

## “Secular Purpose,” Accommodations, and Why Religion Is Special (Enough)

A Response to Micah Schwartzman, *What If Religion Is Not Special?*, 79 U Chi L Rev 1351 (2012).

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Professor Micah Schwartzman’s *What If Religion Is Not Special?*<sup>1</sup> frames important questions under the First Amendment’s Religion Clauses and sets forth useful analytical categories. I question some of his major conclusions, but the road he travels to reach them is worthwhile.

*What If Religion Is Not Special?* first categorizes positive and negative positions on two Religion Clauses issues: (1) constitutionally mandated exemptions (accommodation) for religious conduct in the face of generally applicable laws, and (2) exclusion of religious reasons as grounds for laws.<sup>2</sup> This generates four theoretical approaches. Inclusive accommodation permits religious reasons as grounds for legislation while supporting mandatory religious exemptions from law; exclusive nonaccommodation excludes religious reasons for legislation and rejects religious exemptions; the other two approaches reflect the remaining combinations, inclusive nonaccommodation and exclusive accommodation. Professor Schwartzman argues that the first two approaches are internally inconsistent because they treat religion as special for some purposes but not others.<sup>3</sup> Next he argues that the other two approaches are unfair to both religion and nonreligion because they wrongly treat religion as different from deep or “comprehensive” nonreligious moral theories.<sup>4</sup> He concludes that none of the four approaches provides a coherent, morally attractive theory of the Religion Clauses, and

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<sup>1</sup> 79 U Chi L Rev 1351 (2012).

<sup>2</sup> Id at 1355–56.

<sup>3</sup> Id at 1377.

<sup>4</sup> Id at 1390.

ultimately he suggests expanding the Clauses' reach to encompass comprehensive nonreligious moral views as well, exempting them from burdensome laws while also restricting government reliance on them to justify laws.<sup>5</sup> In effect, Professor Schwartzman says we are driven inexorably to this sort of general Rawlsian limitation on comprehensive theories as grounds for laws.

I agree with much of *What If Religion Is Not Special?*, but I think that Professor Schwartzman overstates two of his main conclusions. The first is his claim that inclusive accommodation is inconsistent. A theory may coherently treat religion as special for some purposes and not others. In particular, it is perfectly consistent to support religious accommodations while concluding that any constitutional restrictions on religion as a grounding for secular laws should be minimal, perhaps nonexistent. Second, the charges of unfairness in treating religion and nonreligion differently are also overstated. Religion has distinguishing features that justify treating it distinctively. We can extend such treatment to systems that share the same features but have not traditionally been called religious, but the extension should be limited—more limited, so far as I can tell, than Professor Schwartzman proposes.

#### I. ON CONSISTENCY: WHY THE “SECULAR PURPOSE” REQUIREMENT SHOULD BE WEAK

Professor Schwartzman argues that inclusive accommodation is inconsistent because it treats religion as special for purposes of exempting it from generally applicable laws but treats religion as equal to nonreligious views in that both may serve as the motivation or rationale for laws.<sup>6</sup> (Conversely, exclusive nonaccommodation inconsistently rejects distinctive accommodation for religious conduct while singling out religious rationales for limitation in the political process.)<sup>7</sup>

Although Professor Schwartzman's discussion produces interesting insights, ultimately his charge of inconsistency proves little. There is no necessary contradiction in treating religion as special for some purposes and not for others. To be coherent, a theory need only be consistent in the particular way(s) it treats religion specially. If you think that religion is special because it

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<sup>5</sup> Schwartzman, 79 U Chi L Rev at 1414–15 (cited in note 1).

<sup>6</sup> See id at 1377–85.

<sup>7</sup> Id at 1385–89.

is uniquely dangerous to society—perhaps because it is not susceptible to reasoned argument—then you probably oppose accommodations and also wish to restrict religious rationales in political decision making. You support exclusive nonaccommodation, and you are consistent from within your premises (however misguided they may be).<sup>8</sup> On the other hand, if you believe that religion’s public role is essential to a good society—or at least to the flourishing of American society—then you will likely support accommodations as well as the inclusion of religious arguments in lawmaking. I believe that the Religion Clauses rest on the rationale that religion has distinctive importance to individuals and society, but only if religious beliefs are freely chosen and religious life maintains some independence from government.<sup>9</sup> This approach calls for significant religious exemptions from generally applicable laws and for important Establishment Clause limits on government promotion of religion.<sup>10</sup> But emphasizing choice in religious matters does not require always treating religion differently. As Professor Michael McConnell puts it, “Obviously, there are many contexts in which the best means of ensuring that government may not control or direct religious practice is to require equal treatment of religion.”<sup>11</sup>

In arguing that inclusive accommodation is internally inconsistent, Professor Schwartzman targets Professor McConnell’s work. As Schwartzman acknowledges, McConnell supports special treatment for religion not just through accommodations, but through Establishment Clause limits on sponsoring religious activities in public schools.<sup>12</sup> But Schwartzman objects that these limits do not consistently treat religion as special because they “do not include any prohibition on appeals to religion in justifying state action.”<sup>13</sup> He first argues that restrictions on “government religious speech”—conducting or promoting specifically religious activities such as prayers in classrooms or a crèche in the town hall—are insufficient because McConnell would only prohibit coercive instances of them (the

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<sup>8</sup> See, for example, Suzanna Sherry, *Enlightening the Religion Clauses*, 7 *J Contemp Legal Issues* 473, 477 (1996).

