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Recent Supreme Court decisions such as Burwell v. Hobby Lobby, Masterpiece Cakeshop v. Colorado Civil Rights Commission, *and* Fulton v. City of Philadelphia *raise the fundamental question of what place religion and religious liberty should hold within a liberal constitutional order that is based on a commitment to the freedom, equality, and well-being of all persons. To explore this question, it is natural to begin with an inquiry into what founding–era Americans thought when they incorporated the First Amendment's Free Exercise Clause into the constitutional order that they were creating. Contrary to the views taken by many judges and scholars, the Clause's ideological background is best understood in terms of neither Enlightenment secularism nor Evangelical Christianity, but rather in terms of what the eighteenth century called natural religion. Natural religion held that human beings were capable of using reason to discern the most basic principles of religion: that the world was created by God, that people ought to worship God, and that God has given them a law of nature that establishes their basic rights and duties with regard to one another. One of the most important natural rights was that of religious freedom: because religion was rooted in reason, individuals had an inalienable right to develop their own beliefs and to live and worship in accord with them. At the same time, religious liberty was bounded by a duty to respect the inherent rights of other individuals as well as the legitimate authority of the state.*

In many ways, the classical eighteenth-century theory of natural religion and religious liberty was a humanistic one. At its heart was a

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recognition of the inherent worth of human beings. The theory held that individuals must be free to use their own minds to pursue truth, rather than having doctrines imposed on them by religious or political authorities. And it held that people with diverse beliefs were capable of living together in an open, self-governing society based on mutual acceptance and respect. These principles remain central to any adequate understanding of the Free Exercise Clause.

Of course, we no longer live in the same intellectual world as the founders. In the wake of Darwinian evolutionary theory, modern cosmology, and other scientific developments, it is no longer widely accepted that reason alone can establish the existence of God or natural law. The question then arises whether the eighteenth-century view can be recast in a way that retains its virtues without depending on controversial theological notions or unjustifiably favoring religious believers over other people.

In this Article, I begin to develop such a view, which I call liberal humanism. Like the classical theory, this view emphasizes the ideals of human freedom, equality, and dignity that informed the adoption of the First Amendment. But the liberal humanist approach seeks to rework the classical theory in a way that reflects our contemporary understanding of those ideals.

The Article begins by summarizing the classical theory and showing how it was used by Thomas Jefferson, James Madison, and a broad coalition of groups as a justification for protecting religious freedom, first at the state and then at the federal level. Next, I discuss how the idea of natural religion can be transformed by moving away from the eighteenth century's ontological approach (an approach that held that reason could demonstrate the existence of God as well as the moral implications that flowed from it) and toward a more phenomenological approach to religion —an approach that focuses on the ways that human beings search for meaning in the world. People experience meaning in all areas of life, and they integrate these experiences into more comprehensive conceptions of the world and of their place within it. Some of these worldviews are religious ones which find ultimate meaning within a transcendent realm, while others are secular ones which find such meaning within this world. Both kinds of worldviews can be reasonable, and so both are entitled to respect. For these reasons, the Constitution should be interpreted to protect not only religious freedom but also a comparable freedom to develop and live in accord with secular beliefs.

Next, I show that just as the eighteenth-century view provided an account of natural rights, the liberal humanist view can offer an account

of fundamental rights within our modern constitutional order. I then discuss the light that this view can shed on two important issues in contemporary free exercise jurisprudence: whether individuals are constitutionally entitled to exemptions from laws that conflict with their conscientious beliefs, and if so, whether those exemptions properly may be granted only to those who hold religious rather than secular beliefs. The Article concludes with some brief reflections on how this approach can enable the secular and religious forces in our cultural battles to find some common ground.

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INTRODUCTION

In recent years, the Supreme Court has handed down a series of major decisions on religious liberty and its relation to other values. For example, in *Burwell v. Hobby Lobby Stores, Inc.*,[1] the Court held that under the Religious Freedom Restoration Act of 1993, the Affordable Care Act's contraception mandate could not be enforced against several family-owned corporations that had religious objections to covering the costs of certain forms of birth control. *Masterpiece Cakeshop, Ltd. v. Colorado Civ. Rts. Comm'n*[2] ruled that a state agency violated the Free Exercise Clause of the First Amendment[3] by interpreting a state antidiscrimination law to compel a baker to serve same-sex couples on the same terms as opposite-sex couples. In 2020 and 2021, the Justices initially rejected but later upheld a series of free exercise challenges to public health orders that restricted the freedom to hold religious gatherings at the height of the COVID-19 pandemic.[4] In *Fulton v. City of Philadelphia*,[5] the Court held that the city violated the Free Exercise Clause when it terminated a contract with a church-affiliated social-service agency that would not commit to vetting same-sex couples to serve as foster parents.

In these cases, it is clear that what is at stake goes far beyond the particular interests of the parties. Instead, these cases are widely regarded as raising fundamental issues about how we should resolve conflicts between religious liberty and other important concerns such as reproductive autonomy, freedom from

1. Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682 (2014).

2. Masterpiece Cakeshop, Ltd. v. Colorado Civ. Rts. Comm'n, 138 S. Ct. 1719 (2018).

3. U.S. CONST. amend. I ("Congress shall make no law . . . prohibiting the free exercise [of religion] . . . .")

4. For some early decisions rejecting these challenges, see S. Bay United Pentecostal Church v. Newsom, 140 S. Ct. 1613 (2020), and Calvary Chapel Dayton Valley v. Sisolak, 140 S. Ct. 2603 (2020). After Justice Amy Coney Barrett replaced the late Justice Ruth Bader Ginsburg, the Court changed course. *See, e.g.*, Roman Cath. Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63 (2020) (per curiam); Tandon v. Newsom, 141 S. Ct. 1294 (2021) (per curiam).

5. Fulton v. City of Philadelphia, 141 S. Ct. 1868 (2021).

discrimination, and the protection of public health. On the deepest level, the cases pose the question of what place religion and religious liberty should hold within a liberal constitutional order that is founded on a commitment to the freedom, equality, and well-being of all persons.

In exploring this question, it is natural to begin with an inquiry into what founding–era Americans thought when they incorporated the Free Exercise Clause into the liberal constitutional order that they were creating.[6] In general, judges and scholars have given two different answers to this historical inquiry. According to one view, the provision was intended to establish a secular liberal state in accord with the philosophy of the Enlightenment.[7] A contrasting view holds that the provision was inspired by an Evangelical Christian perspective that sought to liberate religion from state interference so that believers would be free to live out their faith and spread the Gospel.[8]

In a recent article, I offered an alternative account of the ideological background of the Free Exercise Clause.[9] That background, I argued, is best understood in terms of neither secular liberalism nor Evangelical Christianity, but rather in terms of what the eighteenth century called natural religion. Natural religion held that human beings were capable of using reason to discern the most basic principles of religion, including the ideas that God exists and created the world, that people ought to worship God, and that God has given them a set of moral precepts known as the law of nature, which establishes the basic rights and duties that they have in relation to one another. One of the preeminent natural rights was religious liberty: because religion was rooted in reason, individuals

6. A complete answer to the question would also explore the relationship between government and religion under the First Amendment's Establishment Clause, which provides that "Congress shall make no law respecting an establishment of religion . . . ." U.S. CONST. amend. I. The ideas of religious liberty and non-establishment are deeply intertwined, and neither can be fully understood apart from the other. Each calls for treatment in depth. While much of the history and theory discussed in this Article is relevant to both Clauses, my focus will be on free exercise.

7. *See, e.g.*, Everson v. Bd. Of Educ., 330 U.S. 1, 11–13 (1947).

8. *See, e.g.*, THOMAS E. BUCKLEY, CHURCH AND STATE IN REVOLUTIONARY VIRGINIA, 1776–1787 (1977) [hereinafter BUCKLEY, VIRGINIA]; Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409 (1990).

9. Steven J. Heyman, *Reason and Conviction: Natural Rights, Natural Religion, and the Origins of the Free Exercise Clause*, 23 U. PA. J. CONST. L. 1 (2021) [hereinafter Heyman, *Natural Religion*].

had an inalienable right to develop their own beliefs and to live and worship in accord with them. At the same time, religious liberty was bounded by a duty to respect the inherent rights of other individuals as well as the legitimate authority of the state, which the people had established to protect individual rights and promote the common good.

In this way, the classical eighteenth-century theory of natural law, natural rights, and natural religion offered a relatively coherent account of the place of religion and religious freedom within a liberal constitutional order. By harmonizing reason and religion, this view was able to appeal to a broad coalition of groups who fought to promote religious liberty, from Evangelicals to rationalist Christians to Enlightenment liberals such as Thomas Jefferson and James Madison. It was this view that most powerfully informed the adoption of the Free Exercise Clause.

Of course, we no longer live in the same intellectual world as the founders. In the wake of Darwinian evolutionary theory, modern cosmology, and other scientific developments, it is no longer widely accepted that reason alone can establish the existence of God or natural law. It therefore may seem that the eighteenth-century theory can have no bearing on how we should understand religion and its place within our constitutional order today. However, I believe that there are strong reasons not to simply dismiss the classical theory. First, American constitutional interpretation has always had some regard for the views of those who adopted the document, and that has only become more true in recent years, as the Court's makeup has shifted in a more originalist direction.[10] Second, the theory of natural law, natural rights, and natural religion informed the Free Exercise Clause at the most basic level. For this reason, one would be hard-pressed to fully understand that provision or its relationship to the constitutional order without taking those ideas into account.

Third, and most importantly, some aspects of the classical view continue to have strong appeal today. In many ways, the eighteenth-century view was a humanistic one. At its heart was a recognition of the inherent freedom, equality, and dignity of human beings. The classical view maintained that individuals must

10. *See, e.g.*, John O. McGinnis, *It's Now the Barrett Court*, CITY J. (Oct. 27, 2020), https://www.city-journal.org/barret-appointment-supreme-court-power-shift [https://perma.cc/S8RW-5XEJ] (discussing "[t]he strengthening of the [Court's] originalist camp" in recent years).

be free to use their own minds to pursue truth, rather than having doctrines imposed on them by either religious or political authority. And it held that people with diverse views were capable of living together in an open, self-governing society based on mutual acceptance and respect. These principles continue to be central to any adequate understanding of the Free Exercise Clause.

Thus, instead of simply discarding the eighteenth-century view, I believe that we ought to consider whether it can be recast in a way that retains its virtues without depending on theological principles that are no longer widely accepted. In this Article, I begin to develop such a view, which I call liberal humanism. Like the classical theory, this view emphasizes the values of human freedom, equality, and dignity that informed the adoption of the First Amendment. But this view seeks to broaden that theory in a way that reflects our contemporary understanding of those values.[11]

This Article proceeds in four parts. Part I summarizes the classical view and explains how it provided a justification for the protection of religious freedom, first at the state and then at the federal level. In Part II, I discuss how the idea of natural religion can be transformed by moving away from the ontological approach of the eighteenth century (an approach that held that reason could demonstrate the existence of God and the moral implications that flowed from it) and toward a more phenomenological view of religion. According to this view, human beings have an inherent capacity as well as a deep need to search for meaning in the world. They experience meaning in all areas of life, and they integrate these experiences into more comprehensive conceptions of the world and of their place within it. Some of these worldviews are religious ones which find ultimate meaning in a transcendent realm, while others are secular ones which find such meaning in

11. For purposes of clarity, I should emphasize that what I call liberal humanism should not be equated with *secular* humanism. As I explain in section II.C.1, secular humanism is a view that denies (or at least is skeptical about) the existence of a transcendent or supernatural realm, and that instead locates ultimate reality and value solely within this world, and especially within the sphere of human life and experience. *See infra* note 153. My position resembles secular humanism—as well as some religious views—in holding that a key criterion for evaluating a worldview is whether it promotes human flourishing. In contrast to some versions of secular humanism, however, I shall argue that not only secular but also religious worldviews are capable of meeting this standard. In short, the liberal humanism that I present here is neither a secular nor a religious view, but instead is a metatheory that seeks to explain how both sorts of views can be reasonable and worthy of respect.

this world. Both sorts of worldviews can result from reasonable exercises of this human capacity, and so both are entitled to respect under this transformed version of natural religion. If we were to adopt a view like this, it would follow that the Constitution should be interpreted to protect not only religious freedom but also a comparable right to develop and live in accord with secular beliefs.

In Part III, I show that just as the eighteenth-century view provided an account of natural rights, the liberal humanist view can give an account of fundamental rights in our modern constitutional order. Part IV discusses the light that this view can shed on two contemporary issues. Section A explores the long-running debate over whether individuals and organizations are constitutionally entitled to exemptions from laws that conflict with their conscientious beliefs. Section B argues that in situations where the state is either required or decides to grant such exemptions, it must afford equal treatment to religious and secular claims of conscience. In the Conclusion, I highlight the ways that this transformed version of the classical view can contribute to a current understanding of the Free Exercise Clause, and I briefly reflect on the ways that it can enable the religious and secular forces in our cultural battles to find some common ground.

I. NATURAL RELIGION AND THE ADOPTION OF THE FREE EXERCISE CLAUSE

A. The Eighteenth-Century Conception of Natural Religion

Natural religion and its associated ideas of natural law and natural rights held a central place in the intellectual world of eighteenth-century Americans.[12] In this section, I sketch the form that these ideas took in the political, philosophical, and theological writings of John Locke, the theorist who had the greatest impact on American thought.[13] In the following section, I show the ways in which these ideas provided the rationale for protecting religious liberty in the Free Exercise Clause and its state counterparts.

12. For an in-depth account, see Heyman, *Natural Religion*, *supra* note 9, at 10–56. For a valuable exploration of religious liberty and natural rights theory during this era, see VINCENT PHILLIP MUÑOZ, RELIGIOUS LIBERTY AND THE AMERICAN FOUNDING: NATURAL RIGHTS AND THE ORIGINAL MEANINGS OF THE FIRST AMENDMENT RELIGION CLAUSES (2022).

13. For a study of Locke's influence, see MICHAEL P. ZUCKERT, THE NATURAL RIGHTS REPUBLIC: STUDIES IN THE FOUNDATION OF THE AMERICAN POLITICAL TRADITION (1996).

At the core of Locke's thought was the notion that humans are rational beings who are capable of using their minds to direct their own thoughts and actions and to pursue their own good.[14] To do so, they must attain knowledge of themselves and the world.

That knowledge begins with an intuitive sense of one's own existence.[15] Through the use of reason, one can perceive that this existence is due to a chain of causes that ultimately can be traced back to a first cause—an "*eternal, most powerful, and most knowing*" being who is responsible for the existence not only of intelligent beings but also of everything else in the universe.[16] This being is known as God.[17] In addition to this cosmological argument for God's existence, Locke articulates a teleological argument or argument from design: that only an intelligent being could have "produce[d] that order, harmony, and beauty which is to be found in Nature."[18]

In this way, Locke establishes the first principle of what he calls "Natural Religion"[19]: the recognition "*that there is a God*."[20] A second principle readily follows: because humans are finite beings who are created by and dependent on God, a being who is infinite, all-powerful, wise, and good, they have a duty to honor, obey, and worship that being.[21]

Third, Locke contends that humans can use their minds to recognize that God has established moral precepts to govern their conduct – precepts which Locke calls the "Law of Nature and Reason."[22] As rational creatures, individuals are impelled to pursue

14. *See* Steven J. Heyman, *The Light of Nature: John Locke, Natural Rights, and the Origins of American Religious Liberty*, 101 MARQ. L. REV. 705, 719–26 (2018) [hereinafter Heyman, *Locke*].

15. *See* JOHN LOCKE, AN ESSAY CONCERNING HUMAN UNDERSTANDING bk. IV, ch. IX, § 3, at 618–19 (Peter H. Nidditch ed., Oxford Univ. Press 1975) (1689) [hereinafter LOCKE, HUMAN UNDERSTANDING].

16. *Id.* bk. IV, ch. X, §§ 5–6, at 620–21.

17. *See id.* § 6, at 621.

18. *Id.* § 10, at 624.

19. *Id.* bk. III, ch. IX, § 23, at 490.

20. *Id.* bk. IV, ch. X, §§ 1–11, at 619–25; *see also id.* bk. I, ch. IV, § 9, at 89; bk. III, ch. IX, § 23, at 490.

21. *See id.* bk. IV, ch. XIII, § 3, at 651.

22. JOHN LOCKE, TWO TREATISES OF GOVERNMENT bk. II, § 96, at 332 (Peter Laslett ed., Cambridge Univ. Press 1988) (student ed. 1988) (3d ed. 1698) [hereinafter LOCKE, GOVERNMENT].

their own happiness or good.[23] The law of nature directs them to do so in a way that is consonant with the good of others.[24]

The law of nature prescribes the duties that individuals owe to God, to themselves, and to one another. The first category consists of the duties to worship and obey God that I have just mentioned.[25] The second category encompasses duties of self-preservation.[26] And the third category forbids individuals to harm others in their own "Life, Health, Liberty, or Possessions"—a duty that is based on respect for others as free and equal persons who belong to what Locke calls the "great and natural Community" of "*Mankind*."[27]

In this way, the law of nature establishes not only natural duties but also natural rights. In addition to the external rights to life, liberty, and property, those rights include the internal right to think for oneself—a right that is inherent in individuals as rational beings, and that enables them to comprehend the world and to direct their own actions.[28]

A final element of Locke's view concerns religious liberty. In *A Letter Concerning Toleration*, he argues that this is a right that must be accorded to everyone.[29] The *Letter* opens by making this argument in terms of the "Charity, Love, or Good-will" that Christians ought to show to one another as well as to "all Mankind; even to those that are not Christians."[30] But the *Letter* soon makes clear that the argument is based not only on Christianity but also on natural religion. According to Locke, "the genuine Reason of Mankind" teaches that "Liberty of Conscience is every mans natural Right."[31] This right is an inalienable one because "[a]ll the Life and Power of true Religion consists in the inward and full

23. *See* LOCKE, HUMAN UNDERSTANDING, *supra* note 15, bk. II, ch. XXI, §§ 36–71, at 254–84; *id.* bk. IV, ch. XXI, §§ 1, 5, at 720–21.

24. *See* LOCKE, GOVERNMENT, *supra* note 22, bk. II, §§ 6, 57, at 270–71, 305–06.

25. *See supra* text accompanying note 21.

26. *See, e.g.*, LOCKE, GOVERNMENT, *supra* note 22, bk. II, §§ 6, 23–24, 135, at 270–71, 283–85, 357.

27. *Id.* bk. II, §§ 4, 6, 128, at 269–71, 352.

28. *See, e.g.*, LOCKE, HUMAN UNDERSTANDING, *supra* note 15, bk. II, ch. XXI; bk. II, ch. XXVIII, § 10, at 353; bk. IV, ch. XX, § 4, at 708–09; Heyman, *Locke*, *supra* note 14, at 719–25.

29. JOHN LOCKE, A LETTER CONCERNING TOLERATION (William Popple trans., 2d ed. 1690), *reprinted in* A LETTER CONCERNING TOLERATION AND OTHER WRITINGS 1 (Mark Goldie ed., Liberty Fund 2010), http://oll.libertyfund.org/titles/locke-a-letter-concerning-toleration-and-other-writings [https://perma.cc/DKR2-MQRX] [hereinafter LOCKE, TOLERATION].

30. *Id.* at 7–12.

31. *Id.* at 11, 53, 60.

perswasion of the mind," and "the nature of the Understanding [is such] that it cannot be compell'd to the belief of any thing by outward Force," but only by the light of evidence and reason.[32] Thus, individuals must be free to form their own beliefs about God, to worship in accord with them, and to follow the moral rules that God has established for human life—rules that enable a person to attain life and happiness not only in this world but also in the world to come.[33]

This understanding of religious liberty leads Locke to advocate for a sharp separation between religion and state.[34] Because religious liberty is a right that is inseparable from individuals, they do not part with it when they enter into the social contract and establish a civil society and government.[35] It follows that the government's power must be used solely for the purposes for which it is instituted—protecting civil rights such as life, liberty, and property and promoting the public good—and may not be used to invade the sphere of religion.[36] Within that sphere, individuals must be free to act on their own or within the religious societies or churches that they voluntarily form.[37] But while religious freedom is inalienable, it is not absolute, for the same law of nature that establishes this freedom forbids one to use it in a way that violates either the civil or religious rights of other persons or the duties that one owes to the political community under the social contract.[38]

In these ways, Locke's account of natural rights and the social compact and his defense of religious liberty are integrally connected with his theory of natural religion. That theory holds that human beings can use reason to discern the most basic principles of religion: that God exists and is the creator of the world; that human beings have a duty to honor, worship, and obey God; and that God has given a law of nature that establishes their rights and duties in relation to one another.[39] At its core, religion is not about

32. *Id.* at 13–14.
33. *See id.* at 13–16, 32–33, 39–41, 44–48.
34. *See, e.g.*, *id.* at 11–12, 24.
35. *See id.* at 13.
36. *See id.* at 12–15.
37. *See id.* at 12–16, 32–33, 44–45.
38. *See id.* at 20–26, 37, 48–52, 58; Heyman, *Natural Religion*, *supra* note 9, at 107–08.
39. *See supra* text accompanying notes 15–28.

elaborate rituals or orthodox beliefs, but rather about living a morally good life.[40]

For Locke, natural religion lies at the heart of all reasonable religion.[41] But that does not mean that it is the whole of religion. Instead, there are important aspects of religion that cannot be known through reason alone. With the exception of the existence and attributes of God,[42] reason can tell human beings nothing about the spiritual world,[43] nor can it tell them what particular forms of worship are acceptable to God.[44] And although reason offers some grounds to believe in an afterlife, it cannot demonstrate the existence of such a state with any certainty.[45] Knowledge of these things can come only through divine revelation, which is accepted by means of faith.[46] Revelation also possesses some advantages over reason when it comes to inculcating morality.[47] For these reasons, Locke rejects the Deist view that would base religion on reason alone, to the exclusion of revelation.[48] He insists, however, that reason provides not only the foundation but also the touchstone for true religion.[49] Although revelation can impart truths that are "*Above Reason*," it can never teach anything that is "*Contrary to Reason*," for that would conflict with the rational nature that God has given to human beings.[50] For Locke, then, there is an

40. *See* LOCKE, TOLERATION, *supra* note 29, at 7–8, 45.

