

## Religion's Specialized Specialness

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

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The basic elements of contemporary Religion Clauses doctrine have hidden in plain sight. American law treats religion as a distinctive human good but protects it from political manipulation by denying the state the power to take sides on any theological question. This approach entails rules of disestablishment, such as the secular purpose requirement, which prevent the government from using coercive laws to proclaim religious truth.<sup>1</sup> It also entails that it is permissible for the legislature to recognize religion's value by accommodating it.<sup>2</sup> American law insists (with an important exception, which I'll discuss) on neutrality among religions.<sup>3</sup> Its understanding of "religion" is calculatedly vague, allowing it to accommodate claims of conscience that sufficiently resemble religious claims.<sup>4</sup>

Scholarship in this area is dominated by two visions: a neo-Rawlsian view in which the state should be scrupulously neutral toward all contested visions of the good, or at least toward all comprehensive views of the meaning of life,<sup>5</sup> and a religious

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<sup>1</sup> See *Lemon v Kurtzman*, 403 US 602, 612–13 (1971).

<sup>2</sup> See, for example, *Zorach v Clauson*, 343 US 306, 314–15 (1952).

<sup>3</sup> See *Board of Education of Kiryas Joel Village School District v Grumet*, 512 US 687, 707 (1994).

<sup>4</sup> For an explanation of these aspects of the doctrine, see Andrew Koppelman, *Defending American Religious Neutrality* (Harvard 2013).

<sup>5</sup> See, for example, Brian Leiter, *Why Tolerate Religion?* (Princeton 2013); Jocelyn Maclure and Charles Taylor, *Secularism and Freedom of Conscience* (Harvard 2011); Martha Nussbaum, *Liberty of Conscience: In Defense of America's Tradition of Religious Equality* (Basic Books 2008); Christopher L. Eisgruber and Lawrence G. Sager, *Religious Freedom and the Constitution* (Harvard 2007); Robert Audi, *Religious Commitment and Secular Reason* (Cambridge 2000); Kathleen M. Sullivan, *Religion and Liberal Democracy*, 59 U Chi L Rev 195 (1992); Steven G. Gey, *Why Is Religion Special?: Reconsidering the Accommodation of Religion under the Religion Clauses of the First Amendment*, 52 U Pitt L Rev 75 (1990).

communitarian view that would place few or no limits on the government's ability to endorse religious ideas.<sup>6</sup> American law obviously does not conform to either ideal, so the theorists try to reimagine the law, an approach that obviously entails radical reshaping of doctrine.

There is, of course, nothing necessarily privileged about the status quo, but there are also different possible kinds of neutrality.<sup>7</sup> The neo-Rawlsian vision occludes some of these possibilities, while the religious communitarians reject neutrality altogether. The United States is the most religiously diverse society in the history of the world, and it has done a fine job of handling that diversity—better than some other rich nations. It is theoretically untidy, but there are worse things than theoretical untidiness.

Because scholars regard existing law with contempt, they have spent most of their efforts engaging with each other. An alternate universe of theoretical possibilities has developed, a battleground of competing visions of the Religion Clauses. In this world, American law sometimes goes unnoticed altogether.

Micah Schwartzman is one of our finest young scholars of law and religion and has brought sophisticated philosophical analysis to some perennial problems.<sup>8</sup> His analytical skills are conspicuously on display in *What If Religion is Not Special?*<sup>9</sup> He carefully anatomizes a number of competing positions in the law review literature and shows the weaknesses of each, leaving himself with, as he puts it, an “intellectual ache”: it appears to him that the commitments of our constitutional regime cannot be justified.<sup>10</sup> His article is a valuable contribution. But it can mislead the reader because, as in so much literature in this field, the actual law of the United States escapes his vision.

