116. HARRIET MARTINEAU, THE HILL AND THE VALLEY 45 (Boston, Leonard C. Bowles 1832).

117. ROBERT NELSON, A COMPANION FOR THE FESTIVALS AND FASTS OF THE CHURCH OF ENGLAND: WITH COLLECTS AND PRAYERS FOR EACH SOLEMNITY 472 (London, Black Swan, 2d ed. 1704).

118. THOMAS HOBBES, LEVIATHAN, OR THE MATTER, FORME & POWER OF A COMMON-WEALTH ECCLESIASTICALL AND CIVILL 52 (London, Green Dragon 1651).

owe our Creator, and the manner of discharging it."[119] And Thomas Paine defined religion as "man bringing to his Maker the fruits of his heart."[120]

There are two essential points to be made about these definitions. The first is that even without engaging in any particularly sophisticated efforts to situate oneself in the intellectual and linguistic climate of 1791, the concept of "religion" at the founding appears broader than it is today. We're talking about something related to "virtue," "devotion," "piety"; something uniquely and universally human, a foundation for morality and society generally, and an explanation of one's relationship to the universe. What we're *not* talking about are a set of institutions, or the practices associated with certain transcendentalist metaethical theories in particular.

Second, of course, these definitions reference the divine—referring to "God," the "Creator," the "Maker" of man. Notably, they don't refer to any particular conception of God, and "Creator" and "Maker" are facially broad. But these definitions do reference divinity. Presumably, this is why so many scholars maintain that, as an original matter, "religion" only refers to theistic worldviews. But to do so misunderstands the historical intellectual context in which these definitions were written, to which we now turn.

B. The Darwinian Revolution and "Religion"

Whatever your contemporary religious predilections, imagine yourself in 1791. Let's suppose you're educated, well read, a skeptic of sorts, a child of the Enlightenment. The Scientific Revolution has happened.[121] You understand from Copernicus that we do not occupy the physical center of the universe, that our perceptions of the movement of the sun are confused, and that there are reasons to doubt the literal historicity of the Bible.[122] From Newton, just earlier in the century, you understand that there are almost unbelievably elegant universal mathematical laws governing force and motion, on earth as among the stars.[123]

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119. KATE MASON ROWLAND, THE LIFE OF GEORGE MASON, 1725–1792, at 244 (New York, G.P. Putnam's Sons 1892); Everson v. Bd. of Educ. of Ewing, 330 U.S. 1, 64 (1947) (quoting THE VIRGINIA DECLARATION OF RIGHTS § 16 (Va. 1776)).

120. Thomas Paine, *Rights of Man*, *in* 4 LIFE AND WRITINGS OF THOMAS PAINE 1, 92 (Daniel Edwin Wheeler ed., 1908) (emphasis removed).

121. *See generally* I. Bernard Cohen, *The Eighteenth-Century Origins of the Concept of Scientific Revolution*, 37 J. HIST. IDEAS 257 (1976) (placing the Scientific Revolution in the sixteenth and seventeenth centuries).

122. *See* Owen Gingerich, *From Copernicus to Kepler: Heliocentrism as Model and as Reality*, 117 PROC. AM. PHIL. SOC'Y 513, 514, 521 (1973); *see also* Natalie Ram, *Science as Speech*, 102 IOWA L. REV. 1187, 1202 (2017) ("Nicolaus Copernicus challenged centuries of settled 'truth' by radically suggesting that the Sun, and not the Earth, was the center of the solar system.").

123. *See generally* JAMES GLEICK, ISAAC NEWTON (2003) (summarizing the life and contributions of Isaac Newton).

But you take a walk in your garden, or in the woods, or along the American coastline. You see a world teeming with *life*—complex, purposeful, diverse, and astonishingly, magnificently, even senselessly beautiful.[124] A world of well-hidden predators precisely the right pattern to blend into their environment; with prey just fast enough to escape, or with horns or poison or camouflage to fight back; with plants bending toward the sun. A world of birds with wings to *fly*, fish fins to swim, bats with what is effectively a complex sonar apparatus wired into their heads. You look at your hands, each bone the right size to bend, an opposable thumb to grasp. "What a piece of work is a man!"[125] You consider the eye—a breathtakingly complex optical mechanism, composed of countless cells each operating in precisely the right way.[126]

In short, you see in yourself—and all the world around you—an *unmistakable design*—a living world filled with function, purpose, and vast complexity. How conceivably could this be—that "mystery of mysteries"[127]—except by a designer? How could a world so balanced, so precisely right, so filled with complexity and function and purpose come about without the thoughtful design of some force, some supernatural intelligence? As William Paley would put it in 1802, in looking at any living thing, down to the simplest bacterium, it is as though you have stumbled upon a carefully calibrated watch.[128] Of course you assume a watchmaker. "If anyone doesn't agree that this amount of complex design cries out for an explanation, I give up."[129]

This is the "argument from design" for the existence of a god. It is, on its face and for millennia, an incredibly powerful one, perhaps the most.[130] Plato and Aristotle—hardly intellectual lightweights—rejected the possibility that life emerged and was governed by random chance on precisely this ground—it was simply inconceivable to them that the empirically apparent complexity of the living world could have arisen by chance.[131] David Hume famously criticized the logic of the argument from

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124. *Cf., e.g.*, RICHARD O. PRUM, THE EVOLUTION OF BEAUTY: HOW DARWIN'S FORGOTTEN THEORY OF MATE CHOICE SHAPES THE ANIMAL WORLD—AND US 60 (2017) (describing the "unimaginably stunning" mating display of the male Great Argus bird).

125. WILLIAM SHAKESPEARE, HAMLET, act 2, sc. 2, l. 327.

126. *See, e.g.*, DAWKINS, *supra* note 18, at 1 ("We animals are the most complicated things in the known universe.").

127. Walter F. Cannon, *John Herschel and the Idea of Science*, 22 J. HIST. IDEAS 215, 219 (1961).

128. WILLIAM PALEY, NATURAL THEOLOGY: OR, EVIDENCES OF THE EXISTENCE AND ATTRIBUTES OF THE DEITY, COLLECTED FROM THE APPEARANCES OF NATURE 1 (Cambridge Univ. Press 2009) (1802).

129. DAWKINS, *supra* note 18, at ix.

130. *See id.* at 4 (describing the argument from design as "always the most influential of the arguments for the existence of a God").

131. *See* RUSE, *supra* note 19, at 1 ("[Plato and Aristotle] did not reject evolution out of

design in the late eighteenth century—and came perhaps the closest of anyone before Darwin to rejecting it—but he could think of no alternative, and endorsed the existence of a god.[132] Indeed, the vast majority of people who have ever lived—including many today—have been convinced by something like the argument from design.[133] And roughly contemporaneous with the American founding—in the period after Copernicus and Newton but before Darwin—"support and enthusiasm for the argument [from design] was at its height" in the Anglophone world[134] and on the Continent.[135]

This was because, unlike today, in 1791, *there were no non-theistic explanations for design*.[136] The smartest, most thoughtful people in the world could offer *no explanation* for how this all came to be other than that someone or something—*some* force—designed it.[137] There were indeed a handful of purported "atheists" at the time (though not really any in the serious intelligentsia—the most skeptical Enlightenment philosophers were deists).[138] But without an explanation for the self-evident teleology of life, "atheism" was more than anything a term of disparagement for one's intellectual opponents who proffered a different vision of God than one's

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prejudice—certainly not out of religious prejudice. It was simply that a story that put everything down to blind chance could not account for the most distinctive aspect of organisms—what we would call their 'teleological' nature, what Aristotle would speak of in terms of 'final cause.'").

132. *See* DAVID HUME, *Dialogues Concerning Natural Religion*, *in* THE ESSENTIAL DAVID HUME 283, 356 (Robert Paul Wolff ed., New American Library 1969) (1779); *see also* DENNETT, *supra* note 18, at 32 ("[Hume] caved in because he *just couldn't imagine* any other explanation of the origin of the manifest design in nature."); DAWKINS, *supra* note 18, at 6 ("[W]hat Hume did was criticize the logic of using apparent design in nature as *positive* evidence for the existence of a God. He did not offer any *alternative* explanation for apparent design . . . .").

133. *See* DAWKINS, *supra* note 18, at xii ("[C]omplex elegance is an indicator of premeditated, crafted design. This is probably the most powerful reason for the belief, held by the vast majority of people that have ever lived, in some kind of supernatural deity.").

134. *See* RUSE, *supra* note 17, at 70.

135. *See* Aram Vartanian, *From Deist to Atheist: Diderot's Philosophical Orientation 1746–1749*, 1 DIDEROT STUD. 46, 52 (1949) ("In writings of naturalists of the time, passages abound which convey, in ecstatic tones, the sense of wonder and nearly religious fervor aroused by the seemingly inexhaustible realm of living things.").

136. *See, e.g.*, DAWKINS, *supra* note 18, at xi ("Never forget that, simple as the theory [of natural selection] may seem, nobody thought of it until Darwin and Wallace in the mid-nineteenth century . . . .").

137. *See id.* at 6 (noting that, at best, an atheist before Darwin could only say "I have no explanation for complex biological design"); *see also* RUSE, *supra* note 17, at 70.

138. *See, e.g.*, Arthur Scherr, *Thomas Jefferson Versus the Historians: Christianity, Atheistic Morality, and the Afterlife*, 83 CHURCH HIST. 60, 108 (2014) ("Jefferson died, as he lived, as an Epicurean deistic pagan . . . ."); PAUL HAZARD, EUROPEAN THOUGHT IN THE EIGHTEENTH CENTURY: FROM MONTESQUIEU TO LESSING 402–15 (J. Lewis May trans., Yale Univ. Press 1954) (1946) (describing Voltaire as a Deist who believed in God); RUSE, *supra* note 19, at 14 ("Voltaire was no atheist and neither was David Hume. . . . They tended as did many at that time to a form of deism . . . ." (citation omitted)).

own.[139] Even the notorious self-proclaimed "atheist" French encyclopedists, who "may have been close to total non-belief,"[140] wrote of "Nature"-with-a-capital-N, or "Nature Active," imbued with "extraordinary" vitalistic powers that today we'd hardly hesitate to call "religious"—some form of spiritualism or pantheism.[141] So no wonder everyone thought the bona fide atheists about whom they fantasized were untrustworthy, intellectually vapid, "either wholly deranged or wholly insincere."[142] *They were*. Or, rather, they were necessarily positing a worldview on premises *at least* as dubious as the theists.[143]

This is the world in which the framers of the First Amendment wrote the term "religion." They were all theists.[144] They were not thinking of today's atheists when they sought to protect "religion."[145] It is true that they generally used "religion" to describe theistic doctrines.[146] But no one was thinking about atheism as a serious alternative to theism. Theism was not, at the end of the eighteenth century, a worldview irrational or "insulated from evidence,"[147] or "non-cognitive,"[148] or "accessible only to those who already believe."[149] It was a broad set of worldviews, held by nearly everyone, at least as plausible as its thoroughly anachronistic alternatives.

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139. *See* Alan Charles Kors, *The Age of Enlightenment*, *in* THE OXFORD HANDBOOK OF ATHEISM 195, 195 (Stephen Bullivant & Michael Ruse eds., 2013) ("[A]lmost all educated minds believed that, inductively, the whole of nature, or, deductively, demonstration of God from Being itself, or, for those with less confidence in reason, inward experience established beyond sincere doubt the existence of God.").

140. Michael Ruse, *Origins*, *in* THE ROUTLEDGE COMPANION TO RELIGION AND SCIENCE 381, 384 (James W. Haag, Gregory R. Peterson & Michael L. Spezio eds., 2012).

141. Vartanian, *supra* note 135, at 55, 56; *see also id.* at 60 ("Consequently Diderot's assertion: 'Je crois in Deiu,' [(I believe in God)] . . . was not a mere gesture of solidarity amongst *philosophes*. Diderot's God was the creator of the *demiurgos* Nature.").

142. Kors, *supra* note 139, at 195.

143. *See, e.g.*, DAWKINS, *supra* note 18, at 5 ("I could not imagine being an atheist at any time before 1859 . . . .").

144. *See* George C. Freeman, III, *The Misguided Search for the Constitutional Definition of "Religion,"* 71 GEO. L.J. 1519, 1521 (1983) ("At that time in American history . . . all of the unorthodox believers appear to have been theists."); McConnell, *supra* note 5, at 1497–98 (noting that, for the founders, "belief in the existence of God was natural and nearly universal").

145. *See* Schwartzman, *supra* note 3, at 1406 ("[T]here is substantial evidence that the Founders did not understand either of the Religion Clauses to protect atheist beliefs.").

146. *See* Strang, *supra* note 4, at 1683 ("Approximately 74% of usages of the word religion in the data set were theistic.").

147. BRIAN LEITER, WHY TOLERATE RELIGION? 40 (2013) (emphasis removed); *see also* Feldman, *supra* note 7, at 371 ("The familiar dichotomy of reason and faith did not seem to Locke a contradiction.").

148. *See* Bradley, *supra* note 41, at 313 (describing "the all too common conception of religion as a non-cognitive enterprise").

