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Theorists, Get Over Yourselves: A Response to Steven D. Smith

Andrew Koppelman*

Steven D. Smith is one of our most powerful critics of contemporary liberal theory. He has an acute sense of the hidden flaws and gaps in contemporary conventional wisdom. Even those who disagree must, if they are honest, carefully consider his arguments.

In his most recent work, he claims that in our political culture the case for the specific protection of religious liberty—as opposed to liberty under other descriptions—has been undermined.¹ As a consequence, he fears that, although some freedoms will survive, freedom of religion as such may cease to exist.²

Even if his argument is sound, his fears are misplaced.

I just wrote a book defending the specifically American practice of singling out religion for special protection,³ so I am unlikely to be persuaded by a claim that the thing cannot be done. Stipulate, however, that my argument there fails, and that there is no coherent theoretical case for special treatment of religion. It hardly follows that the law's special treatment of religion is in any danger.

Smith is right that there is a major school of legal and political theory that opposes special treatment.⁴ But he writes as if those people have already won, or are certain to win, in American politics (as opposed to the academy, where their view has indeed become hegemonic).⁵ Their view was

* John Paul Stevens Professor of Law and Professor of Political Science, Northwestern University. Thanks to Steve Smith for years of conversations on these issues, which have been so much fun that it would be a little sad if either of us finally managed to persuade the other.

1. See Steven D. Smith, *The Last Chapter?*, 41 PEPP. L. REV. 903 (2014).

2. *Id.* at 905.

3. ANDREW KOPPELMAN, *DEFENDING AMERICAN RELIGIOUS NEUTRALITY* (2013).

4. Smith, *The Last Chapter*, *supra* note 1, at 904.

5. It is still contested by some. See, e.g., Andrew Koppelman, *Religion's Specialized Specialness*, 79 U. CHI. L. REV. (DIALOGUE) 71 (2013).

unanimously rejected by the Supreme Court in *Hosanna-Tabor*.⁶ The modern American law of religion is predicated on the premise that religion—understood very abstractly—is a good thing.⁷

Smith thinks that secularism erodes religious freedom.⁸ The religious justification for disestablishment destroys itself, because disestablishment cannot act on its own justification.⁹ It rejects its own rationales.

Secularism, in *some* of its formulations, generates this paradox. Those formulations are attractive to American academics who—for sociological reasons having to do with modern American politics—are suspicious of special treatment for religion and are drawn toward a neutralitarian liberalism.¹⁰ But that is only one possible understanding of secularism.¹¹ It is not the understanding that has prevailed in American law.

Smith thinks that there is, on the other hand, a fundamental conflict between religion and modern secular egalitarianism:

Traditional faiths typically teach that some people’s deeply held beliefs are true while others are false. Often they will teach that some people are saved and others are not, and that some ways of living are acceptable to God while others are abhorrent. In these ways, traditional religion in its very essence will often be a scandal and an offense against the whole ethos of contemporary liberal egalitarianism, with its commitment to “equal respect” for all persons and all ways of life or conceptions of “the good.”¹²

What makes the conflict irreconcilable is not merely the demand for formal equality, or even equality in the marketplace, enforced by

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

7. KOPPELMAN, *supra* note 3.

8. Smith, *The Last Chapter?*, *supra* note 1, at 906.

9. *Id.* at 912–17.

10. KOPPELMAN, *supra* note 3, 150–51.

11. There is, of course, an enormous variety of possible understandings of secularism. See TALAL ASAD, *FORMATIONS OF THE SECULAR: CHRISTIANITY, ISLAM, MODERNITY* (2003); COMPARATIVE SECULARISMS IN A GLOBAL AGE (Linell E. Cady & Elizabeth Shakman Hurd eds., 2010); AHMET T. KURU, *SECULARISM AND STATE POLICIES TOWARD RELIGION: THE UNITED STATES, FRANCE, AND TURKEY* (2009); ELIZABETH SHAKMAN HURD, *THE POLITICS OF SECULARISM IN INTERNATIONAL RELATIONS* (2008); Charles Taylor, *Modes of Secularism*, in *SECULARISM AND ITS CRITICS* 33 (Rajeev Bhargava ed., 1998); .