41. *See* Heyman, *Locke*, *supra* note 14, at 739.

42. *See supra* text accompanying notes 16–21.

43. *See* LOCKE, HUMAN UNDERSTANDING, *supra* note 15, bk. IV, ch. III, § 17, at 548; *id.* § 27, at 557–58.

44. *See* JOHN LOCKE, A THIRD LETTER FOR TOLERATION (1692), *in* 5 THE WORKS OF JOHN LOCKE 139, 156 (London, Rivington, 12th ed. 1824), https://oll.libertyfund.org/titles/locke-the-works-vol-5-four-letters-concerning-toleration [https://perma.cc/Z3M6-DG5K] [hereinafter LOCKE, THIRD LETTER].

45. *See* Heyman, *Locke*, *supra* note 14, at 740–43.

46. *See, e.g.*, LOCKE, THIRD LETTER, *supra* note 44, at 156–57; JOHN LOCKE, THE REASONABLENESS OF CHRISTIANITY AS DELIVERED IN THE SCRIPTURES ch. XIV, at 161–63 (John C. Higgins-Biddle ed., Clarendon Press 1999) (1695) [hereinafter LOCKE, REASONABLENESS].

47. *See* Heyman, *Locke*, *supra* note 14, at 743–45.

48. *See, e.g.*, LOCKE, REASONABLENESS, *supra* note 46, ch. I, at 5 (rejecting the Deist view that "made Jesus Christ nothing but the Restorer and Preacher of pure Natural Religion"); ch. XIV, at 139 (suggesting that it is "too hard a task for unassisted Reason, to establish Morality in all its parts, upon its true foundation; with a clear and convincing light").

49. *See* LOCKE, HUMAN UNDERSTANDING, *supra* note 15, bk. IV, ch. XIX, § 14, at 704 ("*Reason* must be our last Judge and Guide in every Thing.").

50. *Id.* bk. IV, ch. XVII, §§ 23-14, at 687–88; ch. XVIII, at 688–96.

inherent harmony between natural and revealed religion, or between reason and faith.[51]

Although Locke's use of the concept of natural religion was deeply influential, it was far from alone. The concept also featured in Sir William Blackstone's *Commentaries on the Laws of England*,[52] and English judges invoked it to resolve some major cases involving law and religion.[53] The concept played a prominent role in works on the law of nature and nations by Samuel Pufendorf, Jean-Jacques Burlamaqui, and Emer de Vattel; in the moral philosophies of Scottish Enlightenment thinkers from Francis Hutcheson to Adam Smith, as well as of British rationalists like Richard Price; in Deist and Christian theology; and even in Newtonian natural science.[54] And it was also a major theme in the Radical Whig tradition which provided the ideological origins of the American Revolution.[55]

51. *See* Heyman, *Locke*, *supra* note 14, at 745–48.

52. *See, e.g.*, 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *55 (St. George Tucker ed., Philadelphia, Young & Small 1803) (stating that "obedience to superiors is the doctrine of revealed as well as natural religion"); 4 *id.* at *51 (denouncing religious persecution as "highly unjustifiable upon every principle of natural reason, civil liberty, or sound religion"); Heyman, *Natural Religion*, *supra* note 9, at 28–31 (discussing Blackstone's views).

53. In the landmark case of *Omichund v. Barker*, the English judges ruled that witnesses were not required to swear on the Gospels but could swear in the manner prescribed by their own religions, since the practice of taking oaths was not peculiar to Christianity but "follows from the Principles of Natural Religion." Of the Sufficiency and Disability of a Witness (Omichund v. Barker) (1744) 22 Eng. Rep. 337, 347; 2 Equity Cases Abridged 395, 408 (opinion of Hardwicke, C.). Three decades later, in the *Sheriff's Case* (1767), the House of Lords ruled that, under the Toleration Act of 1689, Protestant dissenters were entitled to full protection under the law. As the leading opinion observed, nothing is "certainly more unreasonable, more inconsistent with the rights of human nature, more contrary to the spirit and precepts of the Christian Religion, more iniquitous and unjust, more impolitic, than Persecution. It is against Natural Religion, Revealed Religion, and sound Policy." *The Speech of the Right Honorable Lord Mansfield in the House of Lords, Feb. 4, 1767, in the Cause Between the City of London and the Dissenters*, *in* PHILIP FURNEAUX, LETTERS TO THE HONOURABLE MR. JUSTICE BLACKSTONE app. 2, at 249, 265–66, 278 (London, T. Cadell, 2d ed. 1771), https://hdl.handle.net/2027/osu.32437121564914 [https://perma.cc/N6T8-H373]. For discussion of these cases, see Heyman, *Natural Religion*, *supra* note 9, at 31–33.

54. *See* Heyman, *Natural Religion*, *supra* note 9, at 22–28, 34–52.

55. *See id.* at 53–56. For example, the authors of *Cato's Letters* denounced persecution as "incompatible with true Religion, whether Natural or Revealed," because it infringes on the inherent "right of every man to pursue the natural, reasonable, and religious dictates of his own mind." 2 JOHN TRENCHARD & THOMAS GORDON, CATO'S LETTERS NO. 62, at 426, 428–29; *id.* NO. 66, at 462, 468 (Ronald Hamowy ed., Liberty Fund 1995) (6th ed. 1755), https://oll.libertyfund.org/title/gordon-cato-s-letters-vol-2-june-24-1721-to-march-3-1722-lf-ed [https://perma.cc/AZC9-X9BP].

B. From the American Revolution to the First Amendment

The interlocking ideas of natural rights, natural law, and natural religion were central to the justification that Americans put forward for their break with Great Britain. In the Declaration of Independence, they asserted that individuals were "endowed by their Creator with . . . unalienable Rights" to "Life, Liberty, and the pursuit of Happiness"; that governments were instituted "to secure these rights"; and that when a government sought to invade them, the people had a right to revolution under "the Laws of Nature and of Nature's God"—terms that strongly resonated with the concept of natural religion.[56]

That concept also provided a justification for the protections for religious liberty that were enshrined in the first state constitutions and bills of rights. The most striking example may be found in Article 16 of the Virginia Declaration of Rights, a provision that was drafted by George Mason and revised by James Madison.[57] This provision declared:

> [t]hat Religion, or the duty which we owe to our *Creator,* and the manner of discharging it, can be directed only by reason and conviction, not by force or violence; and, therefore, all men are equally entitled to the free exercise of religion, according to the dictates of conscience; and that it is the mutual duty of all to practise Christian forbearance, love, and charity, towards each other.[58]

Like Locke's writings, this provision invoked Christian ideals but ultimately based the right to religious freedom on the core tenet of natural religion: that "[r]eligion . . . can be directed only by reason and conviction."[59]

The concepts of natural religion and natural rights also played a key role in the controversy over religious liberty that took place

56. DECLARATION OF INDEPENDENCE (U.S. 1776), *reprinted in* 1 THE FOUNDERS' CONSTITUTION ch. 1, doc. 5, at 4 (Philip B. Kurland & Ralph Lerner eds., 1987), http://press-pubs.uchicago.edu/founders/documents/v1ch1s5.html [https://perma.cc/89YQ-EWTD].

57. VA. DECLARATION OF RIGHTS of 1776, *in* 5 THE FOUNDERS' CONSTITUTION, *supra* note 56, Bill of Rights, doc. 2, at 3, http://press-pubs.uchicago.edu/founders/documents/bill_of_rightss2.html [https://perma.cc/44P8-J77U]. For the roles of Mason and Madison in formulating this provision, see BUCKLEY, VIRGINIA, *supra* note 8, at 17–19.

58. VA. DECLARATION OF RIGHTS, *supra* note 57, art. 16, at 3–4.

59. *Id.*; *see supra* text accompanying notes 29–38 (discussing Locke's defense of religious toleration). An assertion that religion must be based not on coercion but on "reason, and conviction" appears in JOHN LOCKE, A SECOND LETTER CONCERNING TOLERATION (1690), *in* 5 THE WORKS OF JOHN LOCKE, *supra* note 44, at 59, 73.

in Virginia during the mid-1780s—a controversy that is widely regarded as an important precursor to the adoption of the First Amendment.[60] In 1784, Patrick Henry championed a bill that would have imposed a tax for the support of Christian teaching and worship in Virginia.[61] In a petition against the bill, *A Memorial and Remonstrance Against Religious Assessments*, Madison presented the most comprehensive case for religious liberty in founding-era America.[62]

The *Memorial* began by drawing on Article 16 of the Virginia Declaration to argue that religion is a natural and "unalienable right" which "must be left to the conviction and conscience of every man."[63] This right is unalienable because the beliefs of individuals must be based on "the evidence contemplated by their own minds," and also because religion is a matter of the duty that they owe to their Creator—a duty that "is precedent, both in order of time and in degree of obligation, to the claims of Civil Society."[64] When individuals enter civil society, they give the state no authority whatsoever over religious matters.[65] To institute a tax for the support of Christianity not only would exceed the legitimate power of government but also would violate the natural equality of individuals by discriminating against non-Christians.[66] As Madison explained, "Whilst we assert for ourselves a freedom to embrace, to profess and to observe the Religion which we believe to be of divine origin, we cannot deny an equal freedom to those whose minds have not yet yielded to the evidence which has convinced us."[67] After articulating this rationale based on natural religion and natural rights, Madison added a series of claims that appealed to Christian beliefs—for example, that establishments of religion tend to corrupt and debase Christianity rather than to

60. For a comprehensive account of the dispute, see BUCKLEY, VIRGINIA, *supra* note 8, chs. 3–5.

61. *See id.* ch. 3. For the text, see *A Bill Establishing a Provision for Teachers of the Christian Religion, Virginia* (1784), *in* THE SACRED RIGHTS OF CONSCIENCE 252, 252 (Daniel L. Dreisbach & Mark David Hall eds., 2009).

62. James Madison, *Memorial and Remonstrance against Religious Assessments, [ca. 20 June] 1785*, NAT'L ARCHIVES: FOUNDERS ONLINE, http://founders.archives.gov/documents/Madison/01-08-02-0163 [https://perma.cc/THW5-WP3B] [hereinafter Madison, *Memorial*].

63. *Id.* § 1.

64. *Id.*

65. *See id.*

66. *See id.* §§ 1–2, 4.

67. *Id.* § 4.

promote it.[68] The arguments that Madison made in the *Memorial* broadly reflected the views not only of Enlightenment liberals but also of rationalist Episcopalians—people who belonged to the church that had long been established in Virginia but who emphasized the harmony of reason and revelation and who were strongly committed to religious liberty.[69]

A combination of natural-religious and Christian arguments also appeared in the petitions submitted by Evangelical Christians, who were among the strongest opponents of Henry's bill. One of the largest groups, the Presbyterians, declared that, as "the subjects of Jesus Christ," they considered any "exercise of spiritual powers by civil rulers" to be a gross "invasion of Divine prerogative."[70] But the Presbyterians' most basic objection was that "[r]eligion is altogether personal, and the right of exercising it unalienable": as human beings, "[w]e never resigned to the control of government, our right of determining for ourselves, in this important article; and acting agreeably to the convictions of reason and conscience, in discharging our duty to our Creator."[71]

By contrast, Christian arguments held center stage in another set of widely subscribed petitions that probably were penned by Baptists.[72] These petitions contended that funding churches through compulsory taxation rather than through voluntary contributions would be "contrary to the spirit of the Gospel."[73] Yet even these petitions advanced some natural rights arguments, such as the assertion that the bill would violate the natural freedom and equality of non-Christians by granting exclusive privileges to Christians in contravention of the state's "declaration of Rights."[74]

68. *See id.* §§ 5–7, 9–12.

69. *See, e.g.*, BUCKLEY, VIRGINIA, *supra* note 8, at 124–25, 128, 130–31, 164 (discussing this position); Heyman, *Natural Religion*, *supra* note 9, at 46–47, 80–81.

70. Memorial of the Presbytery of Hanover, Virginia (Adopted Aug. 13, 1785), *in* THE SACRED RIGHTS OF CONSCIENCE, *supra* note 61, at 304, 306.

71. *Id.* at 304–05. For a valuable discussion of natural religion in this petition, see Rhys Isaac, *"The Rage of Malice of the Old Serpent Devil": The Dissenters and the Making and Remaking of the Virginia Statute for Religious Freedom*, *in* THE VIRGINIA STATUTE FOR RELIGIOUS FREEDOM 139, 149–50 (Merrill D. Peterson & Robert C. Vaughan eds., 2003).

72. For a good example of these petitions, see Petition Against the Bill [from Westmoreland County, Virginia] (Nov. 2, 1784), *in* THE SACRED RIGHTS OF CONSCIENCE, *supra* note 61, at 307 [hereinafter Westmoreland Petition]. On their authorship, see BUCKLEY, VIRGINIA, *supra* note 8, at 148–49 & n.12; Isaac, *supra* note 71, at 150–51.

73. Westmoreland Petition, *supra* note 72, at 307–08.

74. *Id.* at 308.

This tide of opposition from Evangelicals, rationalist Episcopalians, and Enlightenment liberals culminated in the defeat of Henry's assessment bill.[75] Under Madison's leadership, the same political coalition then succeeded in passing the Bill for Establishing Religious Freedom that Thomas Jefferson had drafted several years earlier.[76] Once again, this bill included some language with Christian undertones, such as the contentions that all attempts to coerce religious belief "are a departure from the plan of the holy author of our religion" and that it is "sinful and tyrannical" "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves."[77] But the bill's principal arguments were based on natural religion and "the natural rights of mankind."[78] For example, the preamble declared that "Almighty God hath created the mind free" and had made it "altogether insusceptible of restraint"; "that the opinions and belief of men depend not on their own will, but follow involuntarily the evidence proposed to their minds"; that "our religion" should seek to gain followers by "reason alone"; "that our civil rights have no dependance on our religious opinions, any more than our opinions in physics or geometry"; and "that the opinions of men are not the object of civil government, nor under its jurisdiction."[79] The preamble concluded by asserting "that truth is great and will prevail if left to herself," and that "she . . . has nothing to fear from the conflict [with error] unless by human interposition disarmed of her natural weapons, free argument and debate."[80]

Jefferson's bill then provided that no one should "be compelled to frequent or support any religious worship, place, or ministry

75. *See* THOMAS E. BUCKLEY, ESTABLISHING RELIGIOUS FREEDOM 79–80 (2013). To be clear, I do not mean to imply that these three groups were mutually exclusive. The liberal ideals of the Enlightenment were accepted not only by Deists like Jefferson but also by some Episcopalians and others who sought to harmonize traditional religion and reason. Indeed, some people who were Evangelical in religion agreed with Jefferson on matters of political theory. *See, e.g.*, Heyman, *Natural Religion*, *supra* note 9, at 84–86 (discussing the Baptist leader John Leland). The political coalition that I am describing thus consisted of overlapping rather than distinct groups.

76. *See id.* at 155–63. For the text, see *A Bill for Establishing Religious Freedom, 18 June 1779*, NAT'L ARCHIVES: FOUNDERS ONLINE, https://founders.archives.gov/documents/Jefferson/01-02-02-0132-0004-0082 [https://perma.cc/54XJ-Q86A] [hereinafter Jefferson Bill].

77. Jefferson Bill, *supra* note 76.

78. *Id.*

79. *Id.*

80. *Id.*

whatsoever, nor shall be [penalized] on account of his religious opinions or belief; but that all men shall be free to profess, and by argument to maintain, their opinions in matters of religion," and that those opinions should in no way "affect their civil capacities."[81] During its consideration of the bill, the Virginia legislature toned down some of Jefferson's most rationalist language, but the essence of his case for religious liberty was retained.[82] The statute's passage was celebrated not only by Madison and Jefferson but also by Evangelical and Episcopalian leaders.[83]

The debates in Virginia that led to the defeat of Henry's bill and to the adoption of Jefferson's bill yield considerable insight into the way that founding-era Americans understood the normative rationale for religious liberty. Christian ideas played a vital role in these debates. But to the extent that there was a consensus among the groups that prevailed in this contest—Enlightenment liberals, rationalist Christians, and Evangelicals—it lay in their agreement that (in Jefferson's words) God had "created the mind free," that God intended human beings to pursue religious "truth" by means of "free argument and debate," and that religious liberty was among "the natural rights of mankind."[84]

There is good reason to believe that the same ideas underlay the Religion Clauses of the First Amendment. When the Federal Constitution was sent out to the states for ratification, it was sharply criticized on the ground that it lacked protections for essential rights such as freedom of conscience.[85] These criticisms were often

81. *Id.*

82. For the final version, see VIRGINIA, ACT FOR ESTABLISHING RELIGIOUS FREEDOM, *in* 5 THE FOUNDERS' CONSTITUTION, *supra* note 56, Amendment I (Religion), doc. 44, http://press-pubs.uchicago.edu/founders/documents/amendI_religions44.html [https://perma.cc/7D6E-4N38].

83. *See Letter from James Madison to Thomas Jefferson (Jan. 22, 1786)*, NAT'L ARCHIVES: FOUNDERS ONLINE, https://founders.archives.gov/documents/Madison/01-08-02-0249 [https://perma.cc/FA4U-XWDJ]; [THE REV.] JAMES MADISON, A SERMON PREACHED BEFORE THE CONVENTION OF THE PROTESTANT EPISCOPAL CHURCH IN THE STATE OF VIRGINIA, ON THE TWENTY SIXTH OF MAY, 1786, at 3–7 (Richmond, Thomas Nicolson 1786); Isaac, *supra* note 71, at 158–59 (describing how the Baptists welcomed the statute's passage).

84. Jefferson Bill, *supra* note 76.

85. *See, e.g.*, BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 349–51 (enlarged ed. 1992).

expressed in the language of natural rights and natural religion.[86] Several state ratifying conventions proposed constitutional amendments to protect religious liberty.[87] The most fully developed of these proposals drew on Article 16 of the Virginia Declaration of Rights.[88] During the First Congress, Madison (who had been elected to the House of Representatives with crucial support from Evangelical leaders in Virginia[89]) introduced a series of amendments that included a Bill of Rights.[90] The records of that Congress show that he and his colleagues understood religious liberty as one of the natural rights that individuals retain when they establish civil society and government.[91]

86. *See, e.g.*, CENTINEL NO. 2, *in* 2 THE COMPLETE ANTIFEDERALIST § 2.7.55, at 152 (Herbert J. Storing & Murray Dry eds., 1981) (asserting that "all men have a natural and unalienable right to worship Almighty God, according to the dictates of their own consciences and understanding . . . .").

87. *See* THE COMPLETE BILL OF RIGHTS § 1.1.2, at 11–13 (Neil H. Cogan ed., 2d. ed. 2015) (reproducing the proposals from the conventions of New Hampshire, New York, North Carolina, Rhode Island, and Virginia, as well as those from the Antifederalist minorities in the Maryland, Massachusetts, and Pennsylvania conventions).

88. The Virginia convention's proposal read:

> That religion or the duty which we owe to our Creator, and the manner of discharging it can be directed only by reason and conviction, not by force or violence, and therefore all men have an equal, natural and unalienable right to the free exercise of religion according to the dictates of conscience, and that no particular religious sect or society ought to be favored or established by Law in preference to others.

Id. § 1.1.2.8, at 13. North Carolina and Rhode Island subsequently proposed the same language. *See id.* §§ 1.2.2.5, .7, at 12–13.

