Irreducible Constitution, The 1996 JCLI Religion Symposium

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The Irreducible Constitution

Abner S. Greene*

No matter how hard they try, some constitutional theorists can't avoid being, at bottom, either democratic-foundationalists ("democrats") or rights-foundationalists. In the first part of this essay, I will offer a third way, insisting that at the heart of the American constitutional order is an irreconcilable conflict between these divergent accounts, that attempts to predicate constitutionalism on either democracy or rights cannot succeed. Our constitution (a term I will use to mean our constitutional order—text plus . . . ) is, at the core, coreless. It cannot be resolved to a master predicate. It cannot be reduced to democracy or to rights. It is, in this way, the irreducible constitution.

The antifoundationalism of our constitution exists at many levels, and may be understood through the concept of multiple repositories of power.1 It is fairly familiar to understand our structure of government (separation of powers and federalism) as based in multiple repositories of power. Furthermore, the structure of rights in American constitutionalism is also heavily influenced by the avoidance of concentration of power. Although consistent with multiple repositories of power regarding structure and rights, constitutional theory itself—that is, systematic explanations and defenses of our constitutional order—are usually based in a particular conception of self-government, either a democracy conception or a rights conception. It is the singular genius of American constitutionalism, I want to suggest, that the tension between these two conceptions of self-government is, by design, irresolvable. To reduce our constitution to democracy or to rights would require accepting a foundationalist theory, and our constitution rejects such a theory. In other words, multiple repositories of power is our constitution's governing concept not only with regard to the structure of government and the structure of rights, but also with regard to the justificatory practice that undergirds those structures. One might say that multiple grounds of justification is the constitutional theory analogue to the role multiple repositories of power plays regarding the structure of government and rights.

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Part I will proceed in four steps. First: Constitutional theorists are, at the core, either democrats or rights-foundationalists. Neither position, as a foundationalist position, is consonant with our constitution. Second: The tension between democrats and rights-foundationalists is based in conflicting theories of self-government, one based in collective self-government, the other in individual self-government. But neither theory can be defended as foundational. Third: Our constitution renders these conflicts irresolvable, not because tools are lacking to resolve them, but because resolution depends on a type of foundationalist claim that our constitution rejects. Importantly, such rejection does not assert the falsity of the foundationalist claim that would be needed to support the primacy of any of the above (democracy, rights-foundationalism, or either theory of self-government). Rather, our constitution requires an agnostic position regarding such claims. This agnosticism is based not in a truth claim for agnosticism (that would be a good one!), but rather in second-order arguments about governance. Fourth: One might infer from the preceding that I am a rights-foundationalist and defender of the primacy of individual self-government, that my insistence on multiple repositories of power as central to our constitutional order commits me to a foundationalist position on one side of the debates I have described. I will explain why this charge is unfounded. One might also object that although rights-foundationalism is problematic, it is problematic not because of the threat of concentration of power, but because of the threat of anarchy. I offer some further thoughts on this matter, as well.

After setting forth the theory of the irreducible constitution, I will try, in Part II, to apply some of the understandings of that theory to problems raised under the establishment clause and the free exercise clause of the first amendment. The religion clauses, I will maintain, primarily advance the goal of religious pluralism. But not all plausible means toward the end of religious pluralism are permitted. In particular, the establishment clause works as a brake on majoritarian capture of the legislative process to advance the dominant religion. Such capture risks the reduction of religious pluralism. Conversely, when the majority acts to ease burdens on minority religions, no such threat exists. My theory of the irreducible constitution does, however, permit the government to compete with separate fonts of authority for the allegiance of the people. This means, among other things, that the government may operate schools and teach secular values in those schools. Thus, the religion clauses are Exhibit A for the theory of the irreducible constitution, for they enable the flourishing of multiple religions, block the capture of government by a dominant religion, and permit government to remain a potent force in pressing for common ground.
I. CONSTITUTIONAL ANTIFOUNDATIONALISM

A. Conflicting Theories of the Constitution

No constitutional theorist denies the relevance of democratically elected majorities, and none denies the relevance of rights retained by the sovereign people. To some degree, therefore, all constitutional theorists have hybrid positions, seeking the resolution of the democracy-rights tension in various nuanced ways. Nevertheless, we can place theorists into two camps based on what they focus on as foundational in terms of the legitimacy of our constitutional order. Democrats predicate legitimacy in decisions by the people acting collectively; rights-foundationalists predicate legitimacy in rights that people retain as individuals.2