149. Suzanna Sherry, *Enlightening the Religion Clauses*, 7 J. CONTEMP. LEGAL ISSUES 473, 479 (1996).

Indeed, in contrast, *atheism* was a fringe and rather nakedly difficult-to-justify perspective.[150]

This is the historical intellectual context in which we must understand the references to "God" and "piety" in the definitions of religion quoted above. This was a world and a linguistic milieu in which virtually everyone believed in some kind of god in some sense, in which there was no plausible alternative.[151] To say "virtue, as founded upon reverence of God," in this context is not to say much more than "virtue," or "virtue founded upon some remotely plausible theory of the foundations of ethics," or "virtue, as opposed to nihilism." "Piety" must mean something closer to "conscientiousness." The term "religion" simply referred to the entirety of the set of serious theories then extant. It may have had outer limits in excluding poorly thought-through, absurd, or nihilistic worldviews that failed to engage the pellucid empirical fact of biological complexity. But it covered everything that anyone of any intellectual gravity thought was true for ten millennia of human inquiry in thoroughly coterminous magisteria[152]—from Plato and Aristotle to Confucius and Buddha; from Christ to Mohammed; from Descartes and Locke to Voltaire and Hume.[153]

But this all was, of course, an intellectual world very different from our own. That is because—more than anything else—of Charles Darwin's 1859 publication of *On the Origin of Species* and the plausible, grounded, and empirically supported totalizing materialist metaphysics it made possible.[154] *Origin* argued—and marshalled vast evidence to show—that apparent biological design could arise entirely by the interaction of random mutation and differential survival.[155] The "Darwinian Revolution" that followed—the

150. *See, e.g.*, Nathan S. Chapman, *Disentangling Conscience and Religion*, 2013 U. ILL. L. REV. 1457, 1470 ("The reason few Americans imagined a place for nonreligious conscience was surely that most of them maintained Locke's Protestant assumptions about the centrality of the individual's pursuit of eternal salvation, together with his suspicion of the untrustworthiness of atheists."); Feldman, *supra* note 7, at 376 (noting that atheism was not considered compatible with "any possible view of conscience" which was "not a form of extremism").

151. *See* STEVEN WALDMAN, FOUNDING FAITH: PROVIDENCE, POLITICS, AND THE BIRTH OF RELIGIOUS FREEDOM IN AMERICA 82 (2008) ("Remember: In this era before Charles Darwin, most of the Enlightenment leaders were *not* arguing against the existence of God.").

152. That is, the idea that religion and science address "nonoverlapping magisteria" is itself a product of Darwinism. *See* Stephen Jay Gould, *Nonoverlapping Magisteria*, NAT. HIST., Mar. 1997, at 16.

153. *See* sources cited *supra* notes 138–41; *see also* DAWKINS, *supra* note 18, at 3–4 ("Almost everybody throughout history, up to the second half of the nineteenth century . . . believed . . . the Conscious Designer theory.").

154. *See* Julian Huxley, *Introduction* to DARWIN, *supra* note 21, at xi ("Why is *The Origin of Species* such a great book? First of all, because it convincingly demonstrates the fact of evolution . . . ."); RUSE, *supra* note 19, at 1 (noting that before Darwin, belief in god was entirely rational in the absence of a theory that could explain apparent design without a designer); DAWKINS, *supra* note 18, at xii ("It took a very large leap of the imagination for Darwin and Wallace to see that, contrary to all intuition, there is another way . . . for complex 'design' to arise out of primeval simplicity.").

155. *See generally* DARWIN, *supra* note 21.

reckoning with this insight by scientists and philosophers, authors and theologians, commentators and ordinary people—was one of the most significant shifts of thought in the entirety of human history.[156] *Of course* it profoundly changed our understanding of the word "religion," in many ways its chief object.[157] To suppose otherwise would be like reading "deus" in Cicero without accounting for the earthquake of Christ.

For the first time, the theory of evolution by natural selection offered a plausible explanation for teleology, diversity, and complexity in biology that did not posit a designer, and was consistent with a thoroughgoing metaphysical materialism.[158] The argument from design collapsed. It could be answered.[159] You could walk in your garden and see in it the self-evidently miraculous beauty of life and explain how it could get there by chance plus differential survival. Darwinism, thus, heralded a radical change in the way all of us—"non-believers" and "believers" alike—understand the world and our place in it. It fundamentally shifted the burden of proof of any such theory.[160] No longer was it materialist doctrines that had to explain biology; it was theistic doctrines that had to explain what work their god idea did in a world that no longer needed it for biology.[161]

Incidentally, the timing of the Darwinian Revolution—beginning in 1859 and having thoroughly swept through the elite world no later than, say,

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156. *See* PHILIP LIEBERMAN, THE THEORY THAT CHANGED EVERYTHING: "ON THE ORIGIN OF SPECIES" AS A WORK IN PROGRESS xi–ii (2018) ("[Darwin] changed how we view the evolution of all forms of life and their place in nature."); PRUM, *supra* note 124, at 17 ("Adaptation by natural selection is among the most successful and influential ideas in the history of science, and rightly so."); RUSE, *supra* note 17, at ix ("The arrival of the *Origin* changed man's world. At once, it was seen to have implications far beyond biology. It struck at beliefs and behaviors from the most trivial to the most profound."); *see also* KOPPELMAN, *supra* note 29, at 35 (noting that in the late-nineteenth century scientists for the first time "were increasingly persuaded that religion was incompatible with Darwinian evolution"); sources cited *supra* notes 17–18.

157. *See, e.g.*, ÉMILE DURKHEIM, THE ELEMENTARY FORMS OF THE RELIGIOUS LIFE 39–43 (Joseph Ward Swain trans., 1915) (arguing that the development of science as a materialist worldview has dramatically changed Western understanding of the concept of "religion").

158. *See* Francisco J. Ayala, *Darwin's Greatest Discovery: Design Without Designer*, 104 PNAS 8567, 8597 (2007) ("Darwin completed the Copernican Revolution by drawing out for biology the notion of nature as a lawful system of matter in motion that human reason can explain without recourse to supernatural agencies."); *see also* DAWKINS, *supra* note 18, at 3 ("Were we designed on a drawing board too, and were our parts assembled by a skilled engineer? The answer is no. It is a surprising answer, and we have known and understood it for only a century or so."); RUSE, *supra* note 19, at 1.

159. *See* DAWKINS, *supra* note 18, at 6 ("Darwin made it possible to be an intellectually fulfilled atheist.").

160. *See, e.g.*, RUSE, *supra* note 19, at 79 ("The point to be made here is not that everyone becomes a Darwinian . . . . It is rather that even if someone like Dickens rejects pure Darwinism, he knows that he is working in a Darwinian environment and his rejection has to be conscious." (citation omitted)); *see also* DENNETT, *supra* note 18, at 18 ("Almost no one is indifferent to Darwin, and no one should be.").

161. *See* DENNETT, *supra* note 18, at 47 ("[G]iven all the telltale signs of the historical process that Darwin uncovered . . . could anyone imagine how any process *other* than natural selection could have produced all these effects?").

the appearance of natural selection as fact on the 1875 Cambridge University science examinations[162]—explains why the Supreme Court's early efforts to construe "religion" are not particularly illuminating. Indeed, the Court's first engagement with the concept of religion comes in the 1890 case *Davis v. Beason*.[163] The Court there offered something much like today's natural sense of "religion"—referring to, at least at its core, theistic doctrines.[164] But this sheds no light on the understanding of the term a century earlier. By 1890, the Darwinian Revolution had happened; the chasm of intellectual history that lies between us and the founding had already opened.

Believing in a god today is quite simply a radically different epistemic proposition than it was before 1859. And speaking about gods has, as a result, become a different project—even using the same words as we might have two hundred years ago, we inevitably say something quite different. This semantic shift is perhaps nowhere clearer than in the concepts against which we bound the concept of "religion."

C. The Darwinian Revolution and Conceptual Contrasts

The radical intellectual shift of the Darwinian Revolution had its effects on semantics as much as on anything else.[165] What happened upon the emergence of a novel worldview that positioned itself against all then-extant worldviews was that the term "religion"—generally used to refer to all worldviews until then—was cabined to refer to the prior ones; "science" came to describe the new alternative. "Religion" came collectively to stand for the old way, science for the new. "Religion" came to mean something like "anti-materialism" or even, let's be honest, "anti-Darwinism," which it obviously could not have possibly meant at the founding.

This kind of linguistic evolution, in which a word is reallocated from covering a broad category to a subset of it on the introduction of a new word or words (a kind of "semantic narrowing"), happens all the time—"house" used to mean "dwelling" generally, but is now bounded by "apartment" in

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162. RUSE, *supra* note 17, at xii ("If one makes the reasonable assumption that by the time something gets into undergraduate examinations it is fairly uncontroversial, it follows that in no more than a quarter of a century the scientific community had made a complete about-face on the question of evolution.").

163. 133 U.S. 333 (1890).

164. *Id.* at 342 ("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.").

165. *See, e.g.*, RUSE, *supra* note 17, at x ("[T]he term 'evolution' came into general modern use only in the time of Darwin." (citation omitted)); *see also* RICHARDS, *supra* note 6, at 127 ("Developments in science have further expanded . . . metainterpretive diversity . . . over how to reconcile the epistemic claims of science (such as evolution) with traditional Bible interpretation.").

American English;[166] "nature" once meant "being" generally, before certain metaphysical theories divided the "natural sciences" from the "humanities";[167] before the thirteenth century "meat" just meant "food."[168]

Indeed, one of the primary ways in which we today understand the concept of "religion" is in opposition to and delimited by the concept of "science."[169] After all, it is only as constrained by "science" that contemporary theorists so often see "religion" as referring to belief in supernatural forces, or being irrational,[170] or epistemically inaccessible to those not already believers.[171] This opposition is entirely the result of the Darwinian Revolution. The oppositional phrases "religion and science" and "science and religion" were first attested contemporaneously with Darwin.[172] Indeed, the word "science" in its modern sense—the "intellectual and practical activity encompassing those branches of study that relate to the phenomena of the physical universe and their laws"[173]—did not even

166. "House" is derived from the Old English "hus" meaning "dwelling," or "shelter." *House*, ONLINE ETYMOLOGY DICTIONARY, https://www.etymonline.com/word/house [https://perma.cc/54HG-8ESZ]. "Apartment" is only attested from the seventeenth century, with the rise of urbanization. *Apartment*, ONLINE ETYMOLOGY DICTIONARY, https://www.etymonline.com/word/apartment [https://perma.cc/7WD7-7FLP].

167. *See generally* Frédéric Ducarme & Denis Couvet, *What Does 'Nature' Mean?*, PALGRAVE COMMC'NS, 2020, at 14.

168. *See Meat*, ONLINE ETYMOLOGY DICTIONARY, https://www.etymonline.com/word/meat [https://perma.cc/R232-AA2F] (noting that meat is derived from the Old English *mete*, meaning "food, nourishment, sustenance").

169. *See, e.g.*, Tish Harrison Warren, *How Covid Raised the Stakes of the War Between Faith and Science*, N.Y. TIMES (Nov. 7, 2021), https://www.nytimes.com/2021/11/07/opinion/faith-science-covid.html [https://perma.cc/ML52-GLBT].

170. *See* Sherry, *supra* note 149, at 478 ("For the faithful, the ultimate authority and source of truth is extrahuman, and evidence can—and in some religious traditions, must—be entirely personal to the individual; for the reasonable, both the source and the evidence for the truth lie in common human observation, experience, and reasoning."); A. J. AYER, LANGUAGE, TRUTH AND LOGIC 74 (1936) ("[The theist's] assertions cannot possibly be valid, but they cannot be invalid either.").

171. Kent Greenawalt, *Grounds for Political Judgment: The Status of Personal Experience and the Autonomy and Generality of Principles of Restraint*, 30 SAN DIEGO L. REV. 647, 649 (1993) ("The truths that one person learns by making a leap of faith are not fully accessible to someone who has not made a similar leap, and generally accessible reasons are not powerful enough to induce a leap of faith.").

172. *See* PETER HARRISON, THE TERRITORIES OF SCIENCE AND RELIGION 171 (2015) ("When did people first begin to speak about science and religion, using that precise terminology? As should now be apparent, this could not have been before the nineteenth century. When we consult written works for actual occurrences of the conjunction 'science and religion' or 'religion and science' in English publications, that is exactly what we discover." (citation omitted)); Jon H. Roberts, *Science and Religion*, *in* WRESTLING WITH NATURE: FROM OMENS TO SCIENCE 253, 254 (Peter Harrison, Ronald L. Numbers & Michael H. Shank eds., 2011) ("[P]rior to about the middle of the nineteenth century, the trope 'science and religion' was virtually nonexistent."); *see also Science, Prayer, Free Will, and Miracles*, DUBLIN REV., 1867, at 8, 8 ("[W]e shall . . . use the word 'science' in the sense which Englishmen so commonly give to it; as expressing physical and experimental science, to the exclusion of theological and metaphysical.").

173. *Science*, OXFORD ENG. DICTIONARY, https://www.oed.com/dictionary/science_n?tab=meaning_and_use-paywall#23959055 [https://perma.cc/5CNE-RSAF] (noting that this is "[t]he most usual sense since the mid 19th cent. when used without any qualification" and that it is this sense "[o]ften

exist until Darwin's time.[174] Before that, what we call "science" was referred to as "natural philosophy" or "natural *theology*," and was not understood by anyone to exist in opposition to, or as a boundary of, theology proper.[175]

Similarly, in today's legal and philosophical discourse, we also often think of "religion" as contrasted with "secular doctrines," "secularism," or "non-religious" worldviews.[176] So, where Christianity is "religious," scholars typically cite utilitarianism or Kantianism as "non-religious" or "secular" doctrines.[177] These contrasts, too, are anachronistic. "Secularism" first appeared in its modern sense—as a contrast to not just the institution of the church or the spiritual realm, but religion generally—in 1851.[178] And, for instance, Kant hardly saw Kantianism as an "alternative to religion" or a "secular doctrine"—he believed in God.[179] One might be a rigorously intellectual atheistic Kantian today, but that is only, frankly, courtesy of one Charles Darwin.

