The Review of Politics 77 (2015), 287–299.
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doi:10.1017/S0034670515000091

American Religious Freedom

Reflections on Koppelman and Smith

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Among contemporary scholars of American religious freedom, Andrew Koppelman and Steven Smith are two of the most esteemed. They address, in their respective books, a broad range of important issues.[1] Space limitations constrain me to be selective in this review essay; I comment here on what Koppelman and Smith say, and don't say, about two of the most fundamental issues regarding American religious freedom: the meaning of the nonestablishment norm and the constitutionality of granting conscience-protecting exemptions only to religious believers.

According to the Constitution of the United States, as interpreted and enforced by the Supreme Court of the United States, neither the federal government nor state government may prohibit the free exercise of religion or establish religion.[2] However, it is controversial among the justices of the Supreme Court and also among constitutional scholars both what sorts of

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For helpful comments on a draft of this review essay, I am grateful to Dan Conkle, Chris Eberle, Fred Gedicks, Mark Goldfeder, Doug Laycock, and John Witte.

[1]See Andrew Koppelman, *Defending American Religious Neutrality* (Cambridge, MA: Harvard University Press, 2013) (hereinafter "Koppelman"); Steven D. Smith, *The Rise and Decline of American Religious Freedom* (Cambridge, MA: Harvard University Press 2014) (hereinafter "Smith").

[2]The First Amendment to the Constitution states, in relevant part: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." Michael McConnell has explained: "The text [of the First Amendment] states the 'Congress' may make no law 'respecting an establishment' of religion, which meant that Congress could neither establish a national church nor interfere with the establishment of state churches as they then existed in the various states. After the last disestablishment in 1833 and the incorporation of the First Amendment against the states through the Fourteenth Amendment, this 'federalism' aspect of the Amendment has lost its significance, and the Clause can be read as forbidding the government to establish religion" (Michael W. McConnell,

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government action constitute "prohibiting" the free exercise of religion and what sorts constitute "establishing" religion. I begin with the controversy with which Koppelman and Smith are principally concerned.[3]

The Nonestablishment Controversy

There is widespread agreement that the nonestablishment norm[4] forbids government action of this sort: government action according to which (a) a particular church—or a particular range of theologically kindred churches, such as "the Christian church"—is treated as the, or an, official church of the political community (nation, state, county, municipality, township, etc.) or (b) one or more religious doctrines or practices of a particular church are treated as official religious doctrines or practices of the political community. Let us call the proposition that the nonestablishment norm forbids government action of the sort just specified "the central meaning of the nonestablishment norm." The nonestablishment controversy arises in response to this question: Does the nonestablishment norm forbid government action of any sort *in addition to* the sort forbidden by the central meaning of the norm? More simply, is the central meaning the only meaning of the norm?

Koppelman's position is that the central meaning is not the only meaning, that the nonestablishment norm is best understood also to forbid government action that affirms, by treating as "true," any religious tenet whatsoever; according to Koppelman, government may not affirm even a religious tenet whose affirmation by government does not (or would not) violate the central meaning of the norm.[5] Government must be "neutral," insists Koppelman, on the question

"Accommodation of Religion: An Update and Response to the Critics," *George Washington Law Review* 60 [1992]: 685, 690n19).

[3]See Koppelman at 3: "This book offers new 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?"

[4]In their fine book, Ira Lupu and Robert Tuttle argue persuasively that whereas the free exercise norm is appropriately articulated as a right, the nonestablishment norm (a.k.a "the Establishment Clause") is best articulated as a principle: "the nonestablishment principle," Lupu and Tuttle call it. See Ira C. Lupu and Robert W. Tuttle, *Secular Government, Religious People* (Grand Rapids, MI : Eerdmans, 2014), 5.

