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Can We Please Stop Talking About Neutrality? Koppelman Between Scalia and Rawls

Chad Flanders*

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I. INTRODUCTION: KOPPELMAN'S "PURITAN MISTAKE"

In his essay, *Religious Liberty as Liberty*, Douglas Laycock cautioned against what he would later dub "the Puritan mistake,"¹ which is the mistake, as he put it, of looking at whether religion is a good (or bad) thing rather than seeing religious liberty as "first and foremost a guarantee of liberty."² We should not, Laycock warned, let our understanding of the religion clauses be driven by what we think, substantively, about the value

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1. Douglas Laycock, *Religious Liberty as Liberty*, 7 J. CONTEMP. LEGAL ISSUES 313, 353 (1996) [hereinafter Laycock, *Religious Liberty*]; see also Douglas Laycock, *Religious Liberty: Not for Religion or Against Religion, but for Individual Choice*, UT LAW, Spring 2004, at 42, available at http://www.utexas.edu/law/magazine/wp/wp-content/uploads/magazine/archive/utlaw_spring04.pdf.

2. Laycock, *Religious Liberty*, *supra* note 1, at 313.

of religion.³ It should be driven, instead, by an interest in protecting the freedom of religion, and not religion per se.⁴

Although Andy Koppelman positions himself in much the same conceptual space as Laycock, I think he makes (and would probably admit to making) a version of the “Puritan mistake.” Koppelman says that he is interested in avoiding the extreme of radical secularism that favors “the complete eradication of religion from public life” but also the extreme of religious traditionalism, which sees nothing wrong with “frank endorsement of religious propositions.”⁵

Koppelman, like Laycock, wants to find a way between these two extremes. But instead of rejecting the traditionalist view outright, Koppelman instead insists that religion *is* a good thing (this is the Puritan mistake), but—partly in a bid to appease the secularists—that religion ought to be defined at a very high level of abstraction.⁶ We can affirm, in Koppelman’s phrase, “religion in general,” but not any religion in particular.⁷ In short, the Puritan mistake was, in a way, a particularly *Puritan* mistake; the Puritans made the error of supporting religious freedom only for Puritans.⁸ They should have instead supported “religion in general.”

It’s a neat trick, if it works: Koppelman can have his cake and eat it too. He defend the value of religion without defending the value of any religion in particular. And his solution is neat on another level as well, because it defends a practical answer to a theoretical puzzle. The theoretical puzzle is: How can the state possibly support religion, even give it special protection, but remain neutral? The practical answer Koppelman offers is simply to look at American practice and see what we have done.⁹ It seems impossible that a state could promote religion and be neutral, but in America we have done it, surprisingly. In practice we have done what seems to be impossible in theory.

As a theorist, I find this result unsatisfying and more than a little depressing, and I find myself wanting to put pressure on Koppelman from both sides. I want to say, with the radical secularist, that Koppelman’s abstract “religion in general” is too much like religion to be neutral; but I also want to say, with the religious traditionalist, that religion in general may

3. *Id.*

4. *Id.*

5. *Id.*

6. Andrew Koppelman, *And I Don’t Care What It Is: Religious Neutrality in American Law*, 39 PEPP. L. REV. 1115, 1121 (2013) [hereinafter Koppelman, *Religious Neutrality*].

7. Andrew Koppelman, *Secular Purpose*, 88 VA. L. REV. 87, 90 (2002); *see also* Koppelman, *Religious Neutrality*, *supra* note 6, at 1126.

8. Laycock, *Religious Liberty*, *supra* note 1, at 353.

9. *See* Koppelman, *Religious Neutrality*, *supra* note 6, at 1117–32.

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not capture perfectly what many (or most) of us mean by religion. So I want to try putting Koppelman between the traditionalist and the secularist—between Scalia and Rawls, as it were—and see where we end up.