89. *See* JOHN A. RAGOSTA, WELLSPRING OF LIBERTY: HOW VIRGINIA'S RELIGIOUS DISSENTERS HELPED WIN THE AMERICAN REVOLUTION AND SECURED RELIGIOUS LIBERTY 169–70 (2010).

90. *See* HOUSE OF REPRESENTATIVES, AMENDMENTS TO THE CONSTITUTION, *in* 5 THE FOUNDERS' CONSTITUTION, *supra* note 56, Bill of Rights, doc. 11, at 20, 24–29, http://press-pubs.uchicago.edu/founders/documents/bill_of_rightss11.html [https://perma.cc/XF22-BW2L] [hereinafter Madison, *Bill of Rights Speech*].

91. *See id.* at 26 (referring to the "natural right[s]" which are retained by the people); James Madison, *Notes for Speech in Congress (June 8, 1789)*, https://founders.archives.gov/documents/Madison/01-12-02-0125 [https://perma.cc/KMB9-5N3H] (indicating that "Con[science]" is such a right); Roger Sherman's Proposed Committee Report art. 2 (July 21–28, 1789), *in* CREATING THE BILL OF RIGHTS: THE DOCUMENTARY RECORD FROM THE FIRST FEDERAL CONGRESS 266, 267 (Helen E. Veit et al. eds., 1991) (describing "the rights of conscience in matters of religion" as among the "natural rights which are retained by [the people] when they enter into society . . . .").

II. TRANSFORMING NATURAL RELIGION

As Part I explained, during the founding era, the most generally accepted normative justification for religious liberty was rooted in the concept of natural religion. As rational beings, humans had an inherent right to use their minds to pursue religious truth. The most fundamental tenets concerned the existence of a Creator as well as the duties that individuals owed to God, to themselves, and to one another under the law of nature. These principles were understood to be objective ones that could be discerned through reason.

In many ways, this view was a humanistic one. It insisted that religion had to be justified in light of human thought and experience. It condemned force and coercion in matters of belief. It regarded all individuals as members of the human community and held that they were entitled to respect as free and equal persons who were endowed with inherent rights. It maintained that the goal of religion and morality was to promote human happiness.

In these ways, the classical theory contained elements that continue to have great value today. The most serious problem arises from the ontological claims that lay at the heart of that theory. During the eighteenth century, the propositions that God created the world and established the physical and moral laws that govern it could find support in much of the leading philosophy and science of the period, including the works of Locke and Newton. After the rise of Darwinian evolutionary theory, modern cosmology, and other scientific developments, this is no longer the case, for those bodies of thought offer nontheistic explanations for the origins of life and the universe. That is not to say that there is no current scientific or philosophical support for the ideas that flourished in the eighteenth century. The tradition of natural theology (that is, philosophical arguments for the existence of God) is a longstanding one; far from being defunct, it continues to be a thriving field within contemporary philosophy of religion.[92] In addition, there are

92. Excellent overviews of the work in this area may be found in THE BLACKWELL COMPANION TO NATURAL THEOLOGY (William Lane Craig & J.P. Moreland eds., 2012), and THE OXFORD HANDBOOK OF NATURAL THEOLOGY (Russell Re Manning ed., 2013). Two prestigious series of endowed lectures on the subject—the Dudleian Lectures at Harvard, which were established in 1750, and the Gifford Lectures at four British universities, which commenced in 1888—are still being given today. *See Dudleian Lectures*, HARV. DIVINITY SCH. LIBR., https://guides.library.harvard.edu/hds/named-

prominent scholars who maintain that modern science supports—or at least is compatible with—the existence of God.[93] In contemporary society, however, it is no longer widely accepted that God's existence or will for human beings can be discovered by reason alone.[94]

I therefore believe that any effort to translate the eighteenth-century conception of natural religion into our own context must take a different tack. Instead of an approach that seeks to establish the objective truth of religion or of other comprehensive systems of belief, I suggest that we begin with a phenomenological approach which focuses on our experience of living in the world, and particularly on our search for meaning in life.[95]

In this Part, I contend that such an approach can offer a fruitful way of understanding religion and other systems of belief. Section A discusses the concept of meaning, while section B sketches the ways that people pursue meaning in the various spheres of their lives. Finally, section C explores how religion and its secular counterparts seek to integrate these different forms of meaning into comprehensive worldviews that enable human beings to live fulfilling lives.

A. The Concept of Meaning

In accord with the natural right tradition, we can describe humans as rational animals, or as living beings who are endowed

lecture-series/dudleian [https://perma.cc/HB5G-Z9VP] (last visited Mar. 31, 2023); THE GIFFORD LECTURES, https://www.giffordlectures.org/ [https://perma.cc/5KUD-UJ9D] (last visited Feb. 16, 2023). For a highly enjoyable—and critical—literary treatment of this subject, see REBECCA NEWBERGER GOLDSTEIN, 36 ARGUMENTS FOR THE EXISTENCE OF GOD: A WORK OF FICTION (2010).

93. *See, e.g.*, FRANCIS S. COLLINS, THE LANGUAGE OF GOD: A SCIENTIST PRESENTS EVIDENCE FOR BELIEF (2006); JOHN F. HAUGHT, DEEPER THAN DARWIN: THE PROSPECT FOR RELIGION IN THE AGE OF EVOLUTION (2003); KENNETH R. MILLER, FINDING DARWIN'S GOD: A SCIENTIST'S SEARCH FOR COMMON GROUND BETWEEN GOD AND EVOLUTION (1999).

94. *See, e.g.*, CHARLES TAYLOR, A SECULAR AGE (2007).

95. For some philosophical accounts of religion as a way of giving meaning to human life, see JOCELYN MACLURE & CHARLES TAYLOR, SECULARISM AND FREEDOM OF CONSCIENCE (2011); MARTHA NUSSBAUM, LIBERTY OF CONSCIENCE: IN DEFENSE OF AMERICA'S TRADITION OF RELIGIOUS NEUTRALITY 168–69 (2008) [hereinafter NUSSBAUM, LIBERTY OF CONSCIENCE]. For a psychological account, see Crystal L. Park, *Religion and Meaning*, *in* HANDBOOK OF THE PSYCHOLOGY OF RELIGION AND SPIRITUALITY 295 (Raymond-F.-Paloutzian & Crystal L. Park eds., 2005), chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://psipp.itb-ad.ac.id/wp-content/uploads/2020/10/Raymond-F.-Paloutzian-PhD-Crystal-L.-Park-PhD-Handbook-of-the-Psychology-of-Religion-and-Spirituality-2005-The-Guilford-Press.pdf [https://perma.cc/A6PK-7HRL].

with consciousness, feeling, and intelligence.[96] These qualities are what make us free: rather than being solely determined by our bodily constitutions or our instincts, we have a capacity for self-determination, which includes the power to formulate a view of our own good and to direct our actions to achieve it.[97]

As rational animals, our most basic goal is to live. Of course, this involves activity that is directed toward sustaining and protecting our lives.[98] But human life also has a qualitative dimension. We seek not only to live but to live well—to have lives that are flourishing or fulfilling.[99] On one level, this fulfillment involves the satisfaction of physical needs and desires, such as those for food, health, safety, and sex. But because we possess consciousness, feeling, and intelligence, we also strive to realize that side of our nature. One of the most important ways we do so is by pursuing meaning in life.[100]

This quest for meaning takes place on several levels. The first is what I shall call *existential*. As an intelligent being, I am conscious of my own existence. This is Descartes's *cogito*—I have an intuitive

96. *See, e.g.*, ARISTOTLE, THE POLITICS bk. I, ch. 2, 1253a8-9, at 37 (Carnes Lord trans., Univ. of Chicago Press 1984) (asserting that man is the only animal that has speech or reason (*logos*)); ARISTOTLE, NICOMACHEAN ETHICS bk. 1, ch. 7, 1098a3-18, at 12–13 (Robert C. Bartlett & Susan D. Collins trans., Univ. of Chicago Press 2011) (maintaining that the good for human beings is "an activity of [the] soul in accord with reason"); IMMANUEL KANT, THE METAPHYSICS OF MORALS *6:434, at 201 (Mary Gregor trans., Lara Denis ed., Cambridge Univ. Press, rev. ed. 2017) (1797) (referring to "a human being" as "*animal rationale*") [hereinafter KANT, METAPHYSICS OF MORALS]; *cf.* LOCKE, GOVERNMENT, *supra* note 22, bk. II, § 163–64, at 376–77 (characterizing humans as "Rational Creatures"); ST. THOMAS AQUINAS, SUMMA THEOLOGICA pt. I, Q. 76, art. 3; pt. I–II, Q. 91, art. 1–2; pt. I–II, Q. 94, art. 1 (Fathers of the English Dominican Province trans., Benziger Bros. ed. 1947), https://aquinas101.thomisticinstitute.org/st-index [https://perma.cc/J7XV-GCRP] (discussing man as a "rational" "animal" as well as a "rational creature").

97. *See, e.g.*, LOCKE, GOVERNMENT, *supra* note 22, bk. II, §§ 4, 57, 63; LOCKE, HUMAN UNDERSTANDING, *supra* note 15, bk. II, ch. XXI, §§ 46–53, at 262–68.

98. *See, e.g.*, LOCKE, GOVERNMENT, *supra* note 22, bk. II, §§ 6, 25; 4 BLACKSTONE, *supra* note 52, at *186 (discussing "the great universal principle of self-preservation").

99. *See* ARISTOTLE, THE POLITICS, *supra* note 96, bk. I, ch. 2, 1252b29-30 (observing that although the political community comes "into being for the sake of living, it exists for the sake of living well").

100. For some philosophical explorations of this concept, see JOHN COTTINGHAM, ON THE MEANING OF LIFE (2003); TERRY EAGLETON, THE MEANING OF LIFE (2007); TODD MAY, A SIGNIFICANT LIFE (2015); THADDEUS METZ, MEANING IN LIFE (2013); SUSAN WOLF, MEANING IN LIFE AND WHY IT MATTERS (Stephen Macedo ed., 2010). For an overview of recent work in this field, see Thaddeus Metz, *The Meaning of Life*, *in* THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY ARCHIVE (Edward N. Zalta ed., Winter 2021 ed.), https://plato.stanford.edu/archives/win2021/entries/life-meaning/ [https://perma.cc/6VAL-PZRM].

certainty of my existence by virtue of my self-conscious activity of thinking.[101] This activity generates the self, the ego or I. In addition to being aware of my own existence, I affirm that existence—I regard myself as a being who exists "for myself,"[102] a being who is an end in myself and who possesses intrinsic worth.[103] In these ways, self-consciousness lies at the root of meaning and value in life.

A second sort of meaning is *cognitive*. This is what we refer to when we say that a person knows the meaning of a word, a statement, or a text, or that she understands a language.[104] Another form of cognitive meaning results from our efforts to attain knowledge and understanding of ourselves and the world around us.[105] In this way, our experience of life in the world comes to seem relatively comprehensible rather than arbitrary, chaotic, and meaningless.[106]

The word *mean* is also used to denote having an intention or purpose, as when one says, "I didn't mean to do that."[107] This points to a third sort of meaning, which may be called *volitional*. Individuals recognize or posit ends for themselves and then strive to realize those ends in the world. Those ends can take a wide variety of forms: they may be intellectual, such as writing a master's thesis; aesthetic, such as learning to play a musical work; moral, such as striving to become a kinder person; and so on. This activity of formulating purposes and working to accomplish them is another way in which people gain a sense of meaning in life.[108]

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101. *See* RENÉ DESCARTES, THE MEDITATIONS CONCERNING FIRST PHILOSOPHY (1641), *in* DISCOURSE ON METHOD AND MEDITATIONS 59, 82 (Laurence J. LaFleur trans., Bobbs-Merrill Co. 1960); *see also* LOCKE, HUMAN UNDERSTANDING, *supra* note 15, bk. IV, ch. IX, § 3, at 618 (following Descartes).

102. *See, e.g.*, ARISTOTLE, METAPHYSICS 1.2, at 982b26–27 (W.D. Ross trans.), *in* 2 THE COMPLETE WORKS OF ARISTOTLE at 1552, 1555 (rev. Oxford trans., Jonathan Barnes ed., 1984) (describing a free person as one "who exists for himself and not for another"); G.W.F. HEGEL, ELEMENTS OF THE PHILOSOPHY OF RIGHT §§ 34–36, 66R, 105–07, at 67–69, 95–97, 135–37 (H.B. Nisbet trans., Allen W. Wood ed., Cambridge Univ. Press 1991) (1821) [hereinafter HEGEL, RIGHT] (discussing the ways a person exists "for himself").

103. *See* IMMANUEL KANT, FOUNDATIONS OF THE METAPHYSICS OF MORALS *428-29, at 45–46 (Lewis W. Beck trans., Macmillan, 2d ed. 1990) (1785); IMMANUEL KANT, METAPHYSICS OF MORALS, *supra* note 96, *6:236, *6:434–35, at 32, 201.

104. *See Meaning* (noun 2), definition 2, OXFORD ENGLISH DICTIONARY; *see also Mean* (verb 1), definition 6, *id.* All citations to this work are to the online version.

105. *See, e.g.*, METZ, *supra* note 100, at 229–30.

106. *See, e.g.*, EAGLETON, *supra* note 100, at 46, 56–58.

107. Indeed, the Oxford English Dictionary's entry begins with this definition of the word. *See Mean* (verb 1), definition 1, OXFORD ENGLISH DICTIONARY, *supra* note 104.

108. *See, e.g.*, WOLF, *supra* note 100, at 26–27.

A fourth sense of meaning refers to what one cares about. This is how the word is used when one says, "I can't tell you how much this means to me."[109] I shall call this sort of meaning *affective*, since it relates to our affections or emotions. In the language of the eighteenth and early nineteenth centuries, it can be said that meaning in life is a matter of the heart as well as the head.[110]

Although I have listed these forms of meaning separately, it is also important to see the ways in which they interact with each other. For example, if you learn that climate change poses a grave threat to human life (cognitive and existential meaning), you may come to care deeply about the problem (affective meaning), and decide to combat it (volitional meaning). Likewise, if you have a deep love for music, you may resolve to become a musician and undertake to learn all that you need to know for that purpose.

More fundamentally, we should observe that the various levels of meaning are not sharply distinct from one another. For example, because volition is an exercise of practical reason, it is itself a form of thought,[111] and it is often guided by the knowledge that comes from intellectual inquiry (such as climate science). Moreover, it has been persuasively argued that thought and emotion are intimately connected—that our emotions are imbued with thought,[112] and conversely that they play a key role in the formation of consciousness and cognition.[113]

In short, meaning is a matter of intellect, will, and emotion—it is present in what I believe, in what I decide to do, and in what

109. *See Mean* (verb 1), definition 9, OXFORD ENGLISH DICTIONARY, *supra* note 104 ("to be important to a person to the extent indicated, esp. as a source of benefit or as an object of regard, affection, or love; to matter (a lot, nothing, etc.)").

110. *See, e.g.*, MYRA STOKES, THE LANGUAGE OF JANE AUSTEN chs. 5–6 (1991) (discussing the use of these concepts in the writings of Austen and others during this period). For insightful discussions of the relationship between meaning and love, see EAGLETON, *supra* note 100, at 91, 95–100; WOLF, *supra* note 100, at 3–9.

111. *See generally* R. Jay Wallace, *Practical Reason*, *in* THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY ARCHIVE (Edward N. Zalta ed., Spring 2020 ed.), https://plato.stanford.edu/archives/spr2020/entries/practical-reason/ [https://perma.cc/G8HQ-XVC6].

112. *See, e.g.*, MARTHA C. NUSSBAUM, UPHEAVALS OF THOUGHT: THE INTELLIGENCE OF EMOTIONS (2001).

113. *See, e.g.*, ANTONIO DAMASIO, DESCARTES' ERROR: EMOTION, REASON, AND THE HUMAN BRAIN (1994); LEONARD MLODINOW, EMOTIONAL: HOW FEELINGS SHAPE OUR THINKING (2022).

I love.[114] These forms of meaning are closely related to one another, and all of them are rooted in the self and in what I am calling existential meaning. Everything that has meaning for me does so because it relates to me and to my concern for my own life.

Thus far, our discussion has focused on the subjective side of meaning—on what things mean *to me*. But meaning also has an objective dimension. If I devote my life to counting blades of grass or to making my pet goldfish happy, my activity has little objective meaning because these projects do not warrant the care that I lavish on them.[115] Meaning in life is a function of the objective value of one's activity as well as the subjective satisfaction that one experiences from engaging in it. As the philosopher Susan Wolf has put it, "meaning arises when subjective attraction meets objective attractiveness."[116]

The concept of meaning transcends subjectivity in another crucial way as well. Meaning does not exist solely for me. In my efforts to understand the world, I soon become aware that other individuals are also self-conscious beings who are endowed with thought, will, and feeling and who affirm their own existence. And they discover that the same is true of me. In this way, we can come to recognize one another as fellow human beings whose lives have meaning.[117] The recognition or respect that we accord one another enhances the existential meaning that each of us possesses: my claim to intrinsic worth now gains support not merely from my own self-affirmation but also from the fact that my worth is recognized

114. For an account of meaning in life that embraces these three elements, see METZ, *supra* note 100, at 223.

115. *See* WOLF, *supra* note 100, at 16, 36–38.

116. *Id.* at 9.

117. Classic discussions of recognition appear in the works of G.W.F. Hegel. *See, e.g.*, G.W.F. HEGEL, PHENOMENOLOGY OF SPIRIT §§ 178–96, at 111–19 (A.V. Miller trans., J.N. Findlay ed., Oxford Univ. Press 1977) (1807) [hereinafter HEGEL, PHENOMENOLOGY]; 3 G.W.F. HEGEL, PHILOSOPHY OF SUBJECTIVE SPIRIT §§ 430–39 (M.J. Petry ed. & trans., D. Reidel 1978) (1830, 1845); *see also* ROBERT R. WILLIAMS, HEGEL'S ETHICS OF RECOGNITION (1997) (presenting a comprehensive account of Hegel's views). For some valuable recent works, see AXEL HONNETH, RECOGNITION: A CHAPTER IN THE HISTORY OF EUROPEAN IDEAS (2021); AXEL HONNETH, DISRESPECT (2007); PAUL RICOEUR, THE COURSE OF RECOGNITION (David Pellauer trans., 2005); and the essays by Charles Taylor, Jürgen Habermas, and others in MULTICULTURALISM: EXAMINING THE POLITICS OF RECOGNITION (Amy Gutmann ed., 1994). An overview of recent debates in this area appears in Mattias Iser, *Recognition*, *in* THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY ARCHIVE (Edward N. Zalta ed., Summer 2019 ed.), https://plato.stanford.edu/archives/sum2019/entries/recognition/ [https://perma.cc/MLF2-MMCV].

and affirmed by others.[118] This mutual recognition—and the empathy which is its counterpart on an affective level[119]—are crucial forms of meaning in themselves, and they also allow us to generate other forms of meaning—by expressing our thoughts and feelings to one another, by engaging in shared activity, by developing relationships that we regard as having intrinsic value, and by forming a community in which each person feels a sense of belonging and acceptance. These kinds of meaning may be called *relational* or *social*.

In sum, on the view I am developing, meaning in life is rooted in individual self-consciousness and mutual understanding. It arises from our individual and collective efforts to attain insight, knowledge, and wisdom about ourselves and the world; to shape our lives in accord with our own purposes and conceptions of the good; to experience and promote what we love and care about; and to interact and form relationships with other people within a broader community that values each of its members.

In all of these ways, people can find positive meaning in their lives. Yet any account of meaning would be radically deficient if it failed to take account of negative experiences. Meaning in the world is subverted by conduct that abuses or degrades others or that denies them the recognition and respect to which they are entitled as human beings and members of the community; that spreads falsehoods or misinformation about important matters; that sabotages one's own good or the good of other people; or that unjustifiably inflicts suffering on others or destroys things that they

118. *See, e.g.*, HEGEL, PHENOMENOLOGY, *supra* note 117, § 178, at 111 (maintaining that one's self-consciousness cannot be fully realized unless it is recognized by others). A similar view of the connection between selfhood and one's relationships with others may be found in the well-known saying of Rabbi Hillel the Elder: "If I am not for myself, who is for me? But if I am for my own self [only], what am I?" MISHNAH PIRKEI AVOT ch. I, § 14 (Joshua Kulp trans., n.d.), SEFARIA, https://www.sefaria.org/Pirkei_Avot.1.14?lang=bi [https://perma.cc/7L7V-N9UY]. On this view, self-assertion is necessary for selfhood but it is not sufficient. To fully realize oneself, one must move beyond one's own subjectivity, enter into relations with others, and recognize that they have the same status and value that one claims for oneself.