Here are the democrats: Henry Monaghan, Robert Bork, and Antonin Scalia are originalists, tracing authority back to constitutional framers.3 Larry Lessig is a translator, tracing authority back to constitutional framers in a more expansive way than the originalists.4 Bruce Ackerman is a synthesizer, tracing authority to the motivated American citizenry acting on matters of constitutional principle at key moments in our history.5 Akhil Amar is a popular sovereigntyist, tracing authority to majorities.6 John Ely is a representation-reinforcer, tracing authority to majorities insofar as rights of political participation are unencumbered and minorities are not systematically disadvantaged in politics.7 Samuel Freeman is a contractarian, tracing authority to hypothetical agreements that citizens could have made, accounting for various conditions, such as equality.8

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2. Two important caveats: First, many of the works cited below are descriptive rather than normative, or are in large part descriptive rather than normative. They set forth what the authors believe to be the best account of our constitutional tradition, rather than what the authors would prefer our constitutional order to look like. Second, one might argue that I have placed some authors in the wrong camp, or that some of the authors are closer to my view (the constitution cannot be reduced to a master predicate) than I give them credit for. Nonetheless, the categorization that follows should serve as a rough approximation of where people stand on the question whether our constitution, at its core, protects collective decisionmaking with some exceptions for rights claims, or protects rights with some room for the will of the people to govern.


Frank Michelman and Cass Sunstein are civic republicans, tracing authority to political decisions that account for various conditions, such as deliberation and action in the public interest rather than in the interest of factions.

These are all democrats, all theorists who, despite their differences and their conditions, predicate our constitution on decisions made by elected majorities (or supermajorities). Obviously some democrats—such as Freeman—impose substantial enough conditions on the legitimacy of collective decisionmaking that they start looking like rights-foundationists. Other democrats—such as Michelman and Sunstein—also define democracy sufficiently thickly that it might be hard to tell, at first glance, whether they are democrats or rights-foundationists. But whether the tracing to collective decisionmaking is relatively direct (Amar; the originalists) or somewhat less direct (Lessig; Ackerman), or whether the democracy predicate is thinly defined (Amar; the originalists; Lessig; Ackerman) or more thickly defined (Ely a bit; then Freeman, Michelman, and Sunstein much more), these theorists all predicate our constitution on politics, on elected majorities or supermajorities making decisions.

Rights-foundationists, on the other hand, although sometimes making concessions to democrats, adopt a different predicate, one of rights retained by individual persons. Those retained rights—however defined—are primary in our constitutional order; the will of the people is secondary. Thus, Ronald Dworkin, Larry Sager, Jim Fleming, and Tom Grey all point, in varying ways, to a constitution that seeks justice for persons first, and that accomplishes democratic ends second.

Neither foundational claim can succeed, however. Larry Sager has carefully demonstrated how the democrats fail to account adequately for significant aspects of our constitutional tradition. Alexander Bickel, some time ago, showed persuasively how rights-foundationism cannot adequately account for the substantial deference given to collective decisionmaking. Sager has tried to defend this deference on terms acceptable to rights-foundationists, but the deference, it seems to me, is thicker and deeper than Sager’s model can account for. I will offer, in part I.C, an account of our constitution that explains in a different way from either Sager or Bickel why neither foundational claim can succeed.

B. Conflicting Theories of Self-Government

The conflicting theories of our constitution discussed above have roots in conflicting theories of self-government. All theorists of our constitution share a predicate—ours is a government of the people, not of God or of the King. All American constitutional theorists are democrats to this extent, but whether one is a democrat as I have described above or a rights-foundationalist depends, I believe, on which theory of self-government one adopts as a foundation. Here, I will set forth the conflicting theories of self-government and explain why neither should be considered foundational. In part I.C., I will argue that our constitution demands that this conflict, as well as the conflicts discussed in part I.A., be left unresolved.

Democrats appear to rest their claims on a theory of collective self-government. The argument goes something like this: Individual self-government might be a predicate of collective self-government, but it is inadequate for the grounding of a polis. Individuals exist in a state of nature; even if they can govern themselves through reason (thus giving law to themselves in a Kantian way), this aggregation of individual self-governors necessarily leads to a kind of chaos and war. It is only through coming together as a political community that individuals can harness their powers of self-governance and live in peace. Our constitution is predicated on a particular form of collective self-governance—i.e., a version of republican government, or representative democracy. Importantly, although individuals must cede self-governance to live in peace, a representative democracy does not have to cede its self-governance (here understood as a version of majoritarianism) to rights-foundationalists (who want to limit majoritarianism) to live in peace. There might be other reasons to mitigate the harshness of majority rule, but although individual self-government must give way to collective self-government to achieve basic social order, collective self-government does not similarly have to yield to rights claimants for this reason.

