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RELIGION AND THEISTIC FAITH: ON KOPPELMAN, LEITER, SECULAR PURPOSE, AND ACCOMMODATIONS

Abner S. Greene *

ANDREW KOPPELMAN, *DEFENDING AMERICAN RELIGIOUS NEUTRALITY* (2013). Pp. 256. Hardcover \$55.00.

BRIAN LEITER, *WHY TOLERATE RELIGION?* (2013). Pp. 208. Hardcover \$24.95.

What makes religion distinctive, and how does answering that question help us answer questions regarding religious freedom in a liberal democracy? In their books on religion in the United States under our Constitution, Andrew Koppelman (*Defending American Religious Neutrality*)¹ and Brian Leiter (*Why Tolerate Religion?*)² offer sharply different answers to this set of questions. This review essay first explores why we might treat religion distinctively, suggesting that in our constitutional order, it makes sense to focus on theism (or any roughly similar analogue) as the hallmark of religious belief and practice.³ Neither Koppelman nor Leiter focuses on this, in part because it seems to exclude nontheistic religions that are part of the American fabric. I think this is a mistake, and will explain why. If we accept theism as a core aspect of religion in the United States, then we can appreciate how one's view on the "different planes" issue, as I will call it, is important to resolving issues of religious freedom. If one accepts that for many people, religious faith is a different form of knowledge (or belief) from evidence-based science (natural or social), and if we believe that an open-ended agnosticism⁴ is the appropriate political response to such different planes of knowing, then there is a good case for political toleration and respect for religion. The religion clauses of our Constitution are appropriately read, then, as keeping religion out of the state and the state out of religion. This is roughly consistent with Koppelman's conclusions, although from a somewhat different approach regarding both the religious purpose question (reli-

* Leonard F. Manning Professor, Fordham Law School. Thanks to John Nagle for helpful comments, and to Linda McClain for inviting me to review these two books.

1. ANDREW KOPPELMAN, *DEFENDING AMERICAN RELIGIOUS NEUTRALITY* (2013).
2. BRIAN LEITER, *WHY TOLERATE RELIGION?* (2013).
3. *But see* RONALD DWORKIN, *RELIGION WITHOUT GOD* (2013).
4. For an extended argument about political or constitutional agnosticism regarding matters of religion, see PAUL HORWITZ, *THE AGNOSTIC AGE: LAW, RELIGION, AND THE CONSTITUTION* (2011).

gion out of the state) and the accommodation question (the state out of religion).⁵ It is inconsistent with Leiter's conclusions about accommodation (and perhaps with his views about religious purpose, although that is less clear).⁶

At the heart of Koppelman's book is an argument for a version of religious neutrality. Our constitutional doctrine treats religion as "a good thing," and its value is "best honored by prohibiting the state from trying to answer religious questions."⁷ Thus, laws must be "justifiable in nonreligious terms"⁸ (although as we will see, Koppelman's arguments regarding religious purpose are hard to pin down). Conversely (and not inconsistently with a strong religious purpose test, although as I will explain, Koppelman spends too much time suggesting a possible inconsistency), religious "accommodation is a permissible way of recognizing the good of religion, so long as it does not discriminate among religions."⁹ Koppelman is wary of offering a too specific definition of religion for U.S. constitutional purposes, in part because the Supreme Court has been reluctant to do so. The most definitional he gets is this:

"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.¹⁰

The core of Leiter's argument is to define political toleration and respect, to define religion, and to explain why religion deserves neither distinctive toleration nor distinctive respect. He sets forth Kantian and utilitarian arguments for toleration.¹¹ The latter he describes as the "private space argument," i.e., that "[b]eing told *what you must believe* and *how you must live* . . . make lives worse."¹² Leiter uses Rawls' original position logic as a paradigmatic example of the former; if we did not know which religious or other beliefs we would have in a social setting, we would not risk the possibility that our beliefs would be in the minority and subject to persecution; thus, toleration hedges against such risk.¹³ This way of putting the deontological case for toleration is a bit odd. First of all, it is not clear that this aspect of

5. See generally KOPPELMAN, *supra* note 1.

6. See generally LEITER, *supra* note 2.

7. KOPPELMAN, *supra* note 1, at 2.

8. *Id.* at 13.

9. *Id.* at 107.

10. *Id.* at 124 (internal citations omitted).

11. LEITER, *supra* note 2, at 15.

12. *Id.* at 18.

13. *Id.* at 16-17.

Rawls' argument is rights-based rather than utility-based. Second, one could advance a more constitutive argument, i.e., that part of being human is to develop and hold beliefs and act on them, and thus that one has at least a presumptive right for state toleration of such (subject to side constraints, which Leiter acknowledges throughout). Next, relying on Mill, Leiter explains epistemic arguments for toleration, i.e., that "we can only discover the truth (or believe what is true *in the right way*) in circumstances in which different beliefs and practices are permitted to flourish."¹⁴ As

for respect, in the political sense, Leiter explores both affirmative (or appraisal) respect, and minimal (or recognition) respect.¹⁵ Minimal respect just requires us to honor basic moral requirements, which include toleration. So that doesn't advance the ball.¹⁶ Affirmative respect is thicker; it should be reserved for beliefs that have "a special kind of *value*."¹⁷

Leiter maintains that religion deserves neither special toleration nor special respect. There are three features distinctive to religious belief, he says:

