SUBSTANTIVE NEUTRALITY REVISITED

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I. INTRODUCTION ................................................................. 51
II. SUBSTANTIVE NEUTRALITY ............................................. 54
   A. Vocabulary.................................................................... 54
   B. Neutrality in the Supreme Court ................................. 56
   C. Neutrality, Liberty, Voluntarism, and Separation .......... 64
III. LAYCOCK AND FELDMAN ................................................. 68
IV. LAYCOCK AND GEY ......................................................... 80
V. CONCLUSION .................................................................. 88

I. INTRODUCTION

Twenty-one years ago, in the course of an article mostly devoted to the Equal Access Act, I distinguished two meanings of government “neutrality” toward religion. I explained that I did not mean neutrality “in the sense of a ban on religious classifications,” but rather neutrality “in the sense of government conduct that insofar as possible neither encourages nor discourages religious belief or practice.” That definition seemed straightforward enough to me, but both the definition and its application were controversial to those who commented on my paper. *

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Four years later, returning to the point in a more general way, I distinguished formal neutrality, substantive neutrality, and disaggregated neutrality toward religion, and I urged substantive neutrality as the best understanding of religious liberty.\textsuperscript{4} Since then, substantive neutrality has been a unifying theme of my work on the Religion Clauses.\textsuperscript{5}

Over the years, substantive neutrality has been praised,\textsuperscript{6} defended,\textsuperscript{7} and even more or less adopted.\textsuperscript{8} It has been independently invented under other names.\textsuperscript{9} It has been adopted analytically by authors who rejected it normatively,\textsuperscript{10} and adopted normatively, more or less, by authors who rejected it ana-

\footnotesize{among religions, and not neutrality between religious and nonreligious speech, where there is substantial government interest in excluding religious speech); Ruti Teitel, When Separate Is Equal: Why Organized Religious Exercises, Unlike Chess, Do Not Belong in the Public Schools, 81 NW. U. L. REV. 174, 174-76 (1986) (arguing that in context of public schools, religious and nonreligious speech are different, and that it is therefore discriminatory to treat them the same).}


\textsuperscript{8} See Thomas C. Berg, Religion Clause Anti-Theories, 72 NOTRE DAME L. REV. 693, 703-07 (1997) (arguing that government should “minimize the effect it has on the voluntary, independent religious decisions of the people as individuals and in voluntary groups”).

\textsuperscript{9} See infra notes 24-27 and accompanying text.

\textsuperscript{10} See Robin Charlow, The Elusive Meaning of Religious Equality, 83 WASH. U. L.Q. 1529, 1536-37, 1563-66 (2005) (accepting the difference between formal and substantive neutrality, but ultimately seeming to reject any commitment to neutrality or equality as unworkable); Keith Werhan, Navigating the New Neutrality: School Vouchers, the Pledge, and the Limits of a Purposive Establishment Clause, 41 BRANDEIS L.J. 603, 608-09, 612, 628 (2003) (using formal and substantive neutrality to analyze the Court’s reasoning, but concluding that results generated by substantive neutrality are counterintuitive).
lytically.\textsuperscript{11} It has been noted,\textsuperscript{12} analyzed,\textsuperscript{13} criticized,\textsuperscript{14} ridiculed,\textsuperscript{15} and ignored.\textsuperscript{16} Nearly all the attention, for good and ill, has come from other academics. Of all the thousands of judges in America, only Justice Souter has ever

\textsuperscript{11} See Carl H. Esbeck, \textit{The Establishment Clause as a Structural Restraint on Governmental Power}, 84 \textit{Iowa L. Rev.} 1, 112 n.477 (1998) ("It is a view I share, but it is not neutral."); Frank S. Ravitch, \textit{A Funny Thing Happened on the Way to Neutrality: Broad Principles, Formalism, and the Establishment Clause}, 38 \textit{Ga. L. Rev.} 489, 505 (2004) ("Professor Laycock's substantive neutrality has a lot to recommend it . . . [H]is approach has a lot of substantive value, but no neutrality.").

\textsuperscript{12} See Daniel O. Conkle, \textit{The Path of American Religious Liberty: From the Original Theology to Formal Neutrality and an Uncertain Future}, 75 \textit{Ind. L.J.} 1, 9-10 (2000) (finding substantive neutrality "attractive," but difficult to apply, and a clear trend to formal equality in the Supreme Court's cases).

\textsuperscript{13} See John H. Garvey, \textit{All Things Being Equal}, 1996 \textit{BYU L. Rev.} 587, 595-97, 601-04, 609 (1996) (arguing that the case for substantive neutrality depends on a prior normative judgment that religious faith is a good thing); see generally Hugh J. Breyer, \textit{Laycock's Substantive Neutrality and Neuchterlein's Free Exercise Test: Implications of Their Convergence for the Religion Clauses}, 10 \textit{J.L. & Religion} 467 (1994) (generally adopting substantive neutrality but arguing that it is incomplete). For my attempt to justify substantive neutrality without making any judgments about the value of religion, see Laycock, \textit{Liberty}, supra note 5, at 314-23.

\textsuperscript{14} STEVEN D. SMITH, FOREORDAINED FAILURE 81 (1995) (arguing that substantive neutrality depends on certain contested assumptions about the value and sources of religious belief, and thus is not neutral); Steven K. Green, Locke v. Davey and the Limits to Neutrality Theory, 77 \textit{Temp. L. Rev.} 913, 947-48 (2004) (arguing that neutral awards of grants to religious and secular providers alike does not ameliorate the problems of government funding of religious institutions); Toni M. Massaro, \textit{Religious Freedom and "Accommodationist Neutrality": A Non-Neutral Critique}, 84 \textit{Or. L. Rev.} 935, 995-96 & n.267 (2005) (arguing that neutrality toward religion is appropriate in some domains but not others, and certainly not with respect to funding); see generally Paul E. Salamanca, \textit{Quo Vadis: The Continuing Metamorphosis of the Establishment Clause Toward Realistic Substantive Neutrality}, 41 \textit{Brandeis L.J.} 575 (2003) (arguing that substantive neutrality is a marginal criterion because people's religious beliefs are largely immune to government pressure or discrimination); Steven D. Smith, \textit{Separation as a Tradition}, 18 \textit{J.L. & Pol.} 215, 227-28 (2002) [hereinafter Smith, \textit{Separation}] (treating substantive neutrality as an example of the implausible claim that new legal conclusions have been developed from fixed underlying principles); Nelson Tebbe, \textit{Free Exercise and the Problem of Symmetry}, 56 \textit{Hastings L.J.} 699, 710-23 (2005) (arguing that substantive neutrality is not neutral, and that its goals would be better supported by arguing for "substantive liberty").