Rights-foundationalists might offer the following answer: Individual self-government is appropriately foundational; collective self-government must build on that foundation. It is true, the rights-foundationalist constitutional theorist might concede, that individuals must cede self-governance to achieve social order. But collective self-government must yield, as well, for the same reason. The democrat’s argument that collective self-government achieves a baseline of peace that appropriately serves as the foundation for a constitutional order is incorrect. That argument improperly assumes that rights claims are resolvable endogenously by majority rule. But many claims of right—e.g., the claim of a racial or religious minority to avoid discriminatory treatment—are best
understood as state of nature claims. At their extreme, they are claims of violence, of war. They are challenges to the majoritarian conception of self-government. They say: To achieve peace, your majoritarian self-government has to be ceded to a proper conception of justice just as the self-governance of individuals had to be ceded to collective self-governance. On this view, collective self-government (instantiated in our constitution through a form of republican government) is just a means of achieving liberty for the individual (which must include those who lose in voting as well as those who win). Individual self-government, thus, is appropriately deemed foundational.

Is the conflict between theories of self-government that underlies the conflict between constitutional theories resolvable within our constitutional order? I think not, and I reach this conclusion not because tools aren't available to resolve these conflicts, but because I believe that our constitution requires that these conflicts be left unresolved. I turn now to defending that claim.

C. The Irreducible Constitution

Our constitution is committed to multiple repositories of power through and through. This can be seen at various levels. The structure of government fractures power between federal and state, and at the federal level among the three named branches. The rights listed in the constitution, and elaborated through our constitutional tradition continue this commitment to fractured authority in various ways. Rights of political participation (voting, speech, press, petition) ensure that political authority remains in the hands of the citizens as political actors. Other rights help preserve and develop nomic communities that may challenge the government for the allegiance of the people, both by providing a base for direct challenge and by securing a haven for separate normative cultures. The religion clauses, the freedom of association, and rights instant in family units all serve this function.

The core concern of multiple repositories of power is a negative one—it is a nearly pathological fear of the concentration of power. The best way to slip from a government of the people into a government of someone else (such as the King) is to allow any locus of power to become too strong. The best way to ensure a government in which the people retain their sovereignty is to disable any locus of power from becoming too strong. (In this way, antimonopolization laws are close to being constitutionally required, at least regarding essentials. I recognize this sounds quite odd, and I do not want to place too much weight on it, but allowing individual corporations to control significant and essential areas of the American economy risks the alienation of sovereignty just as
allowing the President to become too strong or stripping people of the franchise.)

Now comes the most difficult part of the argument. The multiple repositories of power that are at the heart of our constitution in terms of the structure of government and of rights are, I believe, inconsistent with accepting a foundational theory of our constitution, i.e., a theory that is foundationalist to the extent that it argues for either democracy or rights as primary. This is not immediately apparent, for one could argue that multiple repositories of power are not an end in themselves but rather are a means to another end, such as democracy or rights-foundationalism. That is, perhaps multiple repositories of power help support one of these foundations, or help support values of one theory although another theory is appropriately deemed foundational. Our constitutional commitment to multiple repositories of power runs more deeply than this, however. To accept either of these theories as foundational would be to privilege a certain locus of political authority, and our constitution forbids such privileging. For example, to accept the rule of the majority as foundational, even if one adopts a thick view of democracy (such as Michelman or Sunstein), is to accept the truth of the claim that collective self-government is primary. But to accept such a claim we would run the risk that collective self-government would be seen as worthy of the people’s allegiance in a deeper way than is individual self-government. Or, to take the other case, to accept retained rights as foundational, even if one accepts the role of collective rule in solving many problems, is to accept the truth of the claim that rights retained by the people are primary. But to accept such a claim we would run the risk that rights of the individual would be seen as worthy of the people’s allegiance in a deeper way than are decisions by the collective. These are risks that our constitution does not permit us to run.