12. Smith, *The Last Chapter?*, *supra* note 1, at 918.

antidiscrimination law.¹³ It is that secular egalitarianism “is not content to regulate outward conduct, but instead seeks to penetrate into hearts and minds.”¹⁴

Smith is right. Liberalism has always been concerned with citizens’ character.¹⁵ Good liberal citizens must be able to distinguish reasonable, inevitable disagreements from those that reflect prejudice or error.¹⁶ In order to do this, they must develop a certain measure of ethical autonomy.¹⁷ In my own work on antidiscrimination law, I have argued that the law’s goal cannot be merely to regulate behavior.¹⁸ A racist culture will not even be able to deliver the minimal Nozickian goal of equal protection of citizens’ lives, liberty, and property.¹⁹ Liberalism must aim to transform culture.

Specifically with respect to gay people, the aspects of culture that demand transformation are the tendencies to regard them as vile contaminants, whose welfare counts for nothing, who are appropriate targets of violence.²⁰ Those tendencies have been deeply entrenched in American culture.²¹ But the effort to eradicate them is not in any tension with Christianity, which equally condemns them.²²

A standard—but unfair—rhetorical move within the gay rights movement is to treat all its adversaries as mindless bigots (when only some of them are).²³ But that move is not a misdescription of religion so much as a misdescription of conservative views about sexuality. Fair or unfair, it is a move that is increasingly successful. Its success makes it less relevant to the

13. *See id.* at 921–22.

14. *Id.* at 920.

15. *See* PETER BERKOWITZ, *VIRTUE AND THE MAKING OF MODERN LIBERALISM* (2000); STEPHEN MACEDO, *LIBERAL VIRTUES: CITIZENSHIP, VIRTUE, AND COMMUNITY IN LIBERAL CONSTITUTIONALISM* (1990).

16. EAMONN CALLAN, *CREATING CITIZENS: POLITICAL EDUCATION AND LIBERAL DEMOCRACY* 24–33 (1997).

17. *See id.* at 39–42, 214–20.

18. *See* ANDREW KOPPELMAN, *ANTIDISCRIMINATION LAW & SOCIAL EQUALITY* (1996).

19. *See id.* at 181–90.

20. *Id.* at 164–65.

21. *Id.* at 171.

22. *Cf.* Smith, *The Last Chapter?*, *supra* note 1, at 919–20.

23. This can take extreme forms, such as Chief Judge Walker’s finding of fact in the Proposition 8 case (which Smith quotes) that “religious *beliefs* that gay and lesbian relationships are [. . .] inferior to heterosexual relationships harm gays and lesbians.” Smith, *The Last Chapter?*, *supra* note 1, at 921 (quoting *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 985 (N.D. Cal. 2010) (emphasis added)).

status of religion, because increasingly, even very religious people are not troubled by gay rights. To the extent that suspicion of religion arises out of the gay rights struggle, that suspicion seems likely to abate as that struggle does.²⁴

The disrespect that religious exclusivism engenders is not news. Many American religions have embraced, and continue to embrace, doctrines of exclusive salvation, and these have not hamstrung American liberal democracy.²⁵ America has long been a counterexample to Rousseau's dictum that "[i]t is impossible to live in peace with people whom one believes are damned."²⁶ Liberalism characteristically is determined to live with such tensions. The standard free speech casebook is a catalogue of illiberal speakers who, nonetheless, are allowed to proclaim their views.

There are, undoubtedly, incoherences in the standard story that Americans tell themselves about religious liberty.²⁷ Smith thinks if something is intellectually incoherent, it is doomed.²⁸ But the incoherence of a practice's justification is no basis for predicting that it cannot continue. All minds are sometimes inconsistent, because absolute consistency involves computational complexity that exceeds the capacity of any existing mind.²⁹ Human beings live with inconsistency all the time. Diarmaid MacCulloch observed that the Protestant Reformation had its deepest root in the doctrine of predestination (developed a millennium earlier by Augustine)—a doctrine in deep tension with obedience to the Catholic Church (which Augustine inconsistently also embraced).³⁰ The inconsistency endured for a thousand years before it began making trouble in practice. Maybe American practice cannot be justified. But it is likely to persist, whatever the scholars do.

