

## **“Religion” as a Bundle of Legal Proxies: Reply to Micah Schwartzman**

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The debate among legal scholars about whether religion is special is chronically confused by the scholars’ failure to grasp a point familiar in the academic study of religion: “religion” is a label for something that has no ontological reality.<sup>1</sup> Religion has no essence. If it has a determinate meaning, it is simply because there is a settled and familiar practice of applying the label of religion in predictable ways.<sup>2</sup>

The question of religious accommodation arises in cases where a law can allow some exceptions. Many laws, such as military conscription, taxes, environmental regulations, and antidiscrimination laws, will accomplish their ends even if there is some deviation from the norm they set forth, so long as that deviation does not become too great. In such cases, special treatment is sometimes appropriate.<sup>3</sup> Religious exemption is the practice of singling out religion as a basis for such special treatment. Since there is no such thing as religion, if such accommodations are justified, the justification must ultimately depend on some desideratum other than religion. Religion can only be a proxy.

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1. This is not a theological claim. The proposition that the Christian God exists outside the human imagination, for instance, does not entail that religion, encompassing everything connoted by that word, is an entity that exists outside the human imagination.

2. See ANDREW KOPPELMAN, DEFENDING AMERICAN RELIGIOUS NEUTRALITY 7–8, 43–45 (2013).

3. See Andrew Koppelman, *Secular Purpose*, 88 VA. L. REV. 87, 157 n.257 (2002).

Why does anyone think that religious activity is a worthwhile way to spend one's time? The answers that have traditionally been given point to multiple goods, including

salvation (if you think you need to be saved), harmony with the transcendent origin of universal order (if it exists), responding to the fundamentally imperfect character of human life (if it is imperfect), courage in the face of the heartbreaking aspects of human existence (if that kind of encouragement helps), a transcendent underpinning for the resolution to act morally (if that kind of underpinning helps), contact with that which is awesome and indescribable (if awe is something you feel), and many others.<sup>4</sup>

In the cottage industry of proposals to discard the category of religion and substitute something else, these goods have not gotten much attention for the excellent reason that they are theologically loaded. It is not just that they are narrower and more specific than religion. Their goodness depends on contestable metaphysical premises. Secular liberal philosophers tend to shy away from such notions. When most people outside the academy deem religion valuable, on the other hand, these are the sorts of considerations they have in mind. There are a lot of religious people out there. Religious accommodations are sometimes supported by religious reasons.

Different religions conceive these goods differently. That has political implications. "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."<sup>5</sup> Privileging any one of them would discriminate among religions. The scholars who seek substitutes for religion, who tend to be neutralitarian liberals,<sup>6</sup> instinctively shrink from doing that. American law, however, is not neutralitarian. Its neutrality is specifically neutrality among religions.<sup>7</sup> A major reason for using religion as a proxy for specific ends, such as salvation, is that if the good the state pursues is described in this vague way, the state need not assess the comparative value of those ends. There is also, of course, disagreement about which religions actually achieve these goods. If the pertinent good

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4. KOPPELMAN, *supra* note 2, at 124 (footnotes omitted).

5. Andrew Koppelman, *Religion's Specialized Specialness*, 79 U. CHI. L. REV. DIALOGUE 71, 78 (2013), [lawreview.uchicago.edu/sites/lawreview.uchicago.edu/files/uploads/Dialogue/Koppelman%20Online.pdf](http://lawreview.uchicago.edu/sites/lawreview.uchicago.edu/files/uploads/Dialogue/Koppelman%20Online.pdf).

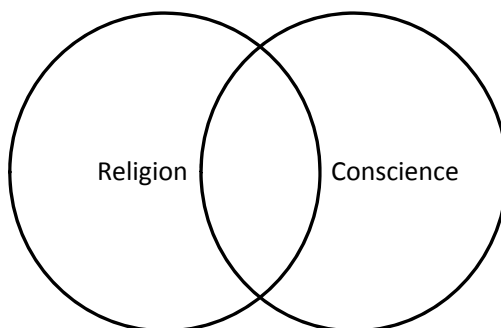
6. That is, liberals who claim that the law should be neutral among all contested conceptions of the good. Schwartzman is attracted to this position.

7. See generally KOPPELMAN, *supra* note 2 (arguing that American neutrality toward religion is coherent and attractive).

is salvation, for instance, then the state should figure out which religion actually delivers it.<sup>8</sup> The broad category of religion evades that task.