\textsuperscript{16} See, e.g., NOAH FELDMAN, DIVIDED BY GOD: AMERICA'S CHURCH-STATE PROBLEM—AND WHAT WE SHOULD DO ABOUT IT (2005) (never mentioning "substantive neutrality").
cited my account of substantive neutrality in reported opinions, and of course he did it only when it suited his purposes.\footnote{17}

My purpose here is to briefly review substantive neutrality, perhaps refreshing the recollections of some readers and introducing an unfamiliar concept to others, to clarify what I mean, and to compare and contrast substantive neutrality with prominent proposals from Noah Feldman and Steven Gey. Professor Feldman and I have similar centrist instincts, yet come to proposed solutions that are almost diametrically opposed on important issues.\footnote{18} That seems to be a phenomenon worth investigating. Professor Gey, who is academia's most able and most prominent defender of absolutely no aid to religion, views substantive neutrality with a despairing and mystified air—as if to say: what's a nice guy like you, who sometimes sounds like a separationist, doing with a proposal like that?\footnote{19} I will try to answer.

II. SUBSTANTIVE NEUTRALITY

A. Vocabulary

I distinguished three measures of neutrality—two intellectually coherent measures, plus one incoherent measure that courts had stumbled into by inadvertence. For better or worse, I called these measures formal neutrality, substantive neutrality, and disaggregated neutrality.\footnote{20}

Formal neutrality requires neutral categories. A law is formally neutral if it does not use religion as a category—if religious and secular examples of the same phenomenon are treated exactly the same.

Substantive neutrality requires neutral incentives. A law is substantively neutral if it neither "encourages [n]or discourages religious belief or dis-
belief, practice or nonpractice, observance or nonobservance." I will return to disaggregated neutrality in due course.

To illustrate formal and substantive neutrality with a very simple and clear cut example, forbidding children to take communion wine is formally neutral. Children cannot consume alcoholic beverages in any amount for any purpose. Religion is not a category in the formulation or application of this rule; alcohol is forbidden to children whether for religious purposes or secular purposes.

But an exception that permits children to take communion wine is substantively neutral. Exempting communion wine from the ban on under-age consumption of alcohol is extraordinarily unlikely to induce anyone to become a Christian, to join a denomination that uses real wine in its communion service, or to attend communion services more often—unless that person already desired to do these things but had been deterred by the threat of government-imposed penalties. Consuming communion wine is a desirable activity only to those who already believe in the religious teaching that gives meaning to the act. Forbidding children to take communion wine, or criminally punishing their parents and the priest who gives them the sacrament, powerfully discourages an act of worship. But exemption does not encourage any child to take communion, or any parent to take his child to a communion service, who is not already religiously motivated do so. An exemption does not change anyone's religious incentives; criminalization changes those incentives profoundly.

Some critics reject this explanation out of hand. To them, neutrality simply is what I have called formal neutrality. No other kind of neutrality is imaginable, and substantive neutrality is not neutrality at all. An exemption from a generally applicable law is special treatment, and to claim that exemption is a form of neutrality is mere verbal wordplay.

I have learned to explain that formal neutrality requires neutral categories, and substantive neutrality requires neutral incentives. So perhaps I should have called these two standards "category neutrality" and "incentive neutrality." Category neutrality and incentive neutrality may better emphasize that each is a real measure of neutrality and that each focuses on a specific criterion that must be kept neutral. Judge Posner and then-Professor McConnell did use the phrases "category neutrality" and "incentive neutrality" to describe a very similar idea in an article published while my elaboration of neutrality was

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21 Id. at 1001.
22 See Graglia, supra note 15, at 676; Tebbe, supra note 14, at 714-23.
23 See Douglas Laycock, Regulatory Exemptions of Religious Behavior and the Original Understanding of the Establishment Clause, 81 NOTRE DAME L. REV. 1793, 1797-98 (2006) (making the point clearly and succinctly); Laycock, Liberty, supra note 5, at 319-20 (making the point a little less clearly).
in the editorial process. But it is too late now. Category neutrality and incentive neutrality have gotten almost no attention, probably because McConnell and Posner mentioned their proposed labels only briefly, deep in an article with a title promising an economic analysis of religious liberty. Formal and substantive neutrality were part of my title and the centerpiece of my article, with the result that these labels have been cited far more often. For better or worse, formal neutrality and substantive neutrality have become the labels for the distinction that McConnell, Posner, and I tried to draw.

Stephen Monsma, a political scientist at Pepperdine, proposed a similar idea in 1993 and called it "positive neutrality." That label has not caught on either. To that large part of our culture that fears or mistrusts organized religion, I fear that "positive neutrality" may sound like neutrality with some measure of favoritism.

B. Neutrality in the Supreme Court

The Supreme Court has been notoriously inconsistent in its uses of the idea of neutrality. It sometimes talks about "benevolent neutrality," or "wholesome neutrality," but neither of these modifiers was ever used consistently to mean a specific theory of neutrality. And "benevolent neutrality" may have the same problem as "positive neutrality:" to some people, it sounds like neutrality with favoritism included.

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25 My article was based on a lecture delivered in April 1989, and for the most part, it spoke "as of that date." Laycock, supra note 4, at 993 n.*. Professor McConnell attended the lecture. I read and commented on the McConnell and Posner article in manuscript, McConnell & Posner, supra note 24, at n.1, and cited it in my article, Laycock, supra note 4, at 995 n.13. Neither McConnell nor I had the foresight to suggest that we settle on a common vocabulary. It is possible that distinguishing the two forms of neutrality was a late addition to the McConnell and Posner manuscript, so that I did not see their proposed vocabulary when I read the draft.

26 A search in Westlaw's "Text and Periodicals – All" database, as of September 3, 2007, yielded four hits for "McConnell" in the same paragraph as "incentive neutrality," but 118 hits for "Laycock" in the same paragraph as "substantive neutrality."

27 See Stephen V. Monsma, Positive Neutrality: Letting Religious Freedom Ring 188 (Greenwood Press 1993) (proposing "to assure that religious associations and communities, and their individual members, are not constricted or disadvantaged in the living-out of their religious beliefs," and that they "not transgress on the rights and prerogatives of the other spheres and that one religious structure does not transgress on those of another or of nonbelievers").


