



MICAH J.
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PUBLIC REASONING IN LAW AND RELIGION

MICAH SCHWARTZMAN works at the intersection of political philosophy, religion, and law. His affinity for these subjects is partly a matter of heritage. Schwartzman grew up in a rabbinic family. His grandfather, Sylvan Schwartzman, was a Reform rabbi and Professor of Jewish Religious Education at Hebrew Union College-Jewish Institute of Religion, the seminary for Reform Judaism in the United States. His father, Joel, is a rabbi who served for much of his career as a chaplain in the U.S. Air Force. And his sister, Ilana Schwartzman, is a congregational rabbi in Salt Lake City. “I was not drawn to join the rabbinate,” Schwartzman said, “but I have not strayed too far in terms of my interests.”

Schwartzman attended the University of Virginia as an undergraduate in the mid-1990s. During that time, the Supreme Court decided *Rosenberger v. University of Virginia*, in which a student-run, evangelical magazine, *Wide Awake*, sued for access to public funding of student activities. The University argued that funding the magazine would require spending taxpayer dollars to support religious speech, violating the Establishment Clause of the First Amendment. But the Supreme Court disagreed, ruling that in providing funding, the University had to treat religious and non-religious publications equally.

“*Rosenberger* left a deep impression on me,” Schwartzman said. “I came to the University with strong convictions about the separation of church and state. And here was the Court deciding a major case involving Mr. Jefferson’s University and casting doubt on Jefferson’s principle that ‘to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves and abhors, is sinful and tyrannical.’ At the time, I thought the Court had rocked the foundations of the wall of separation. But at the same time, there was a certain logic to the Court’s opinion. It was a hard case for me then, and in some ways, it still is.”

Schwartzman participated in the Government Honors Program at Virginia, writing his undergraduate thesis on the theoretical foundations

of liberalism. “In the 1990s, Virginia was a heady place for students of moral and political philosophy. Many of my professors—especially James Childress, John Arras, David Novak, George Klosko, John Simmons, and Richard Rorty—pushed me to think more carefully and systematically about the relationship between religion and politics. I was fortunate to have such good teachers. They made it possible to imagine a life of thinking and writing about some of the big questions in politics and philosophy.”

After graduating, Schwartzman pursued a doctorate in politics at the University of Oxford, where he studied as a Rhodes Scholar. His dissertation, supervised by Adam Swift at Balliol College, focused on political liberalism and the later work of John Rawls, especially his idea of public reason. According to this idea, when citizens and public officials exercise political power, they should justify their decisions by appealing to reasons that others can accept solely in virtue of their status as free and equal citizens in a democratic society. Schwartzman worked to explicate this idea and to defend it against various criticisms that he thought had been neglected in the existing literature.

“I did not go to Oxford with the ambition of writing a defense of public reason. My undergraduate thesis had been quite critical of Rawls’s later work. But with a few important exceptions, I found Oxford rather hostile to the idea of public reason and to the project of political liberalism, and I suppose I reacted to that. After a couple years of reading and thinking more about it, I came around to the view that there was more to say in favor of public reason than against it. So I switched positions and wrote some papers trying to work out the main ideas as carefully as I could.”

After completing his doctorate, Schwartzman returned to the University of Virginia for law school. “I loved living in Charlottesville. Most of my friends had moved on by that point, but it still felt like home. And I was persuaded by Vince Blasi, Jody Kraus, and others that someone with my theoretical interests could do well here.” During law school, Schwartzman was Articles Development Editor of the *Virginia Law Review* and received the Margaret G. Hyde Award, which is the highest award given by the faculty to a graduate of the Law School. He spent his summers at Latham & Watkins and thought he would begin his career working in the appellate practice there. But after clerking for Judge Paul Niemeyer, in the U.S. Court of Appeals for the Fourth Circuit, Schwartzman accepted a postdoctoral research fellowship at the Society of Fellows in the Humanities at Columbia University. A year later, in 2007, he returned to Charlottesville again, this time to join the law faculty.

Over the past decade, Schwartzman has published a body of scholarship animated by the idea that for the state to be legitimate, citizens and public officials must give public justifications for their political and legal decisions. This idea of public reason is controversial, and it has attracted significant criticism in recent years. Schwartzman has contributed to debates about public reason in two ways: by exploring the ethics of public reasoning, and by working out its implications in the context of law and religion.