119. For the history of the concept of empathy as well as an overview of recent psychological and philosophical work on the subject, see Karsten Stueber, *Empathy*, *in* THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY ARCHIVE. (Edward N. Zalta ed., Fall 2019 Edition) https://plato.stanford.edu/archives/fall2019/entries/empathy/ [https://perma.cc/W6HJ-NBUD]. For a striking personal account, see Frank Bruni, *One Day, I Couldn't See Right. My Life Hasn't Been the Same Since.*, N.Y. TIMES (Feb. 16, 2022), https://www.nytimes.com/2022/02/15/opinion/blindness-friendship.html [https://perma.cc/2NSA-WYT6].

care about. Apart from these forms of wrongdoing, people are vulnerable to other negative experiences such as failures at school or work, the end of valued relationships, the loss of loved ones, illness, and death. All these things negate meaning in life.[120] But at the same time, some of the deepest meaning in our lives comes from grappling with suffering and mortality,[121] as well as from opposing wrongdoing and injustice.[122] This suggests that the search for meaning is best understood not simply in positive terms, but rather in terms of an ongoing effort to overcome meaninglessness and to live in a way that has positive meaning and value.

B. The Search for Meaning in Human Life

The previous section developed a general account of meaning. In this section, I explore the ways that people search for meaning in different spheres of life. Of course, virtually all activities and experiences can be said to have some meaning. Here I focus on the ones that have the deepest meaning and value for human beings. As we shall see in Part III, these include many of the activities and experiences that receive heightened protection in American constitutional jurisprudence.

1. Individual

As I have suggested, we can understand the meaning in one's life as beginning with self-consciousness.[123] The individual is aware of her own existence as a living and intelligent being; she wills that this existence should continue; and she cares about this at the deepest level. These three elements come together in the form of existential meaning. The individual asserts that her life matters; she regards herself as an end in herself, as a being with intrinsic value; and she insists that others recognize and respect her as such.[124]

As intelligent beings, individuals are capable of self-determination.[125] One of the most basic forms of self-determination involves the

120. *See* METZ, *supra* note 100, at 233–34 (characterizing negative experiences as a sort of "anti-matter" that reduces meaning in life).

121. For a moving exploration of love and grief, see KATHRYN SCHULZ, LOST & FOUND: A MEMOIR (2022).

122. *See* METZ, *supra* note 100, at 233–34.

123. *See supra* text accompanying notes 101–03.

124. *See supra* text accompanying notes 102–03.

125. *See supra* text accompanying note 97.

assertion of control over one's own mind and body.[126] The mind is the inward side of the self while the body is the outward side.[127] The body is also the means by which the individual expresses his thoughts, feelings, and identity and carries out his intentions. In these ways, possession and control over one's body are imbued with deep meaning. By contrast, to subject another's body to violent, coercive, or degrading treatment involves a profound denial of that person's meaning and worth.

One can attain meaning through several other forms of self-determination as well. The first is by developing one's human nature and particular capacities through education and training.[128] A second is by defining and expressing one's personal identity, for example by deciding to join or leave a particular religious community[129] or to come out as LGBTQ.[130] And a third is by forming and pursuing particular projects,[131] which can range from short-term endeavors to lifelong commitments to a cause or vocation. All of these activities and experiences take place over the course of a lifetime bounded by birth and death—events that have the deepest significance for individuals and that human culture has always regarded as having profound meaning.[132]

126. *See, e.g.*, HEGEL, RIGHT, *supra* note 102, at §§ 47–48, 66, at 78–79, 95–97.

127. *See, e.g.*, *id.* The notion that the body is the external side of the self may be found in classical legal discourse, which often refers to an individual's body as their "person." *See, e.g.*, 3 BLACKSTONE, *supra* note 52, at *120 (explaining that the law regards "[t]he least touching of another's person wilfully, or in anger, [as] a battery," on the ground that everyone's "person [is] sacred, and no other ha[s] a right to meddle with it [without justification] in any the slightest manner").

128. *See, e.g.*, JOHN LOCKE, SOME THOUGHTS CONCERNING EDUCATION (1693), *in* SOME THOUGHTS CONCERNING EDUCATION AND OF THE CONDUCT OF THE UNDERSTANDING 1 (Ruth W. Grant & Nathan Tarcov eds., 1996).

129. *See, e.g.*, EMPTY THE PEWS: STORIES OF LEAVING THE CHURCH (Chrissy Stroop & Lauren O'Neal eds., 2019); DEBORAH FELDMAN, UNORTHODOX: THE SCANDALOUS REJECTION OF MY HASIDIC ROOTS (2012); EMILIE GRIFFIN, TURNING: REFLECTIONS ON THE EXPERIENCE OF CONVERSION (1982). For a fascinating sociological study, see LYNN DAVIDMAN, BECOMING UN-ORTHODOX: STORIES OF EX-HASIDIC JEWS (2015).

130. *See, e.g.*, BRIAN BROOME, PUNCH ME UP TO THE GODS (2021).

131. *See, e.g.*, WOLF, *supra* note 100, at 25–33.

132. For an argument that meaning in life is fundamentally shaped by our mortality, see TODD MAY, DEATH (2014).

2. Social, Political, Legal, and Constitutional

People are not merely individual but also social beings, who develop their nature, define their identities, and pursue their good together with others. Many of our most important experiences involve personal bonds. These bonds include sexual, romantic, and marital relationships, bearing and raising children, and other family ties. Friendships can involve unique forms of self-revelation and sharing with others.[133] Personal relationships draw upon all of our capacities for thought, will, and affection, and they are vital sources of existential meaning—my sense of self and of self-worth is profoundly shaped by the experience of loving and being loved by others. Individuals can also find fulfillment by participating in various groups and associations, as well as in the organizations where they work.

Modern societies are composed of a variety of social and cultural groups which have their own institutions, values, and ways of life. Much of the meaning in social life comes from living within these frameworks. These social and cultural groups encounter one another in the public sphere, where they sometimes come into conflict.[134] These conflicts are often referred to as "culture wars" or disputes in which each side strives to dominate and impose its views on the other.[135] Ultimately, however, political life should not be understood in such destructive terms. Instead, while ideological conflict is a legitimate and inevitable part of political life, citizens should attempt to engage in such conflict in a manner that is consistent with the respect that they owe to one another as human beings and members of the community, and should be willing to engage in democratic deliberation over the best ways to

133. For an overview of the contemporary philosophical literature on friendship, see Bennett Helm, *Friendship*, *in* THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY ARCHIVE (Edward N. Zalta ed., Fall 2017 Edition), https://plato.stanford.edu/archives/fall2017/entries/friendship/ [https://perma.cc/44SL-TSLJ].

134. An illuminating exploration of this dynamic may be found in the work of Robert C. Post. *See, e.g.*, ROBERT C. POST, CONSTITUTIONAL DOMAINS: DEMOCRACY, COMMUNITY, MANAGEMENT (1995).

135. *See, e.g.*, Romer v. Evans, 517 U.S. 620, 636, 646, 651–52 (1996) (Scalia, J., dissenting) (criticizing the majority opinion—which struck down a state constitutional amendment that barred the adoption of legal protections against sexual-orientation discrimination—for "tak[ing] the victory away from traditional forces" in their "culture war" to "preserve traditional American moral values" by preventing "social acceptance . . . of homosexuality").

promote justice and the common good.[136] Meaning in political life comes from participating in this process as well as from the results that it reaches.

Another important source of meaning can be found in the legal order itself, which aims to express and realize our society's conception of persons and of the rights and duties that we have in relation to one another and to the community as a whole.[137] At the most fundamental level, this conception may be found in the Constitution and in the ways that it is understood, interpreted, and lived out in our common life.

As in other areas, meaning in the political realm should not be understood merely in positive terms. Instead, some of the most important forms of political meaning derive from efforts to eradicate social evils and to overcome injustice and oppression—efforts that in recent years have been exemplified by movements such as #MeToo[138] and the struggle to combat systemic racism that took center stage in our national life in the wake of the murder of George Floyd in May 2020.[139]

3. Aesthetic and Intellectual

Of course, some of the deepest forms of meaning can be found in art, literature, drama, music, and other forms of aesthetic expression and experience.[140] Indeed, some fictional characters and events can seem more vivid to us than many of the ones that we encounter in real life. Philosophy and other forms of intellectual activity can offer profound insight into our lives and the world we live in. And science and technology allow us not only to understand the world but also to change and improve it, as with the remarkable development of vaccines and treatments to protect people against

136. *See* STEVEN J. HEYMAN, FREE SPEECH AND HUMAN DIGNITY 170–72 (2008).

137. *See, e.g.*, Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503 (2000).

138. *See, e.g.*, Megan Twohey & Jodi Kantor, *With Weinstein Conviction, Jury Delivers a Verdict on #MeToo*, N.Y. TIMES (Feb. 24, 2020), https://www.nytimes.com/2020/02/24/us/harvey-weinstein-verdict-metoo.html [https://perma.cc/QQT9-VKYL].

139. *See, e.g.*, Giulia McDonnell Nieto del Rio et al., *A Timeline of What Has Happened in the Year Since George Floyd's Death*, N.Y. TIMES (May 25, 2021), https://www.nytimes.com/2021/05/25/us/george-floyd-protests-unrest-events-timeline.html [https://perma.cc/V6PD-XZMT].

140. *See, e.g.*, METZ, *supra* note 100, at 230–31.

the massive illness, death, and disruption caused by the novel coronavirus that emerged in 2019.[141]

4. Religious and Secular

There are moments in which people believe that they have encountered an ultimate reality. If this reality is perceived as transcending the world of space and time, the experience is what I shall call a religious one. The phenomenology of religious experience has been explored by social scientists, philosophers, theologians, and legal scholars.[142] Sometimes individuals have what they take to be direct experiences of the divine.[143] Instances range from St. Paul's encounter with the risen Jesus on the road to Damascus, to the visions of Julian of Norwich and other mystics in a variety of religious traditions, to Avery Dulles's sense of a presence in his room on the night he became a Christian.[144] Less dramatic but more common experiences may occur in the course of personal prayer.

In many other cases, what people take to be experiences of the divine are mediated through things in this world.[145] Thus, a person may gaze into the night sky or stand at the edge of the Grand Canyon and be filled with a sense of the majesty of creation.[146] Alternatively, an encounter with the divine may be mediated through observation of, or participation in, various kinds

141. *See, e.g.*, Anthony S. Fauci, *The Story Behind COVID-19 Vaccines*, SCIENCE, Apr. 9, 2021, at 109, https://science.sciencemag.org/content/372/6538/109 [https://perma.cc/ZL4T-G7JU].

142. *See, e.g.*, KATHLEEN A. BRADY, THE DISTINCTIVENESS OF RELIGION IN AMERICAN LAW: RETHINKING RELIGION CLAUSE JURISPRUDENCE ch. 3 (2015); WILLIAM JAMES, THE VARIETIES OF RELIGIOUS EXPERIENCE: A STUDY IN HUMAN NATURE (Martin E. Marty ed., Penguin Classics 1982) (1902); Mark Wynn, *Religious Experience and Natural Theology*, *in* THE OXFORD HANDBOOK OF NATURAL THEOLOGY, *supra* note 92, at 325–39; Mark Wynn, *Phenomenology of Religion*, *in* THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY ARCHIVE (Edward N. Zalta ed., Winter 2016 Edition), https://plato.stanford.edu/archives/win2016/entries/phenomenology-religion/ [https://perma.cc/TY75-GQFX] [hereinafter Wynn, *Phenomenology*].

143. *See* Wynn, *Phenomenology*, *supra* note 142, § 1-1.

144. *See Acts* 9:1–19; JULIAN OF NORWICH, REVELATIONS OF DIVINE LOVE (Barry Windeatt trans., Oxford Univ. Press 2015); AVERY DULLES, A TESTIMONIAL TO GRACE AND REFLECTIONS ON A THEOLOGICAL JOURNEY (1946).

145. *See* Wynn, *Phenomenology*, *supra* note 142, § 1-2.

146. As the Psalms express it, "The heavens are telling the glory of God; and the firmament proclaims his handiwork." *Psalms* 19:1. Unless otherwise noted, all Biblical quotations are taken from the New Revised Standard Version updated edition (NRSVue).

of human activity. One of the most common forms of religious experience involves the prayer, singing, preaching, scriptural reading, and ritual that take place during worship services, which can range from sober traditional liturgies to the ecstatic worship characteristic of Pentecostalism, Hasidism, and Sufism.[147]

But experiences that people take to be of ultimate reality need not be religious in character. The person who looks at the night sky or the Grand Canyon may be filled with wonder at the cosmos and may perceive the universe itself to be the ultimate reality without positing a realm beyond it.[148] Similarly, one may experience intimate acts of caring, or mass demonstrations against racism, as embodying ultimate values of love and justice whose roots lie in humanity itself rather than in any supernatural source. I shall call these experiences secular ones. Experiences that people take to be of ultimate reality may have great meaning and value regardless of whether individuals locate that reality in this world or in a world that transcends this one. In this respect, secular and religious experiences are on a par.

C. Worldviews

So far, we have been considering the various areas of human experience separately, but of course they overlap with one another. Celebrations that focus on individuals—such as birthday parties, graduations, and funerals—are also deeply social in nature. Political life both draws upon and shapes individual and social experience. Culture can be seen as a system of meaning that encompasses all the experiences that occur within a society.[149] But the broadest frameworks for bringing these experiences together are what I shall call worldviews: accounts that seek to integrate all aspects of human life and existence into a comprehensive whole.[150]

147. For a dramatic recent instance of this sort of religious experience, see Ruth Graham, *"Woodstock" for Christians: Revival Draws Thousands to Kentucky Town*, N.Y. TIMES (Feb. 23, 2023), https://www.nytimes.com/2023/02/23/us/kentucky-revival-asbury-university.html [https://perma.cc/6U5W-R5AN] (describing the spontaneous religious revival that brought more than 50,000 people to a small campus chapel at Asbury University in Wilmore, Kentucky in early 2023).

148. *See, e.g.*, CARL SAGAN, COSMOS (1980); *infra* note 178 (discussing Albert Einstein).

149. *See, e.g.*, CLIFFORD GEERTZ, THE INTERPRETATION OF CULTURES (1973).

150. On the notion of a worldview, see DAVID K. NAUGLE, WORLDVIEW: THE HISTORY OF A CONCEPT (2002); NINIAN SMART, WORLDVIEWS: CROSSCULTURAL EXPLORATIONS OF

At the core of each worldview is a conception of ultimate reality. So a worldview may be either secular or religious. Secular views are those that hold that ultimate reality is immanent within this world of space and time, while religious views hold that such reality is to be found in a realm that transcends this world. These worldviews unify the various forms of meaning that were outlined in section II.A: in addition to providing an intellectual account of the world we live in, they help us to understand who we are, how we should act, what we should love, and how we can feel at home in the world.

If worldviews are to fulfill our need as rational beings to find meaning in life, they must be reasonable and consonant with observable reality as well as with our common experience of living in the world, which provides the "touchstone" for assessing them.[151] I believe that both secular and religious worldviews are capable of meeting this standard.

1. Secular Worldviews

Just as there are many different religions, there are many different secular views of the world.[152] Here I want to focus on one leading view, which is known as secular humanism.[153] Like religion,

HUMAN BELIEFS (3d ed. 2000). This concept is roughly equivalent to what John Rawls calls "comprehensive . . . religious and philosophical doctrines." JOHN RAWLS, POLITICAL LIBERALISM Lecture I, § 2.2, at 13; lecture II, § 3.1, at 58 (1993).

151. JOHN COTTINGHAM, HOW TO BELIEVE 41 (2015).

152. For an overview of academic research on secularism, see Jesse M. Smith & Ryan T. Cragun, *Secularity and Nonreligion*, *in* BLOOMSBURY RELIGION IN NORTH AMERICA (Jan. 2021), https://www.researchgate.net/publication/352407787_Secularity_and_Nonreligion [https://perma.cc/M58F-3TZX].

153. For some valuable statements of this view, see A.C. GRAYLING, THE GOD ARGUMENT: THE CASE AGAINST RELIGION AND FOR HUMANISM (2013); PHILIP KITCHER, LIFE AFTER FAITH: THE CASE FOR SECULAR HUMANISM (2014); STEPHEN LAW, HUMANISM: A VERY SHORT INTRODUCTION (2011). Adherents of this view often simply call it "humanism." In the interest of clarity, I shall refer to it as "secular humanism," since I shall contend that religious views also can be humanistic in the sense of seeking to promote human flourishing. Some secular humanists agree with this point. *See, e.g.*, LAW, *supra*, at 6, 27, 134 (observing that "[a] significant number of religious people actually share many [humanist] views. . . ." and that "most humanists tend to agree with the religious about which lives are meaningful and which are not"). Other secular humanists are inclined to regard religion as "mistaken, retrogressive, oppressive and sometimes downright dangerous. . . ." GRAYLING, *supra*, at 133; *see also id.* at 241, 256 (maintaining that religion is rooted in "a distant past of ignorance, superstition and accompanying myth-making," and that religion should be combatted as a "corrosive enemy to human progress and well-being").

secular humanism addresses such fundamental questions as "what ultimately is real; . . . what ultimately makes life worth living; . . . what is morally right or wrong, and why; and . . . how best to order our society."[154] Secular humanists emphasize the role of reason, science, and experience in addressing such issues.[155] They are skeptical about—or outright reject—the existence of a transcendent realm or of supernatural beings like gods.[156] Instead, they hold that "human beings exist in an entirely natural universe, governed by natural laws, and that the human good is shaped accordingly."[157] That good is conceived in terms of "human flourishing."[158] There is no single formula for what this involves.[159] Secular humanists regard people as autonomous beings who must be free to formulate their own values and their own conceptions of what constitutes a meaningful life.[160] Moreover, the uniqueness and diversity of individuals means that "there might be as many different possible good lives as there are people to live them."[161] In general terms, however, it may be said that a good life is one that "seem[s] meaningful or purposeful" as well as "rich or satisfying" to the individual who lives it; that embraces relationships of "real intimacy—love, or friendship—with one or more other[people]"; that involves active engagement in "worthwhile and creative activities"; that is "marked by honesty and authenticity"; that accepts responsibility for the choices one makes; and finally, that manifests "integrity, in the sense of the integration of all [these features] into a whole which constitutes the individual's own chosen project for the good."[162]

This account of the human good also gives rise to an account of morality. "For the humanist, the source of moral imperatives lies in human sympathy."[163] It follows, in negative terms, that "[a] life cannot be thought good which is harmful in its impact on others,"

154. LAW, *supra* note 153, at 6.
155. *See id.* at 1; GRAYLING, *supra* note 153, at 18, 55, 255.
156. *See* LAW, *supra* note 153, at 1, 92, 137; GRAYLING, *supra* note 153, at 18, 32, 61, 146–47.
157. GRAYLING, *supra* note 153, at 147.
158. *Id.* at 192–93; *see* LAW, *supra* note 153, at 89, 92.
159. *See* GRAYLING, *supra* note 153, at 151, 160–61.
160. *See id.* at 159, 170; LAW, *supra* note 153, at 120.
161. GRAYLING, *supra* note 153, at 160–61.
162. *Id.* at 161, 162, 166.
163. *Id.* at 245.

while from a positive perspective, one should strive to promote the good of other people—for example, by doing one's part to ensure that they do not suffer from "oppression and injustice" or "lack the necessary conditions for human flourishing."[164] Finally, although secular humanists focus on the good of human beings, they recognize that this should not necessarily be our sole concern. Instead, some would argue that morality requires us to act in certain ways toward other sentient beings or even toward the natural world as a whole—for example, by promoting the wellbeing of animals or by combatting climate change.[165]

Of course, the secular humanist worldview does not find expression in religious organizations like churches, synagogues, or mosques, or in religious practices such as prayer, liturgy, or initiations into religious communities.[166] But individuals who hold this view may find community within humanist societies,[167] and may hold events such as naming and coming-of-age ceremonies, weddings, and funerals, in order to satisfy the deeply felt human need to mark important life moments with other people.[168] In all these ways, secular humanism seeks to promote and enhance our lives in this world, which it takes to be the only ones that we have.[169]

2. Religious Worldviews

In short, secular humanism offers a reasonable approach to the existential questions of who we are, how we should live, and how we can feel at home in the world. The same can be true of

164. *Id.* at 161, 193–94.

165. *See id.* at 194–96 & n.29.

166. *See, e.g.*, *id.* at 147.