My argument is not that these foundational claims are false. And it is not that “multiple repositories of power” is true, as a foundational claim. That is, I do not support an irreducible middle as true in the sense that one believes a comprehensive doctrine such as Christianity or Liberalism to be true. The multiple repositories of power position of our constitution, rather, prohibits the acceptance of foundationalist constitutional claims as a second-order matter, to insure against the hegemony of any locus or theory of authority. A violent middle is thus created, and it is in this violent middle that we must continue to struggle for the respect that authority can bring, but can never lock in. And I mean real violence: The struggle between democracy and rights will sometimes play itself out in battles or in criminal acts of disobedience. The struggle for authority helps preserve both sides of this debate, and allows for temporal periods of coexistence (e.g., all the years we are not in a Civil War or its equivalent) and spatial areas of coexistence (e.g., the Amish living alongside other Americans).
This argument might seem akin to Rawls' argument that political liberalism does not assert the truth of the comprehensive doctrine "Liberalism" but rather insists that competing comprehensive doctrines agree on mutually acceptable rules of political order.\textsuperscript{13} The similarity is that I have argued not for the truth of the comprehensive doctrine "Multiple Repositories of Power" but instead for the acceptance of such a doctrine as the best way to explain our constitution and as necessary to achieve the second-order (i.e. nonfoundational) goal of fractured authority. But Rawls' political liberalism is too focused on centralized government; it fails to acknowledge the legitimacy of claims from the fringe, of claims from those comprehensive doctrines that cannot abide the rules of public reason and the overlapping consensus. I want to give those outsiders equal time, and to insist that our constitution compels that their demands—often of disruption and separation—be as much a part of the center as centralized government itself.

D. Two Objections Regarding My Treatment of Rights-Foundationalism

Two objections might arise regarding my insistence that rights-foundationalism is no more consistent with a multiple repositories of power theory than is foundationalist democracy. First, one might argue that the multiple repositories of power theory that I have advanced is itself a foundationalist theory, with strong affinities for rights-foundationalism over democracy. That is because rights-foundationalism points more directly toward the fracturing of political authority than does democracy, which appears to be an authority-consolidating position. But I do not support fractured political authority based in either individual self-government or separate normative communities as foundational. I do believe that collective self-government (say, through majority decision) has an important role to play in competing for the people's allegiance. In other words, although the multiple repositories of power theory (read: "our constitution") demands that authority be fractured and that no foundational claim of authority be accepted, this demand need not be carried out through devolving all sovereignty back to individuals and small communities. It is fine for majorities and the federal government to be among the repositories of power.

Second, it is relatively easy to see how democracy as foundational risks alienating self-government to the government of the "other." But one might think that the problem of privileging rights-foundationalism is anarchy rather than tyranny. In this sense, while tyranny is the bad end

\textsuperscript{13} \textit{John Rawls, Political Liberalism} (1993).
of collective self-government, anarchy is the bad end of individual self-government. But anarchy is a type of tyranny. At some point, individual self-government stops being law given to the self and becomes the tyranny of desire. Collective self-government tames this desire, just as rights cabin the excesses of collective self-government. Thus, allowing the foundationalism of rights does risk alienating self-government to the government of the "other," because the self ruled by desire is a self captured by the "other."

E. Summary

Efforts to locate a foundational theory of American constitutionalism cannot succeed, because our constitution incorporates an antifoundationalist principle. The principle is of multiple repositories of power, and it demands not only that the people's sovereignty be delegated to various levels of agents and retained through various mechanisms of rights, but also that foundational constitutional theories, which privilege certain loci of power, be rejected. We reject these theories not because they are false or because some ultimate middle position is true, but rather because accepting any foundational constitutional theory as true would be to assert that the people's allegiance ought to be pulled in that direction, that other loci of power ought to lose ground. But then we would lose our insurance against the rule of the other; we would lose our most important tool in the preservation of government by the people. Multiple repositories of power would be jeopardized by accepting either democracy or rights-foundationalism as primary, and, because multiple repositories of power are central to preserving self-government (in any form), we must reject constitutional foundationalism as inconsistent with our constitution.

A further word about the significance of multiple repositories of power in the American constitutional order: We have domesticated revolution. Citizens have the responsibility for interpreting the constitution daily. We have domesticated a constant, acceptable debate: the struggle over loci of authority occurs regularly, self-consciously. The legitimacy of government is always open, always front and center. By keeping the question of legitimacy always open, we hold off instability. The domestication of revolution is januslike: it tames and quiets the revolutionary urge, yet it personalizes the stakes and brings the blood to boil. Moreover, article V of our constitution is a high hurdle to formal change, but that is a good thing. It helps to domesticate revolution, to ensure that change occurs within the system rather than through systemic upheavals. Because the question of legitimacy and the appropriate font of authority is constantly open, the allegiance of the people may shift within the constitutional order. Similarly, the concept of entrenchment (rights or powers) is deeply
problematic in our system, because entrenchment entails undomesticating the question of legitimacy.