First, in articles such as “Judicial Sincerity,” 94 *Va. L. Rev.* 987 (2008); “The Sincerity of Public Reason,” 19 *J. Pol. Phil.* 375 (2011); and “The Ethics of Reasoning from Conjecture,” 9 *J. Moral Phil.* 521 (2012), Schwartzman argues that citizens and officials have obligations of sincerity when they justify their actions to others. When public officials are insincere, they not only disrespect those whom they govern, but they contribute to the corruption of deliberative practices and institutions, which in turn undermines the quality of political and legal decisionmaking. Against various objections, Schwartzman defends the view that adhering to principles of sincerity, candor, and truthfulness is crucial for the integrity of our political and legal processes. Indeed, in a recent paper called “Is Lying a Political Wrong?,” Schwartzman returns to these themes to argue that in an era of “fake news” and “alternative facts,” it is more important than ever to have a clear and forceful account of the obligations of sincerity required of those engaged in public discourse.

A second strand of Schwartzman’s work turns from the ethics of public reasoning to its substantive content, especially as applied to questions of religious freedom. When Schwartzman moved from political philosophy to law, he found a fundamental discontinuity between prevailing theories of liberalism, especially those that make central the idea of public justification, and standard accounts of the First Amendment, with its two religion clauses, the Free Exercise Clause and the Establishment Clause. On one hand, liberal theory tends not to distinguish sharply, if at all, between religious views and other ethical and philosophical perspectives. Political liberals believe that the state should give equal treatment to citizens who have widely divergent conceptions of the good life, whether they are religious or not. But on the other hand, American constitutional law gives special treatment to religion, both in providing religious believers with exemptions from generally applicable laws and by prohibiting the state from supporting religion in various ways. What, then, should someone with liberal commitments say about the law? If those with religious beliefs and practices should be treated equally—no better or worse than those with secular ethical and

philosophical views—the law might seem to contradict the demands of liberal political morality. In which case, should the law be criticized and perhaps revised, or are there ways to reconcile liberal theory with law’s special treatment of religion?

Schwartzman has published a number of articles addressing these questions. In “Conscience, Speech, and Money,” 97 *Va. L. Rev.* 317 (2011), he revisits the “Jeffersonian proposition,” according to which taxing citizens to support religious speech is a violation of their freedom of conscience. This principle, which was at issue in *Rosenberger v. Virginia*, has played an important part in arguments for religious disestablishment going back to the Founding era. In recent years, however, critics have argued that the principle is open to an equality objection, namely, that taxation to promote religion does not violate freedom of conscience any more than taxation to promote other views to which citizens may conscientiously object. One way to answer this objection would be to take a broader view of the Jeffersonian proposition, applying it to compelled support for nonreligious ethical and philosophical views as well. But this response faces a further objection, which is that no government could function in an orderly way under a system that provides taxpayers with a general right of conscientious objection. The result would be anarchy.

Faced with these objections, some scholars have argued that the Jeffersonian proposition should be read narrowly, applying it only to support for religion, and others have suggested that it should be rejected entirely. Schwartzman takes a different view. Accepting the equality objection, he argues that the proposition must be broadly construed to cover nonreligious ethical and moral views. But to deal with the anarchy objection, he develops a balancing account of freedom of conscience, according to which the state may override claims of conscience when it has legitimate interests in promoting government speech. When the state seeks to promote religious speech, however, it may not have such countervailing interests. Schwartzman argues that this account makes it possible to vindicate the Jeffersonian proposition, and further, that it provides a better and more unified explanation of existing compelled support doctrine under both the Establishment and Free Speech clauses of the First Amendment.

One might continue to wonder, however, why the state does not have legitimate interests in supporting religion, at least when compared to supporting comparable secular ethical and philosophical perspectives. In other words, if religion is not special, at least as a matter of political morality, then why single it out for disestablishment? In “What If Religion Is Not

Special?” 79 *U. Chi. L. Rev.* 1351 (2012), Schwartzman addresses this question by situating it within a broader discussion of the ways in which the law treats religion distinctively. For example, in the context of disestablishment, courts have read the First Amendment to require that laws have a secular purpose, excluding religious convictions as the primary justification for state action. In this way, the law imposes a special disability on religious beliefs. But in the context of religious accommodations, the law often provides religious believers with special benefits in the form of exemptions from general laws, such as employment regulations, health care mandates, prohibitions on drug use, or requirements to serve in the military.