167. *See* LAW, *supra* note 153, at 24–25. For examples of such groups, see ETHICAL HUMANIST SOCIETY OF CHICAGO, https://ethicalhumanistsociety.org [https://perma.cc/6AJH-T4QB] (last visited Mar. 31, 2023); OASIS NETWORK, https://www.oasisnetwork.com [https://perma.cc/39AK-QFAQ] (last visited Mar. 31, 2023); SUNDAY ASSEMBLY, https://sundayassembly.online [https://perma.cc/9G76-Z5J7] (last visited Mar. 31, 2023). For studies, see ORGANIZED SECULARISM IN THE UNITED STATES: NEW DIRECTIONS IN RESEARCH (Ryan T. Cragun, Christel Manning & Lori L. Fazzino, eds., 2017); Josh Bullock, The Sociology of the Sunday Assembly: "Belonging Without Believing" in a Post-Christian Context (Sept. 2017) (Ph.D. dissertation, Kingston University London), https://eprints.kingston.ac.uk/id/eprint/41775/1/Bullock-J.pdf [https://perma.cc/HH3Y-JPU9]; Sarah J. Charles et al., *United on Sunday: The Effects of Secular Rituals on Social Bonding and Affect*, PLOS ONE (2021), https://doi.org/10.1371/journal.pone.0242546 [https://perma.cc/6MBQ-8YMF].

168. *See* GRAYLING, *supra* note 153, at 148; LAW, *supra* note 153, at ch. 8.

169. *See* LAW, *supra* note 153, at 1, 133–34; GRAYLING, *supra* note 153, at 140, 229–30, 258.

religious worldviews. In the interest of simplicity, I shall focus on the ones that collectively are the most common in our society, that is, the monotheistic, Abrahamic religions of Judaism, Christianity, and Islam. But I believe that a similar case could be made for the reasonableness of other major religions such as Hinduism and Buddhism.

Is it reasonable to believe in God? One way to approach this question is through the discipline of natural theology, which (as I have noted) is a flourishing field within philosophy of religion.[170] In addition to developing contemporary forms of the traditional cosmological, teleological, and ontological arguments, scholars in this discipline have argued that we must conclude that God exists if we are to make sense of a variety of phenomena including consciousness, reason, morality, evil, and religious experience. These arguments have been made with great depth and sophistication, as have the arguments on the other side.[171] I shall not canvass these philosophical debates here. Instead, I shall simply draw on our discussion of the search for meaning in this Part to show how it can be reasonable to adopt a religious worldview. Once more, my aim is not to present an objective argument for God's existence in the manner of eighteenth-century natural religion, but rather to give an account of how some people reasonably can find that religion offers the best way for them to live meaningful lives.[172]

The account runs like this: Humans are living, conscious beings who are endowed with intelligence, feeling, and volition. They use these capacities to seek meaning and value in life. But human consciousness is finite and limited. Taken solely as an individual, one's awareness, love, and will are focused on oneself and one's own purposes and projects. When individuals enter into personal, familial, and other relationships, their concerns expand to embrace

170. *See supra* text accompanying note 92.

171. A wealth of discussion on this subject may be found in THE BLACKWELL COMPANION TO NATURAL THEOLOGY, *supra* note 92, and THE OXFORD HANDBOOK OF NATURAL THEOLOGY, *supra* note 92. For other valuable explorations, see TIM BAYNE, PHILOSOPHY OF RELIGION: A VERY SHORT INTRODUCTION ch. 3 (2018); GRAYLING, *supra* note 153, chs. 7–10; LAW, *supra* note 153, ch. 2–3; Charles Taliaferro, *Philosophy of Religion* § 5.2, *in* THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY ARCHIVE (Edward N. Zalta ed., Fall 2019 ed.), https://plato.stanford.edu/archives/fall2019/entries/philosophy-religion [https://perma.cc/4JLU-E6G2].

172. As a liberal believer, I would count myself within this group.

other people. Their perspectives are further enlarged through participation in social, cultural, and political life. Through various forms of activism as well as artistic, literary, and intellectual pursuits, their interests may come to encompass the whole of humanity and the natural world. Through philosophy and science, they can inquire into the nature of reality and the history of the universe. In these ways, consciousness develops from the personal concerns of individuals, on one end of the spectrum, to the farthest reaches of human awareness and the most comprehensive forms of meaning and value, on the other.

Up to this point, nothing has been said that a secular humanist need take issue with. But the account now makes a transcendental move. When the progression that I just described is taken to its limit, one can conceive of an infinite consciousness whose awareness, love, and will extend to the entire universe and to everything within it. This infinite consciousness may be called God. By entering into a relationship with God, individuals are enabled to transcend their finite nature and commune with (what they take to be) a being who is the *telos* or culmination of their search for meaning and value, and who embraces all forms of meaning and value within itself. As subjects of God's love, individuals possess a sort of absolute value of their own. The believers' relationships with God lie at the core of their identity, give purpose to their lives and pursuits, and bind them together with other people as well as with the whole world. Religion also provides believers with moral guidance by enjoining them to treat others as one would wish to be treated, to combat suffering and injustice, and to strive to transform the world so that it is the way that a being of boundless love and wisdom would want it to be. For believers, religion offers the best way to live a deeply meaningful life in this world and (according to some religious views) to attain life in the world to come.

3. Choosing Between Secular and Religious Worldviews

As thinkers like Locke, Jefferson, and Madison recognize, individuals have only a limited degree of choice when it comes to the beliefs they hold about the world, because they cannot believe anything they do not perceive to be true.[173] What individuals

173. *See* LOCKE, TOLERATION, *supra* note 29, at 13–14; Jefferson Bill, *supra* note 76; Madison, *Memorial*, *supra* note 62, §§ 1, 4.

believe is strongly influenced by their culture, upbringing, personality traits, and similar factors.[174] To the extent that people have autonomy in this area, the decision can be a difficult one. The choice between religious and secular worldviews turns on a number of profound philosophical issues, and there are powerful arguments on both sides. This is one of the most longstanding debates in human life, and it may not be resolvable through reason alone.[175] Thus, it cannot be said that all religious or all secular worldviews are objectively unreasonable in the intellectual account that they give of the world. And from a subjective or phenomenological standpoint, there are many reasonable people who find that one sort of view or the other most deeply resonates with their own experience and enables them to find meaning and value in their lives and to feel at home in the world.

For these reasons, it cannot be said that a reasonable individual can adopt only one or the other type of worldview. And this point is even more true at a collective level. A liberal political community conceives of itself as a society of reasonable persons, and so it is not in a position to treat either religious or secular worldviews as the only ones that people reasonably can accept.[176]

4. The Variety of Worldviews

So far, for purposes of clarity, I have been treating secular and religious worldviews as though they were categorically distinct and mutually exclusive. But it is possible to hold worldviews that combine these two dimensions. This is especially common in modern societies, in which many people sincerely believe in some form of religion, at the same time that they participate in social, cultural, economic, and political realms that are more deeply shaped by secular forces and ideas. This phenomenon cannot be set down to mere hypocrisy. It is no simple matter to navigate life in a complex society that contains many relationships, practices, and institutions that are secular and others that are

174. *See, e.g.*, 1 APA HANDBOOK OF PSYCHOLOGY, RELIGION, AND SPIRITUALITY chs. 5–14 (Kenneth I. Pargament ed., 2013); Vassilis Saroglou, *Personality and Religion*, *in* INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL & BEHAVIORAL SCIENCES 801 (James D. Wright, 2d ed. 2015), chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://dial.uclouvain.be/pr/boreal/object/boreal%3A155326/datastream/PDF_01/view [https://perma.cc/57XJ-9PFP].

175. *See, e.g.*, RAWLS, *supra* note 150, lecture II, §§ 1.3, 3.2, at 53, 60.

176. *See, e.g.*, *id.* lecture I, § 6.2, at 36–37.

religious in character. More fundamentally, many people experience the world as having both secular and transcendent dimensions, and it is not easy to understand how the two should go together.

Moreover, while some worldviews combine elements of secularism and religion, others cannot readily be assigned to either category. In contemporary society, a substantial number of people describe themselves as "spiritual but not religious."[177] And in his final book, *Religion Without God*, the legal philosopher Ronald Dworkin followed Albert Einstein in holding that "'the center of true religiousness' is an appreciation of the 'radiant beauty' of the universe" rather than belief in a deity.[178] As I shall explain, the difficulty of knowing how to categorize views of this sort—Dworkin's "Religious Atheism"[179] or the position of those who are "spiritual but not religious"—lends weight to the notion that the First Amendment should be interpreted to protect the freedom to follow all sorts of worldviews and not only those that are religious in a traditional sense.[180]

III. RELIGIOUS LIBERTY AND OTHER FUNDAMENTAL RIGHTS

In Part I, we explored the intellectual background of the Free Exercise Clause. During the founding era, it was widely held that human beings could use reason to establish the most basic principles of religion: that God existed and created the world, that people had a duty to worship and obey God, and that God had given them a law of nature to regulate their conduct. This law enjoined individuals to treat others as free and equal persons who had inherent rights. Among the most important rights was the

177. *See* Michael Lipka & Claire Gecewicz, *More Americans Now Say They're Spiritual But Not Religious*, PEW RSCH. CTR. (Sept. 6, 2017), https://www.pewresearch.org/fact-tank/2017/09/06/more-americans-now-say-theyre-spiritual-but-not-religious/ [https://perma.cc/W98C-A28K] (reporting that as of 2017, 27 percent of U.S. adults describe themselves this way, as compared with 54 percent who say that they are religious); *see also Religious Landscape Study: The Spiritual but Not Religious*, PEW RSCH. CTR., https://www.pewforum.org/religious-landscape-study/religious-denomination/spiritual-but-not-religious/#beliefs-and-practices (last visited Mar. 31, 2023) [https://perma.cc/JK5B-FA9Z] (detailing the beliefs and practices of this group).

178. RONALD DWORKIN, RELIGION WITHOUT GOD 3, 49 (2013) (quoting Albert Einstein in LIVING PHILOSOPHIES: THE REFLECTIONS OF SOME EMINENT MEN AND WOMEN OF OUR TIME 6 (Clifton Fadiman ed., 1990).

179. *Id.* at 1.

180. *See infra* Section IV.B.

freedom to use one's own mind to pursue religious truth. This theory of natural religion, natural law, and natural rights provided the most broadly accepted normative justification for the protection of religious liberty and other freedoms.

In Part II, I presented a modern version of this eighteenth-century view. Instead of an ontological account of the existence of God, this liberal humanist approach rests on a phenomenological account of the ways that people search for meaning and value in life, from individual self-realization and personal relationships, through participation in social, cultural, political, aesthetic, and intellectual life, to experiences of ultimate reality. For many people, religion offers a way to integrate these experiences into a relatively unified and coherent worldview that shapes their identities and enables them to live rich and meaningful lives. For many other people, secular worldviews perform the same functions.

This Part expands the liberal humanist theory by presenting a contemporary version of natural rights and natural law theory. This view does not depend upon (although it does not reject) the existence of a divine legislator. But it does resemble the classical view in basing rights and duties on an account of human nature.

As in Part II, this account begins with the premise that we are living beings endowed with consciousness, feeling, and intelligence. Because we have these capacities, we have the ability to freely determine our own actions and to pursue our own self-fulfillment or good. This good consists not only in life and material well-being, but also in the meaning and happiness that flow from developing and exercising our capacities for thought, will, love, and relationship with others. Individuals seek self-fulfillment in all areas of life, including their existence in the external world, their personal and family lives, their participation in the broader life of the community, and their relation to ultimate reality.

The previous Part used this theory to explore the importance of religion and other worldviews. This Part will use it to sketch an account of human rights. As a free, self-determining being, I assert a right to pursue self-fulfillment in a variety of ways. At the same time, reason and empathy tell me that other people have the same nature and capacities that I do. I cannot reasonably expect them to respect my personhood and rights unless I am willing to accord them the same respect. On this view, rights and duties are based on

mutual recognition and respect among persons.[181] This is one way of translating the eighteenth-century conception of natural rights and natural law into contemporary terms.[182]

In the following sections, I develop this view and show how it provides a theoretical justification for a broad range of basic rights, including (A) external rights to life and to freedom from violence and constraint; (B) rights to form one's own inner life and to enter into personal relationships with others; (C) rights to participate in the political, social, cultural, and intellectual life of the community; and (D) rights to develop and live in accord with one's fundamental view of the world. Many of these rights relate to the various kinds of meaning that we explored in Part II, and many of them are recognized and protected by American law. In Part IV, I shall bring this theory of rights to bear on some basic issues of free exercise jurisprudence, including the problem of conflicts between religious liberty and other rights.

A. External Rights to Life and Freedom from Violence

The first category of rights involves the individual's life in the external world. At the most basic level, self-determination and self-fulfillment involve affirming one's own existence and asserting control over one's own body.[183] Individuals have inherent rights to life and personal security, as well as the closely related right to personal liberty or freedom from constraint.[184] These rights are protected by a number of constitutional provisions, including the Thirteenth Amendment, which outlaws slavery,[185] and the Fifth and Fourteenth Amendments, which forbid the government to "deprive any person of life, liberty, or property, without due process of law"—provisions that have been held to guarantee

181. *See, e.g.*, LOCKE, GOVERNMENT, *supra* note 22, bk. II, § 6, at 270–71; HEGEL, RIGHT, *supra* note 102, § 36, at 69.

182. For a fuller presentation of this view, which draws on natural rights theorists such as Locke, Kant, and Hegel, as well as on our current understanding of rights, see HEYMAN, *supra* note 136, chs. 3–4.

183. *See supra* text accompanying notes 102–03, 126–27.

184. *See* 1 BLACKSTONE, *supra* note 52, at *129–38 (discussing these rights).

185. U.S. CONST. amend. XIII.

substantive rights as well as procedural fairness.[186] The rights to one's life, body, and freedom are also secured by tort and criminal law, which protect against many forms of personal violence and unlawful restraint.[187] At the same time that liberal humanism offers a rationale for these legal and constitutional provisions, it also offers a basis for criticizing the ways in which the legal system fails to adequately protect the inherent rights at stake—for example, when that system recognizes a rule of qualified immunity that frequently shields law enforcement officers from accountability for invading those rights.[188]

B. Rights to Shape One's Inner Life and Relationships with Others

Another key area of self-determination and -fulfillment involves personal life. To begin with, individuals pursue meaning by cultivating their own inner lives of thought, feeling, and imagination. The freedom to do so finds protection in a variety of constitutional provisions, including the First Amendment, which secures the liberty to choose what materials to view in one's own home;[189] the Fourth Amendment, which proscribes unjustified intrusions into one's home, possessions, and personal information;[190] and the Due Process Clauses of the Fifth and Fourteenth Amendments, which also afford some protection to

186. U.S. CONST. amends. V, XIV; *see* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES § 7.1, at 569–73 (5th ed. 2015) (discussing substantive due process). Other relevant provisions include U.S. CONST. art. I, § 9, cl. 2 (guaranteeing right to habeas corpus against unlawful detention); U.S. CONST. amend. IV (securing freedom from "unreasonable searches and seizures"); U.S. CONST. amends. V–VI, VIII (protecting rights of persons accused or convicted of crimes).

187. *See, e.g.*, MODEL PENAL CODE arts. 210–13 (1985) (defining homicide, assault, kidnapping, sexual assault, and other offenses against the person); RESTATEMENT (SECOND) OF TORTS §§ 13–48 (1965) (setting forth protections against battery, assault, false imprisonment, and other intentional invasions of personal liberty and security); *id.* §§ 281–524A (setting forth protections against unintentional injury).

188. For powerful critiques of this doctrine, see Jamison v. McClendon, 476 F. Supp. 3d 386 (S.D. Miss. 2020); Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 NOTRE DAME L. REV. 1797 (2018).

189. *See, e.g.*, Stanley v. Georgia, 394 U.S. 557 (1969) (possession of obscene material in home cannot be prohibited by the State).

190. *See, e.g.*, Riley v. California, 573 U.S. 373 (2014) (digital contents of cell phones generally may not be searched by the police without a warrant); Katz v. United States, 389 U.S. 347 (1967) (wiretapping by the government violated the Fourth Amendment).

informational privacy.[191] The right to cultivate one's own inner life is also protected by tort law, which makes it unlawful to invade the privacy of others[192] or to improperly subject them to severe emotional distress.[193]

Of course, one of the most important facets of personal life involves relationships with others. In a series of high-profile cases, the Supreme Court has held that the Constitution grants people broad protection in this area. Referring to the core right at issue as one of "liberty," "autonomy," "privacy," "dignity," or "personhood,"[194] these decisions hold that under the Fourteenth Amendment, the government generally may not interfere with the choices that individuals make to engage in consensual sexual relations,[195] to procreate,[196] to use contraception,[197] to form intimate relationships,[198] to marry,[199] "to direct the upbringing and education of [their] children,"[200] or to live with members of their extended family.[201] As Justice Anthony M. Kennedy explained in *Obergefell v. Hodges*,[202] these rights involve decisions that are

191. *See, e.g.*, Whalen v. Roe, 429 U.S. 589, 599 (1977) (observing that the Fourteenth Amendment affords some protection to "the individual interest in avoiding disclosure of personal matters").

192. *See* RESTATEMENT (SECOND) OF TORTS, *supra* note 187, §§ 652A–52E.

193. *See* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 46 (2012).

194. *E.g.*, Obergefell v. Hodges, 576 U.S. 644, 663–72 (2015) (using all these terms).

195. *See* Lawrence v. Texas, 539 U.S. 558 (2003) (striking down anti-sodomy laws under Due Process Clause of Fourteenth Amendment).

196. *See* Skinner v. Oklahoma, 316 U.S. 535 (1942) (holding that law mandating sterilization of habitual criminals violates Equal Protection Clause of Fourteenth Amendment).

197. *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479 (1965) (holding that use of contraceptives by married couples falls within a constitutionally protected right to privacy); Eisenstadt v. Baird, 405 U.S. 438 (1972) (extending this protection to unmarried individuals).

198. *See Obergefell*, 576 U.S. at 666–67; *Lawrence*, 539 U.S. at 567.

199. *See Obergefell*, 576 U.S. 644 (holding that bans on same-sex marriage violate the Due Process and Equal Protection Clauses); Loving v. Virginia, 388 U.S. 1 (1967) (same with regard to bans on interracial marriage).

200. Pierce v. Soc'y of Sisters, 268 U.S. 510, 534–35 (1925) (holding that statute requiring children to attend public rather than private schools "unreasonably interferes with the [Fourteenth Amendment] liberty of parents and guardians to direct the upbringing and education of children under their control"); *see also* Meyer v. Nebraska, 262 U. S. 390 (1923) (invalidating law forbidding teaching foreign languages to school children).

201. *See* Moore v. City of E. Cleveland, 431 U.S. 494 (1977) (plurality opinion) (holding that single-family zoning ordinance may not constitutionally be applied to prevent individual from living with her grandchildren).

202. 576 U.S. 644 (2015).

"central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs" and that give rise to deeply "meaningful" and "fulfill[ing]" relationships.[203]

The Court has found constitutional protection for personal life not only in the Fourteenth Amendment but also in the First Amendment right to freedom of association. As Justice William J. Brennan, Jr. observed, that right extends to "relationships [that], by their nature, involve deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs but also distinctively personal aspects of one's life."[204] "[T]he constitutional shelter afforded such relationships," Brennan explained, "reflects the realization that individuals draw much of their emotional enrichment from close ties with others," and enables individuals to "define [their own] identity" without "unwarranted state interference."[205] In addition to "[f]amily relationships," this right to "intimate association" clearly would seem to protect the freedom to form friendships and other close personal relationships.[206]

Arguably, the constitutional protections for personal autonomy should allow individuals to determine not only the course of their lives but also the manner of their deaths, at least in the case of people who are terminally ill.[207] In *Washington v. Glucksberg*,[208] the Supreme Court rejected the claim that the Fourteenth Amendment guarantees a right to physician-assisted suicide. However, some

203. *Id.* at 656–57, 663, 665–671. In *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022), the Court overruled *Roe v. Wade*, 410 U.S. 113 (1973) and *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992), which had held that the Fourteenth Amendment protected the right to abortion prior to fetal viability. At the same time, however, the *Dobbs* majority insisted that "[n]othing in this opinion should be understood to cast doubt on precedents that do not concern abortion," *id.* at 2277–78, 2280, and that its decision "does not undermine [those precedents] in any way," *id.* at 2258. *See also id.* at 2309 (Kavanaugh, J., concurring) (emphasizing this point); *but cf. id.* at 2300–04 (Thomas, J., concurring) (calling for wholesale repudiation of the Court's substantive due process jurisprudence). For some powerful critiques of *Dobbs*, *see* Reva B. Siegel, *Memory Games:* Dobbs*'s Originalism as Anti-Democratic Living Constitutionalism – and Some Pathways for Resistance*, 101 TEX. L. REV. (forthcoming 2023); Cass R. Sunstein, Dobbs *and the Travails of Due Process Traditionalism* (Harvard Pub. L. Working Paper, Paper No. 22-14, 2022), https://ssrn.com/abstract=4145922.

204. Roberts v. United States Jaycees, 468 U.S. 609, 619–20 (1984).

205. *Id.* at 619.

206. *Id.* at 618–20.