One contrastive concept that did exist at the time was "atheism"—and it is true that the founders and others often inveighed against purported "atheists." But it is worth taking close note of how the word "atheism" was used in the late eighteenth century, and what the founding generation was really saying about the "hypothetical atheists that occasionally appeared in their rhetoric."[180] Consider how John Locke argued that "[p]romises, covenants, and oaths, which are the bonds of human society, can have no hold upon an atheist."[181] Or a Connecticut legislator in 1755—it would be "absurd, to speak of allowing Atheists Liberty of Conscience. Because he

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contrasted with religion when regarded as constituting an influence on a person's world view or belief system").

174. *See* Helen De Cruz, *Religion and Science*, *in* THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY 1.2 (Edward N. Zalta & Uri Nodelman eds., 2017), https://plato.stanford.edu/archives/spr2017/entries/religion-science/ [https://perma.cc/EJS4-YCFT] ("The term 'science' as it is currently used . . . became common only in the nineteenth century . . . .").

175. *See* Michael W. McConnell, *Why Protect Religious Freedom?*, 123 YALE L.J. 770, 794 (2013) (reviewing BRIAN LEITER, WHY TOLERATE RELIGION? (2012)) (interpreting the phrase "natural philosophy" from the eighteenth century to mean "science").

176. *See, e.g.*, Schwartzman, *supra* note 3, at 1392 (arguing that "comprehensive secular moral, ethical, and philosophical doctrines . . . may be similarly inaccessible" as those arising from a belief in God).

177. *See id.* (referring to "Kantianism, utilitarianism, [and] liberal perfectionism" as "secular doctrines").

178. *See generally* GEORGE JACOB HOLYOAKE, ENGLISH SECULARISM: A CONFESSION OF BELIEF v–xii (Chicago, Open Court Publishing Co. 1896); *see also* KOPPELMAN, *supra* note 29, at 35 ("The late nineteenth century also saw the emergence of the first anti-religious secularists.").

179. *See* Alexandru Petrescu, *The Idea of God in Kantian Philosophy*, 163 PROCEDIA – SOC. & BEHAV. SCIS. 199, 200 (2014) ("The issue of existence and justification of the Supreme Being is constantly approached by Immanuel Kant in his entire work. For Kant, the ultimate goal of the nature created by God id [sic] man as a moral being . . . .").

180. *See* Douglas Laycock, *Religious Liberty as Liberty*, 7 J. CONTEMP. LEGAL ISSUES 313, 318 (1996).

181. John Locke, *A Letter Concerning Toleration*, *reprinted in* JOHN LOCKE: A LETTER CONCERNING TOLERATION IN FOCUS 47 (John Horton & Susan Mendus eds., 1991).

who professeth himself to be an Atheist, at the same Time professes that he has no Conscience. For what Conscience can a Man have; who believes there is no God, no moral Obligations, no future Rewards, and Punishments?"[182]

It *sounds* like these speakers really don't like atheists, and that they think atheism is a concept distinct from "religion," but what were they really talking about? Recall the epistemic posture required to reject the existence of a designer in the eighteenth century—you would either have to ignore the complexity of the living world (obviously unserious), or concede that you simply had no explanation for biology and carry on with your life anyway.[183] Suppose you did the latter. In the course of living, you necessarily make decisions that most of us think have ethical content. But in your case, you would have to make these choices without recourse to a general theory of ontology, and, therefore, metaethics, which depends on it.[184] You would be deciding based on a transparently undertheorized theory, one that offers no account of what is pre-philosophically one of the most significant questions in our lives—why we are here.

In other words, you couldn't (just as no one can, today) avoid making or relying on claims about ontology in living your life. If we *are* the product of a conscious designer with certain, particular aspirations for us, for example, that would have implications for how we ought to live—if there *is* a God who wants us to die in battle for Christendom, then maybe we should. In rejecting that hypothesis without an alternative, the best you could do would be to assert that regardless of the metaphysical fabric of the universe, you are going to live the way you want to. A fully realized ethics transparently depends on a fully realized metaethics, and a fully realized metaethics depends on at least *some* account of metaphysics and the nature and constituents of the universe. Before Darwin, in rejecting the only plausible set of theories about the latter that were available without offering a plausible alternative, you *were* severing any foundation for ethics. This isn't "atheism" as we understand it today. It is a position that looks a lot more like *nihilism*.

And look closely at what the speakers above were worried about in "atheists"—atheism's alleged incompatibility with *social responsibility*;

182. MOSES DICKINSON, A SERMON PREACHED BEFORE THE GENERAL ASSEMBLY OF THE COLONY OF CONNECTICUT, AT HARFORD ON THE DAY OF THE ANNIVERSARY ELECTION, MAY 8TH, 1775, at 35 (Conn. 1755).

183. *See, e.g.*, DAWKINS, *supra* note 18, at 6 ("An atheist before Darwin could have said, following Hume: 'I have no explanation for complex biological design. All I know is that God isn't a good explanation, so we must wait and hope that somebody comes up with a better one.' I can't help feeling that such a position, though logically sound, would have left one feeling pretty unsatisfied, and that although atheism might have been *logically* tenable before Darwin, Darwin made it possible to be an intellectually fulfilled atheist.").

184. *See infra* note 265.

with the ability to undertake binding obligations and be responsive to ethical reason. In their defense, these speakers were talking about a (largely hypothetical) class of persons who in fact *had no theory about the universe and didn't seem to think that mattered*. Note how different saying precisely what John Locke said about atheists would be today. Today, an atheist can respond "No, I do not believe in a god, but I have an explanation for where all this came from, what that means about the universe, and a theory of the relationship of metaphysics to our social relationships and obligations." In the eighteenth century, all an atheist could say would be "I don't believe in a god, I have no explanation for where all this came from, but as far as I'm concerned it doesn't matter anyway. So maybe you're right, why should I be held to my contractual obligations?"

The founding generation's failure to *say* "nihilism" when that was closer to what they were talking about, moreover, makes sense historically—"nihilism" was apparently coined in German in 1817,[185] and didn't enter common English usage until the mid-nineteenth century.[186] So maybe the Religion Clauses have what might be thought of as a "Nihilism Exception"—they might not cover truly nihilist doctrines that reject all claims about the foundations of morality or think these kinds of questions don't matter (then again, maybe not—the stray rantings of certain intellectual forebears of the founders are not exactly what was enacted in the First Amendment). But the point is that just as the concept of "religion" has changed fundamentally since Darwin, so too has the "atheism" by which it is bounded.

"Religion" then, when the First Amendment was written, was not limited to theological beliefs. Nor to the doctrines of particular religions. It by necessity referred to something broader—worldview; theory of the good life; ontology; metaethics; "comprehensive doctrine[]";[187] a theory of the universe and our place within it.[188] This, in short, is how the term "religion" must have been understood when it was written in the First Amendment.

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185. *Nihilism*, ONLINE ETYMOLOGY DICTIONARY, https://www.etymonline.com/word/nihilism [https://perma.cc/MDR5-YURX] (explaining that nihilism was "coined by German philosopher Friedrich Heinrich Jacobi").

186. *See Nihilism*, OXFORD ENG. DICTIONARY, https://www.oed.com/dictionary/nihilism_n?tab=factsheet#34880422 [https://perma.cc/T4XH-8WTV]. The OED only lists one usage, from 1812, in English preceding its appearance in German: "All creatures of error; as ghosts, monsters, gods, and the more dangerous subtleties of metaphysicians, necessity, optimism, chivalry of virtue, and nihilism." *Id.*

187. JOHN RAWLS, POLITICAL LIBERALISM xxiv (expanded ed. 2005) ("[P]olitical liberalism assumes the fact of reasonable pluralism as a pluralism of comprehensive doctrines, including both religious and nonreligious doctrines.").

188. *See, e.g.*, Philip A. Hamburger, *A Constitutional Right of Religious Exemption: An Historical Perspective*, 60 GEO. WASH. L. REV. 915, 938 (1992) ("Americans also sometimes listed the things that civil authority could not establish or determine. Typically, they mentioned religious belief and doctrine—what Locke had called 'speculative opinions.'").

III. RELIGION IN CONTEXT

In light of the Darwinian Revolution, there is a strong case that the straightforward semantic content of the word "religion" in the late eighteenth century referred to a different concept than it does today. But semantics is not the only support for this broader interpretation. Indeed, understanding "religion" as worldview makes sense of a number of further pragmatic and contextual factors about how the founders evidently understood the rights they were trying to protect.

First, I suggest that the language of the First Amendment is very much what we would expect if the framers were trying to speak broadly. Next, I argue that religion-as-worldview, but not religion-as-theism, fits with the founders' understanding of freedom of religion as a universal, natural right. Moreover, it makes better sense of the inclusion of "religion" alongside the other rights protected by the First Amendment, and our best understanding of the political philosophy that animated it—liberalism. Finally, it is worth pointing out that, as many scholars have noted, protecting religion-as-worldview makes a great deal more normative sense than protecting religion-as-theism—and even if the evidence offered is only suggestive, the presumption that the founders were reasonable people trying to accomplish reasonable ends might get us across the line.

A. Alternative Words or Phrases

As discussed above, understanding the communicative content of the First Amendment is not only a question of the semantic content of "religion." It is also important to consider alternative ways in which, given the lexicon and usages of the time, the founders could have communicated the message that I am ascribing to them. After all, if there were an obvious alternative way the founders could have less ambiguously protected worldview generally, this would be a strike against my interpretation. But there wasn't—and indeed the language we've ended up with is very much the language we would expect if the founders were trying to speak broadly.

The most frequently suggested alternative phrase is "freedom of conscience."[189] This and related phrases were in wide circulation at the founding.[190] And indeed, earlier drafts of the First Amendment referred to "rights of conscience" and "equal rights of conscience,"[191] which were

189. *See, e.g.*, Schwartzman, *supra* note 3, at 1404–05 (suggesting that the choice of "religion" over "conscience" supports a "more limited" interpretation).

190. *See id.*

191. *See, e.g.*, Philip B. Kurland, *The Origins of the Religion Clauses of the Constitution*, 27 WM. & MARY L. REV. 839, 855 (1986) (quoting initial drafts with this language); *see also* Vincent Phillip

replaced with "religion" for unknown, undiscussed reasons.[192] Some have argued that this choice indicates a conscious desire to limit the First Amendment to theistic religions.[193] But, especially given that the change was made without discussion, the better understanding (around which there is something of a scholarly consensus) is that the framers considered the phrases to be *equivalent*; that the "free exercise of religion" and "rights of conscience" were semantically and conceptually *co-extensive*.[194] These phrases were used interchangeably, and there is, indeed, no contemporaneous evidence suggesting that anyone saw them differently.[195]

Some argue, therefore, that the phrase "freedom of conscience" at the founding was, too, understood to be limited by today's sense of the word "religion."[196] But in fact the equivalence of these phrases suggests precisely the opposite, and supports a broad understanding of "religion" rather than a narrow understanding of "freedom of conscience." The phrase "freedom of conscience" *obviously* applies more broadly than "freedom of conscience with regard to a limited set of supernatural metaphysics that assert the existence of an anthropomorphic God." As a matter of straightforward semantics, "freedom of conscience" refers to individual moral sense, not the content of its conclusions. The fact that "religion" was universally understood to mean "freedom of conscience *generally*," then, bolsters a broader reading of the term.

What else might the founders have said? The truth is that even today there is no perfect (at least not colloquial) English word for what we are talking about—for general theories of metaphysics and the foundations of ethics. Rawls suggested "comprehensive doctrine."[197] I'm going with "worldview"—which did not exist at the founding, and was borrowed from the German *Weltanschauung* in the mid-nineteenth century (perhaps

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Muñoz, *If Religious Liberty Does Not Mean Exemptions, What Might It Mean? The Founders' Constitutionalism of the Inalienable Rights of Religious Liberty*, 91 NOTRE DAME L. REV. 1387, 1393–94 (2016) (summarizing state provisions on religious liberty).

192. *See* JOHN WITTE, JR., JOEL A. NICHOLS & RICHARD W. GARNETT, RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT 88–89 (5th ed. 2022).

193. Schwartzman, *supra* note 3, at 1404–06 (summarizing scholarship).

194. *See, e.g.*, WITTE ET AL., *supra* note 192, at 124 (arguing that "an explicit liberty of conscience clause was left out of the First Amendment" because "it is an inherent part of the free exercise clause"); Freeman, *supra* note 144, at 1522 ("[T]he Founders may have thought [a protection for freedom of conscience] was redundant, the right to freedom of conscience being subsumable under the right to free exercise of religion."); Chapman, *supra* note 150, at 1468–69 ("The most likely reason is that many believed rights of conscience to be redundant with free exercise of religion.").

195. *See* Chapman, *supra* note 150, at 1460 ("The drafters and ratifiers of the First Amendment . . . used religious freedom and liberty of conscience interchangeably."); McConnell, *supra* note 5, at 1482–83 ("In many contexts, the phrases 'rights of conscience' and 'free exercise of religion' seem to have been used interchangeably.").