Then, of course, there are the substitutes that *have* been offered as possible legal criteria for accommodation: “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>9</sup> All are underinclusive.<sup>10</sup> If you substitute any of them for religion, you will not capture settled intuitions about accommodation.<sup>11</sup> There are *lots* of good reasons for accommodation. Neglecting *any* of them is unfair. Religion is not just a proxy for something else. It is a proxy for many something elses. It is a bundle of proxies.

Micah Schwartzman argues that the law “can and should provide significant protections for both” religion and conscience.<sup>12</sup> He is right that the law sometimes does this. When it does, accommodation looks like this:



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8. See Larry Alexander, *Good God, Garvey! The Inevitability and Impossibility of a Religious Justification of Free Exercise Exemptions*, 47 DRAKE L. REV. 35, 42–43 (1998).

9. Koppelman, *supra* note 5, at 75 (citing KOPPELMAN, *supra* note 2, at 131–44).

10. Schwartzman is right that underinclusiveness matters more than overinclusiveness because the latter can be handled appropriately by the compelling interest test.

11. See Koppelman, *supra* note 5, at 75–77.

12. Micah Schwartzman, *Religion as a Legal Proxy*, 51 SAN DIEGO L. REV. 1085, 1088 (2014).

Here, of course, religion persists as a basis for special protection.<sup>13</sup>

I never have said that religion is the *only* legitimate basis for accommodation, nor that conscience, as such, should never be accommodated.<sup>14</sup> “Because no single legal rule can protect all deeply valuable concerns, more specific rules are necessary. Accommodation of religion is one of these.”<sup>15</sup> Some legitimate bases for accommodation have nothing to do with religion, such as a parent’s obligations to his children.

To the extent that religion can be identified with multiple goods—if religion is a proxy for them—then to the extent that it is possible, without discriminating among religions, to bypass religion and directly identify each of these goods and accommodate it as such, we ought to do so. The point is not unique to conscience. It is true of the full range of goods associated with religion. We would then have a complex set of accommodations. I will not attempt to draw the Venn diagram here. Imagine a cluster of partially overlapping circles containing each of the specifications I have described here: conscience, autonomy, comprehensive views, et cetera.<sup>16</sup> Each represents claims for accommodation weighty enough that it would be unfair to ignore them. Some of these, however, will be so theologically loaded that the state ought to avoid discussing their specific bases, for reasons I have already discussed. Others will simply not be administrable, such as Eisgruber and Sager’s “deep” commitments.<sup>17</sup>

In some cases, no proxy is needed. It is misleading to focus exclusively on such cases, such as Schwartzman’s example of the doctor who feels conscientiously compelled to abort a pregnancy that threatens the mother’s

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13. Schwartzman thinks that religion may be a wholly contained subset of conscience, even in the accommodation cases I cite that have no obvious connection to conscience. See *id.* at 1100–02. He does not, however, develop this argument.

14. I acknowledge the possibility of using conscience as a separate category. See KOPPELMAN, *supra* note 2, at 142. I elaborate the point elsewhere:

It is indeed valuable whenever people decide to act morally, and this form of volitional necessity may therefore be especially eligible for accommodation. A well-functioning human being is disposed to heed her conscience, and this disposition is damaged whenever she succumbs to pressure to violate her conscience. That may sometimes be a reason to accommodate conscience as such.

Andrew Koppelman, *Conscience, Volitional Necessity, and Religious Exemptions*, 15 LEGAL THEORY 215, 240 (2009).

15. KOPPELMAN, *supra* note 2, at 165.

16. The pattern of overlap among these terms is so complex that a two-dimensional Venn diagram probably could not represent it.

17. Eisgruber and Sager use that term repeatedly to describe the claims that should be treated equally with religious ones. See CHRISTOPHER L. EISGRUBER & LAWRENCE G. SAGER, RELIGIOUS FREEDOM AND THE CONSTITUTION *passim* (2007).

life. Because it was so easy to identify the nonreligious value being promoted (here, conscience), you can be tempted to say that we should always just do that: focus on that value and ignore religion.<sup>18</sup> If you pull the camera back to the whole range of accommodation cases, the difficulties come back into the field of vision.

Schwartzman is right that my argument "is not sufficient to establish that no other proxy can serve as a global substitute."<sup>19</sup> Nor can I show that no other proxy can serve as a global substitute for the present written exam and road test with which the state tries to detect safe drivers. It is hard to prove a negative. Perhaps someday we will be able to dispense with these imperfect mechanisms. In order to answer this conference's question—whether religion is outdated as a constitutional category—we need to locate ourselves in historical time.

