

THE RELIGIOUS FREEDOM WALTZ: GOING FORWARD WHILE MOVING BACK

*Audra L. Savage**

Defending American Religious Neutrality. Andrew Koppelman. Harvard University Press, 2013. 243 pp. \$49.47. ISBN: 978-0-674-06646-5.

The Rise and Decline of American Religious Freedom. Steven D. Smith. Harvard University Press, 2014. \$35.96. ISBN: 978-0-674-72475-4.

Although religious freedom has the distinction as the “first freedom,” it is not first in terms of protected rights. Religious freedom is under attack and if not shielded from potential threats, this quintessential American right may be lost altogether. Or at least, this is what U.S. law professors Andrew Koppelman and Steven D. Smith would have one believe, according to books each professor recently published. Unfortunately, they are not exaggerating. Volumes of articles and tomes have been written questioning, critiquing and criticizing (and lamenting, blasting and ridiculing) the decisions of the U.S. Supreme Court adjudicating the religion clauses of the First Amendment, in general, and the Establishment Clause, in particular. The Court’s jurisprudence in this regard has been called everything from “unprincipled” to “a disaster” to “an unholy mess.”¹ The frustration with the Court in this area is not limited to the legal academy. It has spilled over into

*Audra L. Savage, Esq. is a candidate for the Doctor of Juridical Science (SJD) (expected May 2016) at Emory University School of Law and is resident in the Center for the Study of Law and Religion, where she received a Master in Laws (LLM) in December 2014. She received her Juris Doctor (JD) from Columbia University School of Law in May 2004.

1. See Jonathan Turley, Blog, [An Unholy Mess: Supreme Court Votes 5-4 in Favor of Christian Prayers at Local Council Meetings](#), May 6, 2014.

public discourse as well, with discussions in social media and op-ed pieces nationwide, by experts, journalists, and the average citizen alike.

The most recent chapter in a long history of jurisprudential incoherence occurred last year when the Court decided the *Town of Greece v. Galloway*² case. In holding that prayer conducted as part of legislative sessions at any level of government was constitutionally permissible under the Establishment Clause, the Court issued five different opinions, advancing seven different theories in support of or against the decision. No theory received clear consensus. The town may have won the case, but many wondered if all Americans lost in the long run because of such a divisive decision by the Court. One of the central premises of the rule of law that shapes American society is stability and predictability. Many questioned whether the Court was eroding the rule of law—not by the decision it made, but by the multitude of theories it advanced for that decision.

The problem of instability and unpredictability may seem interesting from an intellectual standpoint—one that is fun to debate with colleagues and friends in a casual setting or in the comment section of a blog—but not a problem affecting the daily life of Americans. This is a short-sighted perspective, however. The inability for the Court to advance a coherent approach to the religion clauses leaves many areas of American society vulnerable to attack. For instance, the ability of religious organizations to govern their internal affairs without government interference, the ability of religious people to advance their religion openly through the enactment of laws, and the ability of religious people to practice their religion by not providing the services associated with same-sex marriage are all areas affected by the Court's decision-making with respect to the religion clauses.

Given the importance of Supreme Court decisions over Americans' daily lives, it is time for the Court to develop a consistent approach to Establishment Clause issues. Professors Koppelman and Smith each argue for a particular approach to address this quagmire. Each approach has merits. However, Smith offers the better argument as his theory provides a path forward for the Supreme Court using a method of adjudication the Court practiced prior to the mid-twentieth century. Koppelman's theory

2. 572 U.S. ___, 134 S.Ct. 1811 (2014).

has good substantive points and is attractive in terms of public discourse and law-making; however, it is premised on a somewhat flawed understanding of American history and is not developed enough to have practical importance.