Of his four categories, he says that exclusive nonaccommodation—the view that religious convictions are specially excluded as bases for justifying political and legal decisions, but not

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<sup>6</sup> See, for example, Steven D. Smith, *The Disenchantment of Secular Discourse* (Harvard 2010); Christopher J. Eberle, *Religious Conviction in Liberal Politics* (Cambridge 2002); David M. Smolin, *Regulating Religious and Cultural Conflict in Postmodern America: A Response to Professor Perry*, 76 Iowa L Rev 1067 (1991).

<sup>7</sup> See Koppelman, *Defending American Religious Neutrality* at 15–26 (cited in note 4).

<sup>8</sup> See, for example, Micah Schwartzman, *Conscience, Speech, and Money*, 97 Va L Rev 317 (2011); Micah Schwartzman, *The Relevance of Locke's Religious Arguments for Toleration*, 33 Polit Theory 678 (2005).

<sup>9</sup> Micah Schwartzman, *What If Religion Is Not Special?*, 79 U Chi L Rev 1351 (2012).

<sup>10</sup> *Id.* at 1352.

special for purposes of accommodation—“is closest to existing constitutional doctrine.”<sup>11</sup> That conclusion would be bad news for the doctrine’s coherence. His article shows the tensions within any position that makes religion special for one, but not both, of these purposes. Yet he has misclassified the doctrine. The same Court that demands that law have a secular purpose and refuses judicial accommodation of religion is also extremely friendly toward legislative accommodation, and even crafts accommodations when the Religious Freedom Restoration Act<sup>12</sup> tells it to do so.<sup>13</sup>

Schwartzman, like so many others in this field, conflates two different questions: (1) whether there should be religious accommodation at all; and (2) if there is to be accommodation, whether it should be crafted by courts or legislatures. The first of these is the relevant one for Schwartzman’s purposes, and by far the more important of the two. The second, on which a huge literature focuses, is a matter of institutional detail. American law’s answer to the first question is clearly yes. The Supreme Court has almost never invalidated an accommodation of religion. But, after *Employment Division, Department of Human Resources of Oregon v Smith*,<sup>14</sup> the Court insists that such accommodations must come in the first instance from legislatures, and be subject to legislative override.<sup>15</sup>

Our regime, then, is not one of exclusive nonaccommodation, but rather one of exclusive accommodation in which religion is special both for purposes of establishment and of accommodation.<sup>16</sup> This ought to relieve Schwartzman’s ache. American law *consistently* treats religion as special.

So what’s the problem with exclusive accommodation? Schwartzman objects that the exclusive accommodation approach demands that those who endorse it adopt a number of dubious epistemic and moral premises, drawn from the scholarship of Professor Abner Greene—for example: “According to exclusive accommodation, religion warrants special treatment with respect to free exercise exemptions precisely because of the

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<sup>11</sup> Id at 1371.

<sup>12</sup> Religious Freedom Restoration Act, Pub L No 103-141, 107 Stat 1488 (1993), codified at 42 USC § 2000bb et seq.

<sup>13</sup> See, for example, *Gonzales v O Centro Espirita Beneficente Uniao do Vegetal*, 546 US 418, 438–39 (2006).

<sup>14</sup> 494 US 872 (1990).

<sup>15</sup> See id at 891. See also Eugene Volokh, *A Common-Law Model for Religious Exemptions*, 46 UCLA L Rev 1465 (1999) (explaining and defending this result).

<sup>16</sup> See Schwartzman, 79 U Chi L Rev at 1367 (cited in note 9).

special disabilities imposed on religion by the Establishment Clause and, more specifically, by the secular purpose doctrine.”<sup>17</sup> Whatever the merits of Professor Greene’s argument—Schwartzman states some telling objections<sup>18</sup>—this tradeoff has never been expressly adopted by the Supreme Court, and Professor Greene has never, to my knowledge, claimed that the Court has adopted his views. So Schwartzman attributes to the law purposes that are peripheral to it, critiques those purposes, and imagines that he has thus critiqued the law.