II. THE RELIGION CLAUSES AND THE IRREDUCIBLE CONSTITUTION

The religion clauses of our constitution are a paradigmatic case of the multiple repositories of power theory, and of the irreducibility of the constitution. One might understand the core value of the clauses to be the promotion of religious pluralism. Religious pluralism is one of our constitution's most important representations of antifoundationalism. Government is barred from recognizing one religion as the true religion; this ensures against a type of concentration of power, power that would blend governmental office with religious authority.

Although many might agree that religious pluralism is the (or a) core value of the religion clauses, the disagreements center around what means best promote the end of religious pluralism. Imagine a constitution with a free exercise clause but no establishment clause. That constitution would, if taken seriously, advance significantly the cause of religious pluralism. But that constitution would be consistent with a government that endorsed and otherwise supported a particular religion. So long as other religions were left alone, one could argue that religious pluralism would be maintained.

The establishment clause, our unique contribution to the advancement of religious pluralism, can be understood as yet another mechanism of ensuring against foundationalism. It was not enough to protect the free exercise of religion; governmental endorsement of or support for a particular religion, although not directly intruding on the freedom to practice other religions, could easily lead to the erosion of those other religions. The establishment clause fits snugly with the multiple repositories of power instantiated elsewhere in our constitution (separation of powers, federalism, political freedoms, freedoms of nomic communities) by depriving majorities of the power to concretize power. The establishment clause is, importantly, an antimajoritarian device; it tells the dominant religion not to use governmental power to advance its mission.

Even if one adopts this understanding, or a version of it, one still might contend that although the establishment clause bars the actual establishment of a governmental religion, other types of governmental endorsement of or support for a religion are valid. (All agree that government may not coerce religious belief or practice; I am going to assume that the anticoercion principle is captured in the free exercise clause.) But it is consistent with the pervasive fear of concentrated power to view the

establishment clause as a prophylactic device against majoritarian tyranny. Most of the checks against constitutional foundationalism are of this variety. When we insist that the President and Congress both play a role in lawmaking, when we deprive the federal government of certain powers vis-a-vis the states, when we refuse to allow a city to adopt a discretionary licensing scheme for speech—in all of these areas, and others, we rely not on proof that the indiscretion in question has, already, trampled competing fonts of power. Instead, we reach these structural decisions (structural even in the rights area) to ensure against accrued agglomerations of power, which do not arise in a day, but over time. The establishment clause as a prophylactic device against majoritarian capture of the government for religious ends makes sense in light of our other constitutional commitments.

Thus, the question in any case brought under the religion clauses should be: Does the governmental action in question advance or inhibit the cause of religious pluralism? Governmental action reasonably understood to endorse or support the majority religion inhibits the cause of religious pluralism, while governmental action reasonably understood to assist minority religions advances the cause of religious pluralism. The hardest cases are those in which governmental action is reasonably understood as helping religions equally. I will discuss these various cases in Parts II.A. and B.

Although much of this Part will discuss antifoundationalism through the preservation of religious pluralism, I argued earlier that our constitutional antifoundationalism privileges neither democracy nor rights. The centrifugal force of religious pluralism may (and should) be counteracted by the centripetal force of the government seeking, through persuasion, rather than coercion, an American common ground. Among other things, this means that the government may teach secular values in public settings, such as schools. I will take this matter up in Part II.C.

A. Cases that Should be Easy

1. Laws Enacted with a Predominant, Expressly Religious Purpose

When a religious majority captures the legislative process to achieve doctrinal religious ends, what is it up to? How should we categorize this sort of legislative behavior? Is it merely a group of citizens expressing their views on which laws should be enacted? It should be a rather straightforward proposition that such legislative capture is a means toward the end of using the government and its system of laws to instantiate God’s laws. Most scholars agree that if a law lacks a plausible secular purpose it cannot stand. But many scholars argue that if a law has a
plausible secular purpose, it should be upheld even if we all know that the law was enacted for a predominantly, expressly religious purpose. What is the distinction between these two types of law? It cannot turn on the purpose or dominant force behind the legislation, because by definition that force is, in both cases, a religious one. That is, in both cases the majority advances the legislation to achieve a doctrinal religious end. (If the majority is seeking to do something else, then I agree we have a different case.) Likewise, the distinction cannot turn on whether the resulting law aids the majority's religion, because in both cases the law does precisely that. So the distinction must be from the point of view of those who do not follow the majority's religion, that is, the religious minorities in the jurisdiction in question.