<sup>9</sup> Thomas C. Berg, *The Voluntary Principle and Church Autonomy, Then and Now*, 2004 *BYU L Rev* 1593, 1597.

<sup>10</sup> See *id.* at 1606.

<sup>11</sup> Michael W. McConnell, *The Problem of Singling Out Religion*, 50 *DePaul L Rev* 1, 3 (2000).

<sup>12</sup> Schwartzman, 79 *U Chi L Rev* at 1380 (cited in note 1).

<sup>13</sup> *Id.*

classroom prayers, not the crèche).<sup>14</sup> But this argument is a makeweight. McConnell does not give noncoercive government religion a free pass.<sup>15</sup> Moreover, other inclusive accommodationists support invalidating many forms of noncoercive government religious speech.<sup>16</sup>

Professor Schwartzman's real objection is that inclusive accommodationists oppose invalidating "morals legislation" that rests on a religious motivation or justification. They are inconsistent, he says, in that they would prohibit a public school from conducting prayers, but not from banning dancing at school events. Schwartzman argues that "unless the ban on dancing can be supported on nonreligious grounds, it is indistinguishable from the requirement to engage in a religious practice" and should be invalidated under the Establishment Clause for lack of a secular purpose, because "[a] legal obligation to perform a religious rite and a religiously justified legal prohibition on an otherwise nonreligious act are both coercive impositions of religious belief."<sup>17</sup>

This argument, however, proves less than Professor Schwartzman claims. For many reasons, principled and practical, the secular purpose requirement should be weak or nonexistent with respect to laws on secular or this-worldly subjects, within government's ordinary jurisdiction, that reflect religious motivations or justifications. A minimal secular purpose requirement is perfectly consistent with special treatment of religion in the form of significant accommodations and significant limits on government religious speech.

To equate religious accommodations with restrictions on religious rationales for laws, Professor Schwartzman begins with the argument that accommodation rests on religion's distinctive epistemic features, which have been analogized to conditions of

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<sup>14</sup> Id at 1380–81.

<sup>15</sup> See Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U Chi L Rev 115, 159, 194 & n 335 (1992) (arguing for broad concept of coercion and also for invalidating "official acts that declare one religion, or group of religions, superior to the rest, or give official sponsorship to symbols or ceremonies that are inherently exclusionary").

<sup>16</sup> See, for example, Douglas Laycock, *Religious Liberty as Liberty*, 7 J Contemp Legal Issues 313, 348 (1996); Berg, 2004 BYU L Rev at 1597–1600 (cited in note 9); Carl H. Esbeck, *The Establishment Clause as a Structural Restraint on Governmental Power*, 84 Iowa L Rev 1, 61 (1998).

<sup>17</sup> Schwartzman, 79 U Chi L Rev at 1381 (cited in note 1). See also *Lemon v Kurtzman*, 403 US 602, 612–13 (1971) (requiring that a law have a secular purpose to satisfy the Establishment Clause).

insanity.<sup>18</sup> Religious convictions, the argument runs, are uniquely vulnerable because they depart from ordinary standards of practical reasoning and the believer experiences them as unchangeable.<sup>19</sup> Schwartzman rightly responds that this analogy suggests religion should also play little role in the political process, since “insane beliefs are not a legitimate basis for political or legal decision making.”<sup>20</sup> If religion’s distinctiveness consisted solely in its epistemic features, it might support accommodations but not inclusion in politics.

But religion’s distinctiveness in our constitutional tradition does not rest solely on its epistemic features. An equally fundamental feature is the importance that religion holds in the identities of individual believers and the groups they form. I discuss this feature in greater detail in Part II;<sup>21</sup> it is central to most arguments for protecting religious conduct from generally applicable laws. And it also cuts strongly against any significant secular purpose requirement.

To invalidate laws on secular subjects because of their religious motivations or justifications discourages religious individuals and groups from stating, in public debate, their religious arguments for particular laws. Political speech on legislation and public issues “occupies the core of the protection afforded by the First Amendment”;<sup>22</sup> so does religious speech.<sup>23</sup> But under any significant secular purpose restriction, such statements can be used as evidence that the law was motivated or justified too much by religious beliefs. The result is to push people to silence their religious speech as a condition of participating in basic democratic processes. “Focusing on the arguments for a law tends to restrict or penalize arguments in the political process—to do indirectly what cannot be done directly.”<sup>24</sup> This imposes a

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<sup>18</sup> Schwartzman, 79 U Chi L Rev at 1378–85 (cited in note 1).

<sup>19</sup> Id at 1383, citing John H. Garvey, *Free Exercise and the Values of Religious Liberty*, 18 Conn L Rev 779, 798–800 (1986).

<sup>20</sup> Schwartzman, 79 U Chi L Rev at 1384.

<sup>21</sup> See notes 54–64 and accompanying text.

<sup>22</sup> *McIntyre v Ohio Elections Commission*, 514 US 334, 346–47 (1995) (quoting numerous cases).

<sup>23</sup> See, for example, *Rosenberger v Rector and Visitors of University of Virginia*, 515 US 819, 835 (1995) (holding that exclusion of religious speech from public forum contradicts “[v]ital First Amendment speech principles”).

<sup>24</sup> Douglas Laycock, *Freedom of Speech That Is Both Religious and Political*, 29 UC Davis L Rev 793, 812 (1996). See also *Clayton v Place*, 884 F2d 376, 380 (8th Cir 1989) (invalidating secular laws because of religious motivations “would have the effect of disenfranchising religious groups when they succeed in influencing secular decisions”); *McRae v Califano*, 491 F Supp 630, 741 (EDNY 1980) (“[T]he spokesmen of religious institutions

serious burden on religious citizens, for whom religious beliefs tend to be central features of identity, with implications for public as well as private issues. To put it differently, while the outputs of the legislative process—the laws—are limited by the Establishment Clause, the inputs—religious and political expression and activity—are highly protected as free exercise, speech, assembly, petition.<sup>25</sup> A limit on outputs must not restrict constitutionally protected inputs.