Schwartzman’s deeper objection to the singling out of religion is that religion is not ontologically distinct from other deep and valuable concerns.<sup>19</sup> He thinks that it follows that there can be no justification for giving it special treatment. If we are to give anything special treatment for free exercise or disestablishment, it should be for all comprehensive or partly comprehensive views. This is a non sequitur. Compare: if “people who have passed driving exams” are not ontologically distinct from those who have not, then there can be no justification for giving “people who have passed driving exams” special treatment, such as licenses to drive cars on public roads. What we should be doing is privileging “people who are good drivers.” In both cases, the problem is the same: the trait that matters is one that the law can’t detect without relying on imperfect proxies.

Schwartzman is probably right that there is nothing ontologically distinct about religion. Anthropologists disagree about whether there is any identifiable essence to “religion.” Professors Jonathan Z. Smith and Talal Asad claim that the term “religion” denotes an anthropological category, arising out of a particular Western practice of encountering and accounting for foreign belief systems associated with geopolitical entities with which the West was forced to deal.<sup>20</sup> Professor William Cavanaugh argues that the distinction between religion, understood as a distinctively unstable and dangerous set of beliefs, and patriotism, imagined as a stabilizing and valid reason to kill

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<sup>17</sup> Id at 1368, citing Abner S. Greene, *The Political Balance of the Religion Clauses*, 102 Yale L J 1611, 1635 (1993).

<sup>18</sup> See id at 1390–95. In addition to these criticisms, another is that the purported tradeoff doesn’t really balance, because the majority religions that are constrained by the Establishment Clause are not the same as the minority religions that are protected by the Free Exercise Clause.

<sup>19</sup> See id at 1355.

<sup>20</sup> See Jonathan Z. Smith, *Religion, Religions, Religious*, in Mark C. Taylor, ed, *Critical Terms for Religious Studies* 269 (Chicago 1998); Talal Asad, *Genealogies of Religion: Discipline and Reasons of Power in Christianity and Islam* (Johns Hopkins 1993).

and die, is part of the legitimizing mythology of the modern state.<sup>21</sup> Arising thus out of a specific historical situation, and evolving in unpredictable ways thereafter, “religion” would be surprising if it had any essential denotation. Professor Martin Riesebrodt, on the contrary, argues that all religions serve common functions: they promise to avert misfortune, help their followers manage crises, and bring both temporary blessings and eternal salvation.<sup>22</sup> For legal purposes, it does not matter who is correct. Even if theorists could converge upon a single definition, American law will not have relied upon that definition, and that definition may not be suited to the law’s purposes.

In American law, there is no set of necessary and sufficient conditions that will make something a “religion.”<sup>23</sup> But it is remarkable how few cases have arisen in which courts have had real difficulty in determining whether something is a religion or not.<sup>24</sup>

Religion is not a proxy for any other single value. Schwartzman is only the latest of many distinguished legal theorists and philosophers who have claimed that the proper object of the law’s solicitude is not religion, but something else. There are many candidates for the replacement position, including individual autonomy, a source of meaning inaccessible to other people, psychologically urgent needs (treating religion as analogous to a disability that needs accommodation), comprehensive views, and conscience.<sup>25</sup>

The substitute that Schwartzman is most drawn toward is conscience.<sup>26</sup> Yet conscience *excludes* some claims that are widely recognized as valid. At the same time, many religious claims that are uncontroversially weighty, and which nearly everyone would want to accommodate, are not conscientious. A paradigm case for this type of religious exemption, for most proponents of

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<sup>21</sup> See William T. Cavanaugh, *The Myth of Religious Violence: Secular Ideology and the Roots of Modern Conflict* 192 (Oxford 2009).

<sup>22</sup> See Martin Riesebrodt, *The Promise of Salvation: A Theory of Religion* (Chicago 2010).

<sup>23</sup> See, for example, *Texas Monthly, Inc v Bullock*, 489 US 1, 27–28 (1989) (Blackmun concurring).

<sup>24</sup> See Koppelman, *Defending American Religious Neutrality* at 6–7 (cited in note 4).

<sup>25</sup> *Id.* at 131–144.