[5]Not every religious tenet is one whose affirmation by government violates the central meaning of the norm. Since 1954, the Pledge of Allegiance has echoed Abraham Lincoln's Gettysburg Address in declaring that we are "one nation under God." (At Gettysburg, Lincoln resolved that "this nation, under God, shall have a new birth of freedom. . .") In affirming, with Lincoln, that ours is a nation that stands under the judgment of a righteous God, government is not doing what the central meaning of the nonestablishment norm forbids government to do. Here are some other examples of government affirming one or more religious tenets whose

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whether one or another religious tenet, no matter what the tenet, is true: "What [government] may not do—what [nonestablishment] doctrine properly forbids it to do—is declare any particular religious doctrine to be the true one, or enact laws that clearly imply such a declaration of religious truth."[6]

In discussing his position, Koppelman writes: "If government cannot declare religious truth, then its cannot use its coercive powers to enforce religious truth. . . . If [government] may not declare religious truth, or take sides in live theological controversies, then of course it cannot persecute heresy or blasphemy."[7] It bears emphasis, however, that if government *may* declare religious truth, it does not follow that government may "use its coercive powers to enforce religious truth." And, indeed, if under the nonestablishment norm government may affirm some religious tenets, it is nonetheless the case that because government may not prohibit the free exercise of religion, government may neither coerce one to affirm or otherwise conduct oneself in accord with any such tenet nor discriminate against one for refusing to do so.[8] (More about the free exercise norm below.)

In support of his position that the nonestablishment norm is best understood to forbid government to affirm the truth of any religious tenet whatsoever, Koppelman lists "a number of considerations:" (1) government "is incompetent to determine the nature of [religious] truth"; (2) "the use of [government] power to resolve religious controversies is terribly divisive and does not really resolve anything"; (3) government "involvement in such [controversies] has tended to oppress religious minorities" and, further, (4) "tends to corrupt religion."[9] Koppelman's four considerations—the last of which

affirmation by government does not violate the central meaning of the nonestablishment norm: In 1954, "Congress requested that all U.S. coins and paper currency bear the slogan, 'In God We Trust.' On July 11, 1955, President Eisenhower made this slogan mandatory on all currency. In 1956 the national motto was changed from 'E Pluribus Unum' to 'In God We Trust'" (John W. Baer, *The Pledge of Allegiance: A Centennial History, 1892–1992* [Annapolis, MD: Free State Press, 1992], 63). The proceedings of many courts in the United States, including the Supreme Court of the United States, begin with a court official intoning "God save the United States and this Honorable Court."

[6]Koppelman at 3; see also 84, 90, 91.

[7]Ibid., 91–92, 105.

[8]Koppelman suggests that the nonestablishment norm is directed against religiously based coercion (e.g., Koppelman at 117). But it is the free exercise norm that is the barrier—or, at least, the main barrier—to such coercion. As Kent Greenawalt has correctly observed, laws "that enforce a purely religious morality. . . unacceptably impose religion on others" (Greenawalt, "History as Ideology: Philip Hamburger's *Separation of Church and State*," *California Law Review* 93 [2005]: 391). Greenawalt gives as an example "laws against homosexual relations based on the view that the Bible considers such relations sinful" (ibid., 390).

[9]Koppelman at 6.

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he puts the most weight on and spends an entire chapter elaborating[10]—explain why he believes that government should stay out of the business of affirming religious tenets. However, the considerations do not show, and so far as I can tell Koppelman does not try to show, what a defense of a particular understanding of the nonestablishment norm—of the norm, that is, as a *constitutional* norm, as part of the *constitutional law* of the United States, and, as such, judicially enforceable against government—must show, whatever else it must show, *if the defense is to be broadly persuasive*: that as compared to any competing understanding of the norm, the understanding at issue is, if not more congruent, not less congruent with the original understanding of the norm, or with a widely shared historical understanding of the norm, or, at least, with well-settled constitutional doctrine.