196. *See, e.g.*, Schwartzman, *supra* note 3, at 1407 (summarizing scholarship making this argument).

197. *See* RAWLS, *supra* note 187, at 441.

English speakers needed a new word to do the work that "religion" had previously done?).[198] "Ontology" was thrown around in its technical sense in metaphysical philosophy in the eighteenth century,[199] but doesn't seem to have appeared as a countable noun meaning something like "worldview" until the nineteenth.[200] "Morality" was around in more or less its modern sense, but "morality" is not right.[201] We're not talking just about ethics, but ethics as part of and based upon a general theory about their foundations—metaethics and the metaphysical architecture of the universe are of course what the idea of "religion" is all about.

In short, in 1791, if you were trying to prevent a government from adopting any particular worldview, you probably would have written something quite like "Congress shall make no law respecting an establishment of religion." There would not have been much of an alternative way to communicate this idea.

B. Freedom of Religion as a Universal, Natural Right

The hypothesis that the sense of "religion," at the time of the founding, was something closer to "worldview" is further supported by the well-documented historical fact that the founders understood the freedom of "religion" to be a *universal*, *individual*, *natural* right.[202] As Madison put it, "[t]he Religion then of *every man* must be left to the conviction and conscience of every man."[203] To Adams, religious freedom "resides in Hindoos and Mahometans, as well as in Christians; in Cappadocian monarchists, as well as in Athenian democrats; in shaking Quakers as well as in . . . Presbyterian clergy; in Tartars and Arabs, Negroes and Indians . . . [in all] the *people* of the United States" (note, incidentally, Adams's

198. *See, e.g.*, *World-View*, OXFORD ENG. DICTIONARY, https://www.oed.com/dictionary/world-view_n?tab=factsheet&tl=true [https://perma.cc/BF5L-Y9HB] (first example from 1848).

199. *See, e.g.*, ADAM SMITH, *On the Revenue of the Sovereign or Commonwealth*, *in* AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 536, 595–96 (Sálvio Marcelo Soares ed., 2007) (1776) ("[S]ubtleties and sophisms . . . composed the whole of this cobweb science of Ontology, which was likewise sometimes called Metaphysics.").

200. *See Ontology*, OXFORD ENG. DICTIONARY, https://www.oed.com/dictionary/ontology_n?tab=meaning_and_use&tl=true#33598320 [https://perma.cc/Z68L-4MEC] (noting first usage of "ontology" "[a]s a count noun: a theory or conception relating to the nature of being" in 1855).

201. *See Morality*, OXFORD ENG. DICTIONARY, https://www.oed.com/dictionary/morality_n?tab=meaning_and_use#36037258 [https://perma.cc/G87E-D2W9]; *see also* Bradley, *supra* note 41, at 301–02 (noting that, at the time of the founding, "[m]orality . . . was securely distinguished from religion").

202. *See, e.g.*, Muñoz, *supra* note 191, at 1397 ("[T]he language of the Founding-era declarations of rights reveals that the Founders understood that *all individuals* possessed the right to worship according to conscience."); *see also, e.g.*, Michael A. Helfand, *Religious Institutionalism, Implied Consent, and the Value of Voluntarism*, 88 S. CAL. L. REV. 539, 565 (2015) ("This embrace of voluntarism led both Locke and Jefferson to further emphasize that individuals were not, '*by nature* bound to any church,' but instead 'every one joins himself voluntarily to that society in which he believes he has found that profession and worship which is truly acceptable to God.'").

203. Everson v. Bd. of Educ. of Ewing, 330 U.S. 1, 64 (1947) (emphasis added).

inclusion of "monarchists" and "democrats").[204] Similarly, Jefferson understood religious freedom as a right possessed by individuals, "the Jew and the Gentile, the Christian and Mahometan, the Hindoo, and Infidel of every denomination."[205]

The understanding of the concept of religion as universal and individual was, indeed, generally characteristic of the time. The Baptist leader John Leland said that "*every man* must give an account of himself to God,"[206] an anonymous Massachusetts pamphleteer that "*each individual* shall . . . maintain his own system of religion,"[207] and lesser-known founder Richard Spaight that "[*e*]*very man* has the right to worship the Supreme Being in the manner he thinks proper."[208] Indeed, David Richards has argued that the framers derived the principle of religious toleration from a theory of individual moral sense, under which "only each person's own inward reflection and experience could make possible the integrity and purity of both religion and practical ethics."[209]

In short, the founders thought of the freedom of "religion" they sought to protect as something within the province of *every individual*, a right natural, universally accessible and *accessed*—much like, from their perspective, the similarly inalienable rights of life, liberty, and the pursuit of happiness.[210] In contrast, there is no indication that the framers thought of the religious liberty rights they were enshrining as something to be accessed merely by a subset of the population animated by some discrete set of worldviews.[211]

It is hard to make sense of this understanding of the nature of the right of religious liberty if we are to read the term "religion" as limited to a suite of theistic or quasi-theistic doctrines. Not everyone has one of those. But everyone has a worldview. It may not be particularly sophisticated, or deeply thought through, or even fully coherent, but it is impossible to live without one. This is an inevitable feature of the human condition that plausibly arises universally in a state of nature. To the extent then, that the founders thought of the right to define one's "religion" as universal,

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204. Letter from John Adams to John Taylor (Apr. 15, 1814), *in* THE WORKS OF JOHN ADAMS 447, 474 (Charles Francis Adams ed., 1851) (emphasis added).

205. THOMAS JEFFERSON, *Autobiography*, *in* 1 THE WRITINGS OF THOMAS JEFFERSON 1, 66–67 (Andrew A. Lipscomb ed., 1905).

206. WITTE ET AL., *supra* note 192, at 61 (emphasis added).

207. *Id.* at 62 (emphasis added).

208. *Id.* at 73 (emphasis added).

209. RICHARDS, *supra* note 6, at 108.

210. *See generally* Muñoz, *supra* note 191 (making this argument).

211. *See, e.g.*, WITTE ET AL., *supra* note 192, at 50 ("Religion was one of the natural and unalienable rights that God had given to *each person* upon birth, Enlightenment writers believed." (emphasis added)).

personal, and pre-political, the term must have referred to something like worldview generally.

C. Religion and the Rest of the First Amendment

The First Amendment—Religion Clauses, Speech Clause, Press Clause, Assembly Clause, Petitions Clause—is a single sentence.[212] Many of us were taught in school that a sentence is a grammatical unit designed to convey a "complete thought" or a "single idea."[213] And indeed, modern experimental psycholinguistics has largely vindicated this hypothesis—sentences are used and understood as a basic structure of semantics.[214] In ordinary speech, we pause markedly and most distinctively at the ends of sentences, understanding them to be discrete and cohesive units of meaning, not merely chains of words.[215] In the words of foundational psychologist Wilhelm Wundt, "it might be said that the sentence is one long word," that "[t]he total of what is to be said exists in the consciousness precedent to the utterance, and dominates the utterance throughout."[216]

Moreover, the First Amendment is a sentence with a particular grammatical structure—it's a list. "Congress shall make no law doing [X, or Y, or Z, etc., etc.]." In lists, as a matter of grammar and formal logic, the items listed (X, Y, and Z), could in *principle* have nothing to do with each other. Grammatically, the First Amendment could have been written "Congress shall make no law regarding the distribution of tacos, nor regulating foreign vessels, nor declaring war on Sweden without prior approval of the President." But people do not use lists for saying things like that. You *could* tell me to go to the store and get "milk, flour, eggs, and an M4 Sherman tank," but I'm going to have questions about what you're making.[217]

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212. *See* U.S. CONST. amend. I.

213. *See, e.g.*, J. Söderlind, *Utterance, Sentence, and Clause as English Speech-Units*, 45 ENG. STUD. 50, 50 (1964) (noting that a "sentence" has been "[t]raditionally" defined as "the expression of a complete thought").

214. *See, e.g.*, DAVID J. TOWNSEND & THOMAS G. BEVER, SENTENCE COMPREHENSION: THE INTEGRATION OF HABITS AND RULES 1–2 (2001) ("[T]he sentence provides the minimal domain into which elementary meanings can be placed and combined. . . . [T]he sentence level is a natural level of linguistic representation . . . ."); John D. Bransford & Jeffrey J. Franks, *The Abstraction of Linguistic Ideas: A Review*, 1 COGNITION 211, 212 (1972) ("[C]urrent linguistic accounts of language assign special status to the individual sentence, and the psycholinguistic research tends to reflect this point of view.").

215. *See, e.g.*, Frieda Goldman-Eisler, *Pauses, Clauses, Sentences*, 15 LANGUAGE & SPEECH 103, 110–12 (1972).

216. *Id.* at 112.

217. *See* Barotto & Mauri, *supra* note 90, at 102 (noting that a hearer directed to purchase three things will "wonder[] why the speaker built this list and what the three items have in common (are they ingredients for a specific recipe maybe?)").

Linguists have found that in natural speech, lists are tools used for category or concept development.[218] As Alessandra Barotto and Caterina Mauri argue, "every list construction triggers the presupposition of an underlying category subsuming the list members. . . . [L]ist construction[s] of the type [X (and, or) Y (and, or) (Z)] activate[] the presupposition that X, Y, (Z) share some common property P and are therefore exemplifications of the category defined by P."[219]

With the First Amendment, what *is* "category P"? What do all these listed things have in common? This question has never had an obvious answer. But it becomes a lot easier when "religion" is understood to broadly refer to worldview rather than narrowly to certain theistic worldviews. Indeed, scholars and courts have long wondered at the placement of "religion"—in today's sense—alongside speech and the press.[220] And religion, construed that way, has very little to do with the communication and socializing that the rest of the list seems to be about. But reading "religion" as "theory of how we ought to live and why" makes sense of its placement alongside speech and the press—that *is* something we speak about, write about, debate, and come together regarding. *All* these things are liberal features of public life—things connected in some way with our pursuits of and debates about the nature of the universe and its implications for our lives.

In short, understanding religion as worldview makes sense of a longstanding puzzle in interpreting the First Amendment that arises from the semantic characteristics of lists generally—the fact that, under the traditional interpretation of the term, the Religion Clauses seem to have little to do with the rest of the Amendment. The idea of religion-as-worldview, on the other hand, fits more clearly with the category the rest of the list of the First Amendment seems to create.

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218. *See* Ariel & Mauri, *supra* note 93, at 958 (finding that "or" is most commonly used as a mechanism for "referring to [a] higher-level category that the exemplars are members of" in ordinary speech). *See generally id.*; EWALD LANG, THE SEMANTICS OF COORDINATION (John Pheby trans., 1984) (describing the function of conjunctions including "and" and "or"); Robin Lakoff, *If's, and's and but's About Conjunction*, *in* STUDIES IN LINGUISTIC SEMANTICS 114–49 (Charles J. Fillmore & D. Terence Langendoen eds., 1971) (same).

219. *See* Barotto & Mauri, *supra* note 90, at 101.

220. For instance, Bhagwat offers what he presents as a general theory of the First Amendment (that it protects certain democratic values) from which he *explicitly* carves out the Religion Clauses. *See* Ashutosh Bhagwat, *The Democratic First Amendment*, 110 NW. U. L. REV. 1097, 1100–01 (2016). He argues that this move is justified by the fact of the First Amendment's drafting that the Religion Clauses were not combined with the other clauses until relatively late, *id.*, but this is hardly an orthodox approach to the interpretation of the semantic content of texts. *See supra* Part I.B.

D. Religion and the Purpose of the First Amendment

Understanding religion in a broader sense is also supported by the context of what seems to be the general purpose of the First Amendment—a legal instantiation of the founders' commitment to philosophical liberalism. "Liberalism" and "liberal" are, of course, spectacularly contested terms.[221] But in the relevant sense, liberalism is a political philosophy that commits the government to agnosticism as to the truth of citizens' worldviews. Liberalism holds that the question of how we ought to live and why is ultimately a matter of private, not state, decision-making.[222] And so it both commits the government not to adopt its own worldview and recognizes in individual citizens a broad prerogative to shape their own.[223]

Liberalism began as a solution to a history of violent contestation of worldviews with which the founders were well aware. Indeed, liberalism arose from the brutal violence of the centuries-long European wars of religion.[224] Before the Reformation, there was, in an important sense and as never before or after, *one* worldview in Europe—an intellectually united Christianity that accepted at least the existence of a single anthropomorphic God, the basic divinely inspired truth of the Bible, and the promise of the afterlife.[225] The Reformation shattered this worldview, launching two centuries of hardly interrupted sectarian warfare that ranks ignobly among

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221. *See, e.g.*, Richard Schragger & Micah Schwartzman, *Religious Antiliberalism and the First Amendment*, 104 MINN. L. REV. 1341, 1344 (2020) ("Liberalism is often ill-defined."); HELENA ROSENBLATT, THE LOST HISTORY OF LIBERALISM 1 (2018) ("[L]iberalism is . . . a highly contentious concept.").

222. *See* Kyla Ebels-Duggan, *Moral Education in the Liberal State*, 1 J. PRAC. ETHICS 34, 61 (2013) (arguing that liberalism allocates decision-making on questions of the good life to individuals, not the state).