[F]or all religions, there are at least some beliefs central to the religion that 1. issue in categorical demands on action—that is, demands that must be satisfied no matter what an individual's antecedent desires and no matter what incentives or disincentives the world offers up; and 2. do not answer ultimately (or at the limit) to evidence and reasons, as these are understood in other domains concerned with knowledge of the world. Religious beliefs, in virtue of being based on "faith," are insulated from ordinary standards of evidence and rational justification, the ones we employ in both common sense and in science . . . [and 3.] render intelligible and tolerable the basic existential facts about human life, such as suffering and death.¹⁸

Leiter claims there are no good reasons for distinctive toleration of religion. At the center of his case is this concern:

If what distinguishes religious beliefs from other important and meaningful beliefs held by individuals is that religious beliefs are *both* insulated from evidence *and* issue in categorical demands on action, then isn't there reason to worry that religious beliefs, as against other matters of conscience, are *far more likely* to cause

14. *Id.* at 19.

15. *Id.* at 69.

16. *Id.* at 72-73.

17. *Id.* at 82.

18. LEITER, *supra* note 2, at 33-34, 52 (emphasis and internal citations omitted). Leiter also mentions but then puts to the side this possible distinctive feature of religion: ". . . religious beliefs involve, explicitly or implicitly, a metaphysics of ultimate reality." *Id.* at 47.

harms and infringe on liberty?¹⁹

The Millian-epistemic argument for special toleration of religion also fails, contends Leiter, precisely because religion includes insulation from normal standards of evidence. Leiter acknowledges that a Millian might be interested in “alternative epistemic methods,”²⁰ but concludes that those would not distinguish nonreligious methods of this sort—e.g., “telepathy, talking with the dead, clairvoyance”²¹—and thus we still are left short of any reason to tolerate religion specially.

Furthermore, argues Leiter, there is no good reason to have affirmative (appraisal) respect for religion. At the center of Leiter’s case here is this: “religious belief is a *culpable* form of unwarranted belief given . . . ordinary epistemic standards.”²² Leiter acknowledges that to reach this conclusion, one must consider “the available evidence and thus the standards for what would constitute blameworthy epistemic irresponsibility.”²³

Leiter’s case here, I suggest, misses two things: the God that is at the center of most religious belief, at least in the special history of the United States and as adjudicated in our courts; and an understanding that political toleration and respect should account for a thick pluralism, which includes pluralism of ways of knowing, which includes faith-based, theistic belief.

Being human involves both a classical and a modern urge. The classical: It is teleological, positing ultimate ends. In all of us there is desire to go beyond the self, to reach a kind of wholeness or completion; to achieve ec-stasy, out of stasis, beyond language and mediated understanding. It is about overcoming our humanity, even as we remain human. The modern: It is rooted in our corporeal existence, our physical birth to death. The focus is on how we are animals, rather than human beings with minds that can imagine eternity and create culture. We are both human and being at all times, torn between an existential focus on facticity and a pull away toward overcoming our limited selves.²⁴ (For me, the most fascinating part of Christian theology is the concept of God’s coming into being in time as man. This captures the always-present tension in all of us between yearning toward the divine and an anchor in the world.)

Even for us modernists—rooted in science, evidence, reason, etc.—the classical urge does not disappear. As Thomas Nagel puts it, there is a “yearning for cosmic reconciliation that has been part of the philosophical impulse from the beginning.”²⁵ The religious response to this yearning, says Nagel, is “some kind of all-encompassing mind or spiritual principle in addition to the minds of individual hu-

19. *Id.* at 59.

20. *Id.* at 56.

21. *Id.* at 58.

22. *Id.* at 81.

23. *Id.* at 79.

24. See JEAN-PAUL SARTRE, BEING AND NOTHINGNESS 56 (Hazel E. Barnes trans., 1994) (1956) (referring to “the double property of the human being, who is at once a *facticity* [being in-itself, our corporeal being] and a *transcendence* [being for-itself, our human self-consciousness].”).

25. Thomas Nagel, *Secular Philosophy and the Religious Temperament*, in SECULAR PHILOSOPHY AND THE RELIGIOUS TEMPERAMENT: ESSAYS 2002-2008, at 3 (2010).

man beings and other creatures,” and “this mind or spirit is the foundation of the existence of the universe, of the natural order, of value, and of our existence, nature, and purpose.”²⁶ In other words: God, or some extrahuman source of normative authority. Consider also Mark Lilla’s account of Kant’s rational faith.²⁷ For Kant, writes Lilla, “[t]he faculty of reason . . . is not a passive faculty processing the information it receives, as Hobbes and Locke more or less thought. It is an active force driven by curiosity and a rage for order, including the rage to establish its own order and unity.”²⁸ And although metaphysics gives us no “genuine knowledge of the divine, . . . the idea of God serves an important, indeed necessary, function in the operation of reason.”²⁹ We pull toward systematicity and coherence, and positing an external source aids in this endeavor. Note that these linkages of theistic belief with the classical urge are relevant to our discussion of religion whether or not God exists. The theistic belief is at work in a very human, natural way. I will consider Richard Dawkins, Daniel Dennett, and Sam Harris in a moment—in linking their arguments for atheism with Leiter’s more cautious but related concerns about religion. For now, on the point of the centrality of theism to religion, consider Dennett’s working definition of religions: “*social systems whose participants avow belief in a supernatural agent or agents whose approval is to be sought.*”³⁰ For Dawkins, the religion he is critiquing depends upon what he calls “The God Hypothesis”—“*there exists a superhuman, supernatural intelligence who deliberately designed and created the universe and everything in it, including us.*”³¹ And he earlier includes ongoing influence (and not merely design and creation) as part of theism.³²

