

Micah Schwartzman

Abstract: Religion as a Legal Proxy?

As with protections for religion in many nations, the religion clauses of the First Amendment treat religion in a special way. In recent years, however, the idea that religion warrants special treatment has been criticized as violating norms of equality and fairness. In response to these criticisms, a number of scholars (including Andrew Koppelman and Thomas Berg) have argued that even if religion is not epistemically or metaphysically distinctive, at least as compared with secular ethical or moral views, it is nevertheless properly identified by the law as a proxy for a range of beliefs, practices and institutions that warrant special treatment. According to this argument, since no other legal category adequately captures the same set of important human concerns, the state is justified in relying on the category of religion in distributing special legal benefits and burdens. In this paper, I will argue against this proxy-based argument. My basic claim is that sub-constitutional (i.e., state and federal statutory law), as well as international treaty law, include legal provisions that go beyond the category of religion to protect the freedom of conscience, which is not defined in religious terms. Such provisions are fair and workable. Moreover, they do not dilute the strength of legal rights, which might otherwise be a reason to limit protections to a narrower category of religious belief and practice. In fact, far from diluting or trivializing the rights of religious believers, extending rights to those with non-religious claims of conscience strengthens the moral and legal argument for such respecting such protections.