In thinking about these forms of special treatment, some scholars have attempted to argue that religion should be treated specially for purposes of disestablishment, but not for purposes of accommodation. That is, the state should exclude religious reasons as the basis for laws, but it should not provide religion with special accommodations. Others have argued in the opposite direction, that religion should receive equal treatment as a source of justification for laws, but that religious believers are entitled to special treatment when they request accommodations. And still others have taken the view that religious beliefs should be treated equally across the board, included as a source of justification for the law and accommodated to the same extent as comparable secular ethical beliefs.

In a comprehensive analysis of these different perspectives, Schwartzman argues that special treatment for religion cannot be justified as a matter of liberal political morality. On his view, religious reasons should not serve as the basis for justifying state action, but nor should reasons drawn from comparable secular ethical and philosophical doctrines. And with respect to legal exemptions, if the state grants accommodations to religious believers, it should extend the same consideration to those with secular claims of conscience, a position that Schwartzman has developed in more recent work, including “Religion as a Legal Proxy,” 51 *San Diego L. Rev.* 1085 (2014) and “Religion, Equality, and Anarchy,” in Cécile Laborde & Aurélie Bardon, eds., *Religion in Liberal Political Philosophy* (Oxford University Press, 2017).

Schwartzman has extended this argument against the distinctiveness of religion to legal developments involving the rights of religious organizations. In an article co-authored with Richard Schragger, “Against Religious Institutionalism,” 99 *Va. L. Rev.* 917 (2013), he criticizes theories of “freedom of the church” and church sovereignty, which claim that religious organizations have special rights over and against the rights and

interests of their members. Schwartzman and Schragger argue that churches are best conceived as voluntary associations, similar to other expressive organizations, and that they should receive constitutional protections consistent with the individual rights of those who support them.

Schwartzman has continued to explore the rights of religious organizations and the rights of corporations more generally. After the Supreme Court's decision in *Hobby Lobby v. Burwell*, he co-edited *The Rise of Corporate Religious Liberty* (Oxford University Press, 2016), which brings together a diversity of perspectives from some of the leading scholars in the fields of constitutional law, law and religion, and corporate law. With his colleague Steven Walt, he has also begun a project exploring the philosophical foundations of corporate rights. They argue that the ascription of rights to corporations and other organized groups does not depend on a particular theory of the nature or ontology of those groups, a view presented in "Morality, Ontology, and Corporate Rights," 11 *Law & Ethics Hum. Rts.* 1 (2017).

In the last few years, Schwartzman has worked on a broad range of legal issues involving religious freedom, contributing to amicus briefs in a number of major cases. Frequently co-authoring with Nelson Tebbe and Richard Schragger, he has commented extensively on litigation over the contraception mandate, the scope and implications of the Religious Freedom Restoration Act, state laws accommodating religious opponents of same-sex marriage, and the Donald Trump administration's travel ban. Across these issues, Schwartzman's work is characterized by careful attention to legal doctrine and by his view that the government's actions must always be justified by public reasons that account for the rights and interests of all those governed and affected by its decisions.

Schwartzman is currently co-authoring a casebook, *Constitutional Law and Religion*. Looking ahead, he is interested in exploring the role of legislative purpose and motivation in grounding the legitimacy of laws, both within theories of public reason and as a matter of legal doctrine. He plans to continue writing on matters of religious freedom, with articles on the limits of religious exemptions and on the role of religious minorities in political and cultural conflicts over liberalism and secularization. He is also planning book-length projects on the separation of church and state and on the philosophy of corporate rights.

EXCERPTS

JUDICIAL SINCERITY

94 *Va. L. Rev.* 987

Do judges have a duty to believe the reasons they give in their legal opinions? A strong presumption against lying applies to most of our interactions with other people. The same presumption would seem to hold in the context of judicial decisionmaking. Since it is usually wrong to deceive others, judges should be truthful about the reasons for their decisions. At the very least, and barring exceptional circumstances, they should not knowingly make statements they think are false or seriously misleading. Indeed, this principle seems so straightforward that it may be hard to believe that anyone seriously doubts it.

Despite its presumptive appeal, however, the idea that judges must adhere to a principle of sincerity is surprisingly controversial. Some judges and legal theorists reject the notion that judges must believe what they say in their opinions. Although this view is probably a minority position in the academy and on the bench, it has been advanced explicitly with increasing force in recent years.