For most Americans, from the founding through today, religion includes theistic belief of some sort. To be sure, there are Buddhists, and other practitioners of nontheistic approaches to making sense of life and death, but nontheistic beliefs and practices have never been central to the fight for religious liberty nor to the case law in the area. The Court has struggled a bit at the edges—say, in interpreting federal law granting conscientious objection to military service³³—but at the core, religious liberty cases involve people who believe in God, and who either want to foist their theistic beliefs—and purported entailments—on others (Establishment Clause problems, usually), or want to be let go of the grips of law to carry out such entailments in their own lives (Free Exercise Clause issues, usually). That supposedly nontheistic religions exist (I say supposedly because we could spend more time on whether religion should be defined to include, as a necessary component, some sort of God belief) should not drive the constitutional definitional inquiry. Normally in law we work from core, paradigm cases, and deal with peripheral cases as need be. Why should it be any different here? Why the reluctance among some religion

26. *Id.* at 5.

27. MARK LILLA, *THE STILLBORN GOD: RELIGION, POLITICS, AND THE MODERN WEST* 136 (2007).

28. *Id.*

29. *Id.* at 138.

30. DANIEL C. DENNETT, *BREAKING THE SPELL: RELIGION AS A NATURAL PHENOMENON* 9 (2006).

31. RICHARD DAWKINS, *THE GOD DELUSION* 52 (2008).

32. *See id.* at 39.

33. *See Welsh v. United States*, 398 U.S. 333 (1970); *United States v. Seeger*, 380 U.S. 163 (1965).

clause scholars to consider the constitutional ramifications of belief in God—not non-science based beliefs generally that require some particular action (sometimes in tension with the state’s laws), but more specifically beliefs of that sort that have their basis in theistic faith?

I spend time on this point because it leads to the next point, which is how we should think about the “different planes” issue. Dawkins, Dennett, and Harris criticize action based in religious faith, i.e., action not based in standard principles of science or reason.³⁴ Their arguments are in two stages: that people and states should base decisions in science and reason, and that basing decisions in religious faith can lead to bad consequences, and too often has. Harris maintains that we should make “the same evidentiary demands in religious matters that we make in all others.”³⁵ “[T]he only thing that permits human beings to collaborate with one another in a truly open-ended way is their willingness to have their beliefs modified by new facts,” Harris adds.³⁶ “This spirit of mutual inquiry is the very antithesis of religious faith.”³⁷ Harris doesn’t reject spirituality. “For millennia, contemplatives have known that ordinary people can divest themselves of the feeling they call ‘I,’” but “spirituality can be—indeed, *must* be—deeply rational, even as it elucidates the limits of reason.”³⁸ We should reject not just religious extremism but even religious moderation and accommodations of religion, Harris contends; all of it opens the door to harm from action not based in reason and science.³⁹

Dawkins too argues in favor of science over religion. Instead of theistic belief, we should adopt a Darwinian approach: “*any creative intelligence, of sufficient complexity to design anything, comes into existence only as the end product of an extended process of gradual evolution.*”⁴⁰ Dawkins recognizes there are science-minded people who are either theists or agnostic regarding God. He criticizes such open-ended agnosticism. Regarding some matters, he argues, it makes sense to be permanently agnostic, “because the very idea of evidence is not applicable.”⁴¹ This is not the case regarding theistic belief, he maintains. Rather, whether God exists is something susceptible to evidentiary inquiry, and thus an agnosticism on the subject should be temporary only.⁴² Accordingly, he rejects what I have called the “different planes” approach, i.e., that for many, knowledge of God (and God’s demands) involves faith, which may not be based in standard reasoning processes. Dawkins also offers an argument for “Why There Almost Certainly Is No God,” which goes beyond rejection

34. See DAWKINS, *supra* note 31; DENNETT, *supra* note 30; SAM HARRIS, *THE END OF FAITH: RELIGION, TERROR, AND THE FUTURE OF REASON* (2004).

35. HARRIS, *supra* note 34, at 35.

36. *Id.* at 48.

37. *Id.*

38. *Id.* at 40, 43. For a related point, but one that is accepting of religion and not just atheistic spirituality, see JONATHAN HAIDT, *THE HAPPINESS HYPOTHESIS: FINDING MODERN TRUTH IN ANCIENT WISDOM* 183-84 (2006) (“the human mind simply does perceive divinity and sacredness, whether or not God exists.”). “[T]he scientific community should accept religiosity as a normal and healthy aspect of human nature.” *Id.* at 211.

39. HARRIS, *supra* note 34, at 16-23.

40. DAWKINS, *supra* note 31, at 52.

41. *Id.* at 70.