Consider two laws: Law A requires the public schools in the jurisdiction to teach Christian fundamentalism; Law B requires the public schools in the jurisdiction to cease teaching evolution. Assume that both laws are enacted through expressly religious arguments that predominate in the legislative process. In both cases, the majority achieves what it believes to be an important religious goal, and in both cases the majority uses the machinery of government to achieve this goal. In case A, there appears to be no legitimate secular purpose for the law, and my guess is that most scholars would agree it should be invalidated under the establishment clause. In case B, one could easily articulate a plausible secular purpose, as Justice Black did in *Epperson v. Arkansas*, 15 such as avoiding the teaching of a controversial issue, or, perhaps, spending class time on other matters considered more important. Many scholars today are uneasy about the holdings of *Epperson* and its progeny, precisely because there appear to be plausible secular purposes in (at least some of) these cases. But since in both case A and case B the actual legislative process was predominated by religious argumentation and in both case A and case B the religious majority used the legislative process to achieve a religious end, the difference must turn on the point of view of the religious minority. Why, though, should we believe that the rights of the religious minority are affected in a different way in either of these cases? From the viewpoint of a member of a religious minority in the jurisdiction in question, in both cases the legislative process has been commandeered for the precise end that our constitution forbids, the instantiation through law of the doctrine of a preferred religion. In both cases, members of religious minorities would have reason to be concerned that the majority is using the power of government to establish the preferred religion as true, to seek converts, to collapse repositories of power by uniting the secular power of government with the religious power of the dominant sect. Laws not enacted through predominantly, expressly religious arguments, but that

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accord with the tenets of (say) the majority religion, do not create similar harm to members of religious minorities, because the mere coincidence of law with religious tenets does not show minorities that the legislative process has been converted into a conduit for theocracy.

Thus, the Court correctly decided Epperson, Stone, Wallace, and Edwards.16 Those cases are important bulwarks against the capture of government for majoritarian religious interests; they remind legislators and others involved in the legislative process that government may not be used as a tool for the endorsement or advancement of foundational religious values. The requirement that such values be translated into secular terms accords respect for religious minorities, signaling to them that the government is not being used in a way that threatens to harm religious pluralism.

2. Governmental Sponsorship of Religious Symbols

As with laws enacted because of a predominant, expressly religious purpose, governmental sponsorship of religious symbols is another overt means of using the machinery of government to endorse and advance the preferred religion. Whether intended or not, the message sent to minority religions is that the government is not fully theirs, that a preferred set of religious beliefs exists. Additionally, permitting government to endorse its preferred religious symbols helps the majority religion advance its cause and gain the allegiance of more adherents. Thus, the establishment clause is violated in these cases in a straightforward fashion: The dominant religion has used the apparatus of government to advance its cause, gain adherents, and (whether intentionally or not) signal to religious minorities that the government has merged (at least to some degree) with the church, relegating the minorities to less-favored citizen status.

In both the symbols cases and the preceding set of cases (enacting legislation through predominant, expressly religious arguments), the goal of religious pluralism is jeopardized through the governmentally backed hegemony of the favored religion. The dominant religion is not, of course, "established" through any single legislative act. If one accepts, however, the establishment clause as a prophylactic device against such a result, then one can accept the invalidation of laws that tend toward establishment and those that all at once set up a state religion.

If one agrees that the government should not be permitted to sponsor religious symbols but thinks that laws passed through predominantly religious argumentation are constitutional if they are backed by a plausible secular purpose, consider this: Assume Congress repeals the Endangered
Species Act, and a state decides to enact its own Endangered Species Act. Virtually all of the legislators are observant Christians, and virtually all of the legislative arguments for the Act invoke religious authority. The Act includes authorization for an advertising campaign. Billboards go up proclaiming “Serve Christ—Preserve Endangered Species.” It is clear to passersby that the state has sponsored the billboards. I imagine that many scholars would consider the billboards to be unconstitutional. But why are they any more unconstitutional than the Act itself, passed precisely because of the stated legislative purpose to serve Christ?

3. Judicial Authority to Require Exemptions for Religion

In the prior two sections, I argued that when the religious majority captures the legislative process for patently doctrinal purposes, the establishment clause is violated because of the threat to religious pluralism from such a merger of dominant religion with governmental apparatus. The government can harm the cause of religious pluralism in a more indirect way, as well. When government enacts laws that disparately impact certain minority religions, often this is because of neglect rather than intent. Nonetheless, such laws can seriously damage minority religions, and the Court, Congress, and the academy have struggled mightily to resolve the problem. The difficulties here are well known: On the one hand, neglect as well as intent can fuel legislation that threatens core aspects of minority religions, and it seems that judges could spot these instances and require exemptions to help preserve the flourishing of such religions. On the other hand, problems of applying this principle abound: How do we know if the claimant possesses sincere religious beliefs? How can we (or should we) distinguish between a religious claim and a secular claim of conscience? Even if we can solve these two problems, should courts order exemptions in all cases, or must they draw lines (would we really grant an exemption for child sacrifice?), and if they must draw lines, how? What counts as a substantial burden on religion or a compelling government interest to countervail (in the language of Congress’ effort in this area, the Religious Freedom Restoration Act)? Should not we be concerned that the vagaries of application will lead to (perhaps unintentional) judicial discrimination in favor of some minority religions and against others?