Those who oppose a strong presumption in favor of judicial sincerity raise a diversity of objections to it. They argue that sincerity and candor must often be sacrificed to maintain the perceived legitimacy of the judiciary; to obtain public compliance with controversial judgments; to secure preferred outcomes through strategic action on multimember courts; to promote the clarity, coherence, and continuity of legal doctrine; to avoid the destructive consequences of openly recognizing "tragic choices" between conflicting moral values; to preserve collegiality and civility in the courts; and to prevent the unnecessary proliferation of separate opinions. More generally, critics argue that a "purist" emphasis on the need for honesty in judicial decisionmaking ignores the myriad institutional considerations that judges must continuously balance in performing the "prudential" functions assigned to them. To argue for rigid adherence to a norm of sincerity or candor is said to be naïve, foolhardy, and even dangerously utopian.

With all of these institutional objections arrayed against conventional

Footnote citations are not included in excerpts.

wisdom, it may be difficult to see the initial normative appeal of a strong principle of judicial sincerity. There are two ways of recovering this principle from its prudentialist or pragmatist critics. The first is to marshal sufficient reasons of legal and political expediency to generate a strong presumption supporting adherence to a norm of sincerity. Accordingly, proponents of greater candor in the courts have argued that transparent decisionmaking constrains the exercise of judicial power, makes judges more accountable to the law, provides better guidance to lower courts and litigants, promotes trust and reduces public cynicism, and strengthens the institutional legitimacy of the courts. Like the arguments mentioned above, these claims rest on complicated and speculative empirical judgments, but they are the sort of arguments that pragmatists must take seriously. If following a general rule favoring sincerity or candor produces the most prudential or pragmatic outcomes—whatever those happen to be—then following the rule is probably justified.

The problem with this kind of prudential response is that it fails to explain the normative force behind the conventional wisdom that judges should not lie or deliberately mislead in their opinions. In our ordinary moral thinking, duties of truth-telling are not justified merely because they produce good outcomes. Rather, the duty to speak truthfully and openly is thought to be an independent constraint on our actions. This suggests a second way to defend a principle of judicial sincerity, namely, by explaining its appeal without relying solely on prudential considerations. My aim in what follows is to provide such an account. Although consequentialist claims will have an important role to play in this account, as we shall see, they will be subordinate in an argument motivated primarily by moral and political values central to the process of adjudication.

Here, then, is a sketch of the argument I have in mind for defending a principle of judicial sincerity: judges are charged with the responsibility of adjudicating legal disagreements between citizens. As such, their decisions are backed with the collective and coercive force of political society, the exercise of which requires justification. It must be defended in a way that those who are subject to it can, at least in principle, understand and accept. To determine whether a given justification satisfies this requirement, judges must make public the legal grounds for their decisions. Those who fail to give sincere legal justifications violate this condition of legitimacy. They act against the demands of the adjudicative role assigned to them. In extraordinary cases, judges may be justified in reaching beyond the limits of their authority. But this possibility defines a very narrow exception.

Under ordinary circumstances, judges have a general duty to comply with a principle of sincerity in their decisionmaking.

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II. THE VALUE OF LEGAL JUSTIFICATION

B. Legal Justification and Legitimacy

[W]e can now ask why judges ought to comply with the principle of legal justification. Even if the principle is accepted as a necessary condition of legitimate adjudication, it is important to understand why judges must adhere to it. As before, we should look for reasons that can command wide assent. No justification will be entirely without controversy, but some arguments will be more robust than others with regard to competing theories of the judicial role. Here, then, are four reasons supporting the principle of legal justification:

First, some parties voluntarily submit their grievances to public adjudication for the purpose of obtaining impartial review. The parties to a case or controversy present reasoned arguments for their claims on the expectation that judges will be responsive to the strength of the reasons provided. Thus, a traditional argument for the principle of legal justification is that litigants are entitled to a reasoned assessment of their claims. If for whatever reason the parties preferred an arbitrary solution, adjudication would not be necessary. They could simply select a random decision procedure to resolve their dispute. When parties offer reasons for their claims in the form of legal arguments, however, they can reasonably expect that judges will weigh those reasons and provide a decision based on an evaluation of them. Decisions reached without regard to reasons are not responsive to the underlying conflict between the parties. The parties can therefore complain that the purpose of the adjudicative process has been corrupted or ignored. The reasons they presented were not given proper consideration in resolving the conflict between them. The winning party may be pleased with the outcome. But even the winner may realize that the decision was reached incorrectly or, worse yet, illegitimately.