Smith's position in the nonestablishment controversy is that the broad understanding of the norm for which some, prominently including Koppelman, contend—the "neutrality" understanding—is much too broad to be a plausible interpretation of the norm. What I am calling the central meaning of the nonestablishment norm is essentially what Justice Scalia understands to be *the* meaning of the norm.[11] I cannot tell whether Smith thinks that the most plausible interpretation of the norm is narrower even than what Justice Scalia understands it to be.[12] In any event, Smith rejects Koppelman's "neutrality" understanding of the norm; according to Smith, the nonestablishment norm is best understood to permit government to affirm at least some religious tenets.[13]

In criticizing and rejecting the position for which Koppelman contends, Smith does not rely on the original understanding of the nonestablishment norm; Smith is acutely aware of the difficulty, to the point of impossibility, of identifying the original understanding of the nonestablishment norm. As Smith explains, "there has never been a single moment and deliberate or

[10]See ibid., 46–77. In the course of elaborating, in support of his position, the "corruption" rationale, Koppelman identifies a fifth rationale—the "alienation" rationale—and then argues that as supports for his position, the "divisiveness" rationale and the "alienation" rationale are inferior to the "corruption" rationale. See ibid., 46–49.

[11]Koppelman quotes Justice Scalia and discusses Scalia's position at 10 and 39–42. See also "Antonin Scalia Says Constitution Permits Court to 'Favor Religion over Non-Religion,'" *Washington Times*, October 2, 2014.

[12]Smith sometimes seems to suggest (though perhaps I misread him) that even a congressional declaration that the United States is a Christian nation would not violate the nonestablishment norm were the norm correctly—i.e., very narrowly—interpreted. See, e.g., Smith at 85 et seq. This is not to say that Smith supports such a declaration.

[13]Smith objects to Koppelman's use of the terms "neutral" and "neutrality," which Smith finds, at best, misleading. See Smith at 133–38. Koppelman explains and defends his use of the terms in a chapter titled "The American Specification of Neutrality." See Smith at 15–45.

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authoritative decision to which we can look back in order to figure out what the constitutional commitments [to nonestablishment and free exercise] actually mean. Instead, courts have given those commitments meaning through an unmoored process of constructive interpretation and perhaps invention."[14] Nor does Smith rely on well-settled constitutional doctrine; Smith knows that constitutional doctrine regarding nonestablishment is anything but well settled—or even coherent.[15] Instead, Smith marshals more than ample historical evidence to demonstrate that an understanding of the nonestablishment norm much narrower than the broad "neutrality" understanding for which Koppelman contends is much more congruent with what has been the dominant understanding of the norm throughout most of American history. As a federal court put the point in 2001: "[The nonestablishment norm] was not. . . understood to be a prohibition against employing generalized religious language in official discourse. The notion that the First Amendment was designed to impose a secular political culture on the nation would have struck most nineteenth-century judges as absurd."[16] Consider this data:

[14]Smith at 74–75.

[15]See Doe v. Elmwood School District, 687 F.3d 840, 872 (7th Cir. 2012) (Posner, J., dissenting):

> The case law that the Supreme Court has heaped on the defenseless text of the establishment clause is widely acknowledged, even by some Supreme Court Justices, to be formless, unanchored, subjective and provide no guidance. See, e.g., *Utah Highway Patrol Ass'n v. American Atheists, Inc.*, 132 S. Ct. 12 (2011) (dissent from denial of certiorari) ("Establishment Clause jurisprudence [is] in shambles," "nebulous," "erratic," "no principled basis," "Establishment Clause purgatory," "impenetrable," "ad hoc patchwork," "limbo," "incapable of consistent application," "our mess," "little more than intuition and a tape measure"); *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384, 398–99 (1993) (concurring opinion) (a "geometry of crooked lines and wavering shapes," a "ghoul in a late night horror movie" that can't be slain even though "no fewer than five of the currently sitting Justices have, in their own opinions, personally driven pencils through the creature's heart").