The question boils down to whether the difficulties and costs of judicially enforced exemptions are greater or less than the benefits of

awarding such exemptions. Absent a clear sense that the costs of exemptions outweigh the benefits, the default rule should favor exemptions, for exemptions will help at least some members of some minority religions whereas the absence of exemptions will help precisely zero members of minority religions. Furthermore, judicially crafted exemptions to bolster religious pluralism should not be thought to violate the establishment clause, because such exemptions will not be advancing the dominant religion.

4. Legislative Authority to Accommodate Religion

As with judicial exemptions under the free exercise clause, legislatively crafted exemptions for minority religions do not violate the establishment clause, because they neither endorse nor support the dominant religion. Such legislative exemptions—commonly called "accommodations"—merely reflect the majority's respect for minority communities, and may be given to religious or nonreligious communities alike.

One type of challenge to legislative accommodation is similar to the challenges to judicial exemptions: They might not be handed out with equal respect to all minority religions; the legislature is bound to favor some and harm others. Again, though, absent clear proof that this is happening, the default position should be to permit legislative accommodation of minority religions (as well as other, nonreligious communities), for allowing accommodations will advance the cause of religious pluralism, while forbidding them will leave all minority religions subject to the sweeping dictates of general legislation enacted often in ignorance of the impact on those religions. (We should also police legislation to ensure nondiscrimination among minority religions, to the extent possible.)

The accommodation cases have proved difficult for an additional reason. Unlike the exemptions cases, where it is almost always apparent that a law favored by the majority has harmed, inadvertently, a minority community, some laws supported as accommodations of religion do not lift burdens on minority religions, but rather help the majority advance its own religious cause. For example, organized prayer in public schools and government sponsored religious symbols have sometimes been defended as "accommodations" of religion. Indeed, the word "accommodation" could be used, reasonably within the English language, to describe any law that makes the practice of religion easier. But we must maintain the line between the majority's using legislation openly to advance its religious ends (which threatens the goal of religious pluralism) and the majority's using legislation to ease burdens on minority groups, religious or otherwise.

B. Cases that Should be Hard

Legislation that is advanced for predominant, expressly religious purposes, and government sponsorship of religious symbols may be seen as the flip-side of judicial exemptions and legislative accommodations. The former two types of case threaten religious pluralism because they involve majoritarian capture of the legislative process, at the expense of religious minorities. The latter two types of case advance religious pluralism because they involve governmental solicitude toward burdened minority religions. All four types of case should be considered easy. The majority does not need the help of government to thrive, and its use of government to advance its religious agenda, especially when this is done openly (as when expressly religious arguments are advanced for law or when government endorses or supports religious symbols); signals the minorities that church and government have begun merging, and since it is not the minorities’ church, it cannot now be fully their government. When government lifts burdens on minority religions, through either judicial exemptions or legislative accommodations, these problems do not exist.

Funding cases, on the contrary, are hard, precisely because it is unclear whether the laws in question primarily advance the majority’s religious agenda or primarily assist in the cause of religious pluralism. A law that funds private, religious schools, might in some jurisdictions be a way for the majority to opt out of funding public schools and funnel most of those tax dollars into the majority’s preferred private, religious schools. In other jurisdictions, such a law might primarily benefit minority religions, or might equally benefit all religions. The best test, perhaps, would be a case by case empirical approach that would ensure against government funds flowing primarily to majoritarian religious institutions, but that would permit funding of private, religious schools to advance the cause of religious pluralism.

Unfortunately, in this setting a further problem arises. For many citizens, channeling tax dollars to religious institutions constitutes a brand of coercion, and raises, perhaps, a free exercise clause problem. This concern is present even if one’s own religious institution is benefited; so long as tax dollars are channeled to at least one institution other than one’s own, coercion can be raised as a concern. (Some might also object that even their own religious institution should not be supported through governmental coercion, but I leave that argument aside.) The coercion-based objection to even equal government funding of religious institutions is deeply rooted in the American experience. If the taxation in question were meant to support the majority’s religious institutions only or primarily, then the establishment clause would be violated (and we would
not have to address the free exercise clause claim). But the types of funding schemes most often advanced these days spread money widely among religious institutions, so the establishment clause argument weakens, but the free exercise objection remains. The objection is: It violates my religious liberty for the government to compel me to support your religion, even if my religion is supported as well. Religion should be a matter for private conscience and not for governmental intervention. If the government is acting to lift a burden from its own intervention (as in the exemptions or accommodation cases), then the burden-lifting is an appropriate counterweight. But absent such burden-lifting, governmental action that supports religion disrupts the voluntarist baseline of our religious tradition.