The Court often equates neutrality with formal neutrality, with no analysis or explanation, but many of its classic formulations of religious neutrality read as statements of substantive neutrality. Thus, in *Everson v. Board of Education*, the Court said that "[n]either [a state nor the federal government] can force [or] influence a person to go to or to remain away from church against his will." This speaks not to categories of classification, but to government conduct that may change, or "influence," private religious behavior. Other parts of that famous paragraph, and the equally important but neglected paragraph that follows (the one that says no person can be deprived of a social welfare benefit because of his faith or lack of faith are equally consistent with either formal or substantive neutrality. To say that no person can be punished or deprived of a social welfare benefit because of his religious views implements formal neutrality (because punishment or loss of benefits on the basis of religious belief would create rules and categories based on religion), and it also implements substantive neutrality (because punishment or loss of benefits would discourage the religious belief). Some sentences are written in terms of no-aid to religion, a position that is a principal alternative to neutrality of any kind, although the Court appeared to think in 1947 that the two approaches were consistent. I do not claim that *Everson* adopted substantive neutrality; I do claim that substantive neutrality was one of the multiple meanings of neutrality that the Court jumbled together and failed to distinguish.

In *Sherbert v. Verner*, and again in *Wisconsin v. Yoder*, the Court relied on "neutrality" to strike down rules that were defended as formally neutral and which the Court seemed to view as formally neutral. The Court said that

30 See, most famously, Employment Div. v. Smith, 494 U.S. 872, 876-90 (1990), which held that burdens on religious practice require no justification if imposed by laws that are neutral and generally applicable.


32 *Id.* at 15.

33 *Id.* at 16.

34 *Id.*

35 *Id.*

36 *Id.* at 15 ("Neither can pass laws which aid one religion, or aid all religions.").

37 374 U.S. 398, 409 (1963) (holding that the state cannot refuse unemployment compensation to employee who loses her job because of religious refusal to work on her Sabbath).

38 406 U.S. 205, 220 (1972) (holding that Amish parents cannot be required to send their children to public high school).

39 The Court might have said that the South Carolina law in *Sherbert* was not even formally neutral, but that was not the holding. In *Employment Div. v. Smith*, 494 U.S. 872 (1990), the Court said that the requirement of "good cause" for refusing work means that unemployment compensation laws allow secular exceptions, so that it is discriminatory to refuse religious exceptions. *Id.* at 884. But there is no suggestion of that theory in *Sherbert*, and the only South Carolina cases cited in *Sherbert* held that the proffered secular reasons for refusing work were not good cause. 374 U.S. at 401 n.4. The state's entire economy was organized around the mainstream Christian observance of Sunday, but the Court has never understood the discrimination inherent in
accommodation or exemption from regulation "reflects nothing more than the governmental obligation of neutrality in the face of religious differences[.]")  

And more specifically, "[a] regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for governmental neutrality if it unduly burdens the free exercise of religion." The Court did not explain its understanding of neutrality in these passages, but it can only have meant what I have called substantive neutrality.

In School District v. Schempp, the Court offered a "test" to define "[t]he wholesome 'neutrality' of which this Court's cases speak":

The test may be stated as follows: what are the purpose and primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion.

"That is to say" implies that these two formulations were intended to be equivalent—that a "secular" purpose is simply any purpose other than a purpose to advance nor inhibit religion. But that equivalence was hidden when the Court quoted the requirement of "secular legislative purpose" without the two sentences that preceded it. Only the "secular purpose" formulation was incorporated into the famous Lemon test: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither

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that. See Ansonia Bd. of Educ. v. Philbrook, 479 U.S. 60 (1986) (treating a school teacher's request for days off for religious observance as an "accommodation" under 42 U.S.C. §2000e(j), even though school's entire calendar was set up so that school never met on Sunday, Easter, or Christmas, and except for extracurricular activities, never met on Saturday); Braunfeld v. Brown, 366 U.S. 599, 605 (1961) (treating Sunday closing law as "simply regulat[ing] a secular activity" and refusing exemption to Saturday Sabbath observer); McGowan v. Maryland, 366 U.S. 420 (1961) (upholding Sunday-closing laws against Establishment Clause challenge). The Court in Sherbert did note that South Carolina law protected Sunday observers from job loss, but it viewed this discrimination as merely "compound[ing]") a constitutional violation that was already complete when the state refused unemployment compensation to Saturday observers. 398 U.S. at 406.

41 Yoder, 406 U.S. at 220.
43 Id. at 222.
44 Id.
advances nor inhibits religion[.]"\textsuperscript{45} Secular purpose thereafter took on a life of its own, but it was only very occasionally the basis for a judgment.\textsuperscript{46}

The Court's description of the prohibited effect did not suffer the same ambiguity. The Court's rule that government must neither advance nor inhibit religion appears to be equivalent to my proposed rule that government neither encourage nor discourage religion. No advancing or inhibiting is a neutrality standard, but the word "neutrality" does not appear in the canonical formulation of the \textit{Lemon} test. And of course the doctrine did not work out to be either formally neutral or substantively neutral in practice. In part this was because the justices who administered the \textit{Lemon} test had goals not fully captured in its wording. In part it was because these justices did not attend to the question of the baseline from which to measure advancing or inhibiting. And in part it was because the second prong of the \textit{Lemon} test could be read to state two separate requirements: no effect of advancing religion, and, independently, no effect of inhibiting religion.

It was this verbal accident that I described as "disaggregated neutrality."\textsuperscript{47} Instead of asking directly whether a statute was as neutral as could be under the circumstances, or more nearly neutral than any available alternative, courts asked simply whether a statute had an effect that "advanced" or "inhibited" religion.\textsuperscript{48} The "inhibits" part of the test became a mere recital, undeveloped and without content, and the Court ignored the possibility that its own judgments inhibited religion. So far as I am aware, the Court has never struck down any law on the ground that it has a primary effect that inhibits religion. But from 1971 to 1985,

\textsuperscript{45} Lemon v. Kurtzman, 403 U.S. 602, 612 (1971). The third prong of the \textit{Lemon} test is avoiding "excessive government entanglement with religion." \textit{Id}. at 613.

\textsuperscript{46} Government actions were invalidated for lack of secular purpose in \textit{McCreary County v. ACLU}, 545 U.S. 844, 859-74, 881 (2005) (Ten Commandments display); \textit{Santa Fe Indep. Sch. Dist. v. Doe}, 530 U.S. 290, 308-09 (2000) (prayer at high school football games); \textit{Edwards v. Aguillard}, 482 U.S. 576, 586-93 (1987) (teaching of creation science); \textit{Wallace v. Jaffree}, 472 U.S. 38, 56-61 (1985) (moment of silence with legislative encouragement to pray); \textit{Stone v. Graham}, 449 U.S. 39, 41 (1980) (Ten Commandments display); and \textit{Epperson v. Arkansas}, 393 U.S. 97, 107-09 (1968) (ban on teaching evolution). The Court also found an effect of advancing religion in \textit{Santa Fe}, 530 U.S. at 312, and it would have been easy enough to find such effects in \textit{McCreary}, \textit{Stone}, and probably \textit{Jaffree}. Purpose may have mattered only in \textit{Aguillard} and \textit{Epperson}, the two cases on evolution in the public schools, and I suspect that even there, the same justices would have reached the same result with or without the secular-purpose requirement.