Many constitutional scholars have said much the same thing. See, e.g., Jesse H. Choper, *Securing Religious Liberty: Principles for Judicial Interpretation of the Religion Clauses* (Chicago: University of Chicago Press, 1995), 174–76; Akhil Reed Amar, "Foreword: The Document and the Doctrine," *Harvard Law Review* 114 (2000): 119; William Van Alstyne, "Ten Commandments, Nine Justices, and Five Versions of One Amendment—The First. ('Now What?')," *William & Mary Bill of Rights Journal* 14 (2005): 17. Cf. William M. Janssen, "Led Blindly: One Circuit's Struggle to Faithfully Apply the U.S. Supreme Court's Religious Symbols Constitutional Analysis," *West Virginia Law Review* 116 (2013).

[16]ACLU of Ohio v. Capitol Square Review & Advisory Board, 243 F.3d 289, 297 (6th Cir. 2001).

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> Fully twenty-seven, or two-thirds, of the 1868 state constitutions contained an explicit reference to God in their preambles. A typical such reference stated, "[W]e, the people of the State of Indiana, grateful to Almighty God for the free exercise of the right to choose our own form of government, do ordain this Constitution."
>
> In addition to these references to God in the preambles of state constitutions, thirty state constitutions in 1968, or more than three-fourths of the total, contained reference to God. . . . Examples. . . include the use in constitutional texts of such phrases as "Almighty God," "Supreme Being, the Great Creator and Preserver of the Universe," "Author of the universe," "[A]uthor of all good government," "Sovereign Ruler of the Universe," "Divine Being," "Great Legislator of the Universe," and "[O]ur Creator."[17]

It is a virtue of Smith's position in the nonestablishment controversy that, unlike Koppelman's position, Smith's does not entail a conclusion that most citizens of the United States, present as well as past, would greet, or would have greeted, as ridiculously extreme: that having "under God" in the Pledge or "In God We Trust" as the national motto, or beginning a session of court with "God save the United States and this Honorable Court," is unconstitutional.[18] Although Koppelman accepts that conclusion, he manages to steer clear of the related, and unrealistic, prescription that the Supreme Court so rule only by accepting that those practices—and kindred remnants of "ceremonial deism"—have acquired immunity to constitutional challenge in consequence of their having been "grandfathered."[19]

Smith does not rest content with showing that the broad understanding of the nonestablishment norm for which Koppelman and some others contend is implausible as a matter of constitutional interpretation. Smith goes on to explain, at length, why even just as a practical matter, he strongly prefers, for us Americans, a state of affairs in which questions about whether government should affirm one or another religious tenet are decided by the citizenry, or by their political representatives, or by both, in the context of ordinary political discussion and decision-making.[20] Smith's preferred state of affairs—which he calls "the American settlement," and which, according to Smith, prevailed unchallenged throughout most of the nineteenth century up to

[17]Steven G. Calabresi and Sarah E. Agudo, "Individual Rights Under State Constitutions when the Fourteenth Amendment Was Ratified in 1868: What Rights Are Deeply Rooted in American History and Tradition?," *Texas Law Review* 87 (2008): 37 and 38.

[18]See above, n5.

[19]See Koppelman at 2 and 73–77. For thoughtful critical commentary on Koppelman's "grandfathering" argument, see Richard W. Garnett, "Neutrality and the Good of Religious Freedom: An Appreciative Response to Professor Koppelman," *Pepperdine Law Review* 39 (2013): 1152–54.

[20]See Smith at 76–110.

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the middle of the twentieth[21]—contrasts sharply with the state of affairs constituted by Koppelman's position, in which the Supreme Court has removed all such questions from the domain of ordinary politics by ruling that the nonestablishment norm forbids government to affirm any religious tenet whatsoever. However, because the controversy about how the nonestablishment norm is best understood is fundamentally a constitutional controversy, one can be agnostic, or even skeptical, as I am,[22] about the praises Smith sings in support of "the American settlement" and nonetheless conclude, as I do, that what Smith says in rejecting Koppelman's broad interpretation of the nonestablishment norm—the norm qua *judicially enforceable constitutional norm*—is persuasive.

Free Exercise and Religious Exemptions

Like the nonestablishment controversy, the free exercise controversy pits a narrow understanding of the norm at issue against a broad understanding. The free exercise norm is a right: the right to the freedom both to practice ("exercise") one's own religion and not to practice a religion not one's own. That the free exercise right is an antidiscrimination right is not disputed; whether it is more than an antidiscrimination right *is* disputed.