42. *Id.* at 70, 91.

of agnosticism or different planes.⁴³ He also discusses (although less vigorously than does Harris) the harm that flows from action based in religious faith.⁴⁴

Dennett offers an historical-anthropological story of how religion comes into being and maintains itself. To that extent, his case is not necessarily inconsistent with the existence of an extrahuman source of normative (and generative) authority. But he also distinguishes science from religion, separating testing through evidence from faith, and he criticizes some religious belief and practice for disabling inquiry and relying instead on mystery.⁴⁵ One must appreciate, though, that there are plenty of stories to tell about how religion comes into being and what role it plays in our lives—stories themselves based in the method of social science—without necessarily debunking theism. For example, Dennett says “the root of human belief in gods [is] . . . the disposition to attribute *agency*—beliefs and desires and other mental states—to anything complicated that moves.”⁴⁶ From this develop rituals, memes, and leaders, i.e., more complex social structures of transmitting faith in god(s).⁴⁷ One need not take any particular position on whether God exists to adopt this account. Consider Lilla’s intellectual history of (Protestant) religious theology and nontheological explanations of religion. He claims that Hobbes was the key thinker, changing the subject from God and his nature to man and his religious nature, offering a theory for why theistic religion arises and persists.⁴⁸ One could accept a Hobbesian story of the source of religious belief as a believer, an atheist, or an agnostic. As Alvin Plantinga argues, although “some writers seem to think that in coming up with a suggestion as to the evolutionary origin of religion, they are in some way discrediting it,”⁴⁹ that’s not necessarily the case. For example, our agency-detecting devices may lead to some false positives, but they also work well for beliefs we all share (say, in the existence of other minds).⁵⁰

Plantinga’s argument goes further, to show that one can be almost a full-fledged Darwinian *and* a theist. One can believe in a creating God and believe that evolution followed from that. One does not have to believe in unguided evolution: “evolutionary theory does not [or perhaps he should say, should not] pronounce on such questions as whether it is logically possible that minds should come to be in a universe which is originally mindless.”⁵¹ The question, says Plantinga, is “whether there is a source of rational religious belief going beyond perception, memory, a priori intuition, induction, et cetera.”⁵² To argue that evolution is necessarily unguided is a “metaphysical or theological addition” to standard evolutionary theory.⁵³ As Nagel puts it, “[i]f the God hypothesis makes sense at all, it offers a different

43. *Id.* at ch.4.

44. *See id.* at ch. 8.

45. DENNETT, *supra* note 30, at 267-68.

46. *Id.* at 114.

47. *Id.* at chs. 5-6.

48. *See* LILLA, *supra* note 27, at ch. 2.

49. ALVIN PLANTINGA, *WHERE THE CONFLICT REALLY LIES: SCIENCE, RELIGION, AND NATURALISM* 140 (2011).

50. *See id.* at 141.

51. *Id.* at 38.

52. *Id.* at 45.

53. *Id.* at 63.

kind of explanation from those of physical science.”⁵⁴ He continues: “All explanations come to an end somewhere. . . . The God hypothesis does not explain the existence of God, and naturalistic physicalism does not explain the laws of physics.”⁵⁵

If belief in God is a key part of religious practice, at least in our constitutional order, and if one can follow the dictates of science and reason while simultaneously believing in God (as a creator or continuing presence or both), then the ground is established, I would argue, for a deep toleration of religion, and respect as well. We are talking about a very natural and deeply rooted urge in many human beings toward overcoming the self, toward completion or extension. God, for many, is the natural apotheosis of this ineradicable urge. Even those of us who are atheists or agnostics should tolerate faith-based belief because such belief is for many as much of their humanity as is waking and sleeping.⁵⁶ The different planes point is a point about a kind of pluralism, a pluralism of ways of knowing (and being), and such variegated ways of knowing deserve at least the hands-off attitude of tolerance (either personally or politically). I’d say this kind of pluralism should lead even more deeply, to affirmative (appraisal) respect for the complex ways in which theists are seeking to grapple with the classical-modern tension of the human condition.⁵⁷

Leiter’s case against religious toleration or respect is based primarily in a two-step argument: religion is grounded in epistemically culpable (and false)⁵⁸ belief, which, because of its lack of scientific basis, is more likely to lead to bad consequences. (To this extent, his argument is a calmer version of Harris and Dawkins.) The mistake here is twofold—it fails to recognize the virtues of different planes of knowing, or at least to be sympathetic toward the faith-based model, which deserves our appreciation if not our adoption. It also introduces utilitarian cost-benefit analysis at the wrong point. No one who argues for accommodating religious practice believes we should do so wholesale or without balancing. Harm to others always must be taken into account, and often will lead to the denial of ac-

54. See NAGEL, *supra* note 25, at 22.

55. *Id.* at 23.

56. Although my focus is on faith and religious belief, one might establish a broader argument about faith as a separate source of belief. See, e.g., PAUL W. KAHN, *POLITICAL THEOLOGY: FOUR NEW CHAPTERS ON THE CONCEPT OF SOVEREIGNTY* 23, 140 (2011) (“the secular state does not hesitate to speak of sacrifice, patriotism, nationalism, and homeland in the language of the sacred. . . . None of this has much to do with the secular; these are matters of faith, not reason. . . . Revolutions bind the future just as long as they are imagined as action by the popular sovereign—a transtemporal, collective subject. This concept of sovereignty is incomprehensible if stripped of its theological origins. . . . None of this is a matter of reason; all of it is a matter of will, imagination, and faith.”). See also JACK M. BALKIN, *CONSTITUTIONAL REDEMPTION: POLITICAL FAITH IN AN UNJUST WORLD* (2011). For a critique of bindingness over time of a transtemporal, collective subject, see ABNER S. GREENE, *AGAINST OBLIGATION: THE MULTIPLE SOURCES OF AUTHORITY IN A LIBERAL DEMOCRACY* ch. 3 (2012).

57. For an eloquent and moving testimony to the plane of faith, see CHRISTIAN WIMAN, *MY BRIGHT ABYSS: MEDITATION OF A MODERN BELIEVER* (2013). “You have never felt overwhelmed by, and in some way inadequate to, an experience in your life, have never felt something in yourself staking a claim beyond your self, some wordless mystery straining through words to reach you?” *Id.* at 70. “Faith is nothing more . . . than a motion of the soul toward God. It is not belief.” *Id.* at 139. “So much of faith has so little to do with belief, and so much to do with acceptance.” *Id.* at 178.