II. KOPPELMAN’S “MASTER CONCEPT”: THE FLUIDITY OF NEUTRALITY

Koppelman’s “master concept,” the one which inspires the new book he has been working on for many years, is that neutrality is not a fixed thing which we can define once and for all, but is actually a *fluid* concept.¹⁰ More particularly, there are various levels of neutrality, and before we dismiss the idea of neutrality *tout court* we have to grapple with the idea that neutrality as something less than absolute neutrality might be a very useful concept. For instance, someone could like baseball, but be neutral about whether there should be a designated hitter or not. Or (a little closer to our topic) someone could favor state support of the arts, but not support any particular type of art: the state could fund dance, or music, or impressionist paintings, or abstract paintings. Or a state could promote religious belief, but not any particular religious belief; it could promote “religion in general.”

“Religion in general” is also an important concept for Koppelman: it may go hand-in-hand with the fluidity of neutrality as his key concept. The two, of course, are importantly related, because Koppelman believes that religion in general is the appropriately “neutral” level at which we should support religion. The state remains neutral on religion so long as it only backs “religion in general,” and not anything more or less abstract than that.

As Koppelman is well aware, one might argue that state support for religion in general, in fact, is the wrong level of neutrality. For religion in general is at least one level of abstraction above the idea that the state can support monotheistic religion and not just religion in general. And one might think that support for a generic monotheism is the right level of neutrality for America. In fact, Justice Scalia, as Koppelman notes, has endorsed this view in at least one opinion;¹¹ although he has said conflicting things in other opinions.¹² Justice Story may have also held such a view, indeed, perhaps an even narrower one: that Christianity could receive special protection and encouragement from the state, but not any one particular

10. *See id.* at 1127; *see also* Andrew Koppelman, *The Fluidity of Neutrality*, 66 REV. POL. 633 (2004) (discussing this theory at length).

11. Koppelman, *Religious Neutrality*, *supra* note 6, at 1126 (quoting *Lee v. Weisman*, 505 U.S. 577, 641 (1992) (Scalia, J., dissenting)).

12. *Id.* at 1127 (quoting *Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687, 748 (1994) (Scalia, J., dissenting)).

sect.¹³ This is, we might say, *two* levels below Koppelman’s favored level of religious neutrality. Scalia might even face a powerful objection from Story that he has made his concept of religion *too* abstract.

It is important to see, and I think that Koppelman would concede, that Scalia’s and Story’s views are also varieties of religious neutrality. Scalia is neutral as to the monotheistic religions,¹⁴ and Story is neutral as to the various sects of Christianity.¹⁵ But Koppelman rejects both of these views because they do not adequately capture the *right* kind of neutrality. He says that they are not abstract enough, even though they might have been the right kind of neutrality at earlier stages in our nation’s history (as Koppelman might also grant).¹⁶

So the innovation of the fluidity of neutrality can only get us so far, because the real debate will not be whether any of these conceptions are “neutral,” because all of them can be considered as varieties of *neutrality*. You cannot just pound your fist on the table and say your conception is “more neutral” than all the others. This is one main reason that I think it is probably advisable to give up on neutrality as a useful concept, because the real work, the work that goes into getting your conception to be accepted as the “neutral” one, goes on elsewhere. The real question is not whether we should be neutral at all, but what level of neutrality we should aspire to. But how do we answer *this* question?

III. CAN WE FIND THE RIGHT LEVEL OF NEUTRALITY?

As I see it, there are two general ways of deciding which level of neutrality is appropriate—that neutrality means religion in general, say, rather than neutrality about monotheism or neutrality about Christianity.¹⁷ The first way is to look at *existing societal consensus*. The correct level of neutrality will be the one where the most people agree. If most people agree that the state can support “religion in general” then that is neutral, or at least neutral enough. The second way is through *theory*. We might provide some more abstract theoretical method for determining what kind of state support for religion (if any) would be permitted. One such method would be John Rawls’s idea that we can only justify the state’s use of its coercive power if

13. Laycock, *Religious Liberty*, *supra* note 1, at 323–24; *see also* 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION 701 (Boston, Hilliard, Gray & Co. 1833) (stating that the real object of the Establishment Clause was “to exclude all rivalry among Christian sects”).