<sup>26</sup> He uses the term throughout his article to signify the underinclusiveness of “religion,” and conscience is emphasized in the alternative statutory formulations that he cites with approval. See, for example, Schwartzman, 79 U Chi L Rev at 1408 (cited in note 9) (noting the use of “conscience clauses” in state laws). Those formulations still use the term “religion,” however, and so he would still need to explain under what description religion ought to be protected.

such exemptions, is the ritual use of peyote by the Native American Church, which the Supreme Court declined to protect in *Smith*<sup>27</sup> but which received legislative accommodation shortly thereafter.<sup>28</sup> Yet neither of the claimants in *Smith* was motivated to use peyote by religious conscience. Al Smith was motivated primarily by interest in exploring his Native American racial identity, and Galen Black was merely curious about the Church.<sup>29</sup>

The emphasis on conscience focuses excessively on duty. Many and perhaps most people engage in religious practice out of habit, adherence to custom, a need to cope with misfortune, injustice, temptation, and guilt, curiosity about religious truth, a desire to feel connected to God, or happy religious enthusiasm, rather than a sense of duty prescribed by sacred texts or fear of divine punishment. Core religious practices often have nothing to do with conscience. One illustrative bit of data: when a survey asked Catholics why they attended Mass, the largest group, 37 percent, pointed to “the feeling of meditating and communicating with God,” while only 20 percent referred to “the need to receive the Sacrament of Holy Communion,” and only 6 percent said “the Church requires that I attend.”<sup>30</sup> This experience-based religiosity is increasingly common in the United States across all religious denominations.<sup>31</sup> The most recent congressional pronouncement on religious liberty, the Religious Land Use and Institutionalized Persons Act of 2000,<sup>32</sup> declares that “[t]he term ‘religious exercise’ includes any exercise of religion, whether or not compelled by, or central to, a system of religious belief.”<sup>33</sup>

Conscience is also underinclusive because it focuses on those cases in which the agent feels impelled by a duty that she is capable of performing without depending on external contingen-

<sup>27</sup> This result was reversed, with respect to federal law, by statute, which the Court has followed. See *Gonzales*, 546 US at 424.

<sup>28</sup> See Eisgruber and Sager, *Religious Freedom and the Constitution* at 243 (cited in note 5).

<sup>29</sup> See Garrett Epps, *To an Unknown God: The Hidden History of Employment Division v. Smith*, 30 *Ariz St L J* 953, 959–65, 978–85 (1998).

<sup>30</sup> Jim Castelli and Joseph Gremillion, *The Emerging Parish: The Notre Dame Study of Catholic Life Since Vatican II* 132 (Harper & Row 1987). For an argument that this feeling of connection is central to modern American Catholic practice, see Andrew Greeley, *The Catholic Imagination* 123 (California 2001).

<sup>31</sup> See Alan Wolfe, *The Transformation of American Religion: How We Actually Live Our Faith* (Chicago 2003); Robert Wuthnow, *America and the Challenges of Religious Diversity* (Princeton 2005).

<sup>32</sup> Pub L No 106-274, 114 Stat 803, codified at 42 USC § 2000cc et seq.

<sup>33</sup> 42 USC § 2000cc-5(7)(A).

cies. Conscience is a poor characterization of the desire of a church to expand its building to be able to hold its growing congregation, as in *City of Boerne v Flores*.<sup>34</sup> Conscientious resistance to the law was not an option. The reconstruction of the church could not be done without the help of architects and contractors, whom the city could prevent from doing the work merely by withholding the necessary permits. This problem is even more pronounced in *Lyng v Northwest Indian Cemetery Protective Association*,<sup>35</sup> a widely criticized decision in which Native Americans objected to a proposed logging road that would pass through an ancient worship site sacred to their tribe. The logging road, the Court conceded, would “virtually destroy” the ability of the Native Americans “to practice their religion.”<sup>36</sup> Nonetheless, the Court, evidently persuaded that exemptions had to be based on conscience, held that there was no constitutionally cognizable burden because the logging road had “no tendency to coerce individuals into acting contrary to their religious beliefs.”<sup>37</sup> Once more, this result was quickly reversed by Congress.<sup>38</sup> No single-factor justification for singling out religion can succeed. Any single-factor justification will be overinclusive and underinclusive. Any invocation of any factor *X* as a justification will logically entail substituting *X* for religion as a basis for special treatment, making “religion” disappear as a category of analysis. This substitution will be unsatisfactory. There will be settled intuitions about establishment and accommodation that it will be unable to account for. Any *X* will be an imperfect substitute for religion, but a theory of religious freedom that focuses on that *X* will not be able to say why religion, rather than *X*, should be the object of solicitude. No wonder Schwartzman’s survey of possible reasons for accommodation<sup>39</sup> finds none of them persuasive.

