

# Church, State and Neutrality: A Helpful Guidebook

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By Peter Berkowitz

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Last week, the Supreme Court heard oral arguments in *Greece v. Galloway*, an important case on religious liberty. *At issue is whether* Greece, a town in upstate New York, can permit voluntary prayers before town council meetings without running afoul of the First Amendment's prohibition on establishing religion. To decide the case, the court is compelled to revisit established precedents, which bar mandatory school prayer but appear to allow nonsectarian prayers to open legislative sessions.

Those precedents may be particularly ripe for review in light of the renewed salience of questions regarding religion in a free society. In the United States, religion-based complaints to the U.S. Equal Employment Opportunity Commission have doubled over the past 15 years, which reflects a growing demand among the religious for accommodation by the state.

Meanwhile, European nations increasingly confront tough public policy challenges surrounding freedom and religion. These include regulation of the wearing of hijabs and burqas; the struggle against Islamic jihadists using charities as fronts for war on freedom and democracy; and the content of education in a free society -- what doctrines religious schools may teach and what nonreligious content they must teach. In the coming years, such issues are likely to become more prominent in the United States.

In grappling with religious freedom, Andrew Koppelman's superb book, "*Defending American Religious Neutrality*," offers invaluable assistance. The book finds an internal logic in Supreme Court religion and freedom jurisprudence -- from school prayer and the use of government funds for religious education to conscientious objectors and the display of the Ten Commandments in public buildings -- which most commentators regard as a tangled mess. Koppelman also adroitly defends the priority that the Constitution attaches to religion, a priority that many on the left believe is unjustified and which many on the right believe has been betrayed.

A professor at Northwestern University Law School, Koppelman begins with an intriguing provocation.

"Prominent scholars of religion," he notes, "have ridiculed President-elect Dwight Eisenhower's 1952 declaration: 'Our form of government has no sense unless it is founded in a deeply felt religious faith, and I don't care what it is.'"

Koppelman, who identifies himself as “a modern secularist with a deep commitment to human rights,” confronts head-on the conventional wisdom that Eisenhower’s comment exposed his bumbling superficiality. To the contrary, contends the author, Eisenhower “revealed a deep insight into the character of American neutrality.” Koppelman says his book “aims to recover that insight.”

In vindicating Ike’s acumen, he gives scholarship a good name. He has read prodigiously, synthesized creatively and perceptively, criticized constructively, and reasoned sharply and judiciously. Drawing on a deep knowledge of American constitutional law, a sure grasp of the history of modern political philosophy, and a refreshingly robust reservoir of good old-fashioned common sense, he argues persuasively that the doctrine of government neutrality toward religion is deeply rooted in the American constitutional tradition and that, paradoxically, the doctrine was born out of the conviction that religion is deserving of special protection in a state devoted to individual liberty.

No matter how well-reasoned, Koppelman’s thesis will confound those on either side of the religious culture wars.

Atheist activists often assert that the special protection the First Amendment grants to the free exercise of religion indicates that our system is not neutral enough. They would make the wall of separation between church and state impregnable.

Traditional moralists in many cases would like to lower the wall of separation. They would permit non-denominational prayers at public institutions, encourage cooperation between churches and government on behalf of aiding the needy, and restore religious rhetoric and religious symbolism to the naked public square.

Meanwhile, scholars have debated the concept of neutrality for decades. Followers of John Rawls, an influential political theorist, hold that neutrality is the master idea of liberal democracy. In philosophy departments, political science classrooms, and law schools across the country, the Rawlsian interpretation of neutrality reigns. It holds that by resolutely refusing to endorse or aid any particular conception of perfection or salvation, by establishing institutions and implementing rules that allow each person to pursue happiness as he or she sees fit -- provided one respects the like liberty of others to pursue happiness as they will -- the state honors the only appropriate form of justice in a free and democratic society.

Conservative critics of the Rawlsian approach reply that neutrality is a pusillanimous concept. Neutrality, they argue, proclaims that the state is committed to no particular conception of how one should live one’s life -- but in practice, it promotes a progressive and secular ideology. That’s because neutrality toward competing visions of the good life, the critics contend, presupposes that there is no greatest good or ultimate truth about salvation; this, as a result, dissolves restraints on conduct, both by the individual and government.

Koppelman argues that the Rawlsians and their conservative critics are both partly right and partly wrong. State neutrality toward religion is, as the Rawlsians argue, desirable. Yet neutrality in the American constitutional tradition does, as the conservatives maintain, serve a substantive goal, though not the advancement of progressive secularism that the conservatives suppose. Rather, formal neutrality advances the good of religion.

Some of the benefits of neutrality accrue to religion indirectly. If it weren't for neutrality, government (lacking the relevant competence) would likely choose wrongly in religious matters; and by taking sides in debates about ultimate questions, government would divide citizens and impair their right and responsibility to govern their own lives where it counts most.

Koppelman, however, emphasizes the direct benefit conferred on religion by neutrality: Since involvement by the state in religious affairs inevitably degrades and corrupts religion, the state, out of respect for religion, should mind its own business. The corruption argument has roots in Jesus's distinction between the things that are Caesar's and those that are God's. It was developed by, among others, John Milton and John Locke in England and Roger Williams in colonial America in the 17th century, and by Thomas Jefferson and James Madison in the United States in the late 18th century.

Determined to keep government out of religious disputes and thereby protect religion from control by government's clumsy and grasping hands, the American constitutional tradition has resisted incorporating into law a formal definition of religion.

"The precise character of the good being promoted," Koppelman argues, "is deliberately left vague because the broad consensus on freedom of religion would surely collapse if we had to state it with specificity. The state is agnostic about religion, but it is an interested and sympathetic agnosticism. The state does not say 'I don't know and you don't know either.' Rather, it declares the value of religion in a carefully noncommittal way: 'It would be good to find out. And we encourage your efforts to do that.'"

Although not always precisely articulated in its jurisprudence, this is the prudently protective spirit, Koppelman shows, that has largely defined the Supreme Court's approach to religion and freedom and which should continue to do so.

But why should the U.S. Constitution single out religion for special protection? Isn't religion irrational? Doesn't "conscience" capture everything worth preserving in religion? Isn't religion hopelessly controversial? And isn't it unfair to privilege religion, even supposing its value, over other valuable orientations?

To these objections Koppelman replies that secular worldviews rest on ultimate claims about the presence or absence of transcendent authority no less hypothetical than those of religion. Conscience can justify anything. More than two centuries of America's own remarkable experiment in constitutional self-government demonstrates that the protection of religion is

not hopelessly controversial. And the special status accorded to religion by the Constitution does not preclude developing, consistent with the Constitution, protections for other beliefs, practices, and institutions.

Moreover, Koppelman observes, for most of human history organized religion has been (and for most of humanity today it remains) the source of a person's deepest sense of duty and strongest reason to hope. Religion in America has contributed mightily to realizing the promise of America by inspiring the abolition movement and the civil rights movement. And social scientists have shown that American religious faith correlates highly with civic participation and civic virtue.

Hard cases there will always be. The question raised in Supreme Court oral arguments in *Greece v. Galloway* concerning just how nonsectarian prayers must be at the beginning of town council meetings to avoid running afoul of the Constitution's prohibition on establishing religion will demand deft line-drawing. The quality of the court's reasoning will be enhanced by careful study of Andrew Koppelman's compelling arguments in favor of American religious neutrality.