Of course, this does not mean religious believers and arguments get special status to influence legislation. Nonbelievers have the same rights of political speech and activity. It means only that religious believers deserve equal status to bring to politics those arguments that are most convincing to them.<sup>26</sup> My point is that one major argument for that equal status is that religion is important to believers in all aspects of their lives. That importance likewise supports religious-conscience accommodations. Professor Schwartzman omits this from his calculation when he calls inclusive accommodation inconsistent.

Restrictions on religiously motivated, secular legislation encumber religious citizens' ability to live their faith in public much more than restrictions on government religious speech. Eliminating religious exercises in public schools does cause real problems for religious families who do not want a wholly secular education for their children. (This is an argument for choice in school funding.) But ultimately, in the case of specifically religious activities, "no one has to rule. There is no need for the government to make decisions about Christian rituals versus Jewish rituals versus no religious rituals at all."<sup>27</sup> Religious rituals or doctrinal teaching can flow through religious communities' own expression: in religious schools or through student groups in public schools. By contrast, it is often very difficult, especially in an age of active government, to achieve goals of justice and human good that religions emphasize without working to influence laws on this-worldly subjects.<sup>28</sup>

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must not be discouraged, nor inhibited by the fear that their support of legislation, or explicit lobbying for such legislation, will result in its being constitutionally suspect.”)

<sup>25</sup> See Laycock, 29 UC Davis L Rev at 811–13 (cited in note 24).

<sup>26</sup> Michael W. McConnell, *Five Reasons to Reject the Claim That Religious Arguments Should Be Excluded from Democratic Deliberation*, 1999 Utah L Rev 639, 655–56.

<sup>27</sup> Douglas Laycock, *The Benefits of the Establishment Clause*, 42 DePaul L Rev 373, 380 (1992).

<sup>28</sup> Thomas C. Berg, *Religion Clause Anti-theories*, 72 Notre Dame L Rev 693, 746 (1997).

The secular purpose requirement would certainly penalize religious citizens' political speech if it applied in a strong form, for example requiring that the secular motivation or justification for a law be "primary" or "predominant."<sup>29</sup> Religious beliefs and arguments always have influenced legislation and always will. If the inquiry about primary purpose has a subjective focus—What rationales or justifications were most important to securing a law's passage?—often the answer is that religious rationales generate the urgency and tenacity necessary to overcome entrenched opposition. Consider, for example, abolitionism, temperance, and civil rights, among other causes. The 1964 Civil Rights Act<sup>30</sup> was fueled by a religious protest movement organized in African American churches and by a campaign of main-line clergy and congregants who made thousands of phone calls to legislators and held daily protests and worship services near the Capitol.<sup>31</sup> A leading history concludes that pervasive revivalist language was necessary to "ma[ke] civil rights move" in the face of massive resistance and that for "many participants" the movement was "primarily a religious event, whose social and political aspects were, in their minds, secondary or incidental."<sup>32</sup> But under a test of "primarily secular purpose," the pervasiveness of religious language could serve as evidence of the statute's unconstitutionality.

The same problem arises under what Professor Schwartzman calls an "objective" standard, one focused on the message the law expresses.<sup>33</sup> Professor Andrew Koppelman, for example, argues that the secular purpose requirement is necessary for laws on secular subjects in order to prevent the government from declaring a religious truth implicitly as well as explicitly.<sup>34</sup> But again, if the standard is what message is "primary," religious language in the debate would end up counting against the resulting law's validity. After all, under case law the reasonable observer would consider all the evidence to decide what message

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<sup>29</sup> See Schwartzman, 79 U Chi L Rev at 1360 (cited in note 1).

<sup>30</sup> Pub L No 88-352, 78 Stat 241, codified as amended at 42 USC §2000e et seq.

<sup>31</sup> For a discussion of religious groups' influence during the civil rights era, see generally David L. Chappell, *A Stone of Hope: Prophetic Religion and the Death of Jim Crow* (North Carolina 2004). See also James F. Findlay Jr, *Church People in the Struggle: The National Council of Churches and the Black Freedom Movement, 1950-1970*, 48-64 (Oxford 1993).

<sup>32</sup> Chappell, *A Stone of Hope* at 44, 87 (cited in note 31).

<sup>33</sup> Schwartzman, 79 U Chi L Rev at 1361 (cited in note 1).

<sup>34</sup> Andrew Koppelman, *Secular Purpose*, 88 Va L Rev 87, 111-12 (2002).

a law sends.<sup>35</sup> Arguably, a reasonable observer who saw years of rallies in churches and speeches soaked in biblical language would read Congress's message in the Civil Rights Act of 1964 to say that human dignity and equality come from God.

Professor Schwartzman might well respond that the 1964 Civil Rights Act would unquestionably pass muster under weaker versions of the secular purpose prong, which, as he remarks, require that secular rationales be "sufficient" to motivate or justify the law or, even more permissively, that there be some secular rationale, not solely religious rationales.<sup>36</sup> But even these rationales run into serious problems, mostly because for serious believers, it is very difficult to disentangle religious and secular beliefs; the former pervade, and are reflected in, the latter.

