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Neutrality and the Good of Religious Freedom: An Appreciative Response to Professor Koppelman

Richard W. Garnett*

I.

It is an honor and a pleasure to have this opportunity to comment on the work of my friend and collaborator, Andy Koppelman.¹ He has, despite what he is quite comfortable telling me are my errors, been unfailingly generous to me—as a mentor, a conversation partner, and a tough, but constructive, critic. At a time when the work of the academy is often corrupted by low and mean-spirited partisanship, and the commitments and contributions of religious believers are regularly treated in universities with condescension, or worse, Professor Koppelman is a model not only of scholarly integrity, but also of broad-minded decency and fairness. Some are content to write and fret about civility and dialogue, but Andy “walks the walk,” understanding that—this side of Heaven, anyway—decent, intelligent people often disagree, in good faith, about things that matter.

I was fortunate, in the spring of 2011, to read closely and “workshop,” with a number of scholars,² Professor Koppelman’s forthcoming book,³ on

* Professor of Law and Associate Dean, University of Notre Dame. I am grateful to Professor Robert Cochran for his leadership and example, and for including me in the outstanding conference that was the occasion for this short response. All of us who are interested in the study of law and religion, and all of us who embrace (but also struggle with) the challenge of integrating the lawyer’s vocation with religious faith, owe a debt of thanks to Professor Cochran. I also thank Professor Andrew Koppelman for his friendship and for our many conversations, from which I have learned a great deal, and Paul Horwitz, Steven Smith, Michael Perry, Nelson Tebbe, and Chad Flanders for reading and improving this response. And, I appreciate very much the patience of Nicole Rodger and her colleagues on the *Pepperdine Law Review* for their patience and assistance. This is a response to Andrew Koppelman’s *And I Don’t Care What It Is: Religious Neutrality in American Law*, 39 PEPP. L. REV. 1115 (2013), and a part of Pepperdine University School of Law’s February 2012 conference entitled, *The Competing Claims of Law and Religion: Who Should Influence Whom?*

1. See FIRST AMENDMENT STORIES (Richard W. Garnett & Andrew Koppelman eds., 2012).

2. The workshop was organized by Professor Michael Perry and sponsored by The Center for the Study of Law and Religion’s Roundtable on New Books in Morality, Religion, and Law.

which his paper in this volume is based.⁴ And, I can confidently report that the book is first-rate. Koppelman has synthesized—not merely collected and packaged—years of work and dozens of projects, and produced a valuable description, diagnosis, and evaluation of American case law, thinking, and practice regarding religious freedom and church-state relations. Our views and positions are not the same, but I admire his accomplishment.

In this brief response, I will highlight just a few aspects of Koppelman’s argument and project that I think are especially strong and important. I will also mention, without elaboration, a few places where we might part company. And then, in keeping with the longstanding practice of “respondents,” I will exploit my invitation and impose on readers an argument—or perhaps just a suggestion—of my own.

II.

For starters, I appreciate Professor Koppelman’s reminder that, maybe, things are not so bad. Yes, it is true that the Court often makes a mess of things, certain Justices are prone to cringe-inducing displays of unwarranted self-confidence, and the threats to religious freedom, at home and abroad, are real. Still, we have, as Professor Koppelman notes, “been unusually successful in dealing with religious diversity”⁵ and, despite the fair and ample criticism directed at our First Amendment case law, it strikes me that our courts—if not always our administrators and elected officials—are “muddling through” reasonably well: Our judicial doctrines permit reasonable cooperation—like school voucher programs—between governments and religious institutions;⁶ they protect (with some exceptions) private religious speech in public places⁷ and prohibit discriminatory regulation of religious practices;⁸ they allow (even if they do not require) exemptions and other accommodations for religious believers and religiously motivated conduct;⁹ and—as was confirmed by unanimous decision in the *Hosanna-Tabor* case—they recognize the freedom of religious communities to decide religious questions for themselves.¹⁰

3. ANDREW KOPPELMAN, *RELIGIOUS NEUTRALITY IN AMERICAN LAW: AN ANALYSIS AND DEFENSE* (forthcoming 2012).

4. See Andrew Koppelman, *And I Don’t Care What It Is: Religious Neutrality in American Law*, 39 PEPP. L. REV. 1115 (2013).