There are two ways around this difficulty. One is to say that these reasons for accommodation are not ends that the state can directly target, and that religion is a good proxy. This does justify some imprecision in the law. We want to give licenses to “safe drivers,” but these drivers are not directly detectible, so we use the somewhat overinclusive and underinclusive category of

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<sup>34</sup> 521 US 507 (1997).

<sup>35</sup> 485 US 439 (1988).

<sup>36</sup> *Id.* at 451.

<sup>37</sup> 485 US at 450–51.

<sup>38</sup> See Eisgruber and Sager, *Religious Freedom and the Constitution* at 243–44 (cited in note 5).

<sup>39</sup> See Schwartzman, 79 U Chi L Rev at 1378–85 (cited in note 9).

“those who have passed a driving test.” But this doesn’t work for at least some of the substitutes on offer. The state can aim directly at accommodating conscience, say, or autonomy.

The other way is to say that religion is an adequate (though somewhat overinclusive and underinclusive) proxy for multiple goods, some of which are not ones that can directly be targeted. Each of those goods is, at least, more likely to be salient in religious than in nonreligious contexts. The fact that there is so much contestation among religions as to which of these goods is most salient is itself a reason for the state to remain vague about this question. Because “religion”—or, at least, that subset of it that is likely to come before American courts—captures multiple goods, any substitute that aims at any one of them will be underinclusive. That is enough to justify singling out religion.<sup>40</sup>

Just what unfairness is likely to result from reliance upon this imperfect proxy? Schwartzman thinks that, in the case of accommodation, comparable secular claims are likely to be disregarded.<sup>41</sup> But the only examples he offers are the selective draft cases, and he acknowledges that in those cases, the problem was resolved by deeming the objectors to be “religious” in the pertinent sense<sup>42</sup>—a result that is facilitated by the undeniable fact that the boundaries of the category of “religion” are so fuzzy.<sup>43</sup> The problem hasn’t arisen since. That leaves the other

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<sup>40</sup> See Koppelman, *Defending American Religious Neutrality* at 120–65 (cited in note 4). Schwartzman has pointed out in conversation that my defense of singling out religion has been something of a moving target because it has shifted over time: I no longer claim that religion is itself a distinctive kind of human good. See Andrew Koppelman, *Is It Fair to Give Religion Special Treatment?*, 2006 U Ill L Rev 571, 594. That claim is, of course, impossible to maintain once it is conceded that “religion,” at least as that term is used in American law, does not denote a natural kind.

<sup>41</sup> See Schwartzman, 79 U Chi L Rev at 1366, 1390–95 (cited in note 9). Schwartzman has also argued that proxies are inherently problematic: “When it comes to matters of justice and basic liberties, we tend to be skeptical of proxies that are significantly over- and under-inclusive.” Email from Micah Schwartzman, Professor at the University of Virginia School of Law, to Andrew Koppelman, Professor at Northwestern University School of Law (Nov 7, 2012) (on file with author). But the question is whether there is an adequate substitute for the proxy. Wrongful imprisonment is a fundamental matter of justice if anything is, but we imprison “persons convicted after trial” rather than “persons who have committed felonies” because the first category is the best proxy we have for the (in itself undetectable) second.