For example, Professor Schwartzman suggests that the proper requirement is that there be a sufficient secular purpose, or "an independently adequate secular justification."<sup>37</sup> The concept of "sufficiency" is ambiguous: Does it require merely that a secular rationale be legally sufficient to ground the law, or further that such a rationale be sufficient to motivate the law's passage? In another article, Professor Schwartzman chooses the latter, at least as a standard of political morality for individual citizens. He says that citizens should not "rely for the purposes of political justification on reasons they find implausible or inadequate, even though others might be persuaded to accept those reasons."<sup>38</sup> But as other commentators have pointed out, this poses an impossible demand on seriously religious citizens: they must ask whether they would support a law entirely in abstraction from the religious beliefs that ground and structure their beliefs about the world. If the task is not impossible for religious citizens, it is at least a serious burden on their participation in political life.<sup>39</sup> And things only get worse if we try to

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<sup>35</sup> See, for example, *McCreary County, Kentucky v American Civil Liberties Union of Kentucky*, 545 US 844, 866 (2005); *County of Allegheny v American Civil Liberties Union, Greater Pittsburgh Chapter*, 492 US 573, 620 (1989) (Blackmun concurring).

<sup>36</sup> Schwartzman, 79 U Chi L Rev at 1360 (cited in note 1).

<sup>37</sup> Id at 1360–61 & n 30.

<sup>38</sup> Micah Schwartzman, *The Sincerity of Public Reason*, 19 J Polit Phil 375, 385 & n 29 (2011). See also Schwartzman, 79 U Chi L Rev at 1360 & n 30 (cited in note 1). For a similar (if perhaps more demanding) approach, see Robert Audi, *The Place of Religious Argument in a Free and Democratic Society*, 30 San Diego L Rev 677, 691–92 (1993) (endorsing principles of both "secular rationale" and "secular motivation").

<sup>39</sup> See, for example, Kent Greenawalt, *Religious Convictions and Political Choice* 152 (Oxford 1988) ("Even if [the religious believer] tries, it will be hard for him to assess the reasoned arguments detached from what he thinks is correct on religious grounds."); McConnell, 1999 Utah L Rev at 655 (cited in note 26):



translate the concept of sufficient secular motivation to the collective decision and make it a constitutional requirement. If the requirement is that secular rationales be sufficient to induce the legislature to act, it is far too demanding for reasons already given. Again, challengers would use the presence of religious arguments in the legislative debate as evidence that secular arguments were insufficient inducement, which would discourage people from exercising their rights to make religious arguments. The inquiry would ignore the fact that religious arguments, as in the case of civil rights, often provide salutary energy to overcome inertia and entrenched opposition.

On the other hand, if “sufficiency” means simply legal adequacy, then it effectively reduces to the weakest version of the secular purpose requirement: that there simply be some secular rationale for a law on secular matters. That is because under default rational basis review, essentially any rationale suffices legally: almost any purpose counts as legitimate, and almost any means-end relationship as rational. (I will discuss instances of heightened scrutiny below.) And the weakest version of the secular purpose requirement is the most defensible. Under it, the presence of religious arguments in debate will not serve as significant evidence of the law’s unconstitutionality—and thus will not deter people from making them—because religious arguments can easily coexist with some secular arguments. Moreover, if a secular rationale need not be primary, or sufficient to motivate the lawmakers, then there is far less need to attempt the nearly impossible task of isolating religious and nonreligious motivations.

In my view, almost no law violates the weakest standard. Religious citizens never, or almost never, support a policy solely on theological grounds, with no belief that the policy will be better for people in this world. Opponents of same-sex marriage follow theological beliefs, but they also argue that recognizing it will hurt children and society by decoupling marriage’s essence (and the messages it communicates) from the procreation and raising of children.<sup>40</sup> That argument may be incorrect (I have

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[For many believers, i]t is not possible to think productively about issues of right and wrong, justice and injustice, without thinking of God’s will. . . . And even if it were comprehensible to ask ‘what is right (independent of God’s will)?’ the believer would decline to participate in such a sinful enterprise.

<sup>40</sup> See, for example, Sherif Girgis, Robert P. George, and Ryan T. Anderson, *What Is Marriage?*, 34 *Harv J L & Pub Pol* 245, 260–63 (2011).

come to think so), but it clearly concerns this-worldly issues and effects. Similarly, proponents of banning school dances almost certainly think that dancing contributes to sexualization and promiscuity.<sup>41</sup> These examples are unsurprising. They reflect, again, the intertwining of religious and secular beliefs. People who believe that God stands against (or for) certain conduct will also believe that the conduct is bad (or good) for human beings in this world.<sup>42</sup>

The weak rule is most consistent with the Supreme Court's rulings concerning ordinary secular laws. The Court has invalidated multiple forms of government religious speech: government promotion of specifically religious activities such as prayers, symbolic displays, and the exposition of religious doctrine.<sup>43</sup> (One might say that the secular purpose doctrine is strong in that category, although the decisions could just as easily rest on a lack of secular effect.) But in the major cases involving secular legislative subjects, the Court has refused to find that laws disfavoring abortion and providing for a day of rest were unconstitutional because they allegedly rested too much on religious motivations or justifications.<sup>44</sup> Only one decision, *Epperson v Arkansas*,<sup>45</sup> relied on this ground to invalidate a law: the state

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<sup>41</sup> See, for example, Mark A. Copeland, *Shall We Dance?*, (Executable Outlines 2011), online at <http://executableoutlines.com/top/dancing.htm> (visited Apr 8, 2013) ("Both common sense and the testimony of people in the world confirm that dancing is an activity which has the arousal of sexual desires as its main appeal.")