According to Koppelman, religion is good (or, alternatively, a distinctive human good) and is therefore worthy of protection. American law has always offered protection to religion, according to Koppelman, by using the principle of neutrality. This good is under attack by “religious traditionalists” who believe neutrality is a fraud because the law necessarily involves substantive commitments, for every action has a normative component. The law does not go far enough in allowing religion in the public square. At the other end of the spectrum are “radical secularists” who view neutrality as flawed because it does not totally eradicate religion from the public square. Koppelman believes that both camps have an incomplete understanding of the character of neutrality, and once properly understood, they will both see the merits of neutrality and adopt it accordingly. The essence of neutrality, says Koppelman, is the inability of government to declare religious truth, which is to take a position on a live religious debate. The government may not declare any particular religious doctrine to be the true one or enact laws that clearly imply such a declaration. According to Koppelman, government can treat religion (defined at a high enough abstraction) as a good thing without deciding any issue of religious truth. The government should adopt this neutrality because it has the following advantages: 1) reduces civil strife caused by religious debate; 2) protects religion from corruption by government manipulation; 3) ensures that religious minorities are not oppressed; and 4) removes the government from an area of law-making in which it has no competence. The advantage of neutrality is its fluidity. It looks different depending on a particular time and circumstance. For this reason, neutrality in early America took the form of a generic Protestantism. Now, given the change in demographics and the rise of religious plurality, neutrality includes a broad definition of religion, one that can include a nonsectarian morality not based on “religion.”

Koppleman notes the neutrality doctrine in Supreme Court cases, beginning with the pivotal *Everson v. Board of Education*³ case of 1947, declaring the principle that the Establishment Clause

3. 330 U.S. 1 (1947).

is applicable to the states and not just the federal government (the incorporation principle), and the prohibition of government monetary aid in support of religion. In tracing the development of neutrality in American case law, he notes the development of the secular purpose test, where the Court considers whether a law on its face and as applied has a secular purpose, and not just a religious one. He supports this test because it maintains true neutrality—it ensures government is not declaring a religious truth. Removing this test would leave people vulnerable to violations of the Fourteenth Amendment, as historically many laws were enacted on religious grounds.

Supreme Court jurisprudence is in disarray, according to Koppelman, because some scholars and justices want to abandon neutrality (and by extension the secular purpose test) and instead adopt an approach where the government accepts and promotes religion (usually in a monotheistic form). This group adopts the traditionalists' belief that the state needs religion to provide real goods and moral resources, and therefore the government must rely upon and promote a contestable set of ideals, making neutrality impossible. This approach to reject neutrality and permit states to favor monotheistic religion over its rivals (an approach attributed to Justice Antonin Scalia) is, for Koppelman, a return to older, more primitive tendencies in American law and not a good development. He believes neutrality is the path forward. There is no need to go back.

Professor Smith's thesis centers on neutrality as well, but with a different meaning and outcome. Smith defines the essence of religious freedom as the freedom of the church and freedom of conscience (the "inner church"). He traces the American story surrounding these freedoms not to the venerated founders but to Christianity's early history during pagan Rome and its continued ascension in medieval Europe. He notes that the Enlightenment period did not define these concepts, as customarily believed, but was instead a conduit for Christianity in that it embraced the spirit of tolerance found in paganism, which in turn protected both the freedom of the church and conscience. This continued onto the American shores, where the founders instituted the Bill of Rights—not as a transformative expression of new rights, but as an attempt to maintain the status quo. The new national government would not enact laws affecting religion, preferring instead to leave such matters at the state level. The national government was thought to

lack jurisdiction over matters of religion and so the Bill of Rights made explicit what was already understood. Over time, as consensus built in support of the separation of church and state (due to the increase in religious pluralism), the First Amendment was seen to enshrine the idea of disestablishment of religion from the government. In this manner, the amendment transitioned from a statement on the jurisdiction of the national government to an affirmative commitment of the government to maintain a separation of church and state.