Even if we count all six of these cases as turning on a purpose to advance religion, there were far more cases that found or assumed a secular purpose. In all the cases on financial aid to religious schools, there was a secular purpose to aid education. \textit{See, e.g., Lemon}, 403 U.S. at 613. Alleviating regulatory burdens on religion is a secular purpose. Corp. of the Presiding Bishop v. Amos, 483 U.S. 327, 335-36 (1987). More dubiously, the Court held that Sunday closing laws had a secular purpose, \textit{McGowan v. Maryland}, 366 U.S. 420 (1961), and that municipal nativity scenes had a secular purpose, \textit{Lynch v. Donnelly}, 465 U.S. 668, 680-81 (1984).

\textsuperscript{47} Laycock, \textit{supra} note 4, at 1007-08.

\textsuperscript{48} \textit{See id.} (analyzing Aguilar v. Felton, 473 U.S. 402 (1985), \textit{overruled by} Agostini v. Felton, 521 U.S. 203, 235 (1997)).
ever smaller and more attenuated effects were held to have a primary effect of advancing religion. The risk that public school teachers, and employees delivering "auxiliary services" such as counseling, testing, speech and hearing therapy, and remedial instruction, might be overcome by the religious environment and begin teaching religion, was held to be a primary effect that advanced religion. The risk that secular public services delivered in religious schools would be perceived as a "symbolic union" of church and state was held to be a primary effect that advanced religion. In the lower courts, turning on the lights for an after-school religion club was held to be a primary effect that advanced religion.

But this form of disaggregated neutrality is mostly of historical interest. The Lemon test has been fundamentally reinterpreted, most dramatically in Zelman v. Simmons-Harris, to focus directly on neutrality. Zelman is in principle both formally and substantively neutral, but let me postpone that question for now.

With increasing frequency, the Court has held that formal neutrality is constitutionally sufficient but not constitutionally required. Thus, the Court holds that legislatures may apply neutral and generally applicable regulation to the exercise of religion (formal neutrality is permitted), or, within limits that preclude discrimination among faiths and burdens on third parties, legislatures may grant regulatory exemptions (an alternative to formal neutrality is also

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49 Sch. Dist. v. Ball, 473 U.S. 373, 385-89 (1985) (invalidating local funding of remedial and enrichment courses taught by public school teachers in religious schools); Meek v. Pittenger, 421 U.S. 349, 367-72 (1975) (invalidating federal funding for such auxiliary services). This holding in Ball was partly overruled in Agostini, 521 U.S. at 235. This holding in Meek was not expressly overruled, but it was the precedential basis for Ball and it is impossible to see how it can survive Agostini.

50 Ball, 473 U.S. at 389-92.

51 Johnson v. Huntington Beach Union High Sch. Dist., 137 Cal. Rptr. 43, 49 (Cal. Ct. App. 1977) ("It would be entitled to use classroom space rent free, receive heat and light and would be monitored by a paid faculty sponsor.").

52 536 U.S. 639, 648-63 (2002) (upholding state-funded vouchers that could be used to pay for educational services at a wide variety of schools, including public schools, secular private schools, and religious private schools).

53 See infra text accompanying notes 108-109.


55 Texas Monthly, Inc. v. Bullock, 489 U.S. 1, 8-25 (1989) (plurality opinion) (invalidating sales tax exemption exclusively for publications that promote a religion, at least where that exemption is not found necessary to relieve a burden on the exercise of religion); Estate of Thornton v. Caldor, Inc., 472 U.S. 703, 708-11 (1985) (invalidating a law that gave employees an absolute right to not work on their Sabbath and left no ability to consider any resulting burdens on the employer or co-workers).

permitted). Courts may apply "neutral principles of law" to church property disputes\(^{57}\) (formal neutrality is permitted), or they may defer to the highest church authority recognized by both sides before the dispute arose\(^{58}\) (an alternative is also permitted). Legislatures may impose neutral and generally applicable taxes on religious organizations\(^{59}\) (formal neutrality is permitted), or, within limits,\(^{60}\) they may grant tax exemptions\(^{61}\) (an alternative is also permitted). States may provide equal funding to secular and religious educational programs\(^{62}\) (formal neutrality is permitted), or, at least sometimes, they may fund private secular education and refuse to fund private religious education\(^{63}\) (an alternative is also permitted).

These optional rules may be described as permissive formal neutrality—formal neutrality is permitted but some alternative is also permitted. Permissive formal neutrality may be contrasted with mandatory formal neutrality, in which Congress and the states would be required to implement formal neutrality with

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58 Id. at 602 ("[A] State may adopt any one of various approaches for settling church property disputes so long as it involves no consideration of doctrinal matters . . . . "), quoting Md. & Va. Eldership of the Churches of God v. Church of God, 396 U.S. 367, 368 (1970) (Brennan, J., concurring) (emphasis by Justice Brennan); Kedroff v. Saint Nicholas Cathedral, 344 U.S. 94, 113-16 (1952) (constitutionalizing the common-law rule of deference to the highest church authority); see also Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696, 708-20 (1976) (requiring rule of deference to highest church authority in cases of church personnel disputes).


60 Texas Monthly, Inc. v. Bullock, 489 U.S. 1, 8-20 (1989) (plurality opinion) (invalidating sales tax exemption exclusively for publications that promote a religion, at least where that exemption is not found necessary to relieve a burden on the exercise of religion).


62 Zelman v. Simmons-Harris, 536 U.S. 639, 648-63 (2002) (upholding state-funded vouchers that could be used to pay for educational services at a wide variety of schools, including public schools, secular private schools, and religious private schools).

no alternatives permitted. Mandatory formal neutrality would prohibit regula-
tory exemptions, prohibit tax exemptions, prohibit deference to internal reso-
lations of church disputes, and require equal funding for religious institu-
tions. Prominent academics have argued for mandatory formal neutrality,64
but it is hardly surprising that the Court has shown no interest in a rule with such
controversial consequences.

The Court's permissive neutrality rules are some protection for religious
liberty, because the Court usually permits government to depart from formal
neutrality in only one direction. Religion cannot be singled out for discrimina-
tory regulation, taxation, or dispute resolution, and it cannot be singled out for
preferential funding. But these permissive neutrality rules also contain a large
measure of judicial minimalism and deference to majoritarian political proc-
eses: if two rules seem plausible to the Court, the legislature can choose.