207. *See, e.g.*, RONALD DWORKIN, LIFE'S DOMINION: AN ARGUMENT ABOUT ABORTION, EUTHANASIA, AND INDIVIDUAL FREEDOM (1993).

208. Washington v. Glucksberg, 521 U.S. 702 (1997).

states recognize such a right under their own laws,[209] and the Court has suggested that competent individuals have a constitutional right to refuse life-sustaining medical treatment.[210]

C. Rights to Participate in Community Life

Although individuals can exercise some measure of control over their personal and family lives, in many other areas—such as public health and environmental protection—there is little they can do on their own. In areas like this, the only kind of self-determination that people can engage in is collective in nature. In this context, they have an inherent right to participate in political expression, deliberation, and decision-making, as well as to associate with others for those purposes.

The Constitution establishes a form of government that is broadly democratic although it is modified by institutional arrangements such as federalism.[211] A number of constitutional provisions and statutes secure the right to vote.[212] In recent years, however, the Supreme Court often has woefully failed to adequately protect this right or the democratic process in general.[213] By contrast, the Court generally has interpreted the First Amendment to afford strong protection to political expression and association.[214] Unfortunately, however, in a series of narrowly divided decisions, the Court also has undermined our capacity

209. *See, e.g.*, Oregon's Death with Dignity Act, OR. REV. STAT. §§ 127.800–995 (2022).

210. *See* Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 278–79 (1990).

211. *See, e.g.*, U.S. CONST. art. I, § 2, cl. 1 (providing for popular election of House of Representatives); amend. XVII (providing for popular election of senators).

212. *See, e.g.*, U.S. CONST. amend. XV (banning denial of voting rights based on race); amend. XIX (banning denial of voting rights based on sex); amend. XXIV (abolishing poll tax in federal elections); amend. XXVI (securing franchise to citizens who are 18 or older); Voting Rights Act of 1965, Pub. L. 89-110, 79 Stat. 437 (codified as amended in scattered sections of 42 U.S.C.) (banning discrimination in voting rights based on race).

213. *See, e.g.*, Brnovich v. Democratic Nat'l Comm., 141 S. Ct. 2321 (2021) (adopting narrow interpretation of Voting Rights Act § 2); Rucho v. Common Cause, 139 S. Ct. 2484 (2019) (ruling that federal jurisdiction over partisan gerrymandering claims is barred by political question doctrine); Shelby Cnty. v. Holder, (2013) (striking down Voting Rights Act § 4).

214. *See, e.g.*, Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (per curiam) (holding that advocacy of law violation may be prohibited only when intended and likely to produce imminent lawless action); N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964) (ruling that First Amendment protects criticism of public officials unless it is knowingly or recklessly false); NAACP v. Alabama, 357 U.S. 449 (1958) (restricting governmental power to inquire into association's membership).

for democratic deliberation by striking down laws that impose reasonable limits on the role of money in politics.[215]

The ways that individuals engage in self-determination and -fulfillment in the public sphere are not limited to politics, but also include participation in the social, cultural, and intellectual life of the community.[216] Accordingly, the Free Speech Clause has been interpreted to extend beyond political speech to include "expression about philosophical, social, artistic, economic, literary, . . . ethical," cultural, scientific, and other matters.[217] And the First Amendment right to free association has been understood in similarly broad terms.[218]

D. Rights to Form and Live in Accord with Religious and Secular Worldviews

Finally, as we saw in Part II, the worldviews that individuals embrace shape their understandings of who they are, how they should live, and how they can feel at home in the world. It follows that when individuals develop, debate, adopt, or reject particular worldviews, they engage in self-determination and self-fulfillment at the deepest level.

Of course, the freedom to do these things with regard to religious worldviews is protected not only by the Free Speech Clause but also by the Free Exercise Clause. As the Court has explained, "[t]he free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires."[219]

215. *See, e.g.*, McCutcheon v. FEC, 572 U.S. 185 (2014) (holding that federal ban on total amount that wealthy individuals can contribute to political candidates and parties violates First Amendment); Citizens United v. FEC, 558 U.S. 310 (2010) (ruling that for-profit corporations have First Amendment right to spend unlimited amounts on political campaigns).

216. *See, e.g.*, Robert C. Post, *The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and* Hustler Magazine v. Falwell, 103 HARV. L. REV. 601 (1990); Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 879–80, 883 (1963); Alexander Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245, 256–57 (1961).

217. Abood v. Detroit Bd. of Educ., 431 U.S. 209, 231 (1977), *overruled on other grounds by* Janus v. Am. Fed'n of State, Cnty. and Mun. Emps., Council 31, 138 S. Ct. 2448 (2018); Chicago Police Dep't v. Mosley, 408 U.S. 92, 95–96 (stating that the First Amendment protects speech "[t]o permit the continued building of our politics and culture"); Miller v. California, 413 U.S. 15, 22–24 (1973) (indicating that First Amendment protects expression with serious scientific value).

218. *See, e.g.*, Roberts v. United States Jaycees, 468 U.S. 609, 622 (1984) (observing that First Amendment has long been interpreted to protect a "right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends").

219. Emp. Div., Dep't of Hum. Res. v. Smith, 494 U.S. 872, 877 (1990).

As a general matter, it also includes the right to worship in accord with one's beliefs.[220] The most difficult questions are whether, and to what extent, the Clause protects the right to engage in conduct, and especially in conduct that contravenes an otherwise valid law. This is an issue to which we shall return in the next Part.[221]

That Part will also discuss the status of secular worldviews. As we have seen, the capacity to form worldviews is of fundamental importance to human beings, and they can reasonably adopt either secular or religious worldviews (or views that are not easily placed into either category). This strongly suggests that individuals should be entitled to the same protection regardless of which kind of view they adopt. I shall defend this position as a matter of principle and then discuss how it can best be adopted as a matter of constitutional interpretation.[222]

E. An Overview of the Liberal Humanist Approach

Before tackling these issues, however, I want to offer a brief summary and overview of the liberal humanist approach. In contrast to eighteenth-century natural religion, which was rooted in ontological premises regarding the existence of God, my presentation of that approach began in Part II with a phenomenological account of human experience. As conscious beings endowed with intelligence and emotion, people search for meaning and value in all areas of their existence, from personal life through social, economic, political, cultural, and intellectual life to encounters with ultimate reality. Implicitly or explicitly, they seek to integrate those experiences into comprehensive worldviews. Those views range from religious ones that locate ultimate reality in a transcendent realm to secular ones that locate it in this world of time and space. Many views fall somewhere in between. Strong arguments can be made for and against both religious and secular worldviews, but in the end, individuals reasonably can adopt either sort. Conceivably, a time may come when scientific or philosophical advances convincingly demonstrate that a certain worldview is

220. *See id.* at 877–78.

221. *See infra* Section IV.A.

222. *See infra* Section IV.B.

the correct one. But in the meantime, a plurality of reasonable worldviews appears to be an inescapable fact of human life.[223]

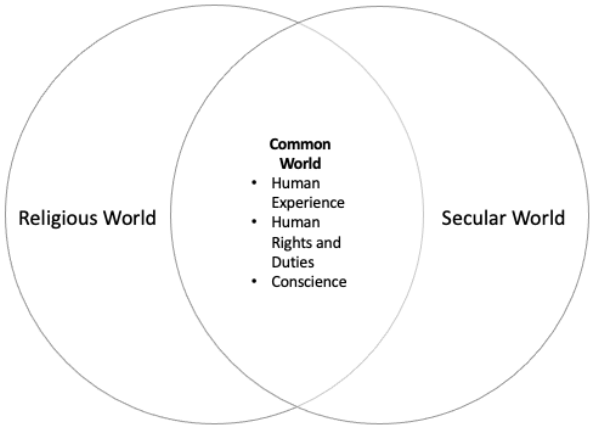
That is not the full story, however. As the phenomenological account shows, while these worldviews differ in fundamental ways, they are rooted in experiences that are common to everyone. To put it another way, the world of human experience is the place where the secular and the religious worlds intersect. As the present Part has shown, the same thing is true of the basic rights and duties that individuals have with regard to one another. To be sure, people who hold different worldviews also are likely to espouse different ethics and ways of life. But insofar as these ethics and ways of life are reasonable, they ought to accept certain common values and principles, including respect for the dignity of all human beings and for the rights that inhere in them. This doctrine of universal human rights and duties is the modern counterpart to the eighteenth-century theory of natural law and natural rights—a theory that (as we saw in Part I) provided the basic normative rationale for the adoption of the First Amendment and other constitutional protections for individual rights.

From a liberal humanist perspective, then, although there are fundamental differences between (and among) secular and religious worldviews, it would be a mistake to believe that there is an unbridgeable chasm between them. Instead, there is a vital and substantial area where they overlap—namely, the common world of human experience (as discussed in Part II) together with the inherent rights and duties that arise from that experience (as discussed in this Part). In section IV.B, I shall argue that conscience, or the moral sense of right and wrong, belongs to this common realm as well.

This account of the relationship between the religious, secular, and common worlds can be represented as follows:

223. *See, e.g.*, RAWLS, *supra* note 150, lecture I, § 6.2, at 36–37.

Relationship Between the Religious, Secular, and Common Worlds



In this graphic, the secular and religious worlds overlap in the common world—the world of human experience, of human rights and duties, and of conscience. Religious believers and secularists may interpret the contents of the common world in differing ways. For instance, the two groups may disagree about whether our basic rights should be understood to derive from God or from nature, or about whether weddings should be seen in religious or instead in purely human terms.[224] But in spite of these differing perspectives, the two groups reasonably can agree in recognizing the deep value that rights and marriage have for human beings. This is a key way in which people with divergent worldviews can find common ground.

IV. APPLICATIONS

In this Part, I explore the implications of the liberal humanist approach for two important issues in free exercise jurisprudence. First, are individuals and organizations constitutionally entitled to exemptions from civil laws that conflict with their religious beliefs? And second, to the extent that the government either is required

224. Justice Kennedy recognizes this point in *Obergefell v. Hodges*, 576 U.S. 644 (2015), when he observes that "[m]arriage is sacred to those who live by their religions and offers unique fulfillment to those who find meaning in the secular realm." *Id.* at 656–57.

or chooses to grant such exemptions, must it extend the same accommodations to those who hold secular beliefs?

A. Religious Exemptions from Civil Laws

1. The Long-Running Debate Over Religious Exemptions

The Supreme Court has struggled with the problem of exemptions since the late nineteenth century. In *Reynolds v. United States*,[225] a prosecution for polygamy, the Justices rejected the position that exemptions were constitutionally required on the ground that this position would "make the professed doctrines of religious belief superior to the law of the land, and in effect . . . permit every citizen to become a law unto himself."[226] This was the prevailing view until 1963, when the Court held in *Sherbert v. Verner*[227] that the Free Exercise Clause prohibits the government from imposing a substantial burden on an individual's ability to practice religion, even under a generally applicable law that does not target religion, unless the government is able to meet the requirements of strict scrutiny by showing that imposing such a burden is the least restrictive way of promoting a compelling government interest.[228] During the 1980s, the *Sherbert* doctrine gradually eroded, and in the 1990 case of *Employment Division v. Smith*[229] it essentially was overruled. Writing for a bare majority of the Court, Justice Antonin Scalia declared 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)."[230] In 1993 Congress attempted to reinstate the *Sherbert* approach by adopting the Religious Freedom Restoration Act (RFRA).[231] A few years later, the Court held that the RFRA exceeded congressional authority insofar as the statute

225. Reynolds v. United States, 98 U.S. 145 (1879).

226. *Id.* at 166–67.

227. Sherbert v. Verner, 374 U.S. 398 (1963).

228. *See id.* at 406.

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

230. *Id.* at 879 (citation and internal quotation marks omitted).

231. Pub. L. No. 103–141, 107 Stat. 1488 (1993) (codified as amended at 42 U.S.C. §§ 2000bb–2000bb-4 (2015)).

applied to state and local governments.[232] But the RFRA continues to apply to the federal government itself,[233] and many states either have adopted their own RFRAs or have interpreted their state constitutions to lay down the same rule.[234] Many other states follow the *Smith* approach.

In recent years, that approach has come under increasing fire from conservative advocates of religious liberty. In 2021, the issue came before the Justices once again in *Fulton v. City of Philadelphia*.[235] The city had contracted with private social-service agencies to vet potential foster parents.[236] After Catholic Social Services (CSS) indicated that it would not consider same-sex couples because of its religious conviction that marriage consists only of the union of a man and a woman, the city refused to renew its contract with CSS on the ground that the organization was unwilling to comply with contractual provisions that banned discrimination based on sexual orientation.[237]

In *Fulton*, the Court unanimously held that the city's refusal to renew the contract violated the Free Exercise Clause. Three Justices would have overruled *Smith*,[238] and two others expressed serious doubts about that precedent.[239] In the end, however, the Court chose to resolve the case on narrower grounds. In an opinion for six Justices, Chief Justice John G. Roberts, Jr. ruled that because the

232. *See* City of Boerne v. Flores, 521 U.S. 507 (1997).

233. *See* Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418 (2006).

234. *See State Religious Freedom Restoration Acts*, NAT'L CONF. OF STATE LEGISLATURES, https://www.ncsl.org/research/civil-and-criminal-justice/state-rfra-statutes.aspx (last visited Apr. 2, 2023) [https://perma.cc/7JMC-B44R]. In addition, in 2000, Congress passed the Religious Land Use and Institutionalized Persons Act of 2000, Pub. L. No. 106–274, 114 Stat. 803 (2000) (codified at 42 U.S.C. §§ 2000cc-2000cc-5), which reestablishes the *Sherbert* test for state and local actions involving land use regulations and prisoners.

235. 141 S. Ct. 1868 (2021).

236. *See id.* at 1875.

237. *See id.* at 1875–76.

238. *See id.* at 1883–1926 (Alito, J., joined by Thomas & Gorsuch, JJ., concurring in judgment); *id.* at 1926–31 (Gorsuch, J., joined by Thomas & Alito, JJ., concurring in judgment).

239. *See id.* at 1882 (Barrett, J., joined by Kavanaugh, J., concurring) ("As a matter of text and structure, it is difficult to see why the Free Exercise Clause—lone among the First Amendment freedoms—offers nothing more than protection from discrimination."). Justice Breyer also signed onto a portion of Justice Barrett's concurrence that suggested that the Court ought to take a more "nuanced" approach to the exemption problem than either "*Smith*'s categorical antidiscrimination approach" or "an equally categorical strict scrutiny regime." *Id.* at 1882–83.

contract gave city officials the discretion to grant exemptions, the ban on sexual-orientation discrimination could not be considered generally applicable under *Smith*.[240] In this situation, the ban could be applied to CSS only if the city were able to satisfy strict scrutiny—a standard that was not met since the city had "offer[ed] no compelling reason why it has a particular interest in denying an exception to CSS while making them available to others."[241] In this manner, a majority of the Court was able to avoid the broader issue presented: whether *Smith* should be rejected in favor of a more stringent approach such as *Sherbert*'s strict scrutiny rule.[242] Thus, the state of the law in this area is deeply unsettled.

This longstanding conflict over whether the Constitution mandates religious exemptions highlights the limitations of the two competing positions. As Justice Samuel A. Alito, Jr. pointed out in *Fulton*, the *Smith* approach would hold that so long as a law was generally applicable and religiously neutral, it could be applied in a way that effectively outlawed a practice that was central to a particular religion—such as kosher or halal slaughter, Jewish or Muslim circumcision, or the use of wine in the Catholic Mass—without triggering any review whatsoever under the Free Exercise Clause.[243]

Yet as Justice Scalia maintained in *Smith*, the *Sherbert* approach is also highly problematic, for it would "deem[] *presumptively invalid*, as applied to the religious objector, every regulation of conduct that does not protect an interest of the highest order"—a rule that would call into question the application of a wide range of laws designed to protect public health, safety, and welfare as well as civil rights.[244] In principle, the *Sherbert* approach would require the government to meet strict scrutiny to apply even its most fundamental laws for the protection of life, liberty, and property against actors who would infringe them for religious reasons. Of course, in the most extreme cases—for example, religiously

240. *See id.* at 1878 (opinion of Court).

241. *Id.* at 1881–82.

242. *See id.* at 1876–77, 1881.

243. *See id.* at 1883–84. In fact, some cases of this sort are not even hypothetical: in *Smith*, the majority did hold that a state could apply its drug laws to criminalize the use of peyote in a central ritual of the Native American Church, regardless of the impact that this would have on its members. *See* Emp. Div., Dep't of Hum. Res. v. Smith, 494 U.S. 872, 884–87, 890 (1990).

244. *Smith*, 494 U.S. at 888–89.

inspired acts of violence against individuals, such as the murder of abortion providers—courts would have no difficulty in concluding that punishing the perpetrators was the least restrictive means of promoting a compelling government interest. But that sort of analysis hardly succeeds in capturing our intuitions on the subject. Instead of viewing this as a situation in which the actors have a presumptive right to religious freedom which must be overridden to protect a compelling government interest, we would be more likely to say that the use of violence is a wrongful act which does not fall within the legitimate scope of religious liberty in the first place.[245] And we might well add that what primarily makes this act wrongful is not its impact on *the interests of the government* but rather its invasion of *the rights of the individuals* who were attacked.

This discussion of *Smith* and *Sherbert* suggests several important points. First, both positions are one-sided and inadequate: *Smith* improperly sacrifices religious liberty for the sake of other values, while *Sherbert* unduly privileges religious freedom over those values. Second, the quest for a single doctrinal standard to cover all exemption problems appears to be misguided. Laws that regulate highly personal conduct such as the use of drugs in religious rituals raise very different questions than do laws that are intended to protect basic civil rights or to regulate the workplace.

2. Toward a Contextual Approach to the Religious Exemption Problem

For these reasons, I believe that a reorientation of exemption jurisprudence is in order. Instead of engaging in an endless battle over efforts to establish a single standard, we should develop a more contextual approach that tailors free exercise analysis to particular areas of social life, from the inner lives of individuals and the internal affairs of religious associations on one end of the spectrum to the civil rights and relationships that characterize the political community on the other. To fully develop and defend such an approach would require a much more extensive discussion than we have room for here. Instead, in this section, I shall merely sketch the main outlines of this approach and identify some of the problems it would need to grapple with.

245. In *Wisconsin v. Mitchell*, 508 U.S. 476 (1993), the Court made a similar point about free speech when it observed that an act of physical violence "is not by any stretch of the imagination expressive conduct protected by the First Amendment." *Id.* at 484.

The approach takes its starting point from the eighteenth-century theory of natural rights and natural religion that we examined in Part I. That view was strongly concerned with religious liberty. But it sought to protect this liberty not by carving out exemptions from general laws but rather by separating the sphere of religion from that of civil society.[246] Within the religious realm, individuals and groups were free to develop and express their beliefs and to worship as they saw fit.[247] The state's authority was limited to protecting individual rights and promoting the common good within the civil realm.[248] The separation of the two domains was intended to secure both religious and civil liberty: just as the state had no power to interfere with the free exercise of religion, religious believers had no right to invade the civil rights of others, such as their rights to life, liberty, and property.[249] For the founding generation, those rights were no less natural and God-given than was the right to religious liberty itself, and civil society was established to protect them.[250]

The approach that I am developing begins with this basic division between the religious and civil spheres. In addition to religious belief, expression, and worship, the core of religious liberty includes the autonomy of religious bodies to direct their own affairs. The Supreme Court affirmed this principle a decade ago in *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*,[251] which unanimously held that the Religion Clauses preclude the government from interfering with "a religious organization's freedom to select its own ministers."[252] Although there is much room for debate over how broadly this "ministerial exception" should apply,[253] the basic rule is a sound one. It is rooted in the principle of church autonomy, which in turn flows from the

246. *See supra* text accompanying notes 34–38.

247. *See supra* text accompanying notes 29–33, 37.

248. *See supra* text accompanying note 36.

249. *See supra* text accompanying note 36–38.

250. *See supra* text accompanying note 56 (quoting the Declaration of Independence).

251. Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC, 565 U.S. 171 (2012).

252. *Id.* at 189.

253. See, for example, *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049 (2020), in which the Justices split 7 to 2 on whether the exception should apply to lay teachers who had little formal religious training and who did not hold the title of "minister."

Constitution's decision to establish a basic separation between the religious and civil realms.[254]

But this same separation means that the First Amendment should not be interpreted to authorize religious believers to violate the civil rights of others. Of course, this point applies to the extreme cases that I discussed above, such as unlawful acts of violence against abortion providers. But it applies to lesser interferences as well. Suppose that religiously inspired pro-life activists began to accost women entering reproductive health clinics and to block their path for a period of ten minutes, in order to persuade them not to have lawful abortions, or that religiously inspired antiwar activists began to use similar methods to dissuade individuals from enlisting in the Armed Forces. In these cases, it might not be a simple task for a court applying the *Sherbert* approach to determine whether the state could prosecute the activists under laws that proscribed such conduct. By contrast, a liberal humanist approach would have no difficulty with such cases, but would hold that the right to religious liberty simply does not allow believers to infringe the civil rights of others, such as their inherent right to liberty of movement without unlawful restraint.[255]

Thus, the approach to exemptions that I am outlining would begin by identifying certain areas that are subject to almost categorical rules. The state generally may not regulate at all within the areas of religious belief, expression, worship, and organization. By contrast, the state generally may enforce its laws that protect the basic rights to life, liberty, and property without making exceptions for religious objectors. These rules are rooted in the division between the religious and civil spheres which lay at the heart of the eighteenth-century view.