Proxies, being imperfect, are always subject to adjustment for the sake of greater precision. Driver exams can be tweaked. Tweaking, however, has its limits. Schwartzman is correct that "when proxies are used to determine the scope of basic rights and liberties, we are generally more suspicious of significant over-and-under-inclusiveness."<sup>20</sup> But that suspicion cannot rule out imperfect proxies altogether, and even supplemental proxies cannot eliminate over- and under-inclusiveness. Criminal punishment is a matter of basic rights and liberties if anything is, but we do not punish *people who have committed crimes*, relying instead on the proxy of *people who have been convicted of crimes*. The supplemental proxy of post-conviction review rescues some, but not all, innocent people who have been wrongly convicted. No matter what we do, if we are going to have criminal punishment at all, it will sometimes make mistakes. That does not mean that the pertinent proxies may not be used. Schwartzman's proposed supplement similarly will diminish, but not eliminate, the law's imperfection.

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18. The same exercise is often undertaken with the *Seeger* and *Welsh* cases, which, because they are the focal cases in every religious liberty casebook, have an anchoring effect. See *Welsh v. United States*, 398 U.S. 333, 344 (1970) (plurality opinion) (allowing exemption from participation in war for anyone "whose conscience[,], spurred by deeply held moral, ethical, or religious beliefs, would give them no rest or peace"); *United States v. Seeger*, 380 U.S. 163, 187 (1965) (same).

19. Schwartzman, *supra* note 12, at 1099. Here, unlike the rest of his article, Schwartzman implies that religion should not merely be supplemented by conscience but also be discarded altogether as a category.

20. *Id.* at 1098.

Schwartzman implicitly admits this when he proposes a supplemental proxy, rather than demanding that proxies be abandoned altogether. So in the end, we are not in fundamental disagreement. There are many today who think that the law should never single out religion for special treatment and that such special treatment itself is an unconstitutional establishment of religion.<sup>21</sup> Brian Leiter states the position incisively when he claims that religion could legitimately be singled out for special protection only because of “features that *all and only* religious beliefs have, either as a matter of (conceptual or other) necessity *or* as a contingent matter of fact,” or features that would not merit such principled toleration if other beliefs have those same features.<sup>22</sup> Schwartzman and I both reject that position.

The category of religion in American law has changed its denotation over time.<sup>23</sup> Its inherent imprecision and its deployment as a proxy respond to conditions of religious diversity that appear to be permanent conditions of modernity. That is why America’s analytically imprecise response to that diversity should be of interest in other regimes where the same conditions apply—which is to say, everywhere. Religion cannot be dispensed with without producing the kind of unfairness that Schwartzman admirably worries about.

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21. See, e.g., *City of Boerne v. Flores*, 521 U.S. 507, 536–37 (1997) (Stevens, J., concurring) (noting that a statute mandating accommodation gives the church a benefit “that no atheist or agnostic can obtain. This governmental preference for religion, as opposed to irreligion, is forbidden by the First Amendment” (citation omitted)); PHILIP B. KURLAND, *RELIGION AND THE LAW: OF CHURCH AND STATE AND THE SUPREME COURT* 17 (1962) (“For if the command is that inhibitions not be placed by the state on religious activity, it is equally forbidden the state to confer favors upon religious activity.”); Frederick Mark Gedicks, *An Unfirm Foundation: The Regrettable Indefensibility of Religious Exemptions*, 20 U. ARK. LITTLE ROCK L. REV. 555, 556 (1998) (arguing that various justifications for religious exemptions under the Free Exercise Clause are no longer plausible); 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, 78 (1990) (arguing that the “accommodation principle” has “no place in either establishment or free exercise clause jurisprudence”); Philip B. Kurland, *The Irrelevance of the Constitution: The Religion Clauses of the First Amendment and the Supreme Court*, 24 VILL. L. REV. 3, 24 (1979) (“The freedom and separation clauses should be read as stating a single precept: that government cannot utilize religion as a standard for action or inaction . . .” (quoting Philip B. Kurland, *Of Church and State and the Supreme Court*, 29 U. CHI. L. REV. 1, 96 (1961))).

22. BRIAN LEITER, *WHY TOLERATE RELIGION?* 27 (2013). Leiter is correct that no such features exist. He acknowledges the indispensability of legal proxies but does not examine the impact of that concession on his thesis that singling out religion is unfair. See *id.* at 94–99.

23. See KOPPELMAN, *supra* note 2, at 26–45.