<sup>42</sup> See, for example, Greenawalt, *Religious Convictions* at 152 (cited in note 39) (all but the most introspective person "will be disposed to find that the publicly accessible arguments consonant with his religious convictions are more powerful than their competitors").

<sup>43</sup> For decisions invalidating such practices for lack of a secular purpose, see *Engel v Vitale*, 370 US 421, 424 (1962) (favoring official prayers); *School District of Abington Township, Pennsylvania v Schempp*, 374 US 203, 226 (1963) (favoring prayers and Bible readings); *Wallace v Jaffree*, 472 US 38, 84 (1985) (favoring prayer or meditation during classroom moment of silence unconstitutional); *Stone v Graham*, 449 US 39, 41 (1980) (favoring a Ten Commandments display in school); *McCreary County*, 545 US at 873–74 (same); *Edwards v Aguillard*, 482 US 578, 597 (1987) (favoring the teaching of biblical creationism). For other decisions invalidating government religious speech, see *Lee v Weisman*, 505 US 577, 599 (1992) (favoring prayers at a public school graduation ceremony); *Santa Fe Independent School District v Doe*, 530 US 290, 317 (2000) (favoring prayer to begin football games); *County of Allegheny*, 492 US at 621 (favoring crèche display inside a courthouse).

<sup>44</sup> *Harris v McRae*, 448 US 297, 326 (1980) (holding that states that participate in Medicaid are not required to fund medically necessary abortions for which federal funding is unavailable); *McGowan v Maryland*, 366 US 420, 452 (1961) (finding laws barring work on Sundays to be constitutional because they are not laws "respecting an establishment of religion").

<sup>45</sup> 393 US 97 (1968)

ban on teaching evolution in public schools.<sup>46</sup> Even *Epperson* can be read to fall within the government-expression category: the state elevated the Genesis doctrine of creation by prohibiting expression of its chief competitor, evolution, in the main forum, public schools, where the competing expression would occur.<sup>47</sup>

Professor Schwartzman worries that without a meaningful secular purpose requirement for secular laws, religious arguments could “serve as a compelling interest to justify infringements on competing rights.”<sup>48</sup> The unspoken worry here is with gay and lesbian rights, and perhaps abortion rights. But I see no problem with concluding that religious arguments cannot serve as compelling interests to satisfy the heightened scrutiny that applies to important rights of equality or personal autonomy. In that context, religion is no different than many other ideas; arguments based on it are not sufficiently shared to override other persons’ important constitutional rights. The courts apply heightened scrutiny to all of the government’s arguments in defense of a law and, after rejecting others, conclude that a religious rationale cannot fill the gap.<sup>49</sup> But a general secular purpose test for secular laws would be quite different. It would apply not just to laws affecting important countervailing rights, but to all laws, greatly increasing the scope of judicial intervention. The weakest version of the test—requiring simply some secular rationale—would not do much damage, because it would leave the level of scrutiny at minimal rationality and would be satisfied by virtually any law. But any stronger version—

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<sup>46</sup> Id at 108 (holding that “fundamentalist sectarian conviction [about biblical creation] was and is the law’s reason for existence”).

<sup>47</sup> *Epperson* may be defensible on other constitutional grounds, and I certainly hold no policy brief for laws against teaching evolution. But the decision actually shows the problems involved in finding no secular purpose. First, for its conclusion the Court relied not on text or legislative findings, but entirely on private citizens’ speech in societal debate: a newspaper advertisement and a few letters to the editor. Id at 108 n 16. Second, the Court said nothing about the secular arguments made by William Jennings Bryan, the leader of the anti-evolutionists, but also a longtime progressive who believed that Darwinism produced Social Darwinism, harming the poor and vulnerable. In one pamphlet he wrote that “the brute doctrine of the ‘survival of the fittest’ is driving men into a life-and-death struggle from which sympathy and the spirit of brotherhood are eliminated. It is transforming the industrial world into a slaughter-house.” William Jennings Bryan, *In His Image* 125–26 (Revell 1922). See also Michael Kazin, *A Godly Hero: The Life of William Jennings Bryan* 140, 264 (Anchor 2006).

<sup>48</sup> Schwartzman, 79 U Chi L Rev at 1398 (cited in note 1) (viewing this issue through the lens of inclusive nonaccommodation).

<sup>49</sup> See, for example, *Varnum v Brien*, 763 NW2d 862, 904–05 (Iowa 2009) (finding a right to same-sex marriage under intermediate scrutiny and finding religious beliefs insufficient to justify denial of the right).

requiring that secular rationales predominate or be sufficient to induce the law's passage—would raise the level of scrutiny and penalize religious and political speech by using it as evidence of insufficient secular grounds. It would create a new “Lochner-izing,” second-guessing the justifications for a law whenever religious activism contributed meaningfully to its passage.

Professor Schwartzman also argues that without a secular purpose requirement, religious arguments might be used to define religious freedom itself narrowly: for example, limiting free exercise rights to those who worship a deity, or permitting a city to “requir[e] students to pray in public schools for the purpose of promoting the truth of a particular religious view.”<sup>50</sup> But he wrongly supposes that limits on government religious favoritism come only from the secular purpose rule. School prayers involve government improperly in religious life for many reasons; requiring them would be unconstitutional even if it were done for wholly secular reasons. Indeed, during the Founding era the most prevalent arguments for religious establishments were secular (that religion encouraged prosocial behavior),<sup>51</sup> and many of the most influential arguments for disestablishment were religious (that government involvement interfered with true faith and undermined churches’ “purity and efficacy”).<sup>52</sup> Even today, minority faiths sometimes fare worse in highly secularized nations than in those with a stronger religious underpinning that leads them to appreciate the importance of faith: consider, for example, the restrictions that French Muslims face in state schools compared with their counterparts in the United States and even Italy.<sup>53</sup> It is anachronistic to assume that religiously grounded arguments will constrict religious freedom.

