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Defending American Religious Neutrality. By Andrew Koppelman. Cambridge, MA: Harvard University Press, 2013. Pp. 256. $55.00 (cloth). ISBN: 9780674066465.

> *"I come not, Ambrosio, for any of the purposes thou hast named," replied Marcela, "but to defend myself and to prove how unreasonable are all those who blame me for their sorrow . . . therefore I ask all of you that are here to give me your attention, for it will not take much time or many words to bring the truth home to persons of sense."*
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> — Miguel de Cervantes Saavedra, *Don Quixote*[1]

Scholars who write about the US Supreme Court's religious liberty jurisprudence typically lambaste the Court for its supposedly secularist or allegedly religious sympathies, or for inconsistencies in its rulings and norms. Andrew Koppelman takes a different approach in this aging but still timely book about the tradition and enduring relevance of religious "neutrality" in American constitutional law.

The key to understanding and appreciating Koppelman's work lies in taking at face value the claim he makes in the book's very title. Koppelman comes not to advocate for a particular position as some critics have claimed, but rather to defend as coherent what he sees as the actual understanding of religious neutrality that has been guiding judicial and legislative policy in this country. While "a growing number of writers, including several Supreme Court Justices, have argued that religion clause doctrine is both incoherent and substantively unattractive" (3), Koppelman replies that "neutrality is available in many forms. The First Amendment stands for one such specification. That specification has done its work well" (5). What he offers "is not a proposal. It is a description. It is already the law in the United States. The normative question is not how to design an ideal commonwealth, but whether we should maintain what in fact we have inherited" (167).

To those "radical secularists" who wish the state would completely separate religion from public life and to those "religious traditionalists" who pray for the state to openly endorse religion, Koppelman has but one answer: American law is not willing to be a member of either of those camps. The central tenet of the book is that religion is valuable—despite what secularists say. Yet this "value is best honored by prohibiting the state from trying to answer religious questions" (2)—despite what traditionalists believe.

Doctrinally, the law of the First Amendment is inherently problematic. As the Supreme Court put it in *Cutter v. Wilkinson*, 544 U.S. 709, 719 (2005), "[t]he first of the two Clauses, commonly called the Establishment Clause, commands a separation of church and state. The second, the Free Exercise Clause, requires government respect for, and noninterference with, the religious beliefs and practices of our Nation's people. While the two Clauses express complementary values, they often exert conflicting pressures." Consequently, the two clauses "are frequently in tension" (Locke v. Davey, 540 U.S. 712, 718 (2004)), and therefore, as the Court acknowledged in *Walz v. Tax Commission of City of New York*, 397 U.S. 664, 668–69 (1970), the Court "has struggled to find a neutral course between the two Religion Clauses, both of which are cast in absolute terms, and either of which, if expanded to a logical extreme, would tend to clash with the other."

Koppelman's answer to the establishment/free exercise dilemma is a somewhat narrow reading of the Establishment Clause which he believes provides that neutral course. In his view, the First

1 Miguel de Cervantes Saavedra, *Don Quixote: The Ingenious Gentleman of La Mancha*, trans. John Ormsby (New York: Heritage Press, 1951), 112.

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Amendment "forbids the state from declaring religious truth" but still allows it to "favor religion at a very abstract level" (6). Whether it is because the state is incompetent to determine the nature of religious truth; or because history has shown that using state power to resolve religious controversies is terribly divisive; or because state involvement in religious matters has tended to oppress religious minorities; or even because establishment tends to corrupt religion itself, the state should always refrain from opining on theological propositions (6). That does not, however, mean that it cannot recognize "religion" per se as something valuable and societally beneficial. Indeed the law requires that we treat religion as one of the many valuable concerns that the state need be cognizant of and respectful towards.

What Koppelman has done, essentially, is fill in the room for "play in the joints" that the Court acknowledged must exist in *Locke v. Davey*. Neutrality is best understood as a simple limit on government expression; so long as the state does not express an opinion on religious matters, nor encourage its citizens to hold certain beliefs, it is free to treat religion with a benevolence befitting a recognized societal good. The definition of religion is fluid, and it changes over time. As more and more ideas that were once subject to general consensus become open issues of religious debate, the state must retreat farther and farther back to try to stay out of any-and-all live controversies, in an effort to be more and more inclusive.[2] The best Koppelman can do to describe the current state of affairs is to note that, at least for now, "Religion . . . denotes a cluster of goods, including salvation (if you think you need to be saved), harmony with the transcendent origin of universal order (if it exists), responding to the fundamentally imperfect character of human life (if it is imperfect), courage in the face of the heartbreaking aspects of human existence (if that kind of encouragement helps), a transcendent underpinning for the resolution to act morally (if that kind of underpinning helps), contact with that which is awesome and indescribable (if awe is something you feel), and many others" (124).