Smith's real concern is not merely inconsistency. He thinks that secularism leads us to a condition in which we are fundamentally lost. He thinks that our deepest moral convictions depend for "their sense and substance" on "notions such as those that animated premodern moral

24. ROBERT D. PUTNAM & DAVID E. CAMPBELL, *AMERICAN GRACE: HOW RELIGION DIVIDES AND UNITES US* 370, 414–18 (2010).

25. See Smith, *The Last Chapter?*, *supra* note 1, at 922.

26. JEAN-JACQUES ROUSSEAU, *ON THE SOCIAL CONTRACT: WITH GENEVA MANUSCRIPT AND POLITICAL ECONOMY* 131 (Roger D. Masters ed., Judith R. Masters trans., 1978).

27. See Smith, *The Last Chapter?*, *supra* note 1, at 923–24.

28. See *id.*

29. See CHRISTOPHER CHERNIAK, *MINIMAL RATIONALITY* (1986).

30. DIARMAID MACCULLOCH, *THE REFORMATION* 103–08 (2003).

discourse— notions about a purposive cosmos, or a teleological nature stocked with Aristotelian ‘final causes,’ or a providential design.’³¹ This incoherence, he thinks, begets moral disintegration.³² The soundness of this diagnosis is a huge question, but the comparative claim about the relative weaknesses of secularism is unsound. The question, whether moral discourse can make sense without implicitly depending on such notions, is, of course, an object of perennial contestation. Smith’s solution merely displaces the lack of foundations to a different level, because there is no way to demonstrate a purposive cosmos, providential design, etc. He thinks it is “intellectually irresponsible” to stipulate the equal worth of persons—one of the core commitments of liberalism—without some deeper foundation on which that commitment rests.³³ But he has the same problem. Why is it not equally irresponsible to stipulate God, whose existence is hardly self-evident?³⁴

Consistency matters. The efforts of political theorists to devise coherent accounts of our practice and to imagine better ways of realizing our ideals are valuable. It is good for a society to be awake, to know what it is doing and why. Keynes was right when he observed long ago that political theory in some sense rules the world.³⁵ That is why I wrote *Defending American Religious Neutrality*. Sometimes, if you can tell people a coherent story about what they are already committed to, their behavior will change. Culture wars are a struggle among elites,³⁶ and elite opinion matters.

31. STEVEN D. SMITH, *THE DISENCHANTMENT OF SECULAR DISCOURSE* 26 (2010).

32. *See id.* at 26–27.

33. *See* Smith, *The Last Chapter?*, *supra* note 1, at 913–14.

34. *See* Andrew Koppelman, *Naked Strong Evaluation*, *DISSENT*, Winter 2009, at 105.

35.

Practical men, who believe themselves to be quite exempt from any intellectual influences, are usually the slaves of some defunct economist. Madmen in authority, who hear voices in the air, are distilling their frenzy from some academic scribbler of a few years back. I am sure that the power of vested interests is vastly exaggerated compared with the gradual encroachment of ideas.

JOHN MAYNARD KEYNES, *THE GENERAL THEORY OF EMPLOYMENT, INTEREST AND MONEY* 383 (1936).

36. This is one of the few points of convergence between James Davison Hunter and Alan Wolfe in *IS THERE A CULTURE WAR?: A DIALOGUE ON VALUES AND AMERICAN PUBLIC LIFE* (2006). There are, of course, deep divides within the electorate, but those concern race as much as religion. *See id.* at 93. The culture wars in politics are a battle among white voters who hold a diminishing share of the electorate. *See* ALAN I. ABRAMOWITZ, *THE POLARIZED PUBLIC?: WHY AMERICAN GOVERNMENT IS SO DYSFUNCTIONAL* 18–35, 62–82 (2012).

But the big difference between the theorists and those they influence is that most people are not troubled by theoretical difficulties. Smith's gloom overstates the efficacy of these theoretical debates. If we theorists decide that the culture will automatically dance to our tune, then we need to get over ourselves. We do not matter *that* much.