It is important to remember that this objection is not the one I have made throughout this essay. That is, it is not an objection based in the need to preserve multiple repositories of power, through the mechanism of religious pluralism and its attendant tools that prevent majoritarian tyranny and enable minority freedom. It is a different sort of objection, based in a thick conception of coercion that we do not normally adopt; after all, one cannot usually demand a tax refund when tax dollars are spent on a project one deems abhorrent to conscience. I cannot resolve here whether the voluntarist objection to government funding of religious institutions should carry the day.

C. Government Speech

So far I have discussed the need to fracture authority by depriving the religious majority of the power to use government to advance its doctrinal ends, while enabling government to make life easier for religious minorities. The irreducibility of our constitution, however, demands that fractured authority be deemed no more foundational than centralized authority. Otherwise, the people would have good reason to pledge their allegiance to self, or family, or religion, but not to the government that they share. As I argued in part I, our constitution no more countenances the Foundationalism of fractured power than it does the Foundationalism of centralized power. Accordingly, government has a legitimate role to play in competing for the allegiance of the people. In other words, government may seek to advance common goals and shared aspirations, while it permits individuals, families, and religious groups to foster separate rather than shared values. The establishment clause places a check on government’s role as the source of common ground, but apart from that check, government may use its power to persuade, even though its power to coerce is limited by the free speech and free exercise clauses, among other.
Thus, government may legitimately sponsor education and advance secular values in the public schools. Again, remember the package: Government must also allow private education to flourish, and there is a good argument that government may, if it chooses, help parents pay for such education. But a thriving public school system (a reality in some places only) helps to pull disparate communities together, and gives us all an opportunity to see what it is like to moderate sectarian values in the name of constructing an American people. True, public schools will often advance values favored by some and not others, and public schools will (in part because of the establishment clause) advance values sympathetic to some religions and not others. But so long as religious liberty is permitted to flourish in the private sector, we must accept that government will advocate ends with which we disagree, even with our tax dollars. To insist otherwise—to insist that government not act in a normatively sectarian fashion, or at least not in the public schools—is to privilege fractured power over the power of government as spokesperson for the collective. The antifoundationalism of our constitution, however, forbids such privileging.

D. Conclusion: Treating Religion as Special

It is hard to argue that religion is not a special subject matter for our constitution. That would require some fancy footwork around the opening clauses of the bill of rights. But increasingly scholars seek to assimilate religion to other sources of value, often in the name of equality. One group of scholars has pushed for allowing religious arguments in the lawmaking process, even if such arguments dominate and result in legislation.20 A central contention is that religious arguments are no more based on faith than is any other type of argument, and that they are no more inaccessible to nonbelievers than is any other type of argument. Those who want to advocate religious reasons for legislation must be treated equally, it is maintained, to those who want to advocate secular reasons for legislation. Other scholars have suggested that judicial exemptions should be awarded for both religious and secular conscience.21 If person A cannot obey a law because of her religion, and person B cannot obey a law because of her secular beliefs, the case for an exemption should be the same for both. These people should be treated equally, it is maintained.

The Irreducible Constitution

One of the most important underanalyzed issues in the religion clause literature is whether a contemporary view of equality requires that the above arguments be accepted, or, rather, whether a different understanding of religion in our constitutional tradition demands that they be rejected. In my view, the arguments are wrong, but to show that they are wrong, one would have to look at, among other things, how the framers viewed religion, how the Civil War amendments altered the constitutional value of equality, and how twentieth century developments in both liberty and equality jurisprudence have or have not rendered the plain language of the religion clauses less than what it seems.

But that is a project for another day. For today, I have tried to describe a view of our constitution that rejects its reduction to democracy or to rights, that insists instead that our constitution is irreducible by design, that our constitution rejects foundationalism and depends upon a constant tension between the collective will and the separate forces that continually threaten to pull the collective apart. It is only through such an ongoing battle for the allegiance of the people that the federation that is the United States of America can remain both strong and unique. And in the religion clauses, we have a paradigmatic example of our constitution's commitment to this ongoing struggle.