58. The focus of Leiter’s argument is on the lack of epistemic warrant for religious belief. See LEITER, *supra* note 2, at 59, 63, 78-85. He introduces the “false” qualifier when discussing Simon Blackburn’s work, and continues with it afterwards, *id.* at 75, 79, but whether religious beliefs, in the end, are true or false is less important to Leiter than that they are, he claims, not properly based on evidence and reason.

commodation. But that religious faith-based belief and practice sometimes leads to harm is not a reason to reject it up front if there are good reasons to be at least open-minded about it. If we understand and accept religious faith as a natural way of expressing our classical urge toward overcoming the self, and if we accept religious faith as (possibly) one way of knowing, then this kind of pluralism should lead us to appreciating and accommodating religion as a distinctive aspect of human existence.

There are two entailments from this for U.S. constitutional practice, and this is a road back into discussing Koppelman. The first entailment: All of the reasons that suggest religion should be tolerated, and perhaps respected, also suggest that legislation should be based in secular, not religious, reasons or purposes. But there are different ways to cash out this secular purpose test, and I fear Koppelman's presentation on the matter is murky. Furthermore, on what appears to be the best understanding of Koppelman's view here, he and I ultimately agree, I think, on the underlying concern; but our suggestions for how the concern should be operationalized are somewhat different. The second entailment: Accommodations for religious practice—to ease burdens on, usually, minority religions, from having to comply with nondiscriminatory laws of general applicability—should be a standard part of liberal democracy, on several different possible grounds. They do not pose a serious conflict with the secular purpose requirement. Koppelman ultimately agrees, but spends too much time asserting a potential tension between what the Establishment Clause (secular purpose test) and the Free Exercise Clause (accommodations) require.

Secular purpose. We human beings are naturally inclined toward going beyond ourselves, toward completion, making whole. This manifests itself in various ways, and has been theorized about for a long time. Any kind of belief in an extrahuman source of normative (or generative) authority is the most obvious and frequent manifestation of the classical teleological urge. If we understand religion as involving faith-based theistic belief, we can understand why the perceived dictates of religion should not be the prime basis for legislation that regulates the citizenry generally. Nonbelievers do not have access to the faith-based knowledge that believers have, and cannot fully participate in the legislative process if such process involves grounding the laws under discussion in religious faith-based belief. The laws that result from such a religiously infused process are properly seen as sectarian and insufficiently general. Thus, laws in a liberal democracy—certainly one with our history of religious pluralism and our Constitution (specifically, our First Amendment's Establishment Clause, but also the Free Exercise Clause, the failure to mention God in the Constitution, and the no religious tests provision)⁵⁹—should be expressly based in predominantly secular, widely accessible reasons.⁶⁰

59. See U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof"); see also *id.* art. VI, cl. 3 ("no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.").

60. See GREENE, *supra* note 56, at 150-55; Abner S. Greene, *The Incommensurability of Religion*, in LAW & RELIGION: A CRITICAL ANTHOLOGY 226, 230-33 (Stephen M. Feldman, ed., 2000) [hereinafter, Greene, *The Incommensurability of Religion*]; Abner S. Greene, *Is Religion Special? A Rejoinder to Scott Idleman*, 1994

The Supreme Court, without always explaining this reasoning, has invalidated legislation based in expressly, predominantly religious justification. The cases involve the teaching of evolution⁶¹ or creation science⁶² in the public schools, the addition of prayer to a moment of silence law for the public schools,⁶³ and the placing of the Ten Commandments on schoolroom or courthouse walls.⁶⁴ I have discussed these cases elsewhere and will not again here.⁶⁵ Despite withering critiques from Justice Scalia and others,⁶⁶ the Establishment Clause-grounded rule against basing laws or other governmental action in predominantly, expressly religious reasons is still on the books and is sound. It is a proper bulwark against what Lilla has elegantly described as an extension of the common, nearly universal religious urge (whether or not we would all put it that way in our own quest for overcoming the anxiety of our limited selves, our mortality), to a kind of political theology.⁶⁷ Many are led, he writes, from the urge for religion as consolation to “being convinced that [their beliefs about the divine or revelation] are legitimate sources of political authority.”⁶⁸

There are different ways to operationalize the secular purpose test. One is to require that all laws be based in a plausible secular purpose. This would not examine the legislative process at all. Another would be to look at the process, and ask whether laws were passed based on expressly (and predominantly) religious arguments. My position has been the latter—that nonbelievers (in the majority religious beliefs and their perceived entailments) are excluded from equal participation in the legislative process when religious grounds become central, and that such exclusion should concern us both as a matter of liberal democratic political theory and U.S. constitutional law.⁶⁹ The problem with Koppelman’s presentation on this issue is that although he seems to want to adopt the more objective, plausible secular purpose argument, he sneaks in enough looks at the actual process, and references to it, that I’m left confused.

We must have a secular purpose requirement, says Koppelman, because of the combination of two factors—“to prevent the corruption of religion by government manipulation,” and this means that, at least, “the state is forbidden from declaring religious truth.”⁷⁰ This is a bit of an odd way to put it. These two factors are more

U. ILL. L. REV. 535; Abner S. Greene, *The Political Balance of the Religion Clauses*, 102 YALE L.J. 1611, 1614-33 (1993) [hereinafter Greene, *The Political Balance*].