For all these reasons, the secular purpose requirement with respect to secular laws should be weak, excluding almost no laws. Arguably it should be nonexistent, because even a relatively weak formulation may encourage judges to second-guess legislation and penalize religious activism in politics. In any event, a

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<sup>50</sup> Schwartzman, 79 U Chi L Rev at 1398 (cited in note 1).

<sup>51</sup> Mass Const of 1780 Pt I, Art III, cl 1 (superseded 1833) (providing clergy subsidies on the ground that “the happiness of a people, and the good order and preservation of civil government, essentially depend upon piety, religion and morality”).

<sup>52</sup> James Madison, *Memorial and Remonstrance against Religious Assessments*, in Jack N. Rakove, ed, *Madison: Writings* 29, 30 (Library of America 1999).

<sup>53</sup> See, for example, Thomas C. Berg, *Can State-Sponsored Religious Symbols Promote Religious Liberty?*, 51 J Cath Legal Stud \*13–15 (forthcoming 2013), online at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2144460](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2144460) (visited Apr 9, 2013).

weak secular purpose requirement is perfectly consistent with meaningful religious accommodations.

## II. WHY RELIGION IS SPECIAL (ENOUGH)

Although Professor Schwartzman argues that certain theories are internally inconsistent concerning the distinctiveness of religion, ultimately this is not central to his thesis, since he argues that religion is not distinctive, at least not compared to various nonreligious moral views that are equally deeply felt.<sup>54</sup> On this basis, he proposes that such views should, like religion, be both exempt from burdensome laws and excluded from serving as grounds for legislation. I'm unsure precisely how much I differ from Professor Schwartzman on this score, because I'm unsure how many secular views his proposal would include. In my view, it makes sense to extend the treatment of religion to atheism, agnosticism, and certain other comprehensive metaphysical and moral views. But the extension should be limited.

The claim for the distinctiveness of the traditional category of religion is stronger than Professor Schwartzman suggests. It rests on several features. The first is that religious commitments involve matters of ultimate status and importance. This feature includes several components and may be expressed in several ways. From the Founding era through much of our history, it has been expressed in religious terms: religion involves duties to the Creator that, in James Madison's words, are "precedent, both in order of time and degree of obligation, to the claims of civil society."<sup>55</sup> Thus, the individual whose religious beliefs conflict with government action faces a distinctively painful choice between authorities, possibly with extratemporal consequences for violating God's norms.<sup>56</sup> Alternatively, the individual's relationship to God can be understood as one less of duties and punishment than of love and fulfillment, which are still frustrated by state interference with the relationship.<sup>57</sup> Although the argument may be strengthened by the proposition that a deity actually exists, it does not stand or fall on that premise. The

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<sup>54</sup> Schwartzman, 79 U Chi L Rev at 1384, 1388 (cited in note 1).

<sup>55</sup> Madison, *Memorial and Remonstrance* at 30 (cited in note 52)

<sup>56</sup> See John H. Garvey, *An Anti-liberal Argument for Religious Freedom*, 7 J Contemp Legal Issues 275, 287 (1996) ("The harm threatening the believer [versus the non-believer] is more serious (loss of heavenly comforts, not domestic ones) and more lasting (eternal, not temporary).").

<sup>57</sup> Alan E. Brownstein, *Justifying Free Exercise Rights*, 1 U St Thomas L J 504, 517-23 (2003).

individual will still tend to feel such matters as particularly important because she believes in God and that departing from God's call will bring damnation or the loss of the highest fulfillment, or simply because she views her decisions on ultimate questions as among the most important in her life. The government has good reasons—founded in historical experience—to recognize that this suffering is especially intense and therefore, when possible, to refrain from causing it.<sup>58</sup>

Second, religious claims and commitments tend, as a category, to be comprehensive in nature. Through what other institution or belief system can a person do all the following things: raise and educate her children, mark births and deaths, meet weekly for sessions of inspiration and teaching, seek personal counseling from a leader, receive moral guidance for her conduct, and devote time to serving others? Although other human activities parallel one or some of these features, “there is no other human phenomenon that combines all of [them]; if there were such a concept, it would probably be viewed as a religion.”<sup>59</sup> Surveying a similar set of features—“virtually all of the defining decisions of personhood”—Professor Alan Brownstein concludes that religion is “one of the most self-defining and transformative decisions of human existence” and that “[a]lmost any other individual decision pales in comparison to the serious commitment to religious faith.”<sup>60</sup> By its nature, religion draws the aspects together into what Professors Christopher Eisgruber and Lawrence Sager call “an expansive web of belief and conduct,” a “comprehensive” web rather than a set of “discrete propositions or theories.”<sup>61</sup> The comprehensiveness and connectedness of religious beliefs and conduct mean that frustration of one aspect of religious practice can have pervasive effects on a religious believer or institution.

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<sup>58</sup> See Laycock, 7 J Contemp Legal Issues at 317, 319 (cited in note 16) (arguing that “beliefs about religion are often of extraordinary importance to the individual,” that “governmental attempts to suppress disapproved religious views ha[ve] caused vast human suffering,” and that “attempts to suppress religious behavior will lead to [the same] problems”).