5. *Id.* at 1115–16.

6. See, e.g., *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002).

7. See, e.g., *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753 (1995).

8. See, e.g., *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993).

9. See, e.g., *Cutter v. Wilkinson*, 544 U.S. 709 (2005).

10. See, e.g., *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694 (2012).

To be sure, things aren't perfect. There are some aspects of our religious freedom law that might make us roll or avert our eyes,¹¹ and there are troubling signs—or reminders, perhaps—that our governments and regulators are tempted to regard religious liberty more as an inconvenience than a fundamental human right. Nevertheless, I do think that Koppelman is right: it could be worse, and there is no shame in being happy that it is not.

There are many other sound and welcome points, claims, and observations in Koppelman's paper (and in his book). He correctly criticizes and refutes those "radical secularists" who regard religion as "toxic and valueless" and who seem bent on its "eradication . . . from public life."¹² He is right that the Constitution does permit—indeed, it invites—the accommodation of religion. Such accommodation, in other words—such special treatment of religion—does not violate the prohibition on religious establishments and is, instead, in accord with what Justice Douglas was right to call "the best of our traditions."¹³ Koppelman helpfully amends John Rawls's call for "civic friendship" with the reminder that the "path to actual civic friendship" is not, in the real world, aided by rules of engagement that require the bracketing or translating of "comprehensive views";¹⁴ the better way, instead, is to "tell each other what we [really] think and talk about it."¹⁵ He is wise to urge readers not to overstate or obsess over the difficulties involved in "defining" religion because there is no single definition. Instead, "[w]e know it when we see it."¹⁶ And he is right that First Amendment doctrine, to the extent it contains a judicially enforceable "secular purpose" requirement, should focus on legislative outputs—that is, on what officials actually do and say—rather than on inputs, including the supposed motives of legislators or religious commitments of voters.¹⁷ After all, what matters is not (or should not be) who supported a particular measure and why, but whether the measure itself exceeds the power constitutionally granted to the government or crosses a boundary constitutionally imposed on the exercise of that power.¹⁸

11. See, e.g., *Lynch v. Donnelly*, 465 U.S. 668 (1984).

12. Koppelman, *supra* note 4, at 1115–16.

13. *Zorach v. Clauson*, 343 U.S. 306, 314 (1952).

14. Koppelman, *supra* note 4, at 1125–26.

15. *Id.* at 1133.

16. *Id.* at 1122.

17. *Id.* at 1133–36.

18. I realize that it is thought by many that the reasons why those (or some or many of those) who supported a particular measure are highly relevant to the task of identifying such boundaries, but I am suggesting here that they should not be.

If only to better play the role of respondent, I should also admit that some of Koppelman's arguments strike me as incomplete, or less than compelling. First, he accepts (even if he is reluctant to actually defend) what appears to be the current Court's settlement of the "ceremonial deism" question, namely the "general rule . . . that old forms of deism are grandfathered into constitutionality, but newer ones are unconstitutional."¹⁹ According to this rule, the "old 1950s civil religion" is "immune from further tinkering;" it is "secure . . . in a walled city, safe but trapped."²⁰ It is not clear to me what is coherent—or, for that matter, "neutral"—about this settlement (even if we think it is, on balance, attractively workable). Why is the American "ideal of religious neutrality"²¹ unthreatened by an older Ten Commandments monument on the grounds of the Texas state capitol, but vexed by a newer montage—which includes the Ten Commandments—on the walls of a county courthouse?²²

Koppelman's view, it seems, is that the message sent—the "social meaning" conveyed—in these two cases is different. The former display represented and expressed a once-shared social consensus, and leaving it alone simply leaves in place the status quo. However, "[n]ew sponsorship of religious practices is far more likely to represent a contemporaneous effort to intervene in a live religious controversy."²³ That is, the social meaning of newer religious symbols and expression is more likely to be one of division, conflict, and exclusion; older symbols, and their toleration, "say" something different.