<sup>42</sup> Schwartzman, 79 U Chi L Rev at 1366–67 (cited in note 9).

<sup>43</sup> See Andrew Koppelman, *The Story of Welsh v. United States: Elliott Welsh’s Two Religious Tests*, in Richard W. Garnett and Andrew Koppelman, eds, *First Amendment Stories* (Foundation 2012). A recent review of the relevant cases by Judge Diane Wood concluded that “[t]he Supreme Court has recognized atheism as equivalent to a ‘religion’ on numerous occasions.” *Kaufman v McCaughtry*, 419 F3d 678, 682 (7th Cir 2005). I



unfairness: Because only religion is disestablished, the schools are free to begin unfairly privileging the philosophy of Hegel.<sup>44</sup> This worry, too, is pervasive in the neo-Rawlsian literature, but here the argument has come unmoored from reality. The secular establishment exists in reality only when the occasional, careless science teacher shares with his class his (mistaken)<sup>45</sup> view that Darwin entails that there is no God. When that happens, there is an Establishment Clause violation.

This obsession with these improbable marginal cases is hardly unique to Schwartzman. It is ubiquitous in Religion Clauses scholarship.<sup>46</sup> These scholars, many of whom are religious skeptics, share with other American skeptics a reasonable fear that, in a regime that treats religion as a good, they will be thereby excluded or demoted to second-class status.<sup>47</sup> Modern atheists are increasingly reconciled to the fact that religion is not going away and that they are not going to win over most Americans to their views.<sup>48</sup> Their central concern—an entirely legitimate concern, given the vicious prejudices they face<sup>49</sup>—has rather become protecting themselves from discrimination.<sup>50</sup> That is why the nonreligious conscientious objection cases are so salient when secular political philosophers think about law's treatment of religion.

Atheist conscientious objectors in fact rarely arise. “[U]nbelief entails no obligations and no observances,” Professor Michael McConnell observes.<sup>51</sup> “Unbelief may be coupled with various sorts of moral conviction. . . . But these convictions must necessarily be derived from some source other than unbelief itself.”<sup>52</sup> In the conscientious objector cases, the direction of causa-

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frankly do not understand the basis of Schwartzman's claim that “Koppelman's conception of neutrality does not extend, in principle, to claims of conscience grounded in non-religious moral and ethical doctrines.” Schwartzman, 79 U Chi L Rev at 1406 n197 (cited in note 9).

<sup>44</sup> See Schwartzman, 79 U Chi L Rev at 1423–24 (cited in note 9).

<sup>45</sup> See Andrew Koppelman, *Darwin Inherits Galileo's Detractors*, Chicago Tribune C8 (Aug 21, 2005).

<sup>46</sup> For a survey of these views, see Koppelman, *Defending American Religious Neutrality* at 124–65 (cited in note 4).

<sup>47</sup> See, for example, Richard Cimino and Christopher Smith, *Secular Humanism and Atheism Beyond Progressive Secularism*, 68 Socio Relig 407, 413 (2007).

<sup>48</sup> See *id.*

<sup>49</sup> See Penny Edgell, Joseph Gerteis, and Douglas Hartmann, *Atheists as “Other”:* *Moral Boundaries and Cultural Membership in American Society*, 71 Am Soc Rev 211, 215 (2006).

<sup>50</sup> See Cimino and Smith, 68 Socio Relig at 412–22.

<sup>51</sup> Michael W. McConnell, *Accommodation of Religion*, 1985 S Ct Rev 1, 10–11 (1985).

<sup>52</sup> *Id.* at 11.

tion went the other way: it was moral conviction that generated the declaration of unbelief.<sup>53</sup> But despite the rarity of these cases, they have enormous symbolic weight because they test the status of atheists in the regime. The issue goes beyond fairness to individuals. But the fraught issue of atheists' status in American culture can't be resolved by constitutional law.