14. *See* Koppelman, *Religious Neutrality*, *supra* note 6, at 1126.

15. 1 STORY, *supra* note 13, at 701.

16. *See* Koppelman, *Religious Neutrality*, *supra* note 6, at 1125–26.

17. *Id.* at 1127; *McCreary Cnty. v. ACLU of Ky.*, 545 U.S. 844 (2005).

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it is based on reasons that no person could reasonably reject.¹⁸ I consider these two methods in turn.

A. *Social Consensus?*

If the standard for neutrality is societal consensus or “the convergence of a contingent set of actual views,”¹⁹ then how are we to determine this consensus? By poll? If so, then Scalia may be closer to what is “neutral” than Koppelman is. Scalia notes that monotheists make up nearly ninety-eight percent of those practicing a religion in America.²⁰ This, of course, does not say what Americans think about what religions should be protected or (to phrase the question in a more accurate way) what they think is religion, and thus worth protecting. And this is a poll only of *believers*, and so it may be somewhat biased, although it seems fair to include only self-ascribed religious believers in the category of the *religious*.

More to the point, if there was a poll asking whether Americans thought the state should protect religion in general, it is hard to say what the results would be or what most Americans take religion to be. Would they agree that atheism is a religion? Koppelman says that we know what religion is when we see it;²¹ then again, who are “we”? I am not so sure, or not as sure as Koppelman, that ceremonial deism is revanchist, rather than an attempt to express contemporary attitudes about majority religious belief; deism may be the tip of a more substantial iceberg, not simply the fragments of a dying (sub)culture.²²

In a way, this is not where I want to press Koppelman, although it is close to it. Koppelman rejects Scalia’s understanding of neutrality, saying that it “does not work, because it *discriminates* among religions;”²³ and later, he says that Scalia does “not appreciate the fluidity of neutrality.”²⁴ But Scalia might insist that *of course he does*, he just understands the level of neutrality required by the “convergence of a contingent set of [our] actual

18. Rawls calls this the “liberal principle of legitimacy.” See JOHN RAWLS, *POLITICAL LIBERALISM* 136–37 (2005).

19. See Koppelman, *Religious Neutrality*, *supra* note 6, at 1126.

20. *Id.* at 1127; *McCreary Cnty. v. ACLU of Ky.*, 545 U.S. 844, 894 (2005) (Scalia, J., dissenting).

21. Koppelman, *Religious Neutrality*, *supra* note 6, at 1121–22.

22. See also Richard W. Garnett, *Neutrality and the Good of Religious Freedom: An Appreciative Response to Professor Koppelman*, 39 PEPP. L. REV. 1149 (2013).

23. Koppelman, *Religious Neutrality*, *supra* note 6, at 1127 (emphasis added).

24. *Id.*

views” to be different than Koppelman does.²⁵ This again shows that invocations of the fluidity of neutrality are just as likely to start disputes as to settle them.

If Koppelman says that Scalia (or at least a suitably theorized version of Scalia²⁶) is wrong about the correct level of neutrality as an empirical matter, he has to explain more about how we understand how to fix that level, and why Scalia is wrong about what “most people” believe, or why what “most people” believe isn’t enough for neutrality. Does there have to be unanimity? If there does, then surely there isn’t unanimity about “religion in general” either, as I elaborate below. Further, Scalia does not rest his argument about consensus merely on polling data alone: he says that support for monotheism in general is based in America’s history and tradition, as well as in the text of the Constitution.²⁷

Saying Scalia is wrong because his view “discriminates” against religions does not sound like Koppelman is merely accusing Scalia of miscounting noses, or getting our history wrong. Rather, Scalia makes something akin to a conceptual mistake, by defining what religion is too narrowly. His understanding of religion as monotheism may reflect a consensus of sorts; in fact, Scalia may be *right* about what our actual consensus about religion is. But Scalia’s understanding of that consensus might not provide us with the *best characterization* of our existing practices, which would lead us (Koppelman intimates) to a broader definition of “religion.”