Koppelman's self-stated goal in writing the book was to provide the answers to three questions: "What conception of neutrality is relied on in the interpretation of the Establishment Clause of the First Amendment? Is it coherent? Is it defensible?" (3). Having established his interpretation of neutrality, we can now consider his answers to the final two questions.

The plausibility of reading this version of neutrality—or really any version of neutrality—into the Constitution is relatively easy. While fans of philosophy, theology, and political science alike will enjoy the brief refresher course that Koppelman provides on all the great thinkers and their various approaches to such matters as originalism, liberalism, and pluralism (to name but a few of the topics covered), the real question at the heart of his defense is not if we *could read* this version of neutrality into the Constitution on its face, but rather if courts and legislatures *have used* this version of neutrality in application.

Perhaps the clearest and most satisfying demonstration of how Koppelman's approach might shed light on our actual balancing process is found in how it adds a layer of understanding to the Court's secular purpose test, first announced in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), and criticized ever after.

In *Lemon*, the Court held that in order to withstand an Establishment Clause challenge, "[f]irst, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster an excessive governmental entanglement with religion" (*Lemon*, 403 U.S. at 612–13). Koppelman classifies four

2 Koppelman does note that ceremonial deism allows some well-established practices that once had broad consensus to be grandfathered in but allowed to grow no further.

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distinct objections that have been raised against the secular purpose prong: (1) the *rubber stamp objection*, which notes that the secular purpose prong is just a sham, and "will condemn nothing so long as the legislature utters a secular purpose and says nothing about aiding religion"; (2) the *evanescence objection*, which notes that discerning subjective motivation is an impossible task anyway; (3) the *participation objection*, which worries that the secular purpose prong denies religious people their right to participate in politics by assigning their support a negative weight and thereby invalidating otherwise acceptable legislation; and (4) the *callous indifference* objection, which claims that the secular purpose prong, if taken seriously, would invalidate the specific religious accommodations that the Court has held permissible, and has sometimes even required, under the Free Exercise Clause (chapter 4).

Koppelman's approach supplies ready answers to all four objections. If we accept the premise that neutrality is just a limit on the government expressing an opinion on religious truth, then the courts need only monitor "legislative outcomes rather than legislative inputs" (94). The requirement of a clear secular purpose is not a sham, it is an objective first line of protection against government declarations of religious truth. As Koppelman has explained elsewhere, because the focus of neutrality is "on what government is saying rather than on who supported any particular law,"[3] we need not care about legislative intent, nor worry about the participation of the religious; citizens or lawmakers may make whatever implicit or explicit religious arguments they like in favor of a law, so long as the law that is ultimately passed is justifiable in nonreligious terms. And as long as religion is treated as an abstract societal good, the law is *allowed* to show it some favor, rather than be callously indifferent.

While it is true that Koppelman's book leaves many serious questions not fully answered—most notably *why* we should *definitely* accept religion as a kind of societal good (the closest we get seems to be that practically speaking history has shown "religion" writ broad to be a legitimate proxy for a variety of otherwise unexplained social benefits, the grand total of which can be made to fit under this broad umbrella term, while any other word would wind up being underinclusive[4])—what he has done is make good on his promise to defend what really does seem to be the doctrine of American religious neutrality *in practice*. That alone is a significant contribution to the field of law and religion, in that it does what many Justices and academics seem to have found to be nearly impossible; it makes Establishment Clause jurisprudence appear a little bit more settled and consistent.

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3 Andrew Koppelman, "And I Don't Care What It Is: Religious Neutrality in American Law," *Pepperdine Law Review* 39, no. 5 (2013): 1115–36.

4 For more on this argument see Andrew Koppelman, "Nonexistent & Irreplaceable: Keep the Religion in Religious Freedom," *Commonweal*, April 10, 2015, https://www.commonwealmagazine.org/nonexistent-irreplaceable.

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