I have noted four sets of rules in which formal neutrality is permitted
but not required. Three of these sets of rules may be restated somewhat differ-
ently: with respect to regulation, taxation, and resolution of church property
disputes, Congress and the states may choose either formal or substantive
neutrality. Regulatory exemptions for religiously motivated behavior is generally
(not universally) substantively neutral for the reasons illustrated by the example
of children taking Communion wine65 and discussed at length in my earlier
work;66 penalizing a religious practice is a substantial discouragement, but per-
mitting a religious practice does not encourage anyone not independently
attracted to it. So the Court's rule—that the legislature may grant or refuse ex-
ceptions from neutral and generally applicable laws—means that the legislature
may choose between the two versions of neutrality.

Deference to the highest religious authority previously recognized by
both sides is substantively neutral, because it avoids government resolution of
internal religious disputes—and thus avoids a judgment that rewards one side
and rejects or penalizes the other—and it leaves these decisions in the religious
hands to which both sides originally committed them. Of course the rule of
deference also ends with a winner and a loser, but if the court simply identifies
the highest church authority and refrains from interpreting the church docu-
ments at the heart of the dispute, the decision for the secular court is usually
much simpler and much less substantive, and it presents much less opportunity
for manipulating the result. I think the Court's rule that secular courts may ei-
ther defer to the highest church authority or decide church disputes themselves

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64 Philip B. Kurland, Of Church and State and the Supreme Court, 29 U. CHI. L. REV. 1, 96
(1961); Mark Tushnet, "Of Church and State and the Supreme Court": Kurland Revisited, 1989
SUP. CT. REV. 373, 402 (concluding, after exploring pros and cons, that Supreme Court should
adopt Kurland's formal neutrality approach).

65 See supra text accompanying notes 21-22.

66 See Douglas Laycock, The Remnants of Free Exercise, 1990 SUP. CT. REV. 1, 10-21; Lay-
cock, supra note 4, at 1013-18.
under neutral principles of law means that state courts may choose either substantive or formal neutrality.

Tax exemptions are generally substantively neutral, at least as currently implemented in most American jurisdictions, which exempt a broad range of nonprofit organizations, including churches, schools, and charities. The incentive to convert from for-profit status (taxed) to nonprofit status (tax exempt) is balanced by a strong counter-incentive: conversion to nonprofit status forever surrenders the right to distribute profits or return capital to the owners of the enterprise.\footnote{See 26 U.S.C. § 501(c)(3) (2000) (requiring that tax-exempt organizations be “organized and operated exclusively” for one or more tax-exempt purposes). An organization is not “organized . . . exclusively” for exempt purposes unless its articles of incorporation provide that no assets can ever be distributed to members or shareholders and that, on dissolution, its assets will be distributed exclusively to another tax-exempt organization or to a government agency. 26 C.F.R. § 1.501(c)(3)-1(b)(4). See also 26 U.S.C. § 501(c)(3) (2000) (requiring that “no part of the net earnings of [the organization] inure[] to the benefit of any private shareholder or individual . . .”).} Within the set of nonprofits, there might be substantial effect on religious incentives if secular schools and charities were exempt and religious schools and charities were not (or vice versa). It would often be tempting to increase or decrease the religious content in a school’s curriculum or a charity’s program in an effort to qualify for the exemption. This would have been the proper rationale for the Court’s decision in \textit{Texas Monthly v. Bullock}.\footnote{489 U.S. 1 (1989) (invalidating, in splintered opinions, sales tax exemption that applied only to religious publications).} Tax exemption only for publications that “consist wholly” of religious teachings\footnote{Tex. Tax Code Ann. § 151.312 (1982), quoted in id. at 5.} discriminated among speakers on the basis of their viewpoint,\footnote{See \textit{Texas Monthly}, 489 U.S. at 25-26 (White, J., concurring) (arguing that this was content discrimination that violated the Free Press Clause). See \textit{generally} Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819, 828-37 (1995) (reviewing and applying the rule that discrimination between different viewpoints is presumptively unconstitutional).} and at the margin, it encouraged publications with small amounts of secular content to eliminate it and become “wholly” religious. Exempting both religious and secular nonprofits creates no such incentive.

The Court’s fourth set of alternatives is very different. Equal funding for religious and secular schools is formally neutral, and for reasons to be explained, I believe that it is also substantively neutral. Funding secular private education but not religious private education is not neutral in either sense, but the Court permits it anyway.\footnote{See Locke v. Davey, 540 U.S. 712 (2004) (permitting Washington to exclude devotional theology majors from a scholarship program available to any other accredited major).} Funding secular private education but not religious private education creates a religious category (thus not formally neutral), and it creates incentives to secularize religious education (thus not substantively neutral). Joshua Davey could have gotten a state Promise Scholarship if he had...
studied theology from a secular perspective instead of a religious perspective. Some states offer state funding to colleges that become merely "sectarian," instead of "pervasively sectarian." In a state such as Maine, which pays tuition for some students to attend secular private high schools but not religious private high schools, a religious high school could qualify for funding if it would drop its religious instruction. These incentive effects are strong, because students are entirely free to respond to them by choosing another school, and schools are also relatively free to respond to them: once an institution is running a school, it is not difficult to augment or reduce the religious content in the curriculum.

The Court's first three sets of permissive neutrality rules, on regulation, taxation, and dispute resolution, can thus be described as permitting states to choose between formal and substantive neutrality. Locke v. Davey is the outlier; it permits states to choose between neutrality and discrimination against religion. That is not how the Court has thought about its rules, but that is what it has done.

C. Neutrality, Liberty, Voluntarism, and Separation

I never claimed or intended that substantive neutrality should be the single explanation or only value of the Religion Clauses. To the contrary, my whole purpose was to reconcile or unify distinct but tangled threads of explanation for the Religion Clauses. I said that:

Because neutrality requires so much further specification, it cannot be the only principle in the religion clauses. Nor can it be the most fundamental. We must specify the content of neutrality by looking to other principles in the religion clauses. When we have done that, neutrality should be defined in a way that makes it largely congruent with those other principles. We will often be able to explain the objection to a law by saying either that it restricts the autonomy of religious belief or practice,

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72 See id. at 716 (noting that ban on scholarships for theology majors applied only to "degrees that are 'devotional in nature or designed to induce religious faith,'" quoting briefs of both parties).
74 See Eulitt v. Maine, 386 F.3d 344, 353-57 (1st Cir. 2004) (upholding this discrimination); Strout v. Albanese, 178 F.3d 57, 60-66 (1st Cir. 1999) (same).
75 540 U.S. 712 (2004) (holding that state can award scholarships to students in every accredited major but refuse scholarships to students majoring in theology taught from a believing perspective).
or that it threatens religious voluntarism, or that it deviates from religious neutrality, and so on.\textsuperscript{76}

Obviously the Religion Clauses are about religious liberty. We also say that government should be neutral among religions and between religion and nonreligion. We say religion should be voluntary. We say church and state should be separate. We say that government should not aid religion. Sometimes these different formulations point in the same direction; sometimes they seem to point in opposite directions. Most importantly, regulation of religious practice often restricts religious liberty, yet regulatory exemptions for religious practice are often attacked as departures from neutrality. Do we have to choose between liberty and neutrality, or is there an understanding of liberty and neutrality that reconciles the two approaches?