There is a notorious exception to the state's abstention from religious questions: the well-established tradition of ceremonial deism, such as "In God We Trust" on the currency. Only recently has anyone on the Court articulated a principle that purports to distinguish permissible from impermissible deism. The general rule now seems to be that old forms of deism are grandfathered, but newer ones are unconstitutional. Thus, the Court recently held that an official Ten Commandments display is unconstitutional if it was erected recently but not if it has been around for decades.<sup>54</sup> Justice Sandra Day O'Connor, in her concurrence in a decision concerning the inclusion of the words "under God" in the Pledge of Allegiance, explicitly made the age of a ceremonial acknowledgement relevant to its constitutionality.<sup>55</sup> She thought that constitutionality was supported by the absence of worship or prayer, the absence of reference to a particular religion, and minimal religious content.<sup>56</sup> (The "reference to a particular religion" requirement harks back to the ecumenism of the 1950s, when many of these practices were adopted. At the time, they signified, in large part, the equal citizenship of Catholics and Jews.<sup>57</sup>) But the first of her factors was "history and ubiquity."<sup>58</sup> "The constitutional value of ceremonial deism turns on a shared understanding of its legitimate nonreligious purposes," Justice O'Connor wrote.<sup>59</sup> "That sort of understanding can exist only when a given practice has been in place for a significant portion

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<sup>53</sup> Elliott Welsh explained his position when I interviewed him, years after his Supreme Court case: "It was made very clear at the hearing by the hearing officer: is there anything you can say that you believe is God? When I think about it from where I am now, I'm thinking, why didn't I just say yes? But it wasn't true and I just wasn't going to say it. That's all I can say." See Koppelman, *The Story of Welsh v. United States* at 293 (cited in note 43).

<sup>54</sup> Compare *McCreary County, California v ACLU*, 545 US 844, 881 (2005) (invalidating a recently erected display), with *Van Orden v Perry*, 545 US 677, 691 (2005) (upholding a forty-year-old display).

<sup>55</sup> See *Elk Grove Unified School District v Newdow*, 542 US 1, 37 (2004) (O'Connor concurring).

<sup>56</sup> See *id.*

<sup>57</sup> See Koppelman, *Defending American Religious Neutrality* at 36–38 (cited in note 4).

<sup>58</sup> *Elk Grove*, 542 US at 37–39 (O'Connor concurring).

<sup>59</sup> *Id.* at 37.

of the Nation's history, and when it is observed by enough persons that it can fairly be called ubiquitous."<sup>60</sup> The consequence is to make old and familiar forms of ceremonial deism constitutional, but to discourage innovation.

This casual identification of God with the nation is hard to defend, and I am not eager to defend it. It produces a culture in which many people feel that their religious beliefs are somehow associated with patriotism. This has the salutary effect of fostering civic unity and common moral ideals and tempering religious fanaticism. It also has the less attractive effect of encouraging self-righteous nationalism and the idea that whatever the United States does, however repugnant, is somehow divinely sanctioned.<sup>61</sup> But this is not what Schwartzman is complaining about.

Contemporary Religion Clauses jurisprudence is layered. An old conception of religion, which in light of growing plurality is not nearly as abstract and uncontroversial as it used to be, is allowed to persist but not to grow. By grandfathering the old ceremonial deism and saying that it could proceed as far as it has and no further, the Supreme Court has essentially declared it immune from further tinkering. Ceremonial deism is secure, but it dwells in a walled city, safe but trapped. So Schwartzman's ache should really be more of a twinge.

A note about originalism. Schwartzman thinks that the present regime cannot be defended on originalist grounds because the founding generation thought of religion in theistic terms.<sup>62</sup> But here we are presented with a familiar problem in originalism: What are we to say when the original meaning contains one commitment at a high level of abstraction and another commitment, which has become inconsistent with the first one, at a lower level of abstraction? The most familiar case is the segregation of schools in Washington, DC by the same Congress that enacted the Fourteenth Amendment,<sup>63</sup> but there are others. The framers of the Constitution never imagined the huge and elaborate federal bureaucracy that now exists, and so many original-

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<sup>60</sup> Id.