There is something to this. Given all the givens, the putting up of a Ten Commandments display in a courthouse today probably communicates—and is probably intended to communicate—something different than did the perhaps unthinking and reflexive display of a similar monument sixty years ago. It probably does represent, in a way that the older display did not, a kind of "pushing back." Still, it seems to me that—as is often the case in law and policy debates when "neutrality" is invoked—there remains the question of the baseline, and the problem of the one-way ratchet. Assuming that newer displays or more recent symbolic expression are, and are perceived as, a kind of "pushing back" against what some reasonably regard as an excessive move toward the so-called "naked public square," it matters whether the move is correctly so regarded and if so, whether the "pushing back" might be justified. The "baseline" that the current settlement

19. *Id.* at 1122.

20. *Id.* at 1124.

21. *Id.* at 1115.

22. Compare *Van Orden v. Perry*, 545 U.S. 677 (2005), with *McCreary Cnty. v. ACLU of Ky.*, 545 U.S. 844 (2005).

23. Koppelman, *supra* note 4, at 1123.

“grandfathers,” in other words, might be more attractive if it really is the “old 1950s civil religion” than if it is, say, the overly strict separationism of the 1970s. It *could* be—to borrow Koppelman’s wonderful metaphor—that official or public silence about religion is like a “rest in music” that “highlights the importance of what is not articulated.”²⁴ Sometimes, though, the silence might be more like the ache and the emptiness left behind when something valuable has been lost or taken, or when someone loved has left—like the hole left in the ground when a flowering plant is uprooted and potted.

Relatedly, Koppelman appears to accept—though, once again, without great enthusiasm—Justice O’Connor’s “history and ubiquity” excuse for the words “under God” in the Pledge of Allegiance.²⁵ Like him, I am not “eager to defend” a “casual identification of God with the nation,”²⁶ but I do not believe the Pledge necessarily proposes such an identification. As I see it, it is not that “under God” signifies nothing, or nothing very religious. It is, instead, that it makes a very important political theology claim—one that is not only permissible, but indispensable, for the government to make. As others have put it, the Pledge affirms the “penultimacy” of the state.²⁷ What is affirmed in the Pledge is not (or need not be) that America is especially Christian, religious, or virtuous, but instead that America is a country that—to our credit—asks only limited loyalty from its citizens.²⁸ Our “nation” is “one,” but it is not everything or the only thing; its claims are relativized, and put beneath—“under”—something else, something ultimate—“God.” If this is a “religious truth,”²⁹ then it seems to me that it is one that the government may and should affirm—one concerning which it need not be

24. *Id.* at 1137.

25. *Id.* at 1122.

26. *Id.*

27. See Frederick Mark Gedicks, *Towards a Defensible Free Exercise Doctrine*, 68 GEO. WASH. L. REV. 925, 951 (2000); Robert W. Tuttle, *How Firm a Foundation? Protecting Religious Land Uses After Boerne*, 68 GEO. WASH. L. REV. 861, 923 (2000).

28. I owe this insight to Professor Thomas C. Berg. See, e.g., Thomas C. Berg, *The Pledge of Allegiance and the Limited State*, 8 TEX. REV. L. & POL. 41 (2003).

29. As Chad Flanders quite correctly observed to me, in correspondence, claims about the penultimacy of the state do not have to have a theological cast. My point here is simply that *even if* we characterize “under God” in the Pledge as stating a “religious” truth, we can (and, I think, should) defend its presence in the Pledge on the ground that this particular “religious” truth is one that even a government like ours may affirm, rather than on the ground that enough time has passed since its addition to the text.