As an antidiscrimination right, the free exercise right forbids government to discriminate against a person—to treat a person, A, less well than another person, B—on the basis of a religion-specific reason regarding the person's conduct.[23] Examples of such religion-specific reasons: A (unlike B) is

[21]See Smith at 111–38. According to Smith, "the American settlement" began to be not only seriously challenged but undermined, by certain Supreme Court rulings, in the early 1960s. See id. at 113 et seq.

[22]Cf. Kevin M. Kruse, *One Nation under God: How Corporate American Invented Christian America* (New York: Basic Books, 2015).

[23]See Employment Division v. Smith, 494 U.S. 872, 877 (1990):

> [T]he "exercise of religion" often involves . . . the performance of (or abstention from) physical acts . . . [A] State would be "prohibiting the free exercise [of religion]" if it sought to ban such acts or abstentions only when they are engaged in for religious reasons, or only because of the religious beliefs that they display. It would doubtless be unconstitutional, for example, to ban the casting of "statutes that are to be used for worship purposes," or to prohibit bowing down before a golden calf.

See also Church of the Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520 (1993).

When I say, in the text, "on the basis of" a religion-specific reason, I mean it in the sense that government would not be treating A less well than B "but for" the religion-specific reason.

Government discrimination against a person on the basis of a reason, including a religion-specific reason, regarding the person's beliefs or speech implicates, and

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engaging in Islamic conduct; A is engaging in religiously based conduct;[24] A is not engaging in Christian conduct; A is not engaging in religiously based conduct.[25] An instance of treating A less well than B can take the form of punishing A, of otherwise imposing a burden on A, or of withholding from A a benefit that is granted to B.[26]

In *Employment Division v. Smith*,[27] five justices of the Supreme Court ruled that the free exercise right is nothing more than an antidiscrimination right.[28] According to a broader understanding of the right, however—an understanding that attracted the support of the four other justices[29]—the free exercise right is more than an antidiscrimination right: the right not only forbids government to discriminate on the basis of a religion-specific reason regarding

sometimes violates, the right to freedom of thought and speech. With respect to beliefs and speech, the free exercise right is redundant. Not that redundancy is never salutary, but it is with respect to *conduct*—conduct other than speech—that the free exercise right most matters.

[24]Cf. Lawrie Breen, "A Chinese Puzzle," *The Tablet* (London), Mar. 5, 2005 (reporting that "new regulations confirm that Beijing perceives religion as unscientific, superstitious and an enemy of progress"). "Last year a secret document, issued by the Central Committee's Propaganda Department, called for a new drive to promote Marxist atheism" (ibid.).

[25]By "religiously based" conduct I mean conduct animated by one or more of one's religious convictions and commitments.

[26]As no more than an antidiscrimination right, the free exercise right reflects what Boucher and Laborde, in their excellent commentary on Brian Leiter's *Why Tolerate Religion?* (2013), call "a theory of toleration"; it does not reflect what they call "a theory of legal exemptions." See François Boucher & Cécile Laborde, "Why Tolerate Conscience?," *Criminal Law and Philosophy* (published online, Nov. 11, 2014).

[27]494 U.S. 872 (1990).

[28]However, in Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC, 565 U.S. (2012), the Supreme Court ruled that although the free exercise right is only an antidiscrimination right with respect to government action that interferes with "outward physical acts," it is a broader right with respect to government action that interferes with "internal church decision that affects the faith and mission of the church itself." For expressions of skepticism about the coherence of that bifurcated understanding of the free exercise right, see Michael Stokes Paulsen, Steven G. Calabresi, Michael W. McConnell, and Samuel L. Bray, *The Constitution of the United States*, 2nd ed. (West Academic, 2013), 1133; Richard Schragger and Micah Schwartzman, "Against Religious Institutionalism," *Virginia Law Review* 99 (2013): 975.