61. See *Epperson v. Arkansas*, 393 U.S. 97 (1968).

62. See *Edwards v. Aguillard*, 482 U.S. 578 (1987).

63. See *Wallace v. Jaffree*, 472 U.S. 38 (1985).

64. See *McCreary Cnty v. ACLU of Kentucky*, 545 U.S. 844 (2005); *Stone v. Graham*, 449 U.S. 39 (1980) (per curiam). *McCreary* contains the best explanation for the secular purpose requirement. See *McCreary*, 545 U.S. at 863. See also Abner S. Greene, *The Apparent Consistency of Religion Clause Doctrine*, 21 WASH. U. J.L. & POL’Y 225, 242-45 (2006).

65. See GREENE, *supra* note 56, at 152-53; Greene, *The Incommensurability of Religion*, *supra* note 60, at 233; Greene, *The Political Balance*, *supra* note 60, at 1624-25.

66. See, e.g., *McCreary*, 545 U.S. at 885 (Scalia, J., dissenting); *Edwards*, 482 U.S. at 610 (Scalia, J., dissenting).

67. LILLA, *supra* note 27, at 7-9.

68. *Id.* at 7.

69. See *supra* note 60.

70. KOPPELMAN, *supra* note 1, at 90

centrally relevant to what we might call the judicial (or administrative) anti-entanglement rule—the case law clearly holds that the state may not resolve matters of religious truth or doctrine for religious institutions (such as deciding which reading of Kosher law is correct, or requiring churches to follow anti-discrimination law when disciplining ministers).⁷¹ It's not entirely clear whether and how the state would corrupt religion by enacting some religious dictates into general law. (Of course, that might happen, and one strand of thinking about religious liberty focuses on the hit to church freedom from religion in the state as well as from the state in religion.) Koppelman is looking at the big picture here, not just at anti-entanglement concerns of the sort I mention. One might think that the secular purpose requirement is as much, therefore, about protecting those who don't share the dominant faith in any given jurisdiction from having their lives governed by religious law, either overtly or in disguise.

In any event, anti-corruption and not declaring religious truth are Koppelman's touchstones. Here are various ways he suggests ensuring secular purpose in state action, and my comments on his suggestions: The state may not "declare any particular religious doctrine to be the true one, or enact laws that clearly imply such a declaration of religious truth."⁷² (This seems to focus, in the first half, on what the law says or perhaps what legislators say.) At one point, summarizing the secular purpose argument, he says:

Because religious neutrality focuses on *what* government is saying rather than on *who* supported any particular law, the participation of the religious is unimpaired. The courts should monitor legislative output, not inputs. Citizens may make whatever religious arguments they like in favor of a law, so long as the law that is ultimately passed is justifiable in nonreligious terms.⁷³

(The focus here is on the presence of a secular justification, and not on the process, except "*what* government is saying" is ambiguous between a law's text and other speech by state actors.)

And this: "Does the Establishment Clause bar the government from enacting laws whose only justification is based on the tenets of some religion?"⁷⁴ (The focus here is on making sure there's not a sole religious justification, which is different from saying there has to be a secular justification.) The state "expresses an opinion . . . through the passage of legislation."⁷⁵ (An interesting theory of expressive harm, but expressive harm from legislation can result in various ways, including from perceiving predominant, express arguments behind the law.) "The question is whether any given law is capable of justification without directly relying on theo-

71. See *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 132 S. Ct. 694 (2012). See, e.g., *Commack Self-Service Kosher Meats, Inc. v. Weiss*, 294 F.3d 415 (2d Cir. 2002).

72. KOPPELMAN, *supra* note 1, at 3. A similar statement can be found on page 84.

73. *Id.* at 13.

74. *Id.* at 84.

75. *Id.* at 91.

logical considerations or religious authority.”⁷⁶ (This is a clear statement of the plausible secular purpose test.) Sometimes what the government “says . . . is obvious on the face of the statute.”⁷⁷ However, sometimes it is not, and we answer the secular purpose question “on the basis of judicial interpretation of social facts.”⁷⁸ (Now he has opened the door to more than plausible secular purpose. Looking beyond the text to background conditions of a law’s enactment is what I’ve suggested we should do.) “Some laws will have *no* plausible secular purpose.”⁷⁹ (Back to that test.) The Court often relies on “objective purpose. . . as a proxy for the subjective legislative intent that is so hard to discern.”⁸⁰ (Tricky. Does Koppelman believe that “subjective legislative intent” is the ideal touchstone, but for second-order reasons we must look to “objective purpose”? My argument has never been about subjective legislative intent. It is always about looking at the legal, social, and cultural history behind legislation, and determining whether a reasonable observer’s best interpretation of the law would be that it passed pursuant to predominant, express (in various ways) religious justification. Does Koppelman agree this is problematic, on an expressive theory of harm?)

Koppelman then writes: “[T]he law would be radically transformed if overtly religious considerations were a permissible basis for state decision making.”⁸¹ (Now he’s in my camp, all of a sudden?) “When the Court attempts to discern a rational basis for a law, it may not cite revelation as the basis that it is seeking.”⁸² (Now back to a plausible, or rational, secular purpose test.) But wait:

The plausibility of the state’s proffered secular justification is context-dependent. The objective approach to legislative purpose does not confine the Court’s attention to the four corners of the statute. The context in which the law was enacted is an objective fact about it, and one that the Court may properly take into account in discerning the law’s purpose.⁸³

(What’s this, now? If we’re allowed to look at the history of a law’s enactment, including (I would assume) what people were saying when they argued for a law, then we are closer to examining the law’s actual purpose than its plausible purpose. “Objective” is a tricky word here. We do not want to get into the heads of legislators (or citizens or others participating broadly in the process), and “objective” marks that concern. But focusing on the actual purpose is different from focusing on a plausible purpose.)