“neutral”—and not merely because it has been affirming it long enough to launder its religious content.³⁰

In addition, I think that Koppelman could say more about judicial review, and the role of judges in policing and maintaining the features of “American religious neutrality.” Protecting and respecting the American ideal, Professor Koppelman argues, requires distinguishing the respective social meanings of older and newer displays, symbols, enactments, and proclamations. It requires identifying the “point of view” expressed by a law, and the purposes served by it, to make sure it is “secular.” We are told that because governments “may not take a position on religious truth,” “courts have to assess the plausibility of whatever secular purposes are proffered by the state.”³¹ But, putting aside for now doubts we might well have about the existence of distinctions between law’s “secular,” “moral,” “religious,” and other purposes,³² it seems at the very least debatable whether courts, and litigation, over time, are more likely than politically accountable actors to identify them in a way that serves well the American ideal. If we think—as both Professor Koppelman and I do—that our approach to religion and public life questions should be context-sensitive, then why shouldn’t we say something like: “These questions are hard; answering them requires balancing and trade-offs; there are many values at stake, and sometimes in tension, so the best way to answer these questions—with a few exceptions—is through politics”? To say this is not, of course, to imagine that there is not a lot at stake, or that the right answers do not matter (just because they are difficult to find); it is simply to confess that, in this area, “judicially manageable standards” are hard to come by and so, perhaps, we should admit what Professor Fallon has called a “permissible disparity between constitutional ideals and [judicially enforceable] implementing doctrine.”³³

30. Cf. Michael J. Perry, *What Do the Free Exercise and Nonestablishment Norms Forbid? Reflections on the Constitutional Law of Religious Freedom*, 1 U. ST. THOMAS L.J. 549, 577 (2003); PAUL HORWITZ, *THE AGNOSTIC AGE: LAW, RELIGION, AND THE CONSTITUTION* 233–34, 280 (2011) (characterizing the Pledge as an example of (unconstitutional) “constitutional easements”).

31. Koppelman, *supra* note 4, at 1136.

32. Cf. Steven D. Smith, *The “Secular,” the “Religious,” and the “Moral”: What Are We Talking About?*, 36 WAKE FOREST L. REV. 487 (2001).

33. Richard H. Fallon, Jr., *Judicially Manageable Standards and Constitutional Meaning*, 119 HARV. L. REV. 1274, 1332 (2006). See generally Richard W. Garnett, *Judicial Enforcement of the Establishment Clause*, 25 CONST. COMMENT. 273 (2008). There is, I realize—as Nelson Tebbe reminded me—some tension between these suggestions, which call for radical changes in the courts’ methods and practices, and my appreciation, expressed above, for “Professor Koppelman’s reminder that, maybe, things are not so bad[.]” and so I should make it clear here that things *could* be better.

III.

Professor Koppelman's primary thesis is that "American religious neutrality is coherent and attractive."³⁴ One question is whether the regime he describes—a regime that, as I noted above, really is (in some ways) "coherent and attractive"—is actually "neutral," or is actually either the American regime or the "American ideal." My own impression is that the coherence and attractiveness of the regime Koppelman proposes and defends depends substantially on its not being—at least, not entirely—"neutral." This regime is one of neutrality "properly understood"³⁵ or, it turns out, of non-neutrality. The government is not required, by Koppelman's "proper" understanding of neutrality, to be religion-blind or indifferent to religion, and it is certainly not required to be leery of or hostile to it. Instead, "American religious neutrality" permits governments and officials to regard religion—at a high level of generality—as a good thing, and to act accordingly.³⁶ The state is to be "silent about religious truth,"³⁷ but this silence may be accompanied or complemented by policies—like religion-based accommodations from generally applicable laws—that both reflect and communicate the view that "religion as such . . . [is] valuable."³⁸