[29]And that prevailed before the Supreme Court changed course in *Employment Division v. Smith*. See Wisconsin v. Yoder, 406 U.S. 205 (1972); Sherbert v. Verner, 374 U.S. 398 (1963). It is noteworthy that during the period when it prevailed, the broader understanding of the free exercise right had little practical bite. See, e.g., Ira Lupu, "*Hobby Lobby* and the Dubious Enterprise of Religious Exemptions," *Harvard Journal of Law and Gender* 38 (forthcoming).

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conduct; the right also requires government, even if it is not discriminating on the basis of such a reason, to accommodate a religious believer by exempting the religiously based choice she wants to make from a law (or other government action) that significantly burdens her ability to make the choice—her ability, that is, to act in accord with her religious convictions and commitments—unless not exempting the choice is the least restrictive means of serving a compelling government interest.[30]

Constitutional scholars too, no less than Supreme Court justices, are divided about which of the two understandings of the free exercise right—the narrow, antidiscrimination understanding that prevailed in *Employment Division v. Smith* or the broader, accommodationist understanding—is the more defensible understanding, in the sense of more faithful to the original understanding of the right.[31] Although Koppelman and Smith each discuss the free exercise controversy, neither indicates which understanding of the right, narrow or broad, he judges to be the more defensible understanding.[32] (Again, Koppelman and Smith are principally concerned, in their books, with the nonestablishment controversy.) However, both Koppelman and Smith approve of government's sometimes accommodating religious believers by exempting religiously based conduct,[33] which, as the Supreme Court emphasized in *Employment Division v. Smith*, government is constitutionally free (though not constitutionally required) to do.

An important question arises when government chooses to grant what we may call a "conscience-protecting" exemption (a) to religious believers, so that they can act in accord with their religious convictions and commitments, including their religiously based moral convictions and commitments, but (b) not to persons who are not religious believers but who nonetheless want to be able to act in accord with *their* moral convictions and commitments: Is it constitutional for government to grant conscience-protecting exemptions only to religious believers?

[30]As more than an antidiscrimination right—as a broad, accommodationist right—the free exercise right reflects what Boucher and Laborde call "a theory of legal exemptions" as well as "a theory of toleration." See above, n26.

[31]For a defense of the accommodationist understanding as more faithful to the original understanding, see Michael W. McConnell, "The Origins and Historical Understanding of Free Exercise of Religion," *Harvard Law Review* 103(1990): 1409–1517. For a defense of the antidiscrimination understanding as more faithful, see Phillip A. Hamburger, "A Constitutional Right of Religious Exemption: An Historical Perspective," *George Washington Law Review* 60 (1992): 915–48.

[32]See Koppelman at 108; Smith at 73–74.

[33]See Koppelman at 107–8. Smith's approval of government's sometimes granting religious exemptions is evident here: Steven Douglas Smith, "Debate: The Contraception Mandate and Religious Freedom," *University of Pennsylvania Law Review Online* 161, no. 261 (2013).

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In *Welsh v. United States* (1970), four members of the Supreme Court avoided the question in the preceding paragraph by construing the conscientious objector provision of the Universal Military Training and Service Act, which by its terms provided only for religiously based conscientious objection, also to provide for conscientious objection that was not religiously based.[34] In an opinion that supplied the crucial fifth vote in support of the Court's judgment, Justice Harlan answered the constitutional question; he explained that in his view, the conscientious-objector provision "runs afoul of the religion clauses of the First Amendment" by discriminating against those who are not religious believers.[35] "[H]aving chosen to exempt, [Congress] cannot draw the line between theistic or nontheistic religious beliefs on the one hand and secular beliefs on the other. Any such distinctions are not, in my view, compatible with the Establishment Clause of the First Amendment."[36]