The golden age of religious liberty according to Smith was the time before *Everson* was decided when there was an “open contestation” between “providentialists,” who believe government should support one religion (Christianity) and allow others to grow, and “secularists,” who believe the government should remain detached and neutral towards religion. During this open contestation, government did not take a position between the two sides. Instead, the disagreements between the two sides were preserved and protected with both sides being constitutionally legitimate. Smith calls this period the “American settlement.” Cases were decided upon the set of understandings defining the country at a particular moment, called soft constitutional law. Under this regime, constitutional questions can be argued and different states and localities reach their own conclusions. Government does not take a position. Smith likens it to the marketplace of ideas in freedom of speech doctrine and the two-party system in politics. Each side is allowed to persuade citizens to adopt a particular perspective and law, which will usually result in cooperation between the two sides producing compromise. The nature of the Constitution itself enshrines this ideal. According to Smith, it is neither providentialist nor secularist, theist nor atheist. This preserves unity amid diversity.

The American settlement is preferable to hard constitutional law where the Supreme Court adjudicates cases based on supporting one of the positions. This is exactly what happened beginning in *Everson* and continuing into the twenty-first century. The Supreme Court adopted secular neutrality, supporting the secularists, and refined the doctrine throughout the decades by adopting and revising various tests to apply to cases. Smith notes that although the Court has used a variety of principles for religious clause cases, neutrality was the predominant one.

Smith’s problem with this approach lies in the nature of

neutrality and the outcome of using it. Genuine neutrality is impossible. It rests on a spurious promise, an illusion. According to Smith, it exists relative to a baseline but the baseline can never truly be neutral. Speaking and acting says something—it stakes a claim. Bias is inevitable. Further, the neutrality doctrine has created a divisive dynamic. The secularists have been declared constitutionally valid while the providentialists are declared constitutional heretics. They can both feel like outsiders, leading to alienation: the providentialists because they are no longer able to speak in religious language and must adopt the secular dialect (which can be superficial and weak) and the secularists because they will feel betrayed by a *de facto* establishment of religion since all traces of religion have not been, and will not be, removed from the public square (*e.g.* religious language allowed in the motto, pledge, and currency.).

For Smith, there is cause for concern. Besides the pressure to adopt secular neutrality, the ideal of equality threatens to dismantle religious freedom all together. Because of various cultural forces, equality is pitted against religious freedom. The insistence that all are free and worthy of equal rights has translated into denying religion and religious people any special consideration. At a fundamental level, the traditional religionist is incompatible with the egalitarian because they are built on differing orthodoxies.

But Smith also has cause for hope. Because of the Supreme Court's erratic enforcement of the First Amendment, no side is losing all of the time. Following this logic, it would seem that if both sides have cause for complaint, then no group is truly ascendant. Smith notes that the future of religious liberty depends upon the fortunes of the church: if it remains a vital part of society, religious freedom will continue. If, however, it succumbs to the forces of secularity and equality, it will collapse.

There are a few areas of overlap between Koppelman and Smith. The first is methodology and the second is substantive. As to methodology, both use the same analytical approach in advancing their theories. Each starts with a claim or story and, in true law professor style, presents an argument against such claim. For Koppelman, it is the claim that neutrality is incoherent and produces bad results. Instead, he writes to defend neutrality. For Smith, it is the standard story of American religious freedom, created by myth and half-truths. Smith wants to present an accurate picture of American religious freedom, and that includes acknowledging the

ebb and flow of the salience of certain principles. Each presents their response as one-half of a dialogue—a conversation in which the audience (the reader) may or may not have prior knowledge. Also, the authors are true professors in that they engage with the other’s works (current and prior). Koppelman notes Smith’s view that neutrality by its nature is biased as the government expressly or tacitly either supports or denies religious belief.⁴ Smith notes Koppelman’s defense of neutrality and counters that, even with the fluidity of neutrality, there will still be bias in the baseline chosen.⁵ He claims that with neutrality, Koppelman is not providing a principle but instead a label to put on specific conclusions reached on other grounds (he even goes so far as to imply Koppelman would agree with him).⁶ Finally, both analyze prior Supreme Court cases (albeit different ones) to support the conclusion that the Court has adopted the neutrality approach.⁷ They part ways on whether this is a good development and whether it should be maintained.