Maybe one way to put the matter is to say that the American religious liberty regime aims to be "neutral" with respect to the truth of (most) religious claims precisely because it is *not* "neutral"—it does not aim to be neutral, it should not be neutral—regarding the good of *religious freedom*. Religious freedom, in the American tradition, is not what results from the operationalization in law of hostility towards religion. It is not (only) what results from a program of conflict-avoidance or division-dampening. It is not merely the product of those compromises that were necessary to secure the ratification of the original Constitution. It is, instead, a valuable and necessary feature of any attractive legal regime because it reflects, promotes, and helps to constitute human flourishing. So, and again, the state should remain "neutral" with respect to most religious questions—primarily because the resolution of such questions is outside the jurisdiction, and not just the competence, of civil authorities—but it may and should affirm

34. Koppelman, *supra* note 4, at 1115.

35. *Id.* at 1119.

36. See John H. Garvey, *An Anti-Liberal Argument for Religious Freedom*, 7 J. CONTEMP. LEGAL ISSUES 275, 283 (1996).

37. Koppelman, *supra* note 4, at 1137.

38. *Id.* at 1121.

enthusiastically that *religious freedom* is a good thing that should be protected and nurtured in law and policy.

To flesh out this thought, I will use the Second Vatican Council's landmark *Dignitatis Humanae: Declaration on Religious Liberty*.³⁹ But first, recall that for centuries, it was widely thought that the “secular” authority—the civil magistrate—was, as such, charged by God with the *cura religionis*, the direct care of true religion itself.⁴⁰ On this view, it was not the obligation of a “secular” authority (it would probably be anachronistic to use the term “state”), because it was secular, to keep itself somehow “separate” from “religion.”⁴¹ It was, instead, the sacred obligation of the political authority to “defend the faith,” even as it respected the appropriate (but usually contested) domain and independence of religious authority.⁴²

This way of thinking has, of course, been abandoned in the West, including in those nations that retain what John Adams might have called “mild and equitable” religious establishments.⁴³ It has also been abandoned by most religious communities and authorities, including the one for which, historically speaking, it was most relevant—the Roman Catholic Church. In the *Declaration*, the Council made it clear that the government's function with respect to religion is “secular”: its task is not to care directly for the true religion, but is, instead—in John Courtney Murray's words— “confined to a care of the free exercise of religion within society—a care therefore of the freedom of the Church and of the freedom of the person in religious affairs.”⁴⁴ This task is, again, “secular,” because “freedom in society [is] a secular value—the sort of value that government can protect and foster by the instrument of law.”⁴⁵

Accordingly, the *Declaration* affirms that “constitutional limits should be set to the powers of government,” so as to protect “the dignity of the human person” and the “right to religious freedom.”⁴⁶ Government should “safeguard . . . the religious freedom of all its citizens . . . by just laws and other means,” and protect the “equality of citizens before the law”; it should

39. SECOND VATICAN ECUMENICAL COUNCIL, DIGNITATIS HUMANAЕ [DECLARATION ON RELIGIOUS LIBERTY] (1965) [hereinafter DIGNITATIS HUMANAЕ], available at http://www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vat-ii_decl_19651207_dignitatis-humanae_en.html.

40. John Courtney Murray, *The Declaration on Religious Freedom, in 15 WAR, POVERTY, FREEDOM: THE CHRISTIAN RESPONSE* 3, 9 (Kevin A. Lynch ed., 1966).

41. *Id.*

42. Koppelman, *supra* note 4, at 1135.

43. See John Witte, Jr., “A Most Mild and Equitable Establishment of Religion”: *John Adams and the Massachusetts Experiment*, 41 J. CHURCH & ST. 213, 214 (1999).