In the end, Koppelman and I agree that the Court should enforce a fairly vig-

76. *Id.* at 93.

77. *Id.*

78. *Id.* (quoting *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 315 (2000) (quoting *Lynch v. Donnelly*, 465 U.S. 668, 694 (1984) (O’Connor, J., concurring)).

79. KOPPELMAN, *supra* note 1, at 94.

80. *Id.*

81. *Id.* at 96.

82. *Id.* at 98.

83. *Id.* at 102.

orous secular purpose principle for state action in our constitutional order. We agree to some extent on the rationale for this—laws should not be based in religion—although he focuses on an anti-corruption of religion principle and I focus on the harm to nonbelievers when the legislative process is captured by a dominant religious group. Koppelman’s presentation of what we should be looking for in determining whether the secular purpose test is met is complex and, I fear, hydra-headed, spinning in too many directions, insufficiently focused.

Accommodations. When should, or must, the state in a liberal democracy (or, under the U.S. Constitution’s First Amendment, more specifically) accommodate (or exempt)⁸⁴ religious practice by setting it free from law? I will not focus here on the institutional question, i.e., whether this should be done by legislatures or by courts (or by executives, given sufficient enforcement discretion). In earlier writing, I argued for mandatory exemptions for religious practice from nondiscriminatory, generally applicable law.⁸⁵ (If the law discriminates against religion or a religion, that would be a sufficient ground to invalidate it, so we are focused on nondiscriminatory laws. Nondiscriminatory in the normal, express, or otherwise provable way; one good argument for exemptions is that laws of general applicability are often subconsciously discriminatory, failing to carve out accommodations for minority religions that the majorities do not see or understand.) My argument was based in a political balance of the religion clauses: because we properly forbid laws from being grounded in predominant, express religious justification, we have therefore limited (to some extent) the participation of religious folk in the lawmaking process, and they are therefore not fully bound by the laws that result; exemptions are a curative device. (The exemptions are *prima facie* only, subject to a complex balancing test to account for harm to others.) That was an argument to treat religion specially. In subsequent work, without disavowing that argument (it can stand alone as a reading of our First Amendment), I offered an argument for accommodating religious *and* secular practice, based in a combination of a negative argument (no political obligation or political legitimacy) and a positive argument (for a robust values pluralism, what I call “permeable sovereignty,” i.e., that the norms that govern us should be seen as permeable through the state’s laws and to our various other sources of authority, such as religion, philosophy, culture, tribe, family, etc.).⁸⁶

In his book, Koppelman supports accommodations for religion only, without necessarily ruling out the development of other arguments for accommodations more broadly.⁸⁷ As explained above, Leiter rejects the argument for treating religion specially, for accommodations, under either a toleration or respect rubric. Leiter also rejects broadening the scope of accommodations to the secular as well as

84. These terms are sometimes used interchangeably; sometimes “exemption” is used for judicial action required by the Constitution, with “accommodation” being used for legislative action either as of grace or as required by the Constitution. I will use the terms interchangeably, specifying any qualifications as needed.

85. See *supra* note 60.

86. See GREENE, *supra* note 56.

87. KOPPELMAN, *supra* note 1, at ch. 4.

religious believer.⁸⁸ His concerns are mostly of the second-order and utilitarian sort: broad accommodations might constitutionalize a right to civil disobedience (actually, conscientious objection); it's too hard to adjudicate too many of these claims; and, exemptions too often place burdens on others. The burdens point again brings to step one what should be left for step two, i.e., if there are otherwise good reasons for having a presumptive system of exemptions, then we should have it, and balance harm to others at step two. The adjudication point is a familiar one, made by most opponents of judicial exemptions (and by most opponents of legislative accommodations, translating to that setting). I refer the reader to chapter two of my book *Against Obligation* for a rebuttal.⁸⁹ The short version is that we can do case by case balancing here as we do throughout the law; that consideration of matters internal to religions and other belief structures are no more complex than many other things that courts and legislatures examine; and that such examination does not violate religious freedom or associational rights, because those asking for accommodation will have waived any such objection.

Accommodations for religious practice (subject to a balancing test) should be uncontroversial (if you put aside the institutional question, which is harder). Why not let people off the hook from obligation to law, if they have conflicting obligations to other sources of normative authority (these are often the root of accommodations), if we can do so at no or low cost to others? (Leiter does mention several times that he might be okay with accommodations with low or no cost to others.⁹⁰ That bolsters the importance of burdens on others to his analysis, and helps make my point that the burden question should be a second-step inquiry in any given case, not a reason for wholesale rejection of accommodations.) Koppelman spends quite a bit of time hoisting the following supposed concern—that religious accommodations would flunk the secular purpose test, and thus that there's a kind of tension between the Free Exercise Clause (supporting accommodations) and the Establishment Clause (barring them). Let me set forth Koppelman's presentation on this, and then explain why the supposed tension is bogus. And . . . Koppelman basically admits the same, which makes one wonder why he spends so much time hoisting.