223. *See* Schragger & Schwartzman, *supra* note 221, at 1350 ("[W]e understand [liberalism] at a minimum to require that the state not concern itself with the salvation of its citizens."); McConnell, *supra* note 175, at 781 ("In the liberal tradition, the government's role is not to make theological judgments but to protect the right of the people to pursue their own understanding of the truth, within the limits of the common good.").

224. *See* Schragger & Schwartzman, *supra* note 221, at 1351 ("The effort to separate the state and religion was in part a reaction to the European wars of religion between Protestants and Catholics."); RAWLS, *supra* note 187, at xxiv ("[T]he historical origin of political liberalism (and of liberalism more generally) is the Reformation and its aftermath, with the long controversies over religious toleration in the sixteenth and seventeenth centuries.").

225. *See* PETER G. WALLACE, THE LONG EUROPEAN REFORMATION: RELIGION, POLITICAL CONFLICT AND THE SEARCH FOR CONFORMITY, 1350–1750, at 3 (3d ed. 2020) ("At the core of the conflict between the Protestant reformers and the Catholic Church lay the account of this drama, the Bible, which all believed that human authors had composed under divine inspiration." (emphasis removed)).

the deadliest periods in human history.[226] For all their sometime patina of dynastic power, fundamentally at issue in these wars were disputes about how to live and why.[227] And in the unsteady peace that followed, there was no longer an intellectually coherent Christian*ity* but Christian*ities*—alternative, apparently plausible, mutually exclusive worldviews.[228]

The philosophers who developed liberalism—most prominently John Locke[229] but also to some extent Bodin, Milton, Montaigne, Pufendorf, Hobbes, and Bayle[230]—wrote in this post-apocalyptic intellectual context.[231] The Wars of Religion had taught these philosophers two essential things. The first was that the question of how we ought to live and why is hard and that thoughtful, intelligent people disagree about its answers in good faith.[232] Second, as they had clearly seen, worldviews are often the sort of thing for which people are willing to kill and die.[233] Thus the primary historical justification for liberalism relies on *practical* grounds—a compromise designed to prevent violence.[234]

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226. *See* ARNAUD BLIN, WAR AND RELIGION: EUROPE AND THE MEDITERRANEAN FROM THE FIRST THROUGH THE TWENTY-FIRST CENTURIES 241 (2019) (stating that from around 1525 "Europe began to experience religious violence that would shock, rock, and transform the continent over the next one hundred and twenty-five years" and "would, in the end, leave millions dead and launch the Western world in a new dimension").

227. *See id.* at 244 ("It seems safe to say that the main cause of the religious revolution was first and foremost . . . religion."); KOPPELMAN, *supra* note 29, at 29 ("Religious persecution during the Reformation was based centrally on the victims' refusal to accept specified philosophical claims.").

228. *See* RICHARD S. DUNN, THE AGE OF RELIGIOUS WARS 1559–1715, at 8 (2d ed. 1979) ("In the forty years since Martin Luther had launched his revolt, the people of western and central Europe had gradually arrayed themselves into warring Protestant and Catholic camps. Furthermore, the Protestants were themselves split into rival denominations—Lutheran, Calvinist, Zwinglian, Anabaptist, and Anglican—which were bitterly antagonistic toward one another.").

229. *See* JONATHAN RAUCH, KINDLY INQUISITORS 59 (1993) (describing Locke as the "father of liberalism itself"); *see also* W. JULIAN KORAB-KARPOWICZ, A HISTORY OF POLITICAL PHILOSOPHY: FROM THUCYDIDES TO LOCKE 291 (2010) (same).

230. *See* Charles Larmore, *Political Liberalism: Its Motivations and Goals*, *in* 1 OXFORD STUDIES IN POLITICAL PHILOSOPHY 62, 65 (David Sobel, Peter Vallentyne & Steven Wall eds., 2015) (observing that the "liberal tradition . . . begins paradigmatically with Locke" but including Bodin, Montaigne, Hobbes, and Bayle as "among its progenitors"); *see also* GEOFFREY TREASURE, THE MAKING OF MODERN EUROPE 1648–1780, at 91–92 (1985) (describing Milton and Pufendorf as advocating different forms of quasi-liberal tolerance).

231. *See, e.g.*, Glenn Burgess, *Was the English Civil War a War of Religion? The Evidence of Political Propaganda*, 61 HUNTINGTON LIBR. Q. 173, 201 (1998); *see also* McConnell, *supra* note 5, at 1431 ("John Locke . . . . [w]riting in the aftermath of religious turmoil in England and throughout Europe . . . viewed religious rivalry and intolerance as among the most important of political problems.").

232. *See* SELINA O'GRADY, IN THE NAME OF GOD: THE ROLE OF RELIGION IN THE MODERN WORLD 250 (2020) ("The exhausted belligerents saw religion as lying at the root of not just the Thirty Years' War but of the century-long wars and civil wars that had and still were bedeviling Europe.").

233. *See id.* at 218 ("The religious issues a stake were indeed of life and death importance to Christians—questions of doctrinal truths and the very nature of the Christian God they should believe in.").

234. *See, e.g.*, FRANCIS FUKUYAMA, LIBERALISM AND ITS DISCONTENTS 6 (2022) ("Liberalism

But some theorists of liberalism—from its early progenitors to today—offer a more full-throated defense. This theory is based on four claims, which overlap with liberalism's pragmatic premises—that (1) there is, or there may be, a *correct* theory of how we ought to live; (2) figuring out this theory is the most important aim of human civilization, or at least in individual lives; (3) figuring it out is hard; and (4) debate and contrastive practice in society is the best way over time to get closer.[235] Indeed, unlike some contemporary liberal theorists, most early proponents of liberalism were not relativists or value pluralists—they believed that although it is hard to find, there *is* a true account of how we ought to live.[236] Liberalism, from this perspective, is not merely a negative political compromise to keep us from killing one another—it can also be a positive theory designed to facilitate the collective process of getting closer.[237]

The framers of the United States Constitution were committed to liberalism for at least these reasons.[238] Indeed, although the colonies were spared the worst of the European religious wars, they were in many ways a *product* of them—founded by dissenting religious sects thrust out by an illiberal consensus that established worldviews and persecuted dissenters.[239] And because most of these dissenters were hardly liberals themselves, they

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sought to lower the aspirations of politics, not as a means of seeking the good life as defined by religion, but rather as a way of ensuring life itself, that is, peace and security."); BLIN, *supra* note 226, at 3 ("[T]he belief in a universal truth fosters a compelling desire to share this truth with others, which naturally attracts those with this desire to power and prompts them, once in the saddle, to use the traditional instruments at the disposal of those who wield power, including force.").

235. *Cf., e.g.*, Michael Stokes Paulsen, *The Priority of God: A Theory of Religious Liberty*, 39 PEPP. L. REV. 1159, 1161 (2013) ("[W]e protect the free exercise of religion for all (or as many as possible) . . . not because of skepticism about the possibility of religious truth but because of the conviction that religious truth is a possibility and because of an agreement that such truth is more important than anything else.").

236. *See* ROBERT G. INGRAM, REFORMATION WITHOUT END: RELIGION, POLITICS AND THE PAST IN POST-REVOLUTIONARY ENGLAND 8 (Alexandra Gajda, Anthony Milton, Peter Lake & Jason Peacey eds., 2018) ("The eighteenth-century English living in the grey dawn of modernity would have thought that postmodern hand-wringing about the very possibility of making non-scientific truth claims was wrong. Truth, perhaps ineffable, was ultimately identifiable.").

237. *See, e.g.*, KOPPELMAN, *supra* note 29, at 45 ("The state is agnostic about religion, but it is an interested and sympathetic agnosticism. The state does not say 'I don't know and you don't either.' Rather it declares the value of religion in a carefully noncommittal way: 'It would be good to find out. And we encourage your efforts to do that.'"); DUNN, *supra* note 228, at 245 (discussing Locke's motivations in arguing for a separation between church and state).

238. There are, to be sure, many other reasons someone might endorse liberalism. Indeed, the most prominent theory in the literature today is *ethical*—that only liberalism manifests the respect that citizens owe one another as citizens, and that the state owes to the citizens that compose it. *See, e.g.*, Han van Wietmarschen, *Political Liberalism and Respect*, 29 J. POL. PHIL. 353, 353 (2021) (arguing that "by far the most common and prominent" justification for liberalism is "in terms of respect").

239. *See* KOPPELMAN, *supra* note 29, at 28–29 ("[V]irtually every church that came to America in the seventeenth and early eighteenth centuries was, in one way or another, a dissenting church."); McConnell, *supra* note 5, at 1421 ("The English legacy was not a happy one. During the early settlement of the colonies in the seventeenth century, England suffered from chronic religious strife and intolerance.").

gave the New World its own brutal history of religious conflict from the witch trials of New England to campaigns of official religious persecution that continued until independence.[240] In short, the intellectual prerequisites of liberalism—recognition that people disagree about how to live and hurt one another over it—were in some ways even more prevalent in the colonies than Europe.[241]

In this context, although there were many things that Franklin, Madison, Hamilton, Washington, and Jefferson disagreed about, the basics of liberalism were not among them.[242] Indeed, as has long been understood, it was John Locke's liberalism—of all the Enlightenment and classical sources that influenced the Constitution—that was most influential on the framers and the structure of government they created.[243] It was Locke's language Jefferson borrowed in the Declaration of Independence and which permeates *The Federalist*; Locke's liberal toleration that underlay the founders' commitment to a limited government that in the first instance lacked authority to prescribe worldview.[244]

Given the well-documented historical influence of liberalism on the intellectual climate of the founding, it is worth considering the ways in which the Religion Clauses—which bear a striking resemblance to the tenets of the political philosophy of liberalism generally—might be understood as an effort to operationalize that commitment. After all, the basic commitment of liberalism is to a government that does not legally adopt or enforce the doctrines of a particular worldview (does not, perhaps, "*establish*" a worldview), and ensures that individuals can determine and pursue their own worldview for themselves (that guarantees "*free exercise*"?).

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240. *See* WALDMAN, *supra* note 151, at xii (noting that "the first 150 years" of the American colonies were "ugly"). "Most colonies were established to promote particular religious denominations—with brutal results." *Id.*

241. *See id.* at 43–44 (discussing the "highly fragmented religious landscape" of the colonies by the time of the American Revolution); *see also* McConnell, *supra* note 5, at 1421 ("[T]he American states had already experienced 150 years of a higher degree of religious diversity than had existed anywhere else in the world.").

242. *See* Laycock, *supra* note 180, at 317 ("[I]n history that was recent to the American Founders, governmental attempts to suppress disapproved religious views had caused vast human suffering in Europe and in England and similar suffering on a smaller scale in the colonies that became the United States." (footnote omitted)).

243. *See* McConnell, *supra* note 5, at 1430 (noting that John Locke's "influence on the Americans and the first amendment was most direct"). *See generally* LOUIS HARTZ, THE LIBERAL TRADITION IN AMERICA (2d ed. 1991) (arguing that Locke's liberalism was the primary intellectual foundation of the federal constitution).

244. *See* Nathan S. Chapman, *Adjudicating Religious Sincerity*, 92 WASH. L. REV. 1185, 1194 (2017) ("The American framers broke with their English and colonial experience to place religious truth beyond the government's ken."); NICHOLAS P. MILLER, THE RELIGIOUS ROOTS OF THE FIRST AMENDMENT: DISSENTING PROTESTANTS AND THE SEPARATION OF CHURCH AND STATE 80–90 (2012) (discussing Locke's influence on American disestablishment).

Of course, as discussed, the worldviews extant at the founding—indeed, the worldviews at issue in the then-apparently interminable conflicts that gave rise to liberalism—were what we today refer to as "religious" doctrines; they were theistic. It is true that the founders would not have been explicitly concerned with efforts by adherents of "non-religious" doctrines to commandeer the organs of the state—there weren't any. But that is an accident of intellectual history—no one had thought of such doctrines yet. And there is no principle *internal to liberalism* that would suggest that its proscription on government establishment of particular worldviews be limited to theistic or transcendent worldviews—indeed, liberal theorists *since* Darwin have consistently concluded that the animating principles of liberalism apply with equal force to non-theistic doctrines as those that we today think of as "religious."[245]

And why wouldn't they? The history of the century and a half since Darwin has made clear that atheistic doctrines (communism) can be as much a source of violence, oppression, and political instability as those that posit a divine creator.[246] And surely naturalistic doctrines are at least as likely to be right as any given theistic doctrine; just as surely as any given naturalistic doctrine is still at least as likely to be wrong.[247]

Non-theistic doctrines, then, are the proper and coherent subject of liberalism—the reasons that justify government agnosticism toward the truth of theistic worldviews apply with equal force to their alternatives. Of course, as has been emphasized many times by now, there were no materialistic doctrines at the time the First Amendment was written. But reading it in the context of the influence of the political philosophy of liberalism on the founding generation supports the broader reading offered here—that late-eighteenth-century readers of the First Amendment would have understood the principle it adopted as one of government agnosticism toward *worldviews*, regardless of the as-yet-unanticipated commitments of those worldviews yet to come.

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245. *See, e.g.*, RAWLS, *supra* note 187, at 13 (defining "[c]omprehensive doctrines," the worldviews to which liberalism applies, to include any general, comprehensive doctrines whatever their metaphysics).

246. *See, e.g.*, Stéphane Courtois, *Introduction* to STÉPHANE COURTOIS ET AL., THE BLACK BOOK OF COMMUNISM: CRIMES, TERROR, REPRESSION 1, 4 (Mark Kramer ed., Jonathan Murphy & Mark Kramer trans., Harv. Univ. Press 1999) (1997) (ascribing the deaths of 100 million people in the Twentieth Century to communist regimes).