<sup>59</sup> McConnell, 50 DePaul L Rev at 42 (cited in note 11).

<sup>60</sup> Alan E. Brownstein, Book Review, *The Right Not to Be John Garvey*, 83 Cornell L Rev 767, 807 (1998) (“[Religious beliefs] influence whom we will marry and what that union represents, the birth of our children, our interactions with family members, the way we deal with death, the ethics of our professional conduct, and many other aspects of our lives.”), reviewing John H. Garvey, *What Are Freedoms For?* (Harvard 1996).

<sup>61</sup> Christopher L. Eisgruber and Lawrence G. Sager, *Religious Freedom and the Constitution* 61, 125–26 (Harvard 2007).

These features, ultimacy and comprehensiveness, can certainly be true of nontheistic perspectives like Buddhism, and of perspectives not traditionally called religious, like Secular Humanism or Ethical Culture. The Supreme Court has identified the last two as “religions,”<sup>62</sup> presumably because they base sets of norms, teachings, and practices on claims about the fundamental meaning of existence. Professor Schwartzman, however, takes this further and argues that a broad range of nonreligious perspectives are indistinguishable from religion in the relevant sense. Therefore, he says, religion is not special, at least not in a moral sense; if our constitutional tradition has treated it as special, that is an imperfection in the tradition.<sup>63</sup> He points out that nonbelievers “may be, and often are, as psychologically committed to their ethical views as believers are to their religious convictions” and “may suffer as much or more than some believers when forced to choose between following their principles and following the law.”<sup>64</sup>

As indicated above, I agree with extending free exercise protection to nontheistic religions, to nontheistic views on religion like atheism and agnosticism, and perhaps somewhat further. But I think Professor Schwartzman takes it too far. There is another distinction in religion’s ultimacy that is not simply reducible to the fact that religious norms are deeply felt. The distinctive status of religion in our tradition rests not just on protection of individual conscience or autonomy, but on a structural principle of limited government. In removing government from both the suppression and the promotion of religion, the Religion Clauses reflect the proposition that the state is not an ultimate institution, and that certain realms of life should be, at least presumptively, outside its reach. Religion is not the only such realm; the Constitution also limits government interference with families, with privacy, with educational decisions, and with other aspects of life. But freedom in the religious realm is especially strong. In areas like the family, sexual privacy, or education, government is restricted in its coercive powers, but it still has the power to act to promote social goals—even extensively—by, for example, conducting divorce and custody processes, funding

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<sup>62</sup> *Torcaso v Watkins*, 367 US 488, 495 n 11 (1961).

<sup>63</sup> Schwartzman, 79 U Chi L Rev at 1402–03 (cited in note 1).

<sup>64</sup> *Id.* at 1388 (“Secular moral views can also be strong motivation for action. Those who espouse them have engaged in acts of civil (and uncivil) disobedience, even at great personal sacrifice.”) (citations omitted).

contraception or (in some states) abortions, and operating public schools.<sup>65</sup> In core matters of religion, by contrast, government is significantly limited in promoting its favored views or goals, even through noncoercive means. In a distinctive way, our constitutional system aims to leave religion to the private decisions of individuals and groups.

This distinctive autonomy is also especially foundational to limited government. By staying out of ultimate matters, the government recognizes at least the possibility of a power higher than itself or than any other human institution, and it preserves room for humans to relate to that power—responding to that power, seeking it, obeying it, loving it—on terms beyond the government's control.

This feature of religion appears most obviously in the various ways in which our tradition separates church and state. As the Supreme Court recognized in striking down prayers at public school graduation ceremonies, government constantly argues for and against various wide-ranging secular moral perspectives—from free-market libertarianism to American nationalism to multiculturalism—in schools and elsewhere. “[T]he government participates” fully in these debates, “for the very object of some of our most important speech is to persuade the government to adopt an idea as its own”—while in contrast, “[i]n religious debate or expression the government is not a prime participant.”<sup>66</sup> But by the same token, this special concern with private choice in religious matters also justifies religious accommodations, which permit religious communities and individuals to act in ways consistent with their judgments about ultimate matters.

To his credit, Professor Schwartzman aims to be consistent in applying his argument that religion is no different from secular comprehensive philosophies. He proposes to apply it to establishment-related issues, as well as to free exercise. Thus, he says:

If a state or local government decided to build into its public school curriculum courses designed to teach that Kantianism is the correct view about ethics and morality (and, we might suppose, metaphysics, epistemology, and aesthetics), parents and students with different perspectives would be

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<sup>65</sup> See McConnell, 50 DePaul L Rev at 19 (cited in note 11).