44. Murray, *supra* note 40, at 9.

45. *Id.*

46. DIGNITATIS HUMANAЕ, *supra* note 39, ¶¶ 1, 2.

also “help create conditions favorable to the fostering of religious life”⁴⁷ and “take account of the religious life of the citizenry and show it favor.”⁴⁸

This stance is not “neutral” toward religious freedom, although it is scrupulously respectful of the human right to freedom in religious matters. What is envisioned is more, it seems, than Professor Koppelman’s evocative reference to a “rest in music,” to “silence [that] highlights the importance of what is not articulated.”⁴⁹ And yet, it seems to me that the “healthy secularity” envisioned in the *Declaration*—one that respects the distinction between religious and political authority, and the autonomy of the political sphere, even as it affirms the “religious” truth that all persons are under a duty, and therefore have the right, to “seek the truth in matters religious”⁵⁰—is consistent with the American tradition and ideal, even with the ideal of “religious neutrality,” properly understood.

How might this work in practice? How might secular, political authorities “care” for “the freedom of the person” in religious affairs; “create conditions favorable to the fostering of religious life”; and “take account of the religious life of the citizenry and show it favor”?⁵¹ Is it possible to do so, consistent with the American ideal of “religious neutrality,” “properly understood”? Part of the answer is easy: governments “foster[] . . . religious life”⁵² by not obstructing or unduly limiting it, and by enforcing (legislatively, judicially, and in the course of administration and regulation) the Constitution’s no-establishment rule and antidiscrimination norm. I am interested, though, in something more. Another part of the answer seems almost as obvious: governments should broadly and generously accommodate religiously motivated activity, through exemptions and otherwise, even when it does not have to. Again, however, I wonder if there isn’t something more. What other “conditions” are favorable to religious freedom, and in what other ways (if any) may governments, consistent with the American idea, “show . . . favor” to “the religious life of the citizenry”?⁵³ Remember, the question is not whether governments like ours are still charged with the *cura religionis*—the care of the true religion. They are not. But they could be—I think they are—charged with the care of *religious freedom*. How might they fulfill this charge?

47. *Id.* ¶ 6.

48. *Id.* ¶ 3.

49. Koppelman, *supra* note 4, at 1137.

50. *DIGNITATIS HUMANAE*, *supra* note 39, ¶ 3.

51. *Id.* §§ 1, 3, 6.

52. *Id.* ¶ 6.

53. *Id.* ¶ 3.

As I have discussed in more detail elsewhere, governments should attend to and nurture what Professor Balkin has called, in another context, the “infrastructure” of religious freedom. He has suggested, with respect to freedom of speech, that it requires “more than mere absence of government censorship or prohibition to thrive; [it] also require[s] institutions, practices and technological structures that foster and promote [it].”⁵⁴ That is, certain institutions—newspapers, political parties, interest groups, libraries, universities and so on—play an important structural, or “infrastructural,” role in clearing out and protecting the civil-society space within which the freedom of speech can be well-exercised. The same thing can be said about religious freedom. Just as “[f]reedom of speech . . . depends on an infrastructure of free expression,”⁵⁵ freedom of religion depends on an infrastructure of, well, religious freedom. Part of this infrastructure—in addition to its more obvious components, like open and functioning courts, legal accommodations, thriving communications networks, etc.—is a web of independent, thriving, distinctive, self-governing (in their appropriate spheres) institutions. Thus, and for example, the recent *Hosanna-Tabor* decision can be seen as a welcome judicial reinforcement of religious freedom’s infrastructure, of the conditions that are useful, or even necessary, for its health. It turns out that the political community can protect religious freedom appropriately only if there are at work in society free associations and authorities that are not merely political.

54. Jack M. Balkin, *The Infrastructure of Religious Freedom*, BALKINIZATION (May 5, 2007, 3:15 PM), <http://balkin.blogspot.com/2007/05/infrastructure-of-religious-freedom.html>.

55. Jack M. Balkin, *Two Ideas for Access to Knowledge—The Infrastructure of Free Expression and Margins of Appreciation*, BALKINIZATION (Apr. 30, 2007, 8:59 PM), <http://balkin.blogspot.com/2007/04/two-ideas-for-access-to-knowledge.html>.