I offered substantive neutrality as that reconciliation. Neutral incentives, neither encouraging nor discouraging religion, is a coherent conception of neutrality that is consistent with religious liberty and consistent with regulatory exemptions for religious behavior. At the conceptual level, substantive neutrality insists on minimizing government influence on religion. Minimizing government influence leaves religion maximally subject to private choice, thus maximizing religious liberty. Carl Esbeck, whose work has emphasized the importance of religious voluntarism,\textsuperscript{77} has noted that voluntarism bears the same relationship to government influence. "Voluntarism is not merely the absence of official coercion. It is also the absence of the government's influence concerning inherently religious beliefs and practices."\textsuperscript{78} Substantive neutrality—minimizing government influence on religious incentives—is thus an understanding of neutrality that is more consistent with religious liberty and religious voluntarism than formal neutrality is. It was no doubt an oversimplification, but in one early article I simply equated "substantive neutrality" with "liberty."\textsuperscript{79}

Later, I undertook to unite substantive neutrality with separation, and more audaciously, to do so in the context of what was then called charitable choice—government payments for social services delivered by religious providers.\textsuperscript{80} Of course that provoked objections;\textsuperscript{81} maybe it was a bridge too far.\textsuperscript{82} I

\textsuperscript{76} Laycock, supra note 4, at 998.


\textsuperscript{78} Esbeck, supra note 11, at 64.

\textsuperscript{79} Douglas Laycock, Summary and Synthesis: The Crisis in Religious Liberty, 60 GEO. WASH. L. REV. 841, 848 (1992).

\textsuperscript{80} See Laycock, Underlying Unity, supra note 5.

\textsuperscript{81} See, e.g., Frederick Mark Gedicks, A Two-Track Theory of the Establishment Clause, 43 B.C. L. REV. 1071, 1073 & n.7 (2002) ("Laycock eliminates the tension between separation and neutrality only by begging the question whether religious belief and activity merit special constitutional protection."); Smith, Separation, supra note 14, at 227 (calling the argument "ingenious (and perhaps too clever)").
agree that neutrality of any kind—either formal or substantive—is inconsistent with the goals of the legal and political movement that has most emphatically claimed the banner of separationism.\(^3\) I did not mean to claim otherwise.

What I did claim was that the Supreme Court had never set up separationism in opposition to neutrality. It had always talked of both, and in its own not-very-theoretical way, it had assumed that separation and neutrality were consistent.\(^4\) Recall that the *Lemon* test, the very symbol of strict separationism, incorporates verbatim an earlier definition of “wholesome neutrality.”\(^5\) The assumption that neutrality and separation are opposites is a product of the last twenty years, a time when conservative justices used the language of neutrality to uphold government financial aid to religious schools, a result that most separationists opposed. Where *Lemon* had found a departure from neutrality in any aid that might benefit a school’s religious mission,\(^6\) the Court’s new majority found neutrality in the fact that aid flowed on similar terms to religious and secular schools alike.\(^7\) This argument over neutrality versus separation has extended to arguments over free speech, with separationists losing their argument that private religious speech may be or must be excluded from public fo-

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\(^2\) See Cornelius Ryan, A Bridge Too Far (1974) (recounting the unsuccessful Allied attempt to capture the bridge over the Rhine at Arnhem, in the Netherlands, at a time when several major streams, and thus several bridges, still lay between the Allied front lines and the bridge at Arnhem).


\(^4\) See Laycock, Underlying Unity, supra note 5, at 53-65 (reviewing the cases and the conflicting pressures on the Court).


\(^6\) See Lemon, 403 U.S. at 619 (“The State must be certain, given the Religion Clauses, that subsidized teachers do not inculcate religion . . . .”) (emphasis added).

\(^7\) See Zelman v. Simmons-Harris, 536 U.S. 639, 648-63 (2002) (upholding state-funded vouchers that could be used to pay for educational services at a wide variety of schools, including public schools, secular private schools, and religious private schools); Mitchell v. Helms, 530 U.S. 793, 829-36 (plurality opinion) (upholding loans of educational equipment on per capita basis to all schools that chose to participate, including religious schools); Agostini v. Felton, 521 U.S. 203, 222-35 (1997) (upholding federal program that provided remedial instruction to low income students in both secular and religious schools); Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1, 8-14 (1993) (rejecting argument that Establishment Clause prohibits government-paid sign-language interpreter for deaf student in Catholic high school); Mueller v. Allen, 463 U.S. 388, 396-404 (1983) (upholding state income-tax deductions for educational expenses, including tuition paid to religious schools).
But even over the last twenty years, Justice O'Connor's endorsement test was a measure of neutrality—government should not endorse any position either pro or con about religion—that produced separationist results with respect to government speech endorsing religious views.

Back when the Court talked about separation, it assumed that separation protects religious liberty. On what understanding of separation would that make any sense? In setting the question up in this way, I was of course reflecting my own separationist history and my reluctance to give up the label. I have been inconsistent over the years about separation. When thinking about how I would use separation, I like it. When thinking about how some folks have misused the same word, I tend to find "separation" fatally ambiguous.

Once when I was focused on my own view of separation, I suggested that on one plausible understanding, the fundamental purpose of separation is to separate private religious choices and commitments from governmental power. On that understanding, separation is congruent with religious liberty, because it leaves religious choices to individuals. It is consistent with voluntarism for the same reason: people will participate in religious activities only when they voluntarily choose to do so. And it is consistent with substantive neutrality: separating religious choice from government influence minimizes government influence on religious choice.


89 See Lynch v. Donnelly, 465 U.S. 668, 692 (1984) (O'Connor, J., concurring) ("What is crucial is that a government practice not have the effect of communicating a message of government endorsement or disapproval of religion.").