<sup>61</sup> See Jeffrey James Poelvoorde, *The American Civil Religion and the American Constitution*, in Robert A. Goldwin and Art Kaufman, eds, *How Does the Constitution Protect Religious Freedom?* 141 (American Enterprise Institute 1987). For recent examples of this unattractive effect, see Andrew Koppelman, *Reading Lolita at Guantanamo: Or, This Page Cannot Be Displayed*, 53 *Dissent* 64 (2006).

<sup>62</sup> See Schwartzman, 79 *U Chi L Rev* at 1406 n 197 (cited in note 9).

<sup>63</sup> See Raoul Berger, *Government By Judiciary: The Transformation of the Fourteenth Amendment* 117–33, 161–63 (Harvard 1977).

ists think that the modern administrative state is unconstitutional.<sup>64</sup> But the core purpose of the Constitution was to end the state of affairs that existed under the Articles of Confederation, in which neither the states nor the federal government had adequate power to address the country's problems.<sup>65</sup>

A core purpose of the Religion Clauses—one that antedates the founding, that animated the framers of the First Amendment, and that had a powerful influence on the Supreme Court when it laid the foundations of contemporary doctrine—is the idea that religion can be corrupted and degraded by state control.<sup>66</sup> Schwartzman gives it little attention, perhaps because this idea is inconsistent with the neo-Rawlsian framework within which he operates.<sup>67</sup> The corruption argument rests on the core assumptions that religion is valuable and that neutrality exists in order to protect it.<sup>68</sup> The framing generation held those assumptions.<sup>69</sup> Schwartzman is correct that a theory of the Religion Clauses that rests on these assumptions “falls outside standard originalist interpretations of the Religion Clauses,”<sup>70</sup> but that is a defect in those interpretations. An originalism that depends on ignoring salient history is unworthy of the label.<sup>71</sup>

My disagreement with Schwartzman is only at the macro level of evaluating doctrine. His criticisms of the now-standard theoretical moves are sound. Like much of his work, he deflates common arguments in an original way. This is valuable, critical work. His only mistake is thinking that his analysis extends to American law as well as its theorists. He has not (yet?) fully

<sup>64</sup> See Randy E. Barnett, *Restoring the Lost Constitution: The Presumption of Liberty* 274–318 (Princeton 2004); Gary Lawson, *The Rise and Rise of the Administrative State*, 107 Harv L Rev 1231 (1994).

<sup>65</sup> See Andrew Koppelman, *The Tough Luck Constitution and the Assault on Health Care Reform* 38–67 (Oxford 2013). This analysis of originalism is elaborated in Andrew Koppelman, *Originalism, Abortion, and the Thirteenth Amendment*, 112 Colum L Rev 1917, 1918–29 (2012).

<sup>66</sup> See Koppelman, *Defending American Religious Neutrality* at 46–77 (cited in note 4).

<sup>67</sup> John Rawls's “veil of ignorance” obscures many ends that are legitimate purposes of political action. See Andrew Koppelman, *The Limits of Constructivism: Can Rawls Condemn Female Genital Mutilation?*, 71 Rev Pol 459 (2009).

<sup>68</sup> See Koppelman, *Defending American Religious Neutrality* at 49–50 (cited in note 4).

<sup>69</sup> See *id.* at 56–64 (cited in note 4). That assumption is shared by strong separationists on the modern Court, such as Justices Hugo Black and John Paul Stevens. See *id.* at 67–70; Andrew Koppelman, *Justice Stevens, Religious Enthusiast*, 106 Nw U L Rev 567, 570–74 (2012).

<sup>70</sup> Schwartzman, 79 U Chi L Rev at 1406 n 197 (cited in note 9).

<sup>71</sup> See Andrew Koppelman, *Phony Originalism and the Establishment Clause*, 103 Nw U L Rev 727 (2009).

freed himself from the assumptions of the discourse in which he is operating. American law has been more sophisticated than its defenders.