247. *See generally* JOHN R. SHOOK, THE GOD DEBATES: A 21ST CENTURY GUIDE FOR ATHEISTS AND BELIEVERS (AND EVERYONE IN BETWEEN) (2010) (summarizing contemporary debates for and against the existence of a god).

E. The Presumption of Normative Coherence

Finally, even if all of the foregoing were suggestive rather than conclusive, there should be enough in the context and history of the term "religion" to at least make *plausible* the hypothesis that the sense in which it is used in the First Amendment is broader than its sense today. If that is only as far as the evidence gets us, we can turn to the longstanding interpretive presumption that the framers were, well, at least minimally reasonable—that the framework of government they were trying to establish was at minimum normatively coherent and explicable.[248]

There is something of a growing consensus in First Amendment scholarship that although the term "religion," as an original matter, refers only to theistic, or at least spiritualist or transcendentalist worldviews (whatever any of that means), it *ought* not to.[249] Indeed, Micah Schwartzman has argued that, to the extent the First Amendment applies only to certain theistic doctrines, it is "morally defective."[250] The argument is that (understanding "religion" to refer only to a limited suite of worldviews) "there is no adequate reason to think that religious worldviews implicate any interests distinct from those implicated by non-religious worldviews."[251] "Religion"—in today's sense of the word—has no unique characteristics worth protecting.

Of course it doesn't. No one ever thought it did, they were just operating under a different understanding of the concept. But even if you remain unconvinced, it should be clear that this argument—routine in the academy and long-simmering in the case law—is fairly obvious.[252] Scholars have

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248. *See* HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 1378 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994) (noting that the courts must apply a presumption that legislators or drafters of constitutions were "reasonable people pursuing reasonable purposes reasonably").

249. *See* Muñoz, *supra* note 191, at 1387 ("Is religion special, and does it, accordingly, deserve unique constitutional protections? A number of leading scholars say it is not, and it doesn't."); Lund, *supra* note 2, at 484 ("In recent years, some of the most distinguished voices in legal scholarship—scholars like Ronald Dworkin, Christopher Eisgruber, Lawrence Sager, Brian Leiter, and Micah Schwartzman—have suggested that the law should abandon special treatment of religion altogether."); Mark D. Rosen, *Religious Institutions, Liberal States, and the Political Architecture of Overlapping Spheres*, 2014 U. ILL. L. REV. 737, 798–99 ("[E]xtensive contemporary literature claim[s] that it is normatively problematic to favor religion over nonreligious commitments."); Schwartzman, *supra* note 3, at 1403–27 (arguing that, to the extent the Religion Clauses do not extend to worldviews not traditionally understood as "religious," they are "morally defective").

250. Schwartzman, *supra* note 3, at 1403.

251. Kenneth Einar Himma, *An Unjust Dogma: Why a Special Right to Religion Wrongly Discriminates Against Non-Religious Worldviews*, 54 SAN DIEGO L. REV. 217, 219 (2017); *see also* Gilad Abiri, *The Distinctiveness of Religion as a Jeffersonian Compromise*, 125 PENN ST. L. REV. 95, 96 (2020) ("Religion has no unique attributes—or at least not any that clearly warrant the distinct constitutional treatment it so often receives.").

252. *See, e.g.*, Schwartzman, *supra* note 3, at 1416 (describing the exclusion of atheism and agnosticism from the protections accorded to "religion" as resulting in "absurd consequences").

spent decades struggling even to define "religion" in today's sense—a concept that doesn't exist can hardly be morally distinctive.[253] Those who claim to have reached a definition of "religion" end up condescending either toward it or toward atheism—caricaturing what we think of as religion as unreasonable[254] or materialist worldviews as sterile.[255] Ultimately, the best anyone can do on this score is to say that "religions" are the subset of worldviews that are not metaphysically materialistic. Why on earth would anyone want to protect those distinctively? Why on earth would anyone ever have wanted to protect those distinctively?

In short, we can assume that the framers—presumably at least roughly reasonable people pursuing reasonable purposes—were *trying* to be inclusive.[256] They were *trying* to be good liberals—trying to avoid the violence and repression of those willing to kill and die for their worldview, trying to give individuals a space for the contestation and pursuit of the life they thought best for themselves.[257] They used the word "religion" because that is what they had available, and all they thought necessary, unable to conceive of scientific and philosophical developments they all predeceased by at least two decades.[258]

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253. *See* Garnett, *supra* note 2, at 495–96; Freeman, *supra* note 144, at 1548 ("The problem is that the very attempt to define 'religion' is itself misconceived. There simply is no essence of religion, no single characteristic or set of characteristics that all religions have in common that makes them religions."); Lund, *supra* note 2, at 498; McConnell, *supra* note 175, at 784 ("Personally, I think it is futile to draw up a list of features descriptive of religion and only of religion.").

254. *See, e.g.*, William P. Marshall, *The Other Side of Religion*, 44 HASTINGS L.J. 843, 858 (1993) ("Because fear is a primary motivation for the adoption of a belief structure, the believer may be upset by any suggestion that her adopted belief system is fallible."); John H. Garvey, *Free Exercise and the Values of Religious Liberty*, 18 CONN. L. REV. 779, 798 (1986) (analogizing religion to insanity); *see also* John Witte, Jr. & Joel A. Nichols, *"Come Now Let Us Reason Together": Restoring Religious Freedom in America and Abroad*, 92 NOTRE DAME L. REV. 427, 439 (2016) ("Too many of these critical arguments . . . trade in caricatures of religion that bear little resemblance to reality.").

255. *See, e.g.*, Michael Stokes Paulsen, *God Is Great, Garvey Is Good: Making Sense of Religious Freedom*, 72 NOTRE DAME L. REV. 1597, 1622 (1997) (reviewing JOHN H. GARVEY, WHAT ARE FREEDOMS FOR? (1996)) ("[R]eligious obligation is qualitatively different from spiritual or philosophical systems that involve no conception of a transcendent Creator, God. For the believer, the nature of the obligation is stronger.").

256. *See, e.g.*, Freeman, *supra* note 144, at 1521 ("[The Founders'] aim . . . was to propound a neutral definition of 'religion,' one that did not discriminate against any unorthodox believer. . . . Had there been nontheists among them, the Founders, in the interest of neutrality, might very well have conceived of religion in broader terms."); *see also* Witte & Nichols, *supra* note 254, at 436 ("The historical reality is that the founding generation spent a great deal of time debating and defending religious freedom for all peaceable faiths . . . .").

257. *See* Freeman, *supra* note 144, at 1521 ("[N]o evidence exists to suggest that the Founders' intention in equating religion with theism was to deny the religious character of nontheism."); Bradley, *supra* note 41, at 305 ("[F]ederal use of the term 'religion,' rather than standard state use of 'sect.' could mean only (if it meant anything distinctive) a wider class of persons protected.").

258. *See, e.g.*, Lund, *supra* note 2, at 514 ("In the context of a written constitution, the way to protect all deep-and-valuable human commitments is by naming certain specific deep-and-valuable commitments. There is no other way.").

Thus, although perhaps it could conceivably be that the sense of the term "religion" was in fact limited to transcendentalist doctrines, and that the Religion Clauses are and have always been morally defective, isn't it at least as likely that the reason they were written the way they were is because their authors and ratifiers shared a broader understanding of the concept of "religion" than we have today? Is it really more likely that the founders chose what may well be a morally vacuous empty signifier in "religion" instead of coherently committing the government to liberalism with respect to worldviews in general?

So in the end, perhaps, the evidence will leave us with a close call. I'm happy to concede that, by its nature, this inquiry is the sort unlikely to produce smoking guns either way—we are reasoning, ultimately, in counterfactuals. But as long as there is enough to make plausible the hypothesis that the founding era sense of religion was broader than it is today, there is no doubt that interpretation is more reasonable. Presuming, then, as we always do, that the framers were reasonable people trying to achieve reasonable ends, that should be enough to take the term in its broader sense.

IV. RELIGION AS WORLDVIEW IN DOCTRINE

If the concept of religion at the time the First Amendment was written would have been understood very differently than it is today, virtually all constitutional theorists accept that it is the earlier concept that ought to guide contemporary constitutional law and doctrine.[259] Indeed, this is perhaps particularly so here, where there is a broad consensus that the Religion Clauses ought not only encompass traditional theistic religions, and the primary counterargument has always been textual.[260] In this context, it is hard to imagine that even those generally less inclined to be constrained by original understandings would object to the law's adopting the original concept of "religion."

Assuming, then, that the law ought to be influenced by the account of "religion" offered thus far, this Part discusses the implications doing so has for doctrine. Most importantly, adopting a pre-Darwinian concept of "religion" speaks to the Religion Clauses' "scope"—it tells us what kinds of things count as "religion" to implicate the First Amendment. This shift in scope does not directly tell us which kinds of government practices are or are not constitutional. But at a high level of abstraction, revising the Religion Clauses' scope in this way offers a fundamental rediscovery of the First Amendment's liberal purpose.

259. *See supra* Part I.A.
260. *See supra* Part III.E.

Further, the concrete outcome of any particular case will turn also on a doctrinal understanding of "establishment" or "free exercise." Without resolving the copious debates about the scope and application of those concepts, this Part next discusses the implications of understanding religion as worldview for each of them in turn.

A. The Scope of the Religion Clauses

Speech Clause scholars distinguish between the First Amendment's "coverage" or "scope" and its doctrinal "protections."[261] The former speaks to the kind of content that implicates the Amendment, and the latter whether, concretely, the government action in question is unconstitutional.[262] So, for example, when the Supreme Court held in *Ward v. Rock Against Racism* that rock music is the sort of thing that implicates the First Amendment, but that regulating its volume at a concert is not unconstitutional, it held that rock music is "covered" by the Speech Clause, but the Amendment's "protections" do not generally handicap the government from regulating things like volume.[263]

By analogy, in the Religion Clauses, reading "religion" as something more like "worldview" speaks to the Clauses' "coverage," not their "protections"—it is a claim about the class of things that count as "religion" for purposes of the First Amendment; the kinds of things that *implicate* the Religion Clauses. In other words, understanding "religion" as "worldview" tells us what religion *is*, not what the *government can do* with respect to it. The doctrinal payoff is a distinct question which, in the context of the Religion Clauses, is necessarily guided by the distinct concepts of "establishment" and "free exercise." So we might understand that utilitarianism qualifies as "religion," but that doesn't tell us what it means to "establish" it.

Reading "religion" in its pre-Darwinian sense reconfigures the coverage of the Religion Clauses. Indeed, it shifts their coverage from what today we archetypically think of as "religions"—theistic doctrines and associated institutions—to the broader concept of "worldview," or "theory about how we ought to live and why." On the one hand, one straightforward

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261. *See, e.g.*, ROBERT C. POST, DEMOCRACY, EXPERTISE, AND ACADEMIC FREEDOM: A FIRST AMENDMENT JURISPRUDENCE FOR THE MODERN STATE 1 (2012) ("An essential task of First Amendment theory is to explain the scope of First Amendment coverage."); Frederick Schauer, *Speech and "Speech"—Obscenity and "Obscenity": An Exercise in Interpretation of Constitutional Language*, 67 GEO. L.J. 899, 905 n.33 (1979) ("If an activity is *covered* by the first amendment, regulation of that activity is evaluated in light of the heightened standard of review required by the first amendment. . . . But if the state can put forth a justification that withstands strict scrutiny, the activity is not protected even though it is covered.").

262. *See* POST, *supra* note 261, at 1.

263. 491 U.S. 781, 803 (1989).

implication of this conclusion is that so-called "secular doctrines"—Kantianism, Deep Ecology, New Atheism, what have you—have the same constitutional status as Catholicism. But what's at stake here is broader, and indeed goes to the heart of our legal relationship with our government—for all of us, whatever we believe—and the aspirations of our politics.

"Worldview" is an irreducible feature of the human experience.[264] We *all* have one. In navigating our lives, we necessarily make assumptions about how we ought to live and why we ought to live that way and not some other—if we think that it is right to be kind to one another, we assume that there is no omnipotent god whose sole edict is cruelty.[265] This is true for everyone; every ethical claim.[266] "It just seems wrong [and something's seeming-wrong to me is probative of its ethical status]" is a claim grounded in a worldview. So is "I don't know if there's a god or not, but I know he could never want X [and am therefore agnostic among a narrow set of clustered worldviews, but think alternatives that other people believe are wrong]," or even "hell, I've got to believe something [and assume there is no supervening discoverable answer]."[267] If "religion" means "worldview," *this all* is the proper subject of the Religion Clauses.

So what the Religion Clauses say, at a high level of abstraction, is that the answers to these kinds of questions are beyond the ken of government power. The government cannot, for example, "establish" an answer to whether something's seeming-wrong is probative of its ethical status, or whether some narrow set of worldviews is right, or whether there is no supervening discoverable answer. It permits individuals "freely" to decide these things for themselves, and "exercise" their lives accordingly. In other words, the basic commitment of the Religion Clauses *is just liberalism*—

264. *See Preface* to HANDBOOK OF SPIRITUALITY AND WORLDVIEW IN CLINICAL PRACTICE x (Allan M. Josephson & John R. Peteet eds., 2004) ("This . . . underscores a major theme of this work: worldview must be considered in all individuals, not just those from a formal religious or spiritual tradition. Everyone has a worldview, whether he or she realizes it or not."); DAVID K. NAUGLE, WORLDVIEW: THE HISTORY OF A CONCEPT 246 (2002) ("[T]he concept of worldview itself seems universal. Everyone has a worldview, no exceptions.").