90 See McCreary County v. ACLU, 545 U.S. 844, 859-81 (2005) (invalidating Ten Commandments display in county courthouse on grounds that county's purpose in mounting the display was inconsistent with the government's obligation of neutrality toward religion); Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 306-08 (2000) (holding that prayer as part of official program at high school football games unconstitutionally endorses religion); Lee v. Weisman, 505 U.S. 577, 627, 631 (1992) (Souter, J., concurring) (arguing that school-sponsored prayer at high school graduation, invalidated by Court on grounds that school coerced students to participate, was also invalid on ground that it endorsed religion); County of Allegheny v. ACLU, 492 U.S. 573, 592-94, 598-602 (1989) (holding that nativity scene in courthouse unconstitutionally endorsed religion); Wallace v. Jaffree, 472 U.S. 38, 56-61 (1985) (holding that moment-of-silence law unconstitutionally endorsed religion).

91 See Laycock, supra note 83, at 1700 (collecting my own inconsistent statements about whether separation is a usable concept).

92 Laycock, Underlying Unity, supra note 5, at 46.
At a conceptual level, this is a perfectly sensible understanding of separation. But it is different from lack of contact between church and state as an end in itself, and different from separation as no aid to religion. That difference leaves two possibilities for the dispute over financial aid to education and social services provided by religious institutions. Either one side or the other has made a mistaken judgment about how the unified principle of liberty, voluntarism, separation, and substantive neutrality applies to the funding issue, or both sides are right about their own principles and separation is ultimately at odds with religious liberty and voluntarism understood in terms of substantive neutrality.

One could continue this march of conceptual unification and try to make the principal of no aid to religion fit with all the rest. The claim would have to be that the aid we are talking about when we say no aid to religion is aid that is preferentially directed to religion, and that the no-aid principle does not include aid that is neutrally distributed to religious and nonreligious providers of the same services. Or we might say that so long as the government gets full secular value for its money, from religious and secular providers on equal terms, its activity is more akin to a purchase of services than to a distribution of aid. If the government can buy a case of wine from a monastery on competitive terms, why can it not buy a math course or the services of a homeless shelter from a religious organization? To fold no-aid into neutrality in this way would not be objectively wrong, and it might conceivably help a few folks who were changing their minds anyway to reconcile their old no-aid principles with their new tolerance for government funding, but I think it would be a mistake. It would leave us with no vocabulary to describe a position with a long and important history in American debates. Some people believe that no government should aid religion in any way, and that this principle trumps all competing principles, including nondiscrimination principles. "No aid" is a sensible way to talk about that idea, and we should preserve the phrase for that use.

III. LAYCOCK AND FELDMAN

Noah Feldman and I did not start out from the same point analytically, but we started out from about the same place on the political spectrum concerning these issues. We are both centrists in important but somewhat different senses.

I am a centrist in the sense that I am equally concerned for the religious liberty of all, believers and nonbelievers. Many activists and judges, and some scholars, address these issues only with a view to helping or opposing the religious side in general, or helping or opposing conservative Christians in particular.93 My ideal is that one’s views on religion should not predict one’s views on religious liberty, and that every American, of every shade of religious belief and

93 See Laycock, Theology Scholarships, supra note 5, at 159-61 (reviewing positions of interest groups, and some justices, and contrasting support for religious liberty with support or opposition to religion).
disbelief, is entitled to the same protection from government interfering with, or attempting to influence, his views about religion.

Professor Feldman may well share the view that every American of whatever belief is equally entitled to religious liberty. I do not know, but I would be surprised if he disagreed with that. But fundamentally, he is a centrist in the quite different sense of looking for compromise. He is trying to pull a divided nation together.\textsuperscript{94} I would like to do that too, but we proceeded in quite different ways.

My approach has been to try to figure out what each side in the culture wars is justly entitled to in principle. Feldman's approach is more political. He identifies two large social movements, which he calls legal secularists and values evangelicals.\textsuperscript{95} He is explicitly trying to broker a deal between them.\textsuperscript{96}

Steven Gey is not a centrist in my judgment, although he has told me orally that I am wrong about that. Professor Gey is a strong legal secularist in terms of Feldman's categories, a strict no-aid separationist, staunchly opposed to any form of government support for religion.\textsuperscript{97} Unlike Feldman, Gey is not looking for compromise. He wants his side to win and the other side to lose.

But Gey and Feldman agree with each other, and disagree with me, on one important point. They both think that current Establishment Clause law is an unprincipled contradiction. The current case law in the Supreme Court continues to sharply restrict government speech endorsing religion, especially in public schools.\textsuperscript{98} Indeed, the formal doctrine is still that government must be neutral between religion and nonreligion, even in its speech.\textsuperscript{99} There are exceptions in which the Court has applied a different rule,\textsuperscript{100} or in which the Court's swing voter found that a plainly religious statement did not endorse religion.\textsuperscript{101}

\textsuperscript{94} See Feldman, \textit{supra} note 16, at 16 ("I undertook this book in the spirit of seeking reconciliation between the warring factions that define the church-state debate . . . ").

\textsuperscript{95} See id. at 150-85 (describing legal secularists); id. at 186-219 (describing values evangelicals).

\textsuperscript{96} See id. at 235-36 ("[A] workable solution to our church-state problem must reconcile secularists and evangelicals by making both sides feel included in the experiment of American government and nationhood.").


\textsuperscript{98} See cases cited \textit{supra} note 90.

\textsuperscript{99} See McCreary County v. ACLU, 545 U.S. 844, 860 (2005) (stating, in a case about a passive religious display, that "[t]he touchstone for our analysis is the principle that the 'First Amendment mandates government neutrality between religion and religion, and between religion and nonreligion.'") (quoting Epperson v. Arkansas, 393 U.S. 97, 104 (1968)).

\textsuperscript{100} Marsh v. Chambers, 463 U.S. 783, 786-95 (1983) (permitting legislative chaplain to open daily sessions with prayer because the First Congress had the same practice).

\textsuperscript{101} Van Orden v. Perry, 545 U.S. 677, 698-705 (2005) (Breyer, J., concurring) (finding that the Ten Commandments display on the grounds of the Texas capitol conveyed a mixed religious and secular message and that the historic lack of controversy suggested that the secular message had dominated in public perception); Lynch v. Donnelly, 465 U.S. 668, 687-94 (1984) (O'Connor, J.,
But the big picture, until and unless new Justices change the rules, is one of substantial restrictions on government speech endorsing or attacking religion.

In sharp contrast, at least from a culture wars perspective, government can send apparently unlimited amounts of money to religious schools through voucher programs. This is so obviously a contradiction to Feldman and Gey that they mostly just assert it. Unless I missed it in another article somewhere else, Feldman sees no possible argument for reconciling these two positions that is worth taking time to rebut. Gey explores a little further, but never actually considers the one argument that might reconcile these two positions.