Over the course of American history, however, the role of government has expanded far beyond its Lockean function of protecting life, liberty, and property. The modern state provides many kinds of benefits and services to people, while also subjecting them to extensive forms of regulation. In these ways, the state often

254. On this principle, see Kathleen Brady, COVID-19 and Restrictions on Religious Worship: From Nondiscrimination to Church Autonomy 13–14 (Jan. 26, 2021) (available at https://ssrn.com/abstract=3748165) (explaining that the "principle reflects the view that church and state are, at least in matters essential to religious mission, separate spheres with distinctive purposes and unique governing structures").

255. *See supra* text accompanying notes 38, 184.

deals with matters that cannot neatly be assigned to the classic spheres of religion and government. In the modern administrative state, there is considerable overlap between these two domains. It is in this intermediate area that many of the most challenging free exercise cases arise, from those involving the regulation of private businesses such as *Hobby Lobby*[256] and *Masterpiece*,[257] to those involving public officers and employees like Kim Davis,[258] to those concerning social services programs as in *Fulton*.[259] It is a mistake to believe that cases of this sort can properly be governed by any one-size-fits-all rule. Instead, under a contextual approach to the Free Exercise Clause, each type of case will require a careful analysis of its own.

B. Religious and Secular Conscience

The final problem I want to discuss has to do with religious and secular conscience. Consider laws that conscript individuals for military service or that require them to be vaccinated against particular diseases. Under the *Smith* doctrine, the government need not grant exemptions to people who oppose these laws on grounds of religious conscience. But suppose, for sake of argument, that we were to reject *Smith* and to hold that such exemptions were constitutionally mandated unless the government could meet strict scrutiny. Or suppose that the government voluntarily decided to grant such exemptions (something that it is permitted but not

256. Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682 (2014).

257. Masterpiece Cakeshop, Ltd. v. Colo. Civ. Rts. Comm'n, 138 S. Ct. 1719 (2018). For an argument that businesses that provide wedding-related services generally should have no free exercise right to exemption from public-accommodations laws that forbid discrimination based on sexual orientation, see Steven J. Heyman, *A Struggle for Recognition: The Controversy over Religious Liberty, Civil Rights, and Same-Sex Marriage*, 14 FIRST AMEND. L. REV. 1, 100–24 (2015) [hereinafter Heyman, *Same-Sex Marriage*].

258. In the weeks following the Supreme Court's decision in *Obergefell v. Hodges*, 576 U.S. 644 (2015), Davis, who was an elected county clerk in Kentucky, refused on religious grounds to issue marriage licenses to same-sex couples, and she ultimately served five days in jail for defying a federal court order to do so. *See* Miller v. Davis, 123 F. Supp. 3d 924 (E.D. Ky. 2015) (rejecting her free exercise claim and ordering her to issue licenses), *application for stay denied*, 576 U.S. 1091 (2015); David Weigel et al., *Kim Davis Released From Jail, Ordered Not to Interfere with Same-Sex Marriage Licenses*, WASH. POST (Sept. 8, 2015), https://www.washingtonpost.com/news/post-nation/wp/2015/09/08/judge-orders-kentucky-clerk-kim-davis-released-from-jail/ [http://perma.cc/PJ3L-F5KN].

259. Fulton v. City of Philadelphia, 141 S. Ct. 1868 (2021).

required to do under *Smith*[260]). In these situations, how broad should the exemptions be? May they be limited to individuals who object to the laws on religious grounds, or must the exemptions also extend to secular claims of conscience? I shall begin by exploring this problem as a matter of principle and then address it as a matter of constitutional doctrine.

1. As a Matter of Principle, May the Government Discriminate Between Religious and Secular Conscience?

a. The case for equal treatment. From a liberal humanist perspective, the answer is clear: all claims of conscience should be treated in the same manner regardless of whether they are religious or secular in character. Two arguments support this conclusion. The first is based on the principle of equal respect for persons. Human beings have a fundamental capacity to develop and live in accord with views of the world. These views reasonably can be either religious or secular. If the law is to accord equal respect to persons, then it must treat those who adopt secular worldviews the same way as those who adopt religious worldviews—a principle that would be violated by favoring religious claims of conscience over secular ones.

The second argument is based on the nature of conscience itself. According to the phenomenological and normative accounts developed in Parts II and III, we are free beings who have the capacity to direct our own actions and to pursue our own self-fulfillment or good. This good consists not only of life and material well-being but also of the meaning and happiness that derive from developing and exercising our capacities for thought, will, love, and relationship with others.[261] Individuals pursue self-fulfillment in the external world; in their inner lives and personal relationships; in social, political, cultural, aesthetic, and intellectual life; and in their relationship to ultimate reality. This provides the basis for an account of right and wrong: individuals have a right to pursue self-fulfillment in all of these ways, and they act wrongfully if they violate the right of others to do the same.

Conscience refers to one's perception of right and wrong. Thus, our account of right and wrong in Parts II and III also provides an

260. *See* Emp. Div., Dep't. of Hum. Res. v. Smith, 494 U.S. 872, 890 (1990).

261. *See supra* Section II.A.

account of the basis and development of conscience. In leading their own lives, forming personal relationships, participating in community, and engaging with ultimate reality, human beings come to develop a sense of right and wrong. Ultimately, they may seek to integrate this moral sense into the framework of comprehensive religious or secular worldviews. But the moral sense is not simply a product of these worldviews; instead, it is formed through the full range of experiences that human beings have. To possess such a moral sense or conscience is an integral aspect of being human, and it is more fundamental than the particular worldviews in which it may come to be embedded.

Thus, just as our society is coming to recognize that "love is love"—that it is a core element of being human which is not, and should not be, restricted by characteristics such as race, gender, or sexual orientation—we should also recognize that *conscience is conscience*—that it is a basic capacity that is shared by all human beings regardless of their broader views on the nature of ultimate reality.[262] At least from a liberal humanist perspective, a conscientious belief is no better founded if it is associated with one sort of metaphysical view than another.[263] And requiring an individual to comply with a particular law would have no greater or lesser impact on personal integrity in one case than in the other.

It follows that the law cannot properly privilege religious over secular conscience by granting exemptions only to the former. And these arguments of principle are reinforced by practical

262. Support for this position can be found in what may seem a surprising place. In his *Letter to the Romans*, a work that lies at the foundation of the Christian theological tradition, St. Paul observes that "[w]hen gentiles, who do not possess the law [that is, the Torah that God revealed to the Jews], by nature do what the law requires, these, though not having the law, are a law to themselves. They show that what the law requires is written on their hearts, as their own conscience also bears witness . . . ." *Romans* 2:14–15. This passage suggests that "conscience" can have the same content regardless of whether it is informed by a positive revelation from God or instead is informed by "nature"—a term that was central to classical philosophy. This passage played a key part in the later natural law tradition that held that human beings are capable of knowing the basic principles of morality through reason and apart from any positive revelation. *See, e.g.*, AQUINAS, *supra* note 96, pt. I–II, Q. 94, art. 6; LOCKE, GOVERNMENT, *supra* note 22, bk. II, § 11, at 274; LOCKE, REASONABLENESS, *supra* note 46, ch. III, at 18; J.B. SCHNEEWIND, THE INVENTION OF AUTONOMY: A HISTORY OF MODERN MORAL PHILOSOPHY 18–21 (1998) (discussing the influence of Paul's dictum).

263. This point is a modern restatement of a central tenet of classical natural religion—that true religion is concerned less with orthodoxy of belief than with living a morally good life. *See supra* text accompanying note 40.

considerations as well. As we have seen,[264] and as courts have discovered,[265] it is extraordinarily difficult to define what should count as "religion" for this purpose. How should the law treat belief systems such as Buddhism, which may not be theistic but are generally considered to be religious? How should the law treat people who identify as "spiritual but not religious," or as atheists who *are* religious? How should it treat people whose worldviews involve a blend of religion and secularism? One advantage of the liberal humanist approach is that it does not require the law to draw lines of this sort.

In short, I believe that there is a strong case for holding that in any situation where the law does grant an exemption to conscientious objectors, it must treat secular and religious claims alike. This is a position that has commended itself to many contemporary scholars.[266]

b. Responding to the case for affording greater protection to religious conscience. By contrast, other scholars reject this position: they maintain that religion holds a distinctive place in our constitutional order and that religious claims of conscience are entitled to stronger protection than secular ones.[267] I shall call this position religious distinctivism. One of the most thoughtful arguments for this view

264. *See supra* Section II.C.4.

265. *See, e.g.*, United States v. Seeger, 380 U.S. 163 (1965), discussed *infra* text accompanying notes 298–301.

266. *See, e.g.*, BRIAN LEITER, WHY TOLERATE RELIGION? (paperback ed. 2014); MACLURE & TAYLOR, *supra* note 95, ch. 10; DAVID A. J. RICHARDS, TOLERATION AND THE CONSTITUTION 136–46 (1986); Frederick Mark Gedicks, *An Unfirm Foundation: The Regrettable Indefensibility of Religious Exemptions*, 20 U. ARK. LITTLE ROCK L. REV. 555 (1998); William P. Marshall, *What is the Matter with Equality? An Assessment of the Equal Treatment of Religion and Nonreligion in First Amendment Jurisprudence*, 75 IND. L.J. 193 (2000); Micah Schwartzman, *What If Religion is Not Special?*, 79 U. CHI. L. REV. 1351 (2012). Martha Nussbaum goes a certain way toward this position when she suggests that the constitutional definition of religion should be expanded to include not only traditional religious belief but also other "forms of committed searching for meaning" regarding "ultimate matters." NUSSBAUM, LIBERTY OF CONSCIENCE, *supra* note 95, at 171–74.

267. *See, e.g.*, BRADY, *supra* note 142; Abner S. Greene, *The Political Balance of the Religion Clauses*, 102 YALE L.J. 1611 (1993); McConnell, *supra* note 8, at 1491–1500; Stephen Pepper, *Conflicting Paradigms of Religious Freedom: Liberty Versus Equality*, 1993 BYU L. REV. 7 (1993). Vincent Phillip Muñoz takes a similar position. Although he rejects the notion that the Free Exercise Clause mandates exemptions from civil laws, MUÑOZ, *supra* note 12, at 208–09, 255–57, he argues that because the clause was rooted in natural rights theory and "natural theology," and because those ideas continue to provide "the most philosophically persuasive argument" for the right to religious liberty, the clause's protections should be confined "to traditional conceptions of religious belief and practice" and should "not include beliefs and practices divorced from the conception of a Creator God," *id.* at 318–22.

may be found in Kathleen A. Brady's book, *The Distinctiveness of Religion in American Law*.[268] Brady begins by discussing the arguments that the founding generation made for the centrality of religion, such as Madison's assertion that we owe our ultimate allegiance to our Creator.[269] Because such arguments rest on "controversial theological premises," she undertakes to translate them into a form that can be accepted by modern Americans regardless of whether or not they are religious.[270] To this end, she offers a deep and insightful phenomenological account of the ways that "[r]eligion arises out of common human experience shared by all."[271] We are finite beings who strive to understand what the world is like, where we come from, and how we should live.[272] As we "reflect upon our lives and the larger world, we confront its source and ground as the ultimate Power or Reality by which everything exists"—a power or reality which Brady refers to as "the divine."[273] While we are all "by nature oriented to the divine," religious believers consciously enter into a relationship of "connection or communion" with it.[274] In addition to affording believers an understanding of themselves and the world, this relationship enables them to overcome "three principal existential threats" that all human beings struggle with: "those of meaninglessness, guilt, and death."[275] Through this relationship, believers come to "share[] in the divine life, which is eternal, absolute, and perfect," and their "finitude is taken up into the infinite."[276] In these ways, believers are able to attain the "salvation or liberation or fulfillment which inheres in this connection" with the divine. Of course, Brady recognizes that individuals who are not religious would not share this view.[277] But because religion is rooted in these common human experiences,

268. BRADY, *supra* note 142.
269. *See id.* at 82; *supra* text accompanying note 64.
270. BRADY, *supra* note 142, at 5–6, 69, 80–81.
271. *Id.* at 81.
272. *See id.* at 82–83.
273. *Id.* at 83.
274. *Id.*
275. *Id.* at 83–84.
276. *Id.*
277. *See id.* at 93.

nonreligious individuals are capable of understanding what is at stake for their religious neighbors.[278]

Brady then uses this account to interpret the Free Exercise Clause. That Clause should give individuals strong protection against laws that interfere with their connection to the divine by requiring them to act contrary to religious conscience.[279] By contrast, while secular conscience is also worthy of great respect, it does not have the same features that give religious conscience the paramount importance that it has in the lives of believers, because secular conscience does not involve a conscious relationship with the ultimate ground of all being.[280]

Brady succeeds admirably at showing how religion grows out of fundamental human experiences that are shared by all. But just as nonreligious people should seek to understand the views held by their religious neighbors, the converse is also true: religious people should strive to understand the views that give deep meaning and value to the lives of secular people.

In response, a religious distinctivist might say that the two sorts of worldviews are not really on par. Secular views lack something that religious views possess, namely a conscious connection with ultimate reality.[281] For this reason, secularists have less at stake than religionists do when their beliefs come into collision with the state's laws. The enforcement of those laws against religious believers interferes with their relationship with the source of all being, a relationship that is central to their lives. That is not the case where secular beliefs are concerned.

In my view, this response fails to grasp the nature of secular worldviews. As I argued in section II.C, those worldviews should not be regarded as limited perspectives that stop short of addressing ultimate reality. Instead, they offer *an alternative conception of that reality*. Secular worldviews seek to understand the fundamental nature of reality and the ultimate source of all meaning and value, just as religious worldviews do. Both sorts of views offer an account of all the meaning that human beings are capable of experiencing in life: secular accounts locate that meaning wholly within this world, while religious ones locate the highest

278. *See id.* at 6, 94, 302–03.

279. *See id.* ch. 5.

280. *See id.* at 302–03.

281. *See id.* at 302, 311.

meaning in our relation to a transcendent realm. If the state enforces laws that restrict the freedom to live in accord with a secular worldview, it interferes with the lives of those who hold that view in a manner that is no less serious than when it restricts the ability to live in accord with a religious worldview.

A religious distinctivist might say that the key difference is that religious views are *relational* in a way that secular views are not. Religious belief involves a conscious relationship with the divine or the source of all being—a relationship that shapes the adherents' lives at the deepest level and places unique demands upon them. By contrast, people who hold secular views do not have this sort of conscious relationship with anything beyond themselves. In this way, religious belief has a vital dimension that secular belief does not have.[282]

A secular humanist might be inclined to respond that this additional dimension—the existence of a realm that transcends the human—is precisely what they deny. But this response would essentially concede their opponent's point: it would show that there is indeed an essential difference between the two sorts of worldviews that—in the absence of a convincing showing that a transcendent realm does not exist—may be said to give religion distinctive value. In my view, then, a better response would be that individuals who hold certain sorts of secular beliefs do have a conscious relation to something beyond themselves—for example, to ideals of justice and goodness, to humanity itself, or to the natural order of the universe—and that this relationship shapes their lives and imposes demands upon them in a way that is comparable to religious belief.[283]

If the points that I have just made are persuasive, then those who take the religious distinctivist position face a dilemma. On one hand, they could concede that secular worldviews do involve a conscious connection with ultimate reality.[284] If so, those worldviews would come within the category of religion as distinctivists conceive of it, and so the case for granting more stringent protection to religious than to secular conscience would collapse. On the other

282. I am grateful to Professor Brady for emphasizing this point in comments that she sent me on December 18, 2021.

283. *See supra* text accompanying note 178 (discussing the views expressed by Dworkin and Einstein); *infra* text accompanying notes 298–301 (discussing *United States v. Seeger*).

284. For Brady's rejection of this position, see BRADY, *supra* note 142, at 310–17.

hand, distinctivists could insist that only religion in the traditional sense involves a conscious connection with the ultimate ground of all being. But that claim would seem to be the very sort of controversial theological notion which makes the founders' views unacceptable to a substantial number of modern Americans.

In my view, then, we should say that when it comes to conscience, the two sorts of worldviews are indeed on a level, and that religious people should seek to understand the views of their secular neighbors just as much as the latter should seek to understand religious views. The real goal is to develop mutual understanding between the two groups. Of course, this sort of understanding is of vital importance to the political community. When people hold fundamentally different worldviews, there is a danger that they will come to regard one another not as fellow citizens who are capable of cooperating for the common good but instead as enemy combatants in a culture war who pose an existential threat to one another's well-being, identity, and rights. Unfortunately, this is a danger that is all too real in contemporary American life. To avoid this nightmare scenario, it is crucial that religious and secular people seek to understand one another's values, perspectives, and worldviews.[285] This mutual recognition and understanding plays a key role in generating the common world of human experience and rights discussed earlier.[286]

But mutual understanding is essential not only from the standpoint of the political community but also from the standpoint of religion itself. Many religions are universalistic in character: they aspire to unite the world under God's reign.[287] In the Christian

285. On the need for mutual recognition and understanding in order to escape from the culture wars over religion and sexuality, see Heyman, *Same-Sex Marriage*, *supra* note 257.

286. *See supra* Section III.F.

287. For some expressions of this vision in the Hebrew Bible, see *Isaiah* 2:2–4 ("In days to come . . . . all the nations shall stream to [the mountain of the Lord's house]. . . . [T]hey shall beat their swords into plowshares and their spears into pruning hooks; nation shall not lift up sword against nation; neither shall they learn war any more."); *Zechariah* 14:9 (A day will come when "the Lord will become king over all the earth; on that day the Lord will be one and his name one"). For some New Testament passages, see *Matthew* 28:19 (Jesus commissions his followers to "[g]o . . . . and make disciples of all nations"); *Galatians* 3:28 (proclaiming that in Christ "[t]here is no longer Jew or Greek" or "male and female"); *Ephesians* 2:11-22 (stating that Christ has "broken down the dividing wall" between Jews and Gentiles, "that he might create in himself one new humanity in place of the two, thus making peace"). For discussion of some universalist themes in the Quran, see Joseph Lumbard, *The*

world, this age-old vision of a single, unified, universal church was shattered by the Protestant Reformation.[288] In modern times, it has become clear that diversity within and between religious groups is a fundamental and ineradicable feature of human life. Thus, to the extent that any form of religious universalism is possible, it can come about only through ecumenical and interfaith efforts to promote mutual understanding and cooperation.[289] But any unity that could be achieved among religious groups would still fall short of true universality, since a substantial proportion of humanity is—and is nearly certain to remain—secular. It follows that, short of divine intervention, religious believers will never be able to achieve their vision of universality without reaching out to, and forging alliances with, people who hold secular worldviews. And the reverse is also true: there is no way for secular people such as humanists to achieve their own vision of a unified humanity unless they endeavor to make common cause with religious believers. To the extent that this unification occurs, it can only be in the common world where religious and secular views overlap.[290]

In my view, then, there is no good reason to hold that the law should accord more protection to religious than to secular conscience.

Quranic View of Sacred History and Other Religions, *in* THE STUDY QURAN: A NEW TRANSLATION AND COMMENTARY 1765 (Seyyed Hossein Nasr et al. eds., 2015). For instance, as the editors of this work note, QURAN 7:172 "mention[s] . . . . the universal, pretemporal covenant between God and all human beings obligating them to recognize God's Lordship, which is thus understood to be the basis of all future covenants between God and humanity as mediated through the prophets." *Id.* at 406 (editors' introduction to *Surah 7: The Heights*). QURAN 2:62 promises that "those who believe, and those who are Jews, and the Christians, and the Sabeans—whosoever believes in God and the Last Day and works righteousness shall have their reward with their Lord." For a similar verse, see QURAN 5:59. QURAN 21:107 declares that God sent the Prophet Muhammad "as a mercy unto the worlds"—a verse that is often interpreted to mean that he was sent as a mercy (that is, "a cause for happiness . . . . in both the life of this world and the Hereafter") "not only for believers, but for all people,—. . . though some [interpreters] restrict it to believers only," *id.* at 829 (editors' note). For assistance with Quranic passages, I am grateful to Professor Fred Donner of the University of Chicago Department of Near Eastern Languages and Civilizations.

288. *See* PETER MARSHALL, THE REFORMATION: A VERY SHORT INTRODUCTION (2009).