265. *See* Steven D. Smith, *Is God Irrelevant?*, 94 B.U. L. REV. 1339, 1340 (2014) ("[F]or those who hold theistic beliefs, God is related to what we typically call morality."); Michael S. Moore, *Metaphysics, Epistemology and Legal Theory*, 60 S. CAL. L. REV. 453, 494–506 (1987) (reviewing RONALD DWORKIN, A MATTER OF PRINCIPLE (1985)) (arguing that Ronald Dworkin's efforts to disentangle claims about ethics from metaphysics are unavailing); *see also generally* Russ Shafer-Landau, *Truth and Metaethics: The Possibility of Metaethics*, 90 B.U. L. REV. 479 (2010) (same); Michael S. Moore, *The Interpretive Turn in Modern Theory: A Turn for the Worse?*, 41 STAN. L. REV. 871 (1989) (same for a variety of comparable attempts).

266. *See* JAMES W. SIRE, THE UNIVERSE NEXT DOOR: A BASIC WORLDVIEW CATALOG 5 (6th ed. 2020) ("Few people have anything approaching an articulate philosophy—at least as epitomized by the great philosophers. Even fewer, I suspect, have a carefully constructed theology. But everyone has a worldview.").

267. *Cf., e.g.*, Matthew Silverstein, *Inescapability and Normativity*, 6 J. ETHICS & SOC. PHIL., Dec. 2012, at 1, 3 (2012) (arguing that it is impossible to "vindicate our ethical practices while sidestepping traditional metaethics").

which, of course, is hardly some outlandish or anachronistic ideology, and indeed which was precisely what the founders were trying to constitutionalize in the First Amendment.[268]

This we have forgotten. People around the United States—across regions and within families—have become deeply divided on questions of worldview; questions about how to live and why.[269] We disagree, deeply, about our worldviews and their implications.[270] But we don't see the connection between these deep and increasingly violent disagreements and the Religion Clauses because when we read the word "religion" we think about theism, not worldview. So we see "believers" and "disbelievers" on our side and on the other side and conclude our disagreements are not "religious," or we think our motives "secular" and theirs "religious." We see no constitutional barrier to pursuing our worldview through the state, so we think we might try.

That is why the way we think about the coverage of the First Amendment matters. What is at stake here is a rediscovery of the First Amendment's basic liberalism—the liberalism that the Religion Clauses were always meant to be about. They prohibit all of us from "establishing" our worldviews; they guarantee us and our fellow citizens the right to freely pursue our own theory of what matters and why. Of course the concepts of "establishment" and "free exercise" must allow for common governance, and permit majorities to make normative decisions through the organs of government.[271] But at the same time, the Religion Clauses are meant to temper the aspirations of politics in a broader way than has thus far been understood.

At a high level of abstraction, then, understanding religion as worldview makes sense of the Religion Clauses' basic scope and aspiration. Their goal is to ensure that the organs of the state are not open to capture in the pursuit of a particular worldview, and that individuals be permitted freely to contemplate, reckon with, and pursue their own. Their method is to prohibit "establishment" of "religion [as worldview]," and guarantee its "free

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268. *See supra* Part III.D.

269. *See* KOPPELMAN, *supra* note 29, at 8. *See generally, e.g.*, ASSOCIATED PRESS, DIVIDED AMERICA: THE FRACTURING OF A NATION (2016).

270. *See generally* The Associated Press, *supra* note 269.

271. *See, e.g.*, KOPPELMAN, *supra* note 29, at 5 (noting that "critics of neutrality are right that the concept is indefensible" but only "when it is understood at the highest possible level of abstraction"); FUKUYAMA, *supra* note 234, at 29 ("Liberal states require governments that are strong enough to enforce rules and provide the basic institutional framework within which individuals can prosper."); Mark Storslee, *Religious Accommodation, the Establishment Clause, and Third-Party Harm*, 86 U. CHI. L. REV. 871, 883 (2019) ("To state the obvious, no one thinks that religious believers or anyone else have the right to engage in murder, theft, or trespass."); Paul Horwitz, *Against Martyrdom: A Liberal Argument for Accommodation of Religion*, 91 NOTRE DAME L. REV. 1301, 1312 (2016) (describing liberalism as "[n]ot *absolutely* neutral").

exercise." That, in broad strokes, is how to read the Religion Clauses—a timeless, enduring, essentially liberal statement of the relationship between all of us and our government.

B. Disestablishment of Worldview

Like "religion," scholars and courts have long struggled to offer a comprehensive account of "establishment," or a clear test of what kinds of government practices qualify and which do not.[272] At a high level of abstraction, however, there is a basic consensus on the thrust of the Establishment Clause—a commitment to forswear the use of government power in favor of any particular "religion."[273] That is, the Establishment Clause is widely understood as a bar to "preferential support for one religious denomination,"[274] "government attempts to promote a favored religious identity,"[275] "the promotion and inculcation of a common set of beliefs through governmental authority,"[276] or "sect preference."[277] It circumscribes government authority over "belief and doctrine,"[278] was "designed to prevent the government from putting its imprimatur behind any one religion,"[279] and promises that "government would never grant political or civil rewards or impose legal burdens on the basis of religious belief and exercise."[280]

At this level of abstraction, the implications of reading religion as worldview are straightforward—the Establishment Clause prohibits the government from giving preferential support, promoting, preferring, or dictating, etc., etc., any particular worldview, regardless of its metaphysical foundations. Whatever else it might mean, then, the Establishment Clause tells us that the government can no more commit itself to the truth of—and act to favor—Deep Ecology as Daoism. Beyond this abstract consensus, however, there is little agreement on what particular practices the Establishment Clause permits or forbids.[281] Understanding the Clause's

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272. *See, e.g.*, WITTE ET AL., *supra* note 192, at 85 ("The term 'establishment of religion' was an ambiguous phrase in the eighteenth century, as much as it is today."); Marc O. DeGirolami, *First Amendment Traditionalism*, 97 WASH. U. L. REV. 1653, 1660 (2020) (noting that recent Establishment Clause cases at the Supreme Court struggled to "reach consensus either about the[ir] method's details or its justifications").

273. *See infra* notes 274–80 and accompanying text.

274. Feldman, *supra* note 7, at 381.

275. Storslee, *supra* note 271, at 876–77.

276. Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 WM. & MARY L. REV. 2105, 2131 (2003).

277. Bradley, *supra* note 41, at 299.

278. Hamburger, *supra* note 188, at 938.

279. Sherry, *supra* note 149, at 474.

280. Chapman, *supra* note 244, at 1195.

281. *See supra* note 272.

coverage to extend to worldview rather than theistic doctrines does not answer this question.[282]

A great deal of historical, conceptual, and linguistic work on the meaning of the Establishment Clause has already been done, much of it inconclusive.[283] Perhaps, indeed, there simply is not a definitive conceptual or interpretive answer in all Establishment cases—all theories of interpretation recognize that in hard cases, texts and concepts may "run out," and judges must by some other method decide.[284] In other words, it might be that, while the government's issuing a proclamation that Kantianism shall be the "American doctrine" and demanding citizens recite the categorical imperative at gunpoint has clearly violated the Establishment Clause, there simply is no interpretive answer to when, if ever, erecting a statue of Immanuel Kant on the taxpayer's dime would qualify. If that's right, in deciding the latter class of cases judges are engaged in a project other than interpretation, and it is not one with which understanding religion as worldview could directly help.[285]

Nevertheless, reading religion to refer to worldview does tell us something about nitty-gritty boundaries of the concept of "establishment." Indeed, if "religion" does not refer to a discrete set of worldviews but *all of them*, it is impossible—and could not conceivably have been the purpose of the Establishment Clause—to banish "religion" from public life in the way that Clause has often been thought to demand. Indeed, many theists have felt that much of the Supreme Court's late-twentieth century Establishment Clause jurisprudence came to be systematically and unfairly biased against their worldviews in particular.[286] If "religion" means worldview, they're right.

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282. *See* Freeman, *supra* note 144, at 1564 (distinguishing the question of what qualifies as a "religion" from the question of what qualifies as "establishment").

283. *See, e.g.*, Feldman, *supra* note 7, at 381 (noting that, at the founding, "[m]odes of establishments in the colonies differed very widely, and the word 'establishment' was not used consistently."); *see also supra* note 272.

284. *See, e.g.*, Ronald Dworkin, *Hard Cases*, 88 HARV. L. REV. 1057, 1057 (1975) (arguing that in hard cases in which the law has "run out" judges should decide with resort to principle); H.L.A. HART, THE CONCEPT OF LAW 126 (2d ed. 1994) (arguing that judges have discretion in such cases); *see also* Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 FORDHAM L. REV. 453, 468–69 (2013) (acknowledging that when "interpretation" does not provide a determinate resolution, judges engage in "construction").

285. *See* Solum, *supra* note 284, at 468–69.

286. *See, e.g.*, Mark W. Cordes, *Schools, Worship, and the First Amendment*, 48 SUFFOLK U. L. REV. 9, 12–13 (2015) (arguing that prohibiting worship services in public school buildings amounts to impermissible viewpoint discrimination); Steven T. McFarland, *The Necessity and Impact of the Proposed Religious Equality Amendment*, 1996 BYU L. REV. 627, 627 ("[C]ourts and public officials act as though the First Amendment requires, rather than prohibits, discrimination against religious expression." (emphasis omitted)); Ralph W. Johnson III, Lee v. Weisman*: Easy Cases Can Make Bad Law Too—The "Direct Coercion" Test Is the Appropriate Establishment Clause Standard*, 2 GEO. MASON INDEP. L. REV. 123, 153 (1993) ("[C]ontemporary Establishment Clause jurisprudence has always been biased against religion.").

First, the "establishment" of a worldview must refer to the government's relationship with theory, doctrine, and belief, not institutions. After all, some worldviews—Catholicism, for instance—come equipped with a ready-made institutional infrastructure, but many others—from Secular Humanism to various kinds of spiritualism—do not.[287] But if the Establishment Clause covers worldview generally, both kinds of doctrines are its proper subject. "Establishment" therefore cannot require pre-existing institutions—declaring some form of spiritualism to be true and ordering federal agents to enforce its doctrines is as much a violation as declaring canon law true and deputizing the Knights Templar. The question must be whether a worldview has been established, not a church.

The Supreme Court has, historically, had this confused. Under the test established by *Lemon v. Kurtzman*, one factor courts were to consider was whether the act resulted in "excessive government entanglement with religion."[288] This requirement fails, for example, where the government interfered with or excessively monitored church governance.[289] Doing so, of course, likely means as a practical matter that the government has committed itself to a particular worldview. But it is that commitment itself, not its relationship with the church as such, that violates the Establishment Clause. In other words, understanding religion as worldview means that "excessive entanglement with religion" (where "religion" is understood to mean "a church") is generally sufficient but certainly not necessary to finding a violation of the Establishment Clause.

Second, and more significantly, the Establishment Clause, understood to prohibit the "establishment" of worldview generally, cannot draw a sharp conceptual distinction between "secular" and "religious" purposes. As discussed above, within the concept of religion before Darwin, virtually *all* serious motivations are "religious."[290] *Everyone* has "religious" motivations.[291] The test could not be, then, as *Lemon* once again would have it, whether a measure has a "secular legislative purpose,"[292] a distinction which would permit the government to regulate the belief and practice of

287. *See, e.g.*, Markus Altena Davidsen, *Future Directions in the Sociology of Non-Institutional Religion*, 15 IMPLICIT RELIGION 553, 553 (2012) (describing "various modes of non-institutional religion").

288. 403 U.S. 602, 613 (1971) (quoting Walz v. Tax Comm'n, 397 U.S. 664, 674 (1970)), *abrogated by* Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407 (2022).

289. *See, e.g.*, Protestant Episcopal Church in the Diocese of Va. v. Truro Church, 694 S.E.2d 555 (Va. 2010); Exec. Bd. of Mo. Baptist Convention v. Mo. Baptist Univ., 569 S.W.3d 1 (Mo. Ct. App. 2019).

290. *See supra* Part IV.A; *see also Kennedy*, 142 S. Ct. at 2416 ("Nor does a proper understanding of the Amendment's Establishment Clause require the government to single out private religious speech for special disfavor.").

291. *See supra* note 265 and accompanying text.

292. 403 U.S. at 612.

traditional theistic religions more than it could with respect to newer creeds.[293] Rather than relying on an indefensible, sharp distinction between "religious" and "secular" purposes, the test must ask whether the law objectively *effects* or *constitutes* an establishment.[294]

At the same time as not sharply distinguishing religious from secular purposes or motivations, this objective test must, of course, accommodate a broad range of positive government regulations. Just as no one should think a prohibition against murder unconstitutional even if the private motivations of its lawmakers were uniformly Christian, nationalizing an industry would not be an establishment of Marxism even if that was the worldview under which the government acted.[295] What we need ultimately is a theory of "establishment" that accommodates these (relatively) uncontroversial sorts of distinctions, and that is not something the concept of "religion" can tell us.