But to speak of the “best characterization” of our views puts us beyond the *actual* convergence of our points of view: it represents a step toward theory. We look at our actual views, and reflect on what is the best characterization of them: something which builds on, but is not reducible to what our actual views are. If Scalia gets his characterization wrong, then we need a theory to say *where* he goes wrong: we can’t just point to the fact that he excludes some beliefs that some would call religious.²⁸ As the old saying goes, it takes a theory to beat a theory.²⁹

25. *Id.* at 1126.

26. I am not much interested, in this particular essay, in getting the actual Scalia right.

27. *McCreary Cnty. v. ACLU of Ky.*, 545 U.S. 844, 886–89 (Scalia, J., dissenting).

28. Scalia, after all, could claim that Koppelman’s definition includes some beliefs that should *not* be interpreted as religious beliefs.

29. See Lawrence Solum, *Legal Theory Lexicon 053: It Takes a Theory to Beat a Theory*, http://lsolum.typepad.com/legal_theory_lexicon/2006/08/legal_theory_le_1.html (last modified June 19, 2011).

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B. Theory?

This brings me to the second answer that we might give to the question of how to specify the right level of neutrality, which is that we decide what the right level of neutrality is as a matter of theory and not (merely) as a matter of practice or social consensus. Koppelman briefly discusses Rawls in this light, and I follow him in this.³⁰ Koppelman, I take it, would agree that promotion of monotheism, as opposed to religion in general, might be “reasonably rejected” by those who have nontheistic religious beliefs.³¹ But if this is true, then we also have to ask: could some reasonably reject the idea that religion in general is good, and deserves protection?

The answer to this, I think, is clearly yes. Some undoubtedly think religion (in general, or in a specific instantiation) is bad and ought to be abolished.³² Certainly as a theoretical matter, the special protection of religion is, at the very least, something upon which reasonable people can disagree.

More directly, some people might reasonably reject that religion can be promoted or privileged; they might even say that about “religion in general,” and they surely will say it about exemptions to religious belief. Some will reject religious exemptions across the board; are they not just mistaken but unreasonably so? And are they being unreasonable if their only ground for rejecting the special treatment of religion is simply because it is unfair to favor religion in general over other modes of belief or ways or life? If they think that protection for religion in general won’t work “because it discriminates”?³³ I am hard-pressed to see how they would be *unreasonable* in claiming this. Surely they can say that promotion or protection of religion in general is controversial just as much as nontheistic religious believers can (rightly) assert that promotion of monotheism is controversial.

Koppelman might reply to the atheist’s objection by saying that the atheist too might be a proponent of a “religion in general.” But if even the *atheist* counts as adhering to a variant of “religion in general”³⁴ then surely we have lost any firm grasp of what is distinctive about the good of religion,

30. Koppelman, *Religious Neutrality*, *supra* note 6, at 1124–26.

31. Again, I take the idea of reasonable rejection from Rawls.

32. See, e.g., CHRISTOPHER HITCHENS, *GOD IS NOT GREAT: HOW RELIGION POISONS EVERYTHING* (2007).

33. Koppelman, *Religious Neutrality*, *supra* note 6, at 1127.

34. Or even if we can coherently conceive of the atheist as believing something rather than just not believing in something (i.e. in God or the sacred).

and even the good of religion in general.³⁵ There ends up being no real light between “religion in general” and what Rawls would call a “comprehensive doctrine,” or a view of the world that can be religious, philosophical, or moral.³⁶ The route of theory gives Koppelman no real support for his understanding of “religion in general,” anymore than the route of social consensus did.