289. For background on ecumenism (that is, the promotion of unity among Christian denominations) as well as on interfaith dialogue, see *The Pluralism Project*, HARV.UNIV., https://pluralism.org/home [https://perma.cc/6B8G-45FX] (last visited Apr. 2, 2023).

290. *See supra* Section III.F.

2. The Doctrinal Basis for Holding that the Constitution Requires Equal Treatment for Religious and Secular Conscience

In response, a religious distinctivist might say that regardless of whether this is true in theory, it simply does not square with the text of the Constitution. The First Amendment provides that the government may not "prohibit[] the free exercise [of *religion*]."[291] This language singles out religion for special protection. Therefore, if the First Amendment ever mandates exemptions from a general law, they are due only to objections that are founded on religion and not on other forms of belief. Similarly, in situations where the government is permitted but not required to grant exemptions, the First Amendment's special solicitude for religion dictates that they may be granted only to people who object on religious grounds.

The force of this position would be greatest when combined with an approach to constitutional interpretation like the one that was espoused by Justice Scalia—an approach that refuses to look to any conception of natural law or substantive principles beyond the text, and that instead holds that a constitutional provision should be interpreted to have the same meaning that it had at the time it was adopted.[292] On an interpretive approach like this, one could make a powerful case that the protections of the Free Exercise Clause extend only to "religion" as traditionally understood, and that the government may choose to grant exemptions that are limited to "religious" exercise in this sense.

By contrast, the approach to interpretation that I would advocate differs from Scalia's in two key respects. First, it stresses that the Constitution was intended to reflect higher law principles such as inherent rights, and that it should be interpreted in accord with those principles.[293] And second, it holds that those principles should not be understood as static doctrines that were fixed at the time of adoption. Instead, as our understanding of the principles evolves over time, so should our interpretation of the provisions that were meant to incorporate them.[294] If we approach the

291. U.S. CONST. amend. I (emphasis added).

292. *See, e.g.*, ANTONIN SCALIA, A MATTER OF INTERPRETATION (1997).

293. *See, e.g.*, Madison, *Bill of Rights Speech*, *supra* note 90, at 26 (discussing how bills of rights protect the "natural right[s]" that the people retain when they form a government); HEYMAN, *supra* note 136, at 37–40, 43, 224 n.54 (maintaining that the First Amendment should be interpreted to protect inherent rights).

294. *See* HEYMAN, *supra* note 136, at 42–44, 223 n.54.

interpretive task in this way, then the position that I am advocating—that the government must treat religious and secular conscience alike—can be seen to be fully consistent with the language of the Constitution.

a. The Free Exercise Clause. The most straightforward way to make this argument focuses on the Free Exercise Clause itself. This argument holds that, when founding-era Americans adopted the provision, they did not mean to discriminate between "religion" and other reasonable conceptions of ultimate reality. Instead, in line with the teachings of natural religion, they believed that a proper use of reason necessarily would lead individuals to recognize that God was the ultimate reality in the universe.[295] They protected the free exercise of religion because they believed that it was the only way for individuals to establish a right relationship with this ultimate reality, who was the source of all good. In more recent times, however, we have come to believe that this traditional notion of religion is not the only defensible conception of ultimate reality, but that individuals reasonably can adopt secular conceptions as well.

In this situation, we must choose between two competing interpretations of the Free Exercise Clause—a narrow interpretation that understands it to protect only theistic (or perhaps also other transcendental) views and a broad interpretation that understands it to also protect secular conceptions of ultimate reality. We ought to adopt the broad interpretation because it more fully promotes the values on which the Clause was based and because it better reflects our contemporary understanding of the fundamental human rights at stake. By contrast, adopting the narrow interpretation would result in invidious discrimination against people who hold secular worldviews. In addition to violating the Free Exercise Clause itself, this result arguably would infringe their rights to equal protection under the Fifth and Fourteenth Amendments.[296] And it might also violate the Establishment Clause, which the Court has interpreted to disallow laws that favor religion over non-religion.[297]

295. *See supra* Part I.

296. *See infra* text accompanying note 306.

297. *See, e.g.*, McCreary Cnty., Ky. v. ACLU of Ky., 545 U.S. 844, 860 (2005) (asserting "that the 'First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion'") (quoting Epperson v. Arkansas, 393 U.S.

In the landmark case of *United States v. Seeger*,[298] the Supreme Court adopted a similar view on the treatment of conscience when it construed a provision of the Selective Service Act that exempted from military service individuals who were conscientiously opposed to all war as a matter of "religious training and belief"—a term that the Act defined as "an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but [not including] essentially political, sociological, or philosophical views or a merely personal moral code."[299] *Seeger* held that the statutory term "Supreme Being" was not limited to "the orthodox God" but instead should be interpreted to embrace "the broader concept of a power or being, or a faith, 'to which all else is subordinate or upon which all else is ultimately dependent.'"[300] The Court concluded that the statutory exemption for "religious" belief should extend to any "sincere and meaningful belief [that] occupies [a place] in the life of its possessor . . . . parallel to that filled by the [orthodox belief in] God."[301] Although the Court decided *Seeger* as a matter of statutory construction, the decision clearly suggests that the Free Exercise Clause should be understood in the same way.

On these grounds, it would be reasonable to adopt the broader interpretation of the Free Exercise Clause—an interpretation that is

97, 104 (1968)); Everson v. Bd. of Educ., 330 U.S. 1, 16 (1947) (declaring that "[n]either a state nor the Federal government . . . can pass laws which aid one religion, aid all religions, or prefer one religion over another"). In recent years, this position has been criticized by some Justices, *see, e.g.*, Espinoza v. Montana Dep't of Revenue, 140 S. Ct. 2246, 2263 (2020) (Thomas, J., concurring); *McCreary*, 545 U.S. at 885–93 (Scalia, J., dissenting) (same), but it has not been repudiated by a majority of the Court. For some opinions that would invalidate discriminatory grants of exemptions, see City of Boerne v. Flores, 521 U.S. 507, 536–37 (1997) (Stevens, J., concurring) (contending that the RFRA violates the Establishment Clause because the statute mandates religious "exemption from a generally applicable, neutral civil law"); Welsh v. United States, 398 U.S. 333, 356–57 (1970) (Harlan, J., concurring in result) (contending that granting exemptions for "religious beliefs" but not "secular beliefs" would contravene the Establishment Clause).

298. United States v. Seeger, 380 U.S. 163 (1965).

299. *Id.* at 164–65.

300. *Id.* at 174, 176 (quoting WEBSTER'S NEW INTERNATIONAL DICTIONARY (2d ed.)).

301. *Id.* at 176. In taking this position, the Court drew on the work of modern theologians like Paul Tillich, who observed that "if that word (God) has not much meaning for you, translate it, and speak of the depths of your life, of the source of your being, or your ultimate concern, *of what you take seriously without any reservation*. Perhaps, in order to do so, you must forget everything traditional that you have learned about God . . . ." *Id.* at 163 (quoting PAUL TILLICH, THE SHAKING OF THE FOUNDATIONS 57 (1948)) (emphasis added by Court).

not limited to the eighteenth-century understanding but that reflects our current views. A broad reading of this sort would hardly be unusual in modern constitutional jurisprudence. For instance, the Court has interpreted the First Amendment to shield forms of expression that do not constitute "speech" or "press" in the ordinary sense of those words, and the protection of which goes far beyond anything that the founding generation envisioned.[302] Similarly, the Justices have applied the Fourth Amendment's ban on unreasonable searches and seizures to high-tech forms of surveillance.[303] And they have interpreted the Commerce Clause to reflect the realities of the modern American economy rather than the one that existed in 1787.[304] It would be no greater departure from original meaning if the Court were to interpret the Free Exercise Clause to grant the same protection to secular as to religious conscience and to require that the two receive equal treatment.

b. Other constitutional provisions. Other constitutional provisions could also be used to establish such a doctrine. I have already alluded to two such arguments. In a number of cases, the Supreme Court has stated that the Establishment Clause does not permit the government to favor religion over nonreligion.[305] Laws that protect religious but not secular conscience would clearly violate this principle if one were to accept the liberal humanist view that there is no sound justification for discriminating between the two. For the same reason, such discrimination arguably should be regarded as a

302. *See, e.g.*, Brown v. 'Ent. Merchs. Ass'n, 564 U.S. 786 (2011) (majority opinion by Scalia, J., extending First Amendment protection to violent video games); United States v. Stevens, 559 U.S. 460 (2010) (videos depicting extreme cruelty to animals); Ashcroft v. ACLU, 542 U.S. 656 (2004) (internet pornography); Turner Broad. Sys. v. FCC, 512 U.S. 622 (1994) (cable television); Reno v. ACLU, 521 U.S. 844 (1997) (internet); Barnes v. Glen Theatre, Inc., 501 U.S. 560 (1991) (nude dancing). Although I believe that some of these decisions, such as *Brown* and *Stevens*, are problematic, that is because of the way they allow freedom of speech to override other values and not because they hold new forms of media to be covered by the First Amendment. *See* Steven J. Heyman, *The Conservative-Libertarian Turn in First Amendment Jurisprudence*, 117 W. VA. L. REV. 231, 278–83, 311–17 (2014).

303. Carpenter v. United States, 138 S. Ct. 2206 (2018) (obtaining cell phone location information); United States v. Jones, 565 U.S. 400 (2012) (placing GPS tracker on car); Katz v. United States, 389 U.S. 347 (1967) (electronic surveillance of telephone calls).

304. *See, e.g.*, Wickard v. Filburn, 317 U.S. 111 (1942) (upholding agricultural production quota as applied to home-grown wheat).

305. *See* authorities cited *supra* note 297.

violation of the equal protection guaranteed by the Fifth and Fourteenth Amendments.[306]

One can also argue that the freedom to live in accord with secular conscience is protected by the First Amendment as a whole, even though that provision does not expressly confer such a right. Admittedly, it may sound odd to suggest that the First Amendment protects unenumerated rights. But in fact one of the most basic of all First Amendment rights falls into this category. No one doubts that the First Amendment protects freedom of thought,[307] and yet that right is nowhere mentioned in the text. The best explanation for this protection is grounded in classical natural rights theory and its modern counterpart. On this view, the capacity for thinking is central to personhood and is the basis of human freedom and self-determination.[308] It follows that freedom of thought is a core human right as well as the fount of many other rights.[309] In particular, all of the rights that are expressly protected by the First Amendment presuppose freedom of thought. For these reasons, it would be deeply anomalous to interpret that Amendment to

306. When a law improperly discriminates against religion, the Justices generally have found it unnecessary to resort to equal protection analysis since they can simply rely on the Free Exercise Clause. *See, e.g.*, Espinoza v. Montana Dep't of Revenue, 140 S. Ct. 2246, 2263 n.5 (2020); Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2024 n.5 (2017). Perhaps for this reason, the Court has never directly held that the Equal Protection Clause applies to such discrimination. *See* Steven G. Calabresi & Abe Salander, *Religion and the Equal Protection Clause: Why The Constitution Requires School Vouchers*, 65 FLA. L. REV. 909, 919 (2013). In some cases, however, the Court has referred to religion as a "suspect classification" for equal protection purposes. *E.g.*, Plyer v. Doe, 457 U.S. 202, 216–17 (1982). On the view I am taking, it is difficult to see why laws that privilege religious over secular conscience should not be subject to serious equal protection review.

307. *See, e.g.*, Ashcroft v. Free Speech Coal., 535 U.S. 234, 253 (2002) (Kennedy, J.) ("First Amendment freedoms are most in danger when the government seeks to control thought or to justify its laws for that impermissible end. The right to think is the beginning of freedom, and speech must be protected from the government because speech is the beginning of thought."); Griswold v. Connecticut, 381 U.S. 479, 482 (1965) (Douglas, J.) (asserting that the First Amendment embraces "freedom of inquiry, freedom of thought, and freedom to teach").

308. *See* LOCKE, GOVERNMENT, *supra* note 22, bk. II, § 63, at 309 ("The *Freedom* then of Man and Liberty of acting according to his own Will, is *grounded on* his having *Reason* . . . ."); LOCKE, HUMAN UNDERSTANDING, *supra* note 15, bk. II, ch. XXI (discussing relationship between liberty and thought).

309. *See* Palko v. Connecticut, 302 U.S. 319, 326–27 (1937) (Cardozo, J.) (observing that the "freedom of thought and speech" secured by the First Amendment "is the matrix, the indispensable condition, of nearly every other form of freedom").

protect the specific rights that it mentions but not the deeper freedom that undergirds them all.

It is clear, then, that the First Amendment can be a source of unenumerated rights and that this includes freedom of thought. One of the most important kinds of thought relates to worldviews or conceptions of ultimate reality.[310] There can be no doubt that the First Amendment protects the rights *to form* and *to hold* such a view, for these rights fall within the scope of freedom of thought. Does the Amendment also protect the right *to live in accord* with such a view? As the Free Exercise Clause makes clear, the Amendment does protect this right in the case of religious worldviews. The question then becomes whether the same is true in the case of secular worldviews. As I have argued, regardless of how the founders would have answered this question, the law currently has no sound reason to discriminate between individuals who hold these two sorts of worldviews.[311] It follows that, if the First Amendment is to be interpreted in accord with a principled and coherent account of human freedom, it should protect the right to live in accord with secular as well as religious worldviews. If this position is not reached through an expansive interpretation of the Free Exercise Clause itself, then it should be reached by holding that the First Amendment protects an unenumerated right to live in accord with one's worldview, a right that protects secular no less than religious conscience.

Finally, similar arguments can be given for finding such an unenumerated right in other, more general constitutional provisions. The Ninth Amendment rests on the classical idea that the people have certain inherent rights that they do not surrender when they enter civil society.[312] The right to free exercise of religion was a paradigm case of such a right,[313] and under a modern version of natural rights theory, we should say the same about the right to follow a nonreligious worldview. Although the Justices have rarely

310. *See supra* Section II.C.

311. *See supra* text accompanying notes 173–76.

312. U.S. CONST. amend. IX ("The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."); *see* Randy E. Barnett, *Reconceiving the Ninth Amendment*, 74 CORNELL L. REV. 1 (1988).

313. *See supra* text accompanying notes 85–91.

invoked the Ninth Amendment,[314] they have often interpreted the Due Process Clauses of the Fifth and Fourteenth Amendments to protect fundamental rights.[315] As Justice Kennedy observes in *Obergefell*, many of these decisions rest on the idea that individuals have a right to develop, and to act in accord with, their own "personal identity and beliefs," whether they "find meaning" in the religious or "in the secular realm"[316]—an idea that provides strong support for the principle that the government must accord the same respect to secular as it does to religious conscience.

In conclusion, I should reiterate that the problem of exemptions is a difficult one. As we saw in section IV.A, there are some situations (such as a church's choice of its own ministers) in which the Constitution should be interpreted to mandate an exemption from general laws, and other situations (such as the application of laws for the protection of life, liberty, and property) in which it should not; other cases call for a more complex analysis. In this section, I have not taken a general position on when the government must make exceptions for conscientious objection. Instead, I have simply argued that in any situation where exemptions are either mandated or permitted, the government must treat religious and secular conscience alike. To be sure, the effect of adopting this position would be to either expand the number of exemptions that are granted (if they are accorded to both religious and secular claims) or to reduce that number (if they are accorded to neither sort of claim). Both positions would have costs. But I believe that these are costs that we must bear if we are to afford equal treatment to religious and secular claimants—a requirement that is rooted both in respect for persons and in the nature of conscience itself.[317]

314. For the leading instance, see Griswold v. Connecticut, 381 U.S. 479, 486 (1965) (Goldberg, J., joined by Warren, C.J., & Brennan, J., concurring).

315. *See supra* text accompanying notes 194–203.

316. Obergefell v. Hodges, 576 U.S 664, 656–57, 663 (2015).

317. Admittedly, the position I am taking would be tenable only if it is possible to develop a workable approach to defining what forms of secular belief should be regarded as comparable to religious belief, as well as to determining when secular claims of conscience are sincerely made. Free exercise scholars have devoted careful attention to these issues of definition and sincerity when it comes to religious beliefs. *See, e.g.*, BRADY, *supra* note 142, ch. 10. The challenge would be to do the same thing with regard to secular beliefs.

CONCLUSION

What place do religion and religious liberty have within a liberal democratic constitutional order? To answer this question, founding-era Americans drew on the theory of natural religion, natural law, and natural rights that flourished during the Enlightenment. That theory held that human beings were capable of using reason to discern the most basic principles of religion and morality: that the world had been made by a benevolent Creator; that they had a duty to love, worship, and obey that being; and that God had established the law of nature to direct their conduct in ways that promoted their good. Individuals were naturally free and equal and had inherent rights which they retained when they entered civil society. Among these rights, none was more vital than the freedom to exercise religion in accord with the dictates of one's own mind. Like all rights, however, this freedom was limited by a duty to respect the rights of other individuals as well as the legitimate authority of the state, which the people had established to protect their rights and promote their private and public good.

In this way, natural religion offered a fairly coherent conception of the relationship between religion and the constitutional order. On one hand, the state was forbidden to intrude into the religious sphere by preventing individuals and groups from believing and worshipping as they saw fit. On the other hand, religious liberty did not relieve individuals of their duties as members of the political community, nor did it authorize them to violate the religious or civil rights of others. The two realms were complementary, and each possessed its own integrity and autonomy.

Ironically, the very commitment to reason that lay at the heart of the eighteenth-century view makes it no longer tenable, for in light of modern scientific developments, it is no longer widely accepted in our society that the basic principles of religion and morality can be discerned through reason alone. But it does not follow that we have nothing to learn from the founding-era view. That view was a humanistic one. It recognized the inherent freedom, dignity, and rights of individuals; it held that they should be able to develop, express, and live out their own beliefs on matters of ultimate importance; and it sought to establish a self-governing society in which people who held diverse views could live together on the basis of mutual recognition and respect. The question is whether we can formulate a version of this view that

retains its virtues without depending on theological premises on which a consensus no longer exists.

In this Article, I have suggested that we can develop such a theory by shifting our focus from the ontological question of whether God exists to a phenomenological inquiry into how human beings make sense of the world. Some people find ultimate meaning and value in relation to a transcendent being or realm, while other people find them in relation to this world and to humanity itself. Both sorts of worldviews can respond in a reasonable and compelling way to the existential questions of who we are, how we should live, and how we can feel at home in the world. This modern, liberal humanist account concurs with classical natural religion in holding that one of the deepest forms of freedom lies in the right to form such a worldview, but it expands this right to include secular as well as religious worldviews. At the same time, the classical and modern theories agree in situating this right within a broader framework of basic rights, ranging from external rights to life, liberty, and property to the political, intellectual, and spiritual freedoms enshrined in the First Amendment.

In Part IV, we explored some of the doctrinal implications of this liberal humanist approach. First, that approach suggests that no single principle can satisfactorily apply to the wide range of situations in which people claim that they should be exempted from the obligation to comply with general laws. On one hand, freedom of religion (or of other belief) generally should not entitle individuals to violate the basic rights of others. On the other hand, some activities (such as those that fall within the doctrine of church autonomy) generally should be regarded as beyond the reach of state authority. But the modern state also has generated many intermediate situations which call for a more nuanced analysis. Thus the problem of exemptions is a complex one. One point is clear, however. From a liberal humanist perspective, religious and secular worldviews stand on the same footing, and so in any situation where the state either is compelled or chooses to grant an exemption, it cannot legitimately discriminate between these two forms of conscience.

In conclusion, I want to suggest that the liberal humanist view has implications not only for free exercise doctrine and the place of religion in our constitutional order, but also for how it is possible for people with radically different views to coexist within the same

political community. In contemporary America, the relationship between religious conservatives and secular liberals is often described as a culture war. Although this metaphor is apt in many ways, it should not be allowed to obscure what the two groups have in common.[318] On one level, this is the system of rights that all individuals in the society are entitled to enjoy, and that gives them a substantial degree of freedom to form their own beliefs and to live their own lives. But what the two groups share runs even deeper than this. As I have argued, however profoundly our worldviews may differ, they are all rooted in the common world of human experience. When family members hold conflicting views about such matters as religion, politics, or sexuality, the only way that these individuals can sustain a relationship is by drawing upon empathy and reflection to recognize the ways in which their desires, goals, and experiences are similar. And that is no less true of relationships between social groups. There will always be substantial disagreements between people who hold divergent worldviews; in that sense, the cultural wars will always be with us. But such disputes make sense only on the assumption that they are concerned with some deeper truth. That truth is to be found in the common world of experience that we all participate in, and that secular and religious people strive to comprehend in their own ways. That is the freedom that lies at the heart of the First Amendment.

318. Of course, these are not the only groups that make up the society: it also includes religious liberals and progressives, secular conservatives, and moderates of all stripes. This is another reason that our communal life should not be regarded simply as a culture war between two opposing forces.