Justice Harlan's sense that "any such distinctions" are unconstitutional was correct, but his reliance on the nonestablishment norm was problematic. It is far from obvious that by granting conscience-protecting exemptions only to (all) religious believers (i.e., who otherwise qualify), government violates even the broad understanding of the nonestablishment norm, much less a narrower understanding: granting such exemptions only to religious believers does not affirm—or presuppose or entail the affirmation of—any religious tenet; it does not, in Koppelman's articulation, "declare religious truth." The reason: there are *secular* rationales for granting exemptions only to religious believers.[37]

However, by granting such exemptions only to religious believers, government does violate the prevailing understanding—the narrow, antidiscrimination understanding—of the free exercise right: granting conscience-protecting exemptions only to religious believers discriminates against those who are not religious believers on the basis of a religion-specific reason regarding conduct. More precisely, granting such exemptions only to religious believers is to treat less well those who are not religious believers based on the fact that the conduct that those who are not religious believers want to engage in, unlike the conduct that the religious believers want to engage in, is not

[34]Welsh v. United States, 398 U.S. 333, 335 (1970) (Black, J., joined by Douglas, Brennan, and Marshall, JJ.).

[35]Id. at 345.

[36]Id. at 356.

[37]See Boucher and Laborde, "Why Tolerate Conscience?"; Christopher J. Eberle, "Religion and Insularity: Brian Leiter on Accommodating Religion," *San Diego Law Review* 51, no. 4 (2014). For an argument that granting exemptions to religious believers does not violate the original understanding of the nonestablishment norm, see Douglas Laycock, "Regulatory Exemptions of Religious Behavior and the Original Understanding of the Establishment Clause," *Notre Dame Law Review* 81 (2006): 1793.

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religiously based conduct.[38] Justice Harlan's bottom line was correct: it is not constitutional for government, if it grants conscience-protecting exemptions, to grant them only to religious believers.[39]

That government is not constitutionally free to grant conscience-protecting exemptions only to religious believers is not, in the United States, controversial as a practical—political—matter: it is not at all uncommon for the federal government, when it grants exemptions to religious believers so that they can act in accord with their religiously based moral convictions and commitments, also to grant exemptions to persons who are not religious believers so that they can act in accord with *their* moral convictions and commitments, even though their moral convictions and commitments are not religiously based. Micah Schwartzman's list illustrates the point:

> Federal and state legislation often goes beyond the category of religion to protect non-religious ethical and moral beliefs. For a recent example, the Affordable Care Act. . . includes an exemption from its minimum coverage provision—aka the "individual mandate"—for members of a recognized "health care sharing ministry," which the statute defines as a non-profit organization whose members "share a common set of *ethical or religious beliefs* and share medical expenses among members in accordance with those beliefs." Similar language is used in federal legislation prohibiting public officials from requiring health care providers to perform or assist with abortions or sterilizations when doing so would violate their "religious beliefs or moral convictions." The federal government is also barred from requiring employees to participate in the administration of the death penalty "if such participation is contrary to the *moral or religious convictions* of the employee." Numerous other federal and state statutes and regulations involving foreign aid, counseling services, vaccinations, pharmacies, organ donation, assisted suicide, and, of course, military service follow the same pattern of expressly protecting not only

[38]Douglas Laycock too argues that granting conscience-protecting exemptions only to religious believers is inconsistent with the free exercise right: Douglas Laycock, "Religious Liberty as Liberty," *Journal of Contemporary Legal Issues* 7 (1996): 326–37.

[39]Justice Harlan's answer to the constitutional question rests comfortably with the conclusion that as a matter of political morality, government should protect not only religiously based moral freedom but also moral freedom that is not religiously based. See Michael J. Perry, "Freedom of Conscience as Religious and Moral Freedom," *Journal of Law and Religion* 29, no. 1 (2014): 124–41; Michael J. Perry, "A Right to Religious and Moral Freedom? A Reply to Rafael Domingo," *International Journal of Constitutional Law* 12, no. 1 (2014): 248–55.

An important question put to me by Dan Conkle in commenting on a draft of this review essay: Is the Supreme Court's unanimous decision in *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC* consistent with the position that granting exemptions only to religious believers is unconstitutional? On *Hosanna-Tabor*, see above, n28.