As for substance, both confirm the original meaning of the Establishment Clause—the prohibition on government to establish a national church. It is interesting that they both use the same work by Donald Drakeman to support this conclusion.⁸ What is even more interesting, however, is Smith’s (friendly) amendment to Drakeman’s proposition.⁹ Smith notes that the prohibition was not just on establishing a religion, but also on anything that respects religion, so that it covers collecting taxes from the public to support the church, the licensing of ministers, and the like. It went beyond building a national church.¹⁰ Further, both professors base their theories on conflict between two groups, and the nature of these groups is the same for each author—those who would allow and protect monotheism in law while tolerating other religions (providentialists/traditionalists) and those who would remove religion from law and the public square (secularists). They both

4. ANDREW KOPPELMAN, *DEFENDING AMERICAN RELIGIOUS NEUTRALITY* 92 (2013).

5. STEVEN D. SMITH, *THE RISE AND DECLINE OF AMERICAN RELIGIOUS FREEDOM* 135-36 (2014).

6. *Id.*

7. KOPPELMAN, *supra* note 4, at 84-90; SMITH, *supra* note 5, at 113-20.

8. KOPPELMAN, *supra* note 4, at 82-84; SMITH, *supra* note 5, at 57-58 (both referencing DONALD L. DRAKEMAN, *CHURCH, STATE, AND ORIGINAL INTENT* (2010)).

9. SMITH, *supra* note 5, at 59-60.

10. *Id.*

note that each group has roots since the American founding and can support their claims through historical documents. It is not surprising that they both identify these groups, given the existence of the culture wars and the polarizing nature of politics and public discourse currently roiling through the country. It is helpful, however, to have both professors acknowledge this division and provide support that these divisions have existed for decades. Here, again, they use the same source to evidence a part of their theory—they both refer to Justice Scalia’s “atavistic” approach as representative of the providentialist/traditionalist perspective.¹¹

The key difference between the two authors is their vision for the role of the Supreme Court. One views the Court as referee in a boxing match between two, and equally valid, conceptions of constitutional law, while the other views the Court as a coach for one of the boxers. In the open contestation between providentialists and secularists, Smith is ambivalent as to which side should win. His theory suggests that each will fight with the tools available in a democracy (speech, association, political discourse, and the like) and either there will be a compromise (draw) or one will dominate (a knock-out). The Court is the referee ensuring the fight is conducted fairly and abides by the proper rules. Koppelman, on the other hand, sides with the secularists. While he is not as radical in insisting upon the total removal of religion from public and for denying any special consideration to religion (he advocates a balancing approach when dealing with accommodations),¹² he believes that religious justification for any law or policy is not acceptable. In this way, he advocates for the Court to side with the secularists and counsel them on their approach to neutrality by maintaining the secular purpose test in order to best their opponent—the traditionalist viewpoint.

The practical effect of both approaches is alienation. Koppelman does not seem to be as concerned about this effect as Smith. Koppelman says that alienation, or one not getting what they want, is part of the political process. There will always be winners and losers. It is not clear why law should be more concerned with religious losers than other political losers. Smith, however, sees alienation as the possible death knell to religious freedom and results when the Court no longer plays the referee. Once the

11. KOPPELMAN, *supra* note 4, at 39-42; SMITH, *supra* note 6, at 91.

12. KOPPELMAN, *supra* note 4, at 11-12.

government chooses neutrality, religious adherents are no longer able to be full participants in the public discourse and law-making, and religion will no longer be given special consideration. Were this to happen, the vitality of religion (and the power of the church) will begin to wane leading to the evaporation of religious freedom. Koppelman is concerned with protecting the abstract good of religion by prohibiting government speaking on religious truth, while Smith is concerned with the practical effect on religious people and institutions.