Can there be a third way?

IV. CONCLUSION: GIVING UP ON NEUTRALITY

Koppelman, in his contribution to this issue,³⁷ can be a little vague (perhaps deliberately so) about the value of religion in general and how religion has a distinct value over other conceptions of the good.³⁸ He says in one place that religion gives us hope,³⁹ but so do many other things.⁴⁰ What he means to say, or should mean to say, is that religion gives us a special kind of hope, a hope that transcends the mundane. This is a type of good that cannot be captured by secular theories: it suggests that no matter the appearances, the world, as such, is *just*, or at least tends towards justice. I do not think a secular theory can give any sense to this type of hope—what we might call a hope in the transcendent.⁴¹

If religion is a good, it is (as Koppelman observes elsewhere⁴²) a very distinct kind of good and not simply the sum total of all good religiously-inspired acts and attitudes. And if religion is a good, a real good, then it is doubtless a very important good, worthy of protection. Moreover, if the state promotes this good, it is not simply saying that many people believe religion is a good and so we protect it (people believe all sorts of things are good, but not all of them get or deserve protection) or that the people who believe religion are particularly intense about it (again, people are intense

35. It is relevant that in the quote that gives Koppelman’s essay its title, Eisenhower was talking about not caring about what *religion* people had; he did not say that it was important that people *believe something*, and it did not matter what it was. Eisenhower, in his own way, was trying to pick out the uniqueness of religion.

36. RAWLS, *supra* note 18, at 37; *see also* Micah Schwartzman, *What If Religion Isn’t Special?*, U. CHI. L. REV. (forthcoming 2012), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1992090.

37. Koppelman, *Religious Neutrality*, *supra* note 6.

38. *Id.* at 1137; *see also* Andrew Koppelman, *Is It Fair to Give Religion Special Treatment?*, 2006 U. ILL. L. REV. 571 [hereinafter Koppelman, *Is It Fair?*].

39. Koppelman, *Religious Neutrality*, *supra* note 6, at 1130–31.

⁴⁰ America’s past history of overcoming division and discord may give us hope, the example of great men and women may give us hope, and so on.

41. *See generally* CHARLES TAYLOR, *A SECULAR AGE* (2007).

42. *See* Koppelman, *Is It Fair?*, *supra* note 38, at 593.

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about all sorts of things, but not all of them get or deserve protection); rather, it is saying that *religion is good*, period. Any sound defense of religious liberty will, I think, make Laycock's "Puritan mistake" at some level. Maybe not necessarily at the level the Puritans made it, but at some level.

I do not think, in articulating and ultimately defending this good, we are helped by saying that we are promoting religion (even religion in general) in a neutral way. It defers the problem without addressing it, because it does not get us around the implications of making the Puritan mistake. Some will legitimately object that any promotion of religion is nonneutral, even at a very high level of abstraction. They are right, I think, to say that there is no sound reason to stop at *that* level of abstraction, if we are speaking solely in terms of neutrality. The Rawlsians can say, just as Koppelman says to Scalia, that anything less than their level of neutrality "discriminates."

We are better off, I think, giving up on neutrality as a term of art and simply arguing directly in terms of religion's distinct value: we protect religion not because we are being neutral, but because of the value of religion as such.⁴³ Those who deny that religion has any distinct value will have to say that religion is not relevantly different from believing anything else. At the limit, they may say that religion does more harm than good, or that religion is simply false. Those who believe in the value of religious liberty *qua* religious liberty will have to have answers to these questions. This is the debate that the Enlightenment, in part, was about, and I do not think that there is any way we can get around it by talking about neutrality. There is no muddling through it, not in theory, and not in practice either.

43. For further elaboration of this point, see Chad Flanders, *The Possibility of a Secular First Amendment*, 26 QUINNIPIAC L. REV. 257 (2008).