<sup>66</sup> *Lee v Weisman*, 505 US 577, 591 (1992).



justified in objecting on the grounds that the state had established a secular doctrine.<sup>67</sup>

The same would hold, he says, for Hegelianism or utilitarianism as comprehensive philosophies. In response to the argument that this would cripple government (especially public schools) because they are constantly teaching various secular moral views, he proposes to distinguish in Rawlsian terms between secular “comprehensive” doctrines, “which are generally not sufficient grounds for state action,” and so-called public values, “a subset of moral and political values that the government can legitimately promote in a liberal democratic society.”<sup>68</sup> He suggests that citizens can debate “the proper meaning of public values such as liberty and equality” and “how they ought to be ordered when they conflict, without at the same time agreeing on the epistemic, metaphysical, and religious foundations of those concepts.”<sup>69</sup>

I confess I am no expert on Rawlsian discourse, but I am skeptical that the distinction between comprehensive and public secular values can stand, or at least go very far—especially as a doctrine for courts to try to implement. The hypothetical Schwartzman chooses—the public school course indoctrinating students in Kantianism or Hegelianism—is the one most conducive to his thesis that the government may not establish any secular doctrine, because the hypothetical involves explicit teaching of an ideology. And Kant and Hegel, we should not forget, both expressed views on the nature or knowability of God that were important to their overall systems.<sup>70</sup> Certainly, secular moral views can be taught in ways that effectively take positions on ultimate questions. Although the major lawsuit alleging

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<sup>67</sup> Schwartzman, 79 U Chi L Rev at 1422 (cited in note 1) (adding, concerning utilitarianism, that “[i]t is not for the state to dictate that the only considerations relevant to determining the rightness or wrongness of an action are whether that action maximizes utility”).

<sup>68</sup> Id at 1425.

<sup>69</sup> Id.

<sup>70</sup> See, for example, Peter Byrne, *Moral Arguments for the Existence of God* § 2.1 (Stanford Encyclopedia of Philosophy 2007), online at <http://plato.stanford.edu/entries/moral-arguments-god> (visited Apr 10, 2013) (describing Kant’s argument that God’s existence is necessary to make morality rational by making virtue possible and ultimately rewarding it); Paul Redding, *George Wilhelm Friedrich Hegel* § 2.2, (Stanford Encyclopedia of Philosophy 2010), online at <http://plato.stanford.edu/entries/hegel/#TraMetVieHeg> (visited Apr 10, 2013) (describing Hegel’s account under which, at least in traditional interpretation, God or Absolute Spirit is progressively actualized in human minds and in historical stages of culture).

that schools taught Secular Humanism failed,<sup>71</sup> there surely are high school teachers (my own junior-year English teacher, for example!) who present existentialism or Darwinism as showing that no God exists or is necessary. But if we define “ultimate” and “comprehensive” theories more broadly—to cover any theories that involve deeply held or wide-ranging moral claims—we quickly run into problems. Is Ayn Rand’s Objectivism, even without its explicit atheism, still a sufficiently ultimate and comprehensive doctrine because of its wide-ranging exaltation of the individual—and at what point would a teacher’s libertarian criticisms of government and of duties to others cross the line into forbidden comprehensive individualism? I imagine such questions arising frequently, and courts in particular having difficulty resolving them.

Even greater difficulties arise, however, if we extend Professor Schwartzman’s proposal beyond explicit teaching of comprehensive doctrines to prohibit their role in ordinary legislation. Plugging in words from the secular purpose discussion produces the proposition, for example, that the government may not pass a law in which propositions of utilitarianism played a significant (or predominant) role. Taken seriously, this would call into question many laws in which judgments about relative utilities, costs and benefits, do play a predominant role. If the answer is that these laws do not reflect the claim that utilitarianism is the sole comprehensive guiding moral theory, then what about laws where cost-benefit analysis is defended on the ground that other principles are too controversial and the only way to treat all persons fairly is to sum up their respective utilities? Certainly a central argument for comprehensive utilitarianism is that it treats all persons, of differing views and interests, equally; as Jeremy Bentham put it, “Everyone is to count for one, no one for more than one.”<sup>72</sup> One might argue similarly that laws defended primarily on nonreligious grounds of human dignity and autonomy implicitly reflect Kantianism. Professor Schwartzman’s proposal raises a double problem of disentangling permissible

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<sup>71</sup> *Smith v Board of School Commissioners of Mobile County*, 827 F2d 684, 693–94 (11th Cir 1987) (holding that although Secular Humanism could be a religion, the schools in question did not teach it).

<sup>72</sup> Jeremy Bentham, *Plan of Parliamentary Reform*, in John Bowring, ed, 3 *The Works of Jeremy Bentham* 433, 459 (Tait 1843). See also John Stuart Mill, *Utilitarianism* 93 (Longmans 1871) (quoting Bentham and arguing that utility principle comports with justice because under it “one person’s happiness . . . is counted for exactly as much as another’s”).

from impermissible justifications: determining not only which justifications or motivations are central (predominant, etc.) to the law, but also whether a particular justification reflects a comprehensive or noncomprehensive version of a value such as utility or autonomy.

Given these difficulties, I doubt that any kind of broad exclusion of secular philosophies is a viable doctrine, particularly for courts trying to apply it in constitutional cases. The category of religion can expand to cover atheism, agnosticism, and a relatively narrow band of other nontheistic systems that combine ultimacy and comprehensiveness in metaphysics and morals; but the problems with extending it to all deeply felt or important moral views are significant. The set of reasons for keeping religion distinct from government does not apply in full to most secular philosophies—for nonestablishment issues, or for free exercise issues.

Professor Schwartzman believes that unless comprehensive philosophies are excluded as grounds for legislation, we will face a dilemma of either allowing “majorities to impose their religious views by enacting legislation justified solely on religious grounds,” or excluding religious grounds alone and thus “discriminat[ing] against religious believers by constraining their participation in the political process.”<sup>73</sup> However, as I’ve argued in Part I, any rule excluding religious grounds from legislation should also be very narrow; religion should not be singled out in any meaningful way for exclusion from the political process. The way to protect minorities is to focus on the interests they have that merit heightened constitutional protection, not on the motivations or worldviews of those supporting a piece of legislation.

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<sup>73</sup> Schwartzman, 79 U Chi L Rev at 1425 (cited in note 1).