When considering a path forward, Smith has the better argument. First, his theory is supported by a more credible reading of American history. Using historical documents, along with the expertise of historians and scholars, he aptly demonstrates that the drafting of the First Amendment was not a momentous movement, but a retrieval of themes posited by pagans during medieval times. Smith is methodical in his approach, which makes him credible and his theory attractive. Koppelman's analysis of history is not as clear. He makes sweeping statements that are unsupported by facts and then provides a more balanced, nuanced discussion. For instance, he states that the framers believed religion corrupted government.¹³ To be sure, this is partially true—some framers did believe this. But there were a host of others who did not. Further, even some of those that believed this still supported government expression of religion. Koppelman also states neutrality has always been part of American history, but then notes the ways the law was not entirely neutral in early America.¹⁴ He also states that everyone supports giving accommodations to religious believers¹⁵ (surely this is not true as demonstrated by the number of lawsuits on this issue), and then provides a detailed discussion of the different considerations and arguments surrounding accommodations.¹⁶ Most people agree that the history of America at its founding and the subsequent development of constitutional principles is complicated and nuanced. Koppelman's broader statements miss this nuance and accordingly reduce his persuasive credibility.

Furthermore, Smith's theory is attractive because he avoids making any normative claim on religion or the role of religion in society. The idea of religion is controversial and contestable in

13. *Id.* at 2.

14. *Id.* at 26-42.

15. *Id.* at 11, 107.

16. *Id.* at 98-117.

modern society. Smith shows that one need not wade into the waters of this age-old conflict in order to adopt a coherent theory on religious liberty. In fact, Koppelman exemplifies the problems that occur when making claims about the nature of religion. One of the major problems with Koppelman's work is the shifting description of religion. At times he says religion is "good."¹⁷ Other times, he says religion is a "distinctive human good."¹⁸ These are two very different concepts. The idea that religion is good is contestable and has been for some time. A theory based on this premise will automatically be unsatisfactory for those who do not believe religion is good, or worse, believe that religion is a societal evil. In this case, there is no need to protect or preserve something that is detrimental for society. On the other hand, even those who are not religious or believe that religion is not good, can accept religion as *a* good—one method for humans to use to achieve the good life. Some may not want religion in the public square, but would not want to prohibit their fellow citizen from practicing religion in private or in limited circumstances. They might be persuaded to believe in the benefits of neutrality to protect religion. The inconsistent use of religion as good/*a* good further confuses Koppelman's theory and weakens his central thesis.

Because Smith's work leans more toward the descriptive side and is less normative, his argument that the Court should return to the time when government had no jurisdiction over religious matter is persuasive. He notes that it is a stronger claim to say government has no jurisdiction over religious matter, rather than say government ought to do or ought not to do a certain action. Again, Koppelman is a useful foil. Of the four reasons Koppelman gives for supporting neutrality, three are normative—government ought to protect the good of religion from corruption; government ought to protect the civil peace; and government ought to protect religious minorities. If one disagrees with these central premises (and there is plenty of reasonable disagreement), then his theory becomes less persuasive. Further, it is not clear why government *ought* to do these things and not others. The fourth reason is the same as Smith's jurisdiction argument. Government lacks the competence to decide matters of religion and law. The Court should remove religious issues completely from government's purview and let the people decide

17. *Id.* at 2, 20, 49, 107, 120.

18. *Id.* at 11, 15, and generally, ch. 4.

for themselves.

The final reason Smith's arguments are more persuasive is less substantive and more stylistic. Smith's prose is easily accessible by any reader, constitutional scholar or average person. His style is conversational, open and friendly. He presents each side and supports the best argument with a balanced approach. He acknowledges that he is oversimplifying complicated and complex concepts. This is extremely beneficial, however. Since the reader is joining a conversation each author is having within a larger community, the most persuasive argument will be the one that is comprehensible to the reader without prior knowledge. This cannot be said about Koppelman's work. Admittedly, Koppelman offers his work as part of a discussion among legal theorists and political philosophers. This requires a level of sophistication on the part of the reader, perhaps limiting its accessibility for many.