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> religious convictions but also ethical and moral beliefs, conscience, or some combination thereof.[40]

But then there is RFRA—the Religious Freedom Restoration Act of 1993—which by its explicit terms grants exemptions (when doing do does not disserve a "compelling" government interest) only to religious believers. Specifically, RFRA prohibits the federal "[g]overnment [from] substantially burden[ing] a person's exercise of religion even if the burden results from a rule of general applicability" unless the government "demonstrates that application of the burden to the person (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest."[41]

Again, both Koppelman and Smith approve of government's sometimes accommodating religious believers by exempting religiously based conduct. Smith, however, says nothing about how he thinks the Supreme Court should respond if one who is not a religious believer seeks a conscience-protecting exemption under a statute that, like RFRA, grants such exemptions only to religious believers. How should the Court respond? Is there, all things considered, a more appropriate way to respond—does Smith think that there is a more appropriate way to respond—than the way the Court responded in *Welsh v. United States*, in which one who was not a religious believer sought conscientious objector status under the Universal Military Training and Service Act, which by its explicit terms granted conscientious objector status only to (otherwise qualifying) religious believers?[42] I concur in Douglas Laycock's judgment that responding the way the Court responded in *Welsh* is optimal, namely, by broadening the coverage of the law at issue rather than by invalidating the law.[43] At one point in his discussion of religious exemptions, Koppelman expresses support for the Court's strategy in *Welsh*, [44] in which, as Koppelman explains, the Court ruled that the Act exempted "from military service all those whose consciences, spurred by

[40]Micah Schwartzman, "Religion as a Legal Proxy," *San Diego Law Review* 51 (2014): 1100–1101 (citations omitted). See also Lynn D. Wardle, "Protection of Health-Care Providers' Rights of Conscience in American Law: Present, Past, and Future," *Ave Maria Law Review* 9, no. 1 (2010).

[41]42 U. S. C. §§2000bb–1(a), (b). As amended by the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), RFRA covers "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." §2000cc–5(7)(A). As of December 2014, twenty states have enacted laws that are substantially like RFRA, except that whereas RFRA applies only to the federal government, each state law applies to the government of the state whose law it is. See http://rfraperils.com/.

[42]According to Douglas Laycock, responding the way the Court responded in *Welsh* is optimal: Laycock, "Religious Liberty as Liberty," n. #, at 336–37

[43]Laycock, "Religious Liberty as Liberty," 336–37.

[44]See Koppelman at 161.

https://doi.org/10.1017/S0034670515000091 Published online by Cambridge University Press

deeply held moral, ethical, or religious beliefs, would give them no rest or peace if they allowed themselves to become a part of an instrument of war."[45]

* * *

I have focused here on two of the most fundamental controversies concerning American religious freedom: the meaning of the nonestablishment norm and the constitutionality of granting conscience-protecting exemptions only to religious believers. Much more in Koppelman's and Smith's learned, thoughtful, and constructively provocative books merits comment. Suffice it to say that anyone interested in state-of-the-art discussions of religious freedom under the constitutional law of the United States should read both books—and, ideally, read them seriatim, because, as I have explained, the two books articulate sharply different responses to the question, What sorts of government action constitute the "establishment" of religion?

[45]Welsh v. United States, 398 U.S. 333, 344 (1970) (plurality op'n), quoted by Koppelman at 133. Cf. Mark L. Rienzi, "The Case for Religious Exemptions—Whether Religion Is Special or Not," *Harvard Law Review* 127 (2014): 1409n39 (citations omitted): "The federal government has since expressly changed its conscientious objector provisions to embrace both secular and religious conscience objections."

Responding the way the Court responded in *Welsh* would have the great virtue of bringing RFRA into alignment with Article 18 of the International Covenant on Civil and Political Rights, to which the United States has been a party since 1992. See Perry, "Freedom of Conscience as Religious and Moral Freedom," 126–33.

https://doi.org/10.1017/S0034670515000091 Published online by Cambridge University Press