Although not by adopting the original concept of "religion," the Court has recently moved toward an understanding of "establishment" more in line with it. Indeed, the Court appears to have finally put the *Lemon* test to bed in *Kennedy v. Bremerton School District*.[296] And for a long time before that, courts had largely discarded the rhetoric of entanglement,[297] focused more clearly on the "objective" purpose of statutes rather than their subjective motivation,[298] and blurred the distinction between secular and religious purposes.[299] These developments have already made

293. *See, e.g.*, Stratechuk v. Bd. of Educ., 587 F.3d 597 (3d Cir. 2009) (upholding a school policy prohibiting "religious" songs celebrating the holidays).

294. *See* Freeman, *supra* note 144, at 1564 ("[T]he key word in establishment clause cases, particularly in those at the penumbra, is not the word 'religion' but the word 'establishment.' The critical inquiry in such cases is: What constitutes an impermissible *establishment* of religion?").

295. Although, in either case, under some plausible tests such as the endorsement test, either might count as an establishment if the government were contemporaneously insisting that its reasoning was that Christianity or Marxism is the one true faith. *See infra* note 300 and accompanying text.

296. 142 S. Ct. 2407, 2427 (2022) ("[T]his Court long ago abandoned *Lemon* . . . .").

297. *See, e.g.*, Agostini v. Felton, 521 U.S. 203, 232 (1997) ("Regardless of how we have characterized the issue . . . the factors we use to assess whether an entanglement is 'excessive' are similar to the factors we use to examine 'effect.'").

298. *See, e.g.*, Milwaukee Deputy Sheriffs' Ass'n v. Clarke, 588 F.3d 523, 527–28 (7th Cir. 2009) (observing that, to show that a proffered "secular purpose" is a "sham," the sham must be obvious to a reasonable observer and the burden of proof is on the plaintiff).

299. *See, e.g.*, Ark Encounter, LLC v. Parkinson, 152 F. Supp. 3d 880, 899 (E.D. Ky. 2016) ("If a particular religious group receives more favorable treatment than a secular group, or if a secular group receives more favorable treatment than religious groups because they are secular, such treatment would violate the Establishment Clause."); Am. Atheists, Inc. v. City of Detroit Downtown Dev. Auth., 567 F.3d 278, 289 (6th Cir. 2009) ("The most essential hurdle that a government-aid program must clear is neutrality—that the program allocates benefits in an evenhanded manner to a broad and diverse spectrum of beneficiaries."); *see also* Epperson v. Arkansas, 393 U.S. 97, 104 (1968) ("The First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion.").

Establishment Clause jurisprudence more consonant with the original concept of religion-as-worldview, though justified on different grounds.

Beyond clarifying that "establishment" must be concerned with doctrines rather than institutions and must not rely on a rigid distinction between "religious" and "secular purposes," understanding "religion" as "worldview" is consistent with a broad range of plausible tests. For instance, the most prominent historical alternative to *Lemon* has been the so-called "endorsement test," developed by Justice O'Connor, which asks whether the government's actions objectively send a message of endorsement of a particular religion.[300] It would not be difficult—theoretically or practically—for courts to inquire into whether government action objectively endorses a particular worldview instead. The same goes for the theory that the Establishment Clause only prohibits the government from directly coercing belief[301]—courts can as much assess whether a statute coerces belief in philosophical materialism as traditional theism.

Similarly, in *Kennedy*, the Court appears to have replaced the *Lemon* test with one grounded in "historical practices and understandings."[302] It is not clear yet what, if anything, this means,[303] but it could be compatible with understanding "religion" as "worldview." After all, that interpretation is itself grounded in "historical practices and understandings."[304] And if "historical practices and understandings" show us that, for example, a cross in a war memorial does not "establish" a "religion,"[305] the same must go for an inscription from Christopher Hitchens's *Mortality*.

In short, although understanding "religion" as worldview would be compatible with most pre-existing views of the Establishment Clause, it does tell us something new about its meaning. Indeed, understanding religion-as-worldview helps us see the liberal commitment at the concept's heart—a commitment that the coercive apparatus of government not be used in favor of one worldview over another.

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300. Lynch v. Donnelly, 465 U.S. 668, 691 (1984) (O'Connor, J., concurring) ("The proper inquiry under the purpose prong of *Lemon*, I submit, is whether the government intends to convey a message of endorsement or disapproval of religion."). Although initially proposed as a subjective test of the government's intention, its progenitor, Justice O'Connor, later clarified that it is objective, focusing on "the perception of a reasonable, informed observer." Capitol Square Rev. & Advisory Bd. v. Pinette, 515 U.S. 753, 773 (1995) (O'Connor, J., concurring in part and concurring in the judgment).

301. *See, e.g.*, *Kennedy*, 142 S. Ct. at 2429 ("Government 'may not coerce anyone to attend church' . . . ." (quoting Zorach v. Clauson, 343 U.S. 306, 314 (1952))); *see also* Johnson, *supra* note 286, at 125 (arguing that the Establishment Clause is only violated when the government directly coerces religious observance).

302. *Kennedy*, 142 S. Ct. at 2428 (quoting Town of Greece v. Galloway, 572 U.S. 565, 576 (2014)).

303. *See id.* at 2450 (Sotomayor, J., dissenting) ("The Court reserves any meaningful explanation of its history-and-tradition test for another day . . . .").

304. *See supra* Part II.

305. *See* Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2074, 2090 (2019).

C. Free Exercise of Worldview

With the Establishment Clause, there's a general consensus on its basic purpose, but widespread disagreement about its peripheral application.[306] In contrast, in Free Exercise interpretation, the debate is between two fundamentally different, but each relatively straightforward, theories of the Clause—either it empowers or requires judges to offer religious exemptions from generally applicable laws, or it does not.[307] This is an unsettled interpretive question separate from that of the scope of "religion,"[308] and understanding "religion" as "worldview" is consistent with either theory. But reading religion-as-worldview offers some contextual support to the theory that the Free Exercise Clause does not require individual exemptions from generally applicable laws on religious grounds.

One of the primary arguments against a broad understanding of "religion" has always been that it would court anarchy—assuming that indeed the Free Exercise Clause demands judicial exemptions, and anyone can claim one on the grounds of any worldview, how could we aspire to a rule of law?[309] Because the Constitution cannot reasonably be interpreted to court anarchy, scholars suggest that limiting individual exemptions to those motivated by "religion" at least cabins the number of persons and reasons that could avoid general statutes.[310] But if the Free Exercise Clause simply does not guarantee judicial exemptions from generally applicable laws—as is, at least, the current position of the Supreme Court—"religion" can be broadly construed without suggesting an anarchy objection at all.[311]

The question on this theory is what the Free Exercise Clause guarantees, if not individual exemptions. Vincent Phillip Muñoz has argued that the

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306. *See supra* Part IV.B.

307. *Compare* Emp. Div., Dep't of Hum. Res. of Or. v. Smith, 494 U.S. 872, 884 (1990) (holding that the Free Exercise Clause does not provide exemptions from generally applicable laws), *superseded by statute*, Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488, *with* Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1883–1926 (2021) (Alito, J., concurring) (criticizing *Smith*'s holding and arguing that the Free Exercise Clause does provide exemptions).

308. *See* Stephanie H. Barclay, *The Historical Origins of Judicial Religious Exemptions*, 96 NOTRE DAME L. REV. 55, 55–103 (2020) (summarizing the debate).

309. *See, e.g.*, Micah Schwartzman, *Religion, Equality, and Public Reason*, 94 B.U. L. REV. 1321, 1327 (2014) ("The problem with leveling up [secular doctrines to the same status as traditional religions] is that anyone with a strongly held ethical or moral view, whether religiously motivated or not, would have a claim for exemption from the law. That prospect, in turn, triggers an anarchy objection . . . ."); Feldman, *supra* note 7, at 424 ("The Constitution could not practically have been drawn to preserve everyone's liberty of conscience in all things."); McConnell, *supra* note 5, at 1493 ("[I]f the exercise of religion extends to 'everything and anything,' the interference with ordinary operations of government would be so extreme that the free exercise clause would fall of its own weight.").

310. *See, e.g.*, McConnell, *supra* note 5, at 1492–93.

311. *See Emp. Div., Dep't Human Res. of Or.*, 494 U.S. at 884 (holding that the Free Exercise Clause does not offer exemptions from generally applicable laws). *But see Fulton*, 141 S. Ct. at 1883 (Alito, J., concurring) (characterizing *Smith* as "ripe for reexamination").

Free Exercise Clause would have been understood to enact the natural right—and corresponding natural boundaries—of the concept of freedom of conscience.[312] That is, because the framers understood the right of conscience to be an "inalienable" natural right over which the government had no control, the Free Exercise Clause prohibits "outlawing a practice *on account of its religious character*."[313]

But, Muñoz argues, because the framers "understood the natural boundaries of natural rights to be established by the law of nature," the Free Exercise Clause would not have been understood to invalidate a "general prohibition that happens to outlaw a religious practice," even as applied to religious individuals.[314] Similarly, Gerard Bradley has argued that the language of the First Amendment ("Congress shall make no law . . . prohibiting the free exercise thereof") must be read as prohibiting a *class* of legislation—specifically the class of laws that would prohibit "doctrine, discipline, and worship" rather than offer individualized exemptions.[315] And in *Employment Division v. Smith*, the Court held that "the right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)."[316]

If this all is right, then reading "religion" as "worldview" does not even suggest an anarchy objection. The Free Exercise Clause would simply recognize that the government has no authority over worldview and its corresponding practices as such.[317] But because individuals could not claim individualized exemptions from otherwise valid laws, there would be no threat of anarchy. For these reasons, reading "religion" to refer to something like "theory of how we ought to live and why" supports, at least atmospherically, the hypothesis that "free exercise" does not offer individualized exemptions.

On the other hand, because anarchy is so obviously an interpretive non-starter, other scholars have offered accounts under which the Free Exercise Clause guarantees judicial exemptions that manage to avoid anarchy

312. *See* Muñoz, *supra* note 191, at 1403, 1409.

313. *Id.* at 1405, 1409.

314. *Id.* at 1409.

315. *See* Bradley, *supra* note 41, at 301, 306 ("'Congress shall make no law . . . .' This means that a class of legislation is forbidden. A class is definable by foreclosing legislative adoption of truth claims of one or another church. . . . [T]he conduct exemption does not forbid a class of legislation." (footnote omitted)).

316. 494 U.S. at 879 (internal quotation marks and citation omitted).

317. *See, e.g.*, Muñoz, *supra* note 191, at 1409 ("I have frequently used the cumbersome modifier 'as such' following 'religious worship.' 'As such' is intended to convey the distinction between outlawing a practice *on account of its religious character* as opposed to a general prohibition that happens to outlaw a religious practice.").

objections. These theories generally do so by cabining the conditions under which exemptions can be offered. For example, Michael McConnell argues that the Free Exercise Clause guarantees only "maximum freedom for religious practice consistent with the demands of public order."[318] And Stephanie Barclay argues that, at the founding, religious exemptions could have been offered under the doctrine of "equity of the statute," which would have been understood to provide individualized exemptions to general statutes upon judicial consideration of the equities for, in principle, *any* reason—including but not limited to objections of theistic conscience.[319]

With caveats such as "public order" and individualized equitable consideration, a Free Exercise Clause that provides individualized exemptions would be compatible with understanding religion as worldview. Just as a court could turn down a claim for exemption from a murder prohibition for an Aztec sacrifice on grounds of "public order," it could turn down a request for a comparable exemption from some kind of atheistic anti-natalist death cult. And just as a court could equitably consider the imposition of applying a vaccine mandate to a Jehovah's Witness, it might consider the harm of feeding GMO foods to a Deep Ecologist in prison.

In short, understanding the concept of "religion" to apply to "worldviews generally" does not itself tell us what it means for the government to "prohibit the free exercise thereof." The account of religion offered here is compatible with both alternative understandings of that phrase—that the Clause offers judicially enforceable individualized exemptions, and that it only prohibits the outlawing of religious conduct as such. But because a broader understanding of religion makes broader the classes of persons that could claim exemptions under a broader class of reasons, reading "religion" as "worldview" suggests, if it doesn't compel, the conclusion that the Free Exercise Clause does not guarantee individualized exemptions.

CONCLUSION

The meanings of words change over time, sometimes significantly. Often, this is obvious, as the evolved usage is consciously chosen, or metaphorical. But many times it happens more subtly, is never discussed, and can go unacknowledged. The meanings of words are in part dependent on the context in which they are uttered—including the assumptions and widespread understandings of a given intellectual moment. Subtle as these

318. Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. CHI. L. REV. 1109, 1111 (1990).

319. Barclay, *supra* note 308, at 60 ("Just the opposite, this Article shows that under a widely accepted doctrine called equity of the statute, judicially created exemptions were frequently employed during the Founding period to protect a wide variety of liberties from laws that swept too broadly.").

shifts may be, understanding them is an essential part of understanding the Constitution.

This Article has argued that such a shift has taken place in the meaning of the term "religion" as a result of the Darwinian Revolution in the second half of the nineteenth century. The shift has been from a broader understanding of "religion" as something like "worldview" to today's understanding in which only a subset of theories about the universe and our place in it qualify as "religious." Today's law must reckon with this semantic evolution.

It is, perhaps, trite to say that we live in a divided country, in which people disagree about the most important things, and that the stakes of these disagreements are only rising. But the point is that the Religion Clauses of the First Amendment have always aspired to offer an approach for confronting precisely this kind of disagreement about what matters. We've just been confused about how to read them.