In the Introduction, he refers to this as a "deep coherence problem in First Amendment law," otherwise referred to as "*the free exercise/establishment dilemma*."⁹¹ Then: "how can these accommodations have a secular purpose? They seem flatly to contradict the secular purpose requirement."⁹² In chapter three, he writes that the Court's exemptions and accommodations cases "reveal a deep incoherence at the heart of the Court's religion jurisprudence, since the *Lemon* test [which includes a requirement of secular purpose for state action] seems to forbid what the free exercise cases require."⁹³ Next, in chapter four, he says, "[m]uch of the attrac-

88. LEITER, *supra* note 2, at ch. 5.

89. See GREENE, *supra* note 56, at ch. 2.

90. LEITER, *supra* note 2, at 4, 106.

91. KOPPELMAN, *supra* note 1, at 5, 6.

92. *Id.* at 11.

93. *Id.* at 87.

tiveness of conscience [as a more general ground for accommodation] arises from its perceived capacity to resolve the free exercise/establishment dilemma [by getting us out of the dilemma] . . . without endorsing any claims about religious truth.”⁹⁴

As Koppelman notes, some Supreme Court Justices have advanced this ‘religion clauses in tension view.’⁹⁵ For example, Justice O’Connor wrote: “a rigid application of the *Lemon* test would invalidate legislation exempting religious observers from generally applicable government obligations. By definition, such legislation has a religious purpose and effect in promoting the free exercise of religion.”⁹⁶ Justice Scalia has written: “We have not yet come close to reconciling *Lemon* [referring to its secular purpose test] and our Free Exercise cases, and typically we do not really try.”⁹⁷ Other cases have seen similar discussions of this supposed tension.⁹⁸

This is not such a hard problem. The core cases about accommodation involve minority religious groups seeking to be let free from the grips of otherwise valid laws of general applicability, because of a (real) tension between the dictates of the law and religious norms of the groups. When a legislature or court says ‘yes, we will let you practice your religion here,’ it is not seeking to advance a dominant notion of religious truth, and it is not seeking to advance the minority group’s notion of religious truth. The secular purpose is obvious: help some fellow citizens out of a conflict of obligations. As Koppelman himself notes (and therefore, why spend so much time suggesting an easy problem is a hard one?): “the state can abstain from endorsing any specification of the best or truest religion while treating religion as such, understood very abstractly, as valuable. . . . That is how it can accommodate religion as such while remaining religiously neutral.”⁹⁹ And this: “It is possible for the state to favor religion-in-general as such, in all the ways that free exercise requires and that the Court has traditionally permitted, without declaring religious truth and so without violating the secular purpose prong.”¹⁰⁰

Sometimes “accommodation” gets distorted, as when, say, someone argues that we must allow teacher-led prayer in public school or blatantly sectarian religious symbols on government property, to “accommodate” the dominant religious sect’s desire to advance its religious views by conscripting the state apparatus. This is not a valid secular purpose. And it should not be called “accommodation.” However, when the state lifts a burden on the free exercise of religion imposed by a nondiscriminatory law of general applicability, there is no Establishment Clause problem, unless one thinks that benefiting religion where similarly situated secular interests would not be benefited raises an Establishment Clause problem. This was Justice Stevens’ position throughout his career, regarding both legislative and judi-

94. *Id.* at 131.

95. *Id.* at 39-40, 87-88.

96. *Wallace v. Jaffree*, 472 U.S. 38, 82 (1985) (O’Connor, J., concurring in the judgment).

97. *Edwards v. Aguillard*, 482 U.S. 578, 617 (1987) (Scalia, J., dissenting).

98. *See, e.g., Thomas v. Review Board*, 450 U.S. 707 (1981).

99. KOPPELMAN, *supra* note 1, at 7.

100. *Id.* at 95.

cial action.¹⁰¹ Despite my deep affection for Justice Stevens both jurisprudentially and personally (I clerked for him), I don't share his views here. Religion is distinctive—faith in God is different from other forms of belief or grounds for knowledge—and the disabilities we place on religion in the governmental sphere nicely set up a need to accommodate and exempt religious practice when possible. This does not come close to establishing religion.

In conclusion: I have advanced an understanding of religion in the U.S. constitutional and cultural order that includes theistic faith as part of religious practice. In turn, that requires us to consider different planes of knowledge and belief—one might say a plane of natural and social science, and a plane of theistic faith. The different planes concept is a cogent one; a broad values pluralism requires us to treat theistic faith, and religious belief and practice that follows, with toleration and respect, *contra* Leiter. Because of the often sectarian and inaccessible nature of such faith, however, we appropriately forbid legislation based primarily on express reference to an extrahuman source of normative authority. Koppelman's secular purpose argument is close to this, but different and sometimes hard to grasp. Accommodating religious practice when possible properly acknowledges the separate sources of normative authority to which some of our fellow citizens adhere, a point with which Koppelman agrees, but only after unnecessarily problematizing the matter.

101. See *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997) (Stevens, J., concurring) (rejecting legislatively ordered judicial strict scrutiny balancing test for religious but not secular claims, as violative of the Establishment Clause). See also *Goldman v. Weinberger*, 475 U.S. 503, 510 (1986) (Stevens, J., concurring); *United States v. Lee*, 455 U.S. 252, 261 (1982) (Stevens, J., concurring). In the latter two cases, Justice Stevens did not expressly state that exemption would violate the Establishment Clause, but his concern with judicial entanglement from a balancing test that would result in victories for some claimants but not others expresses a disestablishment concern.