Second, the parties to adjudication will often not have consented to adjudication in any meaningful way. The involuntariness of their participation does not, however, diminish the requirement that judges justify their decisions. On the contrary, the fact that litigants have no choice but to submit to adjudication greatly strengthens the demand for justification. As unwilling participants, they have even more reason to complain when

they are treated arbitrarily. When the parties have not chosen to settle their dispute by adjudication, the imposition of a decision without reason is a form of oppression. This claim may seem overstated. In the legal domain, however, the orders and judgments that follow from adjudicative proceedings are backed by the coercive power of the state. The threat of brute force conveyed by judicial decisions is perhaps most apparent in the domain of criminal law. But it is present all the same on every occasion in which judges invoke their legal authority.

Third, in many cases, judges make decisions that reach beyond disputes between particular litigants. In common law systems, cases or controversies arising from the same or similar circumstances are often governed by precedent. For that reason, the demand for justification can be issued not only by present litigants but also by any future parties whose claims will be controlled by a court's prior decisions. Furthermore, as proponents of structural litigation have emphasized, it is a mistake to conceive of adjudication solely as a mechanism for resolving disputes between individuals with private ends. The judicial process is used, sometime to great effect, for the purpose of challenging large-scale social and political institutions. In such cases, judges are called upon to elucidate and apply public norms to correct systemic injustices. Indeed, if courts find breaches of constitutional values, they may exercise their equitable powers to order remedies with far-reaching consequences for the basic structure of society. By altering the patterns of opportunities and entitlements available to people, courts may have profound effects on life chances. Those influenced by such decisions have a strong interest in demanding justifications for them.

Fourth, and perhaps most fundamentally, the principle of legal justification is based on the idea that legal and political authorities act legitimately only if they have reasons that those subject to them can, in principle, understand and accept. This principle of political legitimacy permits a range of argument about what kinds of reasons might be accepted for the purpose of justifying the exercise of political power. But however we specify those reasons, adherence to the underlying principle expresses a commitment to treating citizens as capable of understanding and responding to the reasons that justify the rules by which they are governed. When legal and political officials lack sufficient reasons for their decisions, they fail to respect the rational capacities of those subject to their authority. They show disrespect for the fundamental interest that citizens have in being governed according to reasons and principles to which they can give their considered assent. This interest, which resonates with the idea that government should

be based on consent, is at the core of liberal democratic conceptions of political legitimacy. Indeed, a basic commitment of liberal political thought is, as Jeremy Waldron has written, that “intelligible justifications in social and political life must be available in principle for everyone. ... [T]he basis of social obligation must be made out to each individual, for once the mantle of mystery has been lifted, everybody is going to want an answer.” Of course, not everyone will be happy with all of the answers all of the time. But the fact of reasonable disagreement does not excuse political officials, including judges, from their responsibility to justify their decisions. The losing party may often be dissatisfied with the reasons for judgment. That does not, however, make the obligation to produce a reasoned outcome any less significant. The exercise of legal authority must be justified especially to those whose interests are adversely affected. As rational and reasonable agents, they are owed a justification for the way they are treated under the law.

WHAT IF RELIGION IS NOT SPECIAL?

9 *U. Chi. L. Rev.* 1351 (2012)

Nearly thirty years ago, Frederick Schauer published an article asking the question, “Must speech be special?” That question, he said, was not the same as the question, “Is speech special?” The first question was about whether an adequate theory of the First Amendment must explain why the law provides special protection for speech. The answer to that question was, “Yes.” Otherwise, the theory could not provide guidance in determining the meaning of the constitutional text. But the answer to the second question was probably, “No.” As a matter of political morality, speech cannot be distinguished from many other activities as warranting special constitutional protection. These conflicting answers produced what Schauer described as an “intellectual ache.” On the one hand, the constitutional text makes speech special; on the other hand, there is no sound normative argument to support the text. If we think speech *must* be special and also that it is *not*, then we face a real conundrum. The law pulls in one direction, and political morality in the other. With a constitutional guarantee as fundamental as the freedom of speech, the need to resolve this tension seemed both pressing and inescapable.