Both authors published their book prior to the Court's decision in *Town of Greece*. Ironically, the Court's decision demonstrates each theory well. The majority opinion noted that the context and jurisprudence of the First Amendment shows that the Establishment Clause was never meant to prohibit legislative prayer. Such prayer created the proper deliberative mood and acknowledged religion's role in society. The Court also distinguished between offense and coercion.¹⁹ The concurring opinion noted the long history of legislative prayer.²⁰ Smith would probably support this outcome since it eschewed the requirement for neutrality and secular purpose; it supported the local community's understanding of religion and its history; and did not violate the Establishment Clause's prohibition on establishing or supporting a national church. The Court's reasoning looks more like the soft constitutionalism of the pre-*Everson* era.

Koppelman would not support the *Town of Greece* decision. He might say that the nature of prayer itself and the sectarian character of the prayers at issue in the case suggest that government is declaring religious truth (prayer is good, Christianity is good), or at the very least lending support for religious truth. In fact, he argues that *Town of Greece*'s predecessor case, *Marsh v. Chambers*, should be overruled as legislative prayer involved the government

19. *Town of Greece*, 134 S.Ct. at 1826.

20. *Id.* at 1832-33 (Alito, J., concurring).

in making a continual set of discretionary religious choices.²¹ As government is deciding a live religious debate, and there is no secular purpose, the principle of neutrality dictates the law to be overturned.²²

The discussion above should not suggest there are no weaknesses of Smith's theory. As attractive as it is, it begs the question of how the Court should return to soft constitutionalism. Perhaps the answer is allowing the Court to continue its erratic course of using different principles for each Establishment Clause case it decides. This might seem to work, but a bit more formality may be preferable if Smith's theory is adopted. For instance, Smith notes that in the pre-*Everson* adjudication, the Court decided cases based on state law and avoided making declarations on what the First Amendment meant. If the law is to return to that path, as Smith advocates, would this require the Court to avoid making any pronouncements on what the Constitution requires and instead make decisions solely based on political morality? Further, would it necessitate the de-incorporation of the Fourteenth Amendment from the First Amendment so that state law and local understandings could be determinative? Or is the alternative even starker—if the Court is to return to the jurisdictional argument, does it need to abstain from all such cases entirely, so that it would not agree to hear a case on legislative prayer or any other Establishment Clause issue because it lacks the necessary competence? A little more direction from Smith would be beneficial. Without any, it would seem Smith's theory is one where the Court gives deference to the majority rule in which the religious understandings of a state or community is shaped by those with the most political power. If this is the case, then it is not clear that religious minorities will face less oppression or feel any less alienated.

Perhaps it is a bit naïve for any American, at this point in the nation's history, to expect coherence and consistency in Supreme Court adjudication. Both Koppelman and Smith demonstrate the difficulty in building a coherent approach to the Establishment Clause. The country is moving towards a heightened level of religious pluralism as the number of people who do not affiliate with religion increases, while at the same time the number of monotheistic denominations and new religions grow as well. The

21. 463 U.S. 783 (1983); KOPPELMAN, *supra* note 4 at 76.

22. *Id.*

ability to define what constitutes religion and who is a religious believer becomes more difficult as time goes on. Maybe it is just not possible to adopt one principle to be used for each and every case and instead, the best the Court can do is make case-by-case decisions based upon whatever principles seem most appropriate at that particular time. In this sense, perhaps Smith is correct. If all groups are losing, then all are winning. This is not exactly satisfactory, but it may be the best that can be done. At least this way, America's first freedom is protected, even if the strength of that protection may occasionally rise or fall.