In the last decade or so, it has become increasingly clear that similar concerns apply with equal, or perhaps even greater, force to the Religion Clauses of the First Amendment. If we ask Schauer's question *mutatis mutandis*—"Must religion be special?"—the answer again would seem to be, "Yes." The Establishment Clause says that Congress cannot pass any law respecting an establishment of religion. It does not prohibit the establishment of nonreligious ethical or moral views. Religion is special in the sense that it suffers from a legal disability that does not apply to secular beliefs and practices. Similarly, the Free Exercise Clause identifies religion as the subject of special protection. Congress is prohibited from passing laws prohibiting the free exercise of religion. There is no general prohibition on laws restricting the free exercise of nonreligious beliefs and practices. Thus, any theory that seeks to explain the Religion Clauses must provide an account of what is special about religion in terms of both its disabilities and protections. The problem, however, is that religion cannot be distinguished from many other beliefs and practices as warranting special constitutional treatment. As a normative matter, religion is *not* special. Again, we find ourselves in something of a bind. Religion *must* be special, and yet it is *not*.

This conflict between the legal and normative status of religion is now at the center of debates about the Religion Clauses. For example, the Supreme Court recently decided *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, holding that religious institutions are entitled to a special constitutional exemption (the "ministerial exception") from laws prohibiting employment discrimination. The Government had argued that religious groups are not entitled to protections beyond those available to nonreligious expressive associations under the Free Speech Clause. At oral argument, two Justices—from opposite sides of the political spectrum—found this position to be "extraordinary" and "amazing," and a unanimous Court eventually rejected the Government's view, describing it as "remarkable" and "hard to square with the text of the First Amendment itself, which gives special solicitude to the rights of religious organizations."

Once it becomes apparent, however, the problem of religion's distinctiveness is pervasive in thinking about the meaning of the Religion Clauses. Must the government provide special accommodations for religious citizens when their beliefs conflict with the law? If so, must those accommodations be extended to similarly situated nonbelievers? What about government speech promoting religion? If a state government can support gay rights, reproductive choice, and gun control, why not also prayer in public school, creationism, and displays of religious symbols? And why do

taxpayers have a special right to challenge legislation taxing them to support religion, when they have no standing to object when the government spends their money on policies that might be more controversial and indeed of far greater consequence to them? If taxpayers cannot sue to stop the War in Iraq, why do they have standing to prevent Congress from spending money on, say, vouchers for religious schools? All of these questions, which are easily proliferated, turn on the constitutional status of religion.

Given the importance of the issue, it is not surprising that there have been numerous attempts in recent years to explain why religion is both morally and legally distinctive. There have also been numerous attempts to explain why it is not. This Article advances beyond the existing literature first by providing ... a new taxonomy to describe how religion might (or might not) be special for constitutional purposes. Some theories hold that religion should not be treated differently from secular ethical and moral views under the Establishment Clause, but that it should be given more favorable treatment under the Free Exercise Clause. Another set of theories takes the opposite view, namely that religion should be distinctively disfavored under the Establishment Clause but not given any special treatment under the Free Exercise Clause. More recently, some have argued that religion is morally distinctive in both contexts, while others have argued that it is not special in either of them.

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Many of the most widely held normative justifications for favoring (or disfavoring) religion are prone to predictable forms of internal incoherence. Furthermore, accounts of religion's distinctiveness that manage to avoid such incoherence succeed only at the cost of committing other serious errors, especially in allowing various types of unfairness toward religious believers, nonbelievers, or both. The upshot of all this is that principles of disestablishment and free exercise ought to be conceived in terms that go beyond the category of religion. Instead of disabling or protecting only religious beliefs and practices, the law ought to provide similar treatment for comparable secular ethical, moral, and philosophical views.

If religion is *not* special, then what attitude should we adopt toward the constitutional text, which says that it *must* be? Answering this question requires a more general theory of constitutional interpretation. Since such theories are at least as controversial as theories of the Religion Clauses, I consider two possible responses. The first says that if the Religion Clauses are interpreted according to their original meaning, then they should be criticized as morally defective. Departing from original meaning, the second

response attempts to reconcile the Religion Clauses with political morality by expanding the definition of religion to include secular ethical and moral doctrines. This approach faces some familiar difficulties, but it suggests one path to bringing existing law into line with the view that religion is not normatively distinctive. Without taking sides between these alternative responses, I argue that adopting either of them has profound implications for our understanding of the First Amendment.

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