The Court took this combination of positions because justices Kennedy and O’Connor took this combination of positions. They never saw any contradiction, so they never explained how their positions fit together. But it is not difficult to make sense of their intuitions. With respect to the Establishment Clause, substantive neutrality and the protection of individual choice in religious matters can explain their votes. I confine this claim to the Establishment Clause, because with respect to the Free Exercise Clause, Justice Kennedy went off in a very different direction.

Consider first the Court’s voucher decision, Zelman v. Simmons-Harris. The details of Cleveland’s program were messy, and details matter. A choice program can be implemented well or badly, and if implemented badly,
it may not provide the choice it promises. I will take up a few of these details below,\footnote{See infra text accompanying notes 181-191.} but for now, let us assume reasonable implementation.

The principle of the voucher decision is both formally neutral and substantively neutral. The state pays for education that satisfies the compulsory education requirements—math, reading, science, history, etc.—and it pays for that education at any school the parents choose, public or private, religious or secular. This law is formally neutral, because there are no religious categories in the program. It is also substantively neutral, because it creates no incentives to choose religious or secular education. You get the same government subsidy either way. As always, substantive neutrality protects individual choice; each family can choose for itself which school to attend.

In terms of minimizing government interference with private religious choices, this is a huge improvement over the traditional public school monopoly. Traditionally, the states have said that here is five, eight, even ten thousand dollars a year that we will spend on your child’s education—if you choose a thoroughly secular education in a public school. You also have a constitutional right to choose a religious education,\footnote{See Pierce v. Soc’y of Sisters, 268 U.S. 510 (1925) (invalidating law requiring all children to attend public schools).} but if you choose that, you forfeit all this money. That threatened forfeiture vigorously discourages any parent inclined to choose the religious alternative; it creates a huge distortion of the constitutionally protected choice between religious and secular education. A program that offered the same state funding no matter what school a family chooses would be substantively neutral and would protect private choice in religious matters.

Now consider a school-sponsored prayer at the opening of every class, or at every meeting of the school board, or at every graduation ceremony. This is not substantively neutral. Government is taking a whole series of positions on religion: that there is a God, that praying to God is a good thing, that all students are encouraged to join in prayer, that the form of prayer offered at the school is a good or efficacious way to pray—maybe the best way to pray. There are many forms and styles of prayer, but each school-sponsored prayer will be a particular form and in a particular style. The odds are that over the course of a year, all or most of the school’s prayers will be in the same form and style. The government endorses all these positions, both general and specific, and encourages all to participate.

And there is no individual choice. The school makes a series of collective decisions and imposes those decisions on everyone. Whether to pray, how to pray, whom to pray to—in Jesus’ name or not?—all these choices are made by state actors and their choices are imposed on everyone in the room. Everyone in the room will either participate in the particular prayer the school or its appointed agent selected, or they will conspicuously not participate while eve-
ryone else prays, or they will conspicuously leave the room and return when the prayer is over. Everyone is pushed to join in a particular form of prayer, and effective individual choice is eliminated.

The short version of this extended comparison is that money can be delivered in a way that is consistent with individual choice. Prayers cannot. Neither can scriptures, creeds, Christmas displays, or any other government speech promoting or denigrating religion.110

A second important difference between money and prayer is relevant here, although the Court has neglected the point.111 When the government pays for education, it gets full secular value for its money. It pays for courses that satisfy the compulsory education requirements. When it supports a broad range of schools, it supports education in secular subjects and lets parents choose whether to add religion to the curriculum. But when government adds a religious observance to a meeting or ceremony, there is no secular value added. Government is verbally supporting religion as religion.

So what does Professor Feldman say about this comparison between financial support for education in religious schools, on the one hand, and government-sponsored religious speech on the other? As I said, Feldman has almost exactly the opposite proposal. He would have the Court tighten up on financial support for religiously-affiliated institutions, including for religious schools.112 And he would have the Court loosen up on verbal support for religion, letting government endorse religious teachings and sponsor religious displays.113 I frankly cannot tell how far he would go with this. He says he would abandon the secular purpose requirement and the endorsement test, and substitute the simple principle of "no coercion and no money."114

But he never explains his understanding of coercion. Does he accept something like the Court's view that religious ceremonies at public events inherently coerce those in attendance?115 Or Justice Scalia's view that coercion

110 See Laycock, Theology Scholarships, supra note 5, at 156-58 (elaborating this distinction).
111 The Court's theory is that the choice of a religious school or major is an "independent and private choice" that breaks "the link" to government funds. Locke v. Davey, 540 U.S. 712, 719 (2004). This theory implies that the religious content of the student's choice is no longer relevant. Surely there are some limits to this reasoning, but the Court has not yet found any. For analysis, see Laycock, Theology Scholarships, supra note 5, at 167-71.
112 See Feldman, supra note 16, at 237, 244-48.
113 See id. at 237-44.
114 Id. at 238.
115 See Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 312 (2000) ("Even if we regard every high school student's decision to attend a home football game as purely voluntary, we are nevertheless persuade that the delivery of a pregame prayer has the improper effect of coercing those present to participate in an act of religious worship."); Lee v. Weisman, 505 U.S. 577, 593 (1992) ("[P]ublic pressure, as well as peer pressure, . . . though subtle and indirect, can be as real as any overt compulsion."); Sch. Dist. v. Schempp, 374 U.S. 203, 221 (1963) ("When the power, prestige and financial support of government is placed behind a particular religious belief, the indirect
means only "coercion of religious orthodoxy and of financial support by force of law and threat of penalty." He never says. Would he permit school-sponsored prayer in classrooms? Or only at special events like graduations? Or would he permit only passive displays like Nativity scenes and Ten Commandments monuments? I don't know. But on the central thrust, his proposal is the opposite of mine.

On what grounds? So far as I can tell, Feldman has no legal principle that generates both of these results. He says money for religious schools but no verbal support for religious belief is a contradiction, apparently because the issue in both contexts is whether government can support religion. When he reverses both results, permitting verbal support but prohibiting financial support, presumably he still thinks it is a contradiction. So what is he doing?

Actually, Feldman appears to be doing two rather different things, or perhaps acting on two different motivations. First, he is trying to broker a political compromise, and second, independent of whether it leads to compromise, he seems to think that pushing both sides to moderate their positions is a good thing.

Feldman's argument for compromise is also two-fold. One argument for his compromise is that he thinks it gives each side what it cares about most, or at least what each side should care about most. He thinks that secularists are simply choosing to feel excluded by government endorsements of religion; they should choose to feel differently. There is an echo here of the Supreme Court's old view that African-Americans were simply choosing to feel stigmatized by segregation. The tangible harm of segregation was of course much greater than the tangible harm of Christian prayers at government events, but the government's declaration of preference for one race over others in segregation was no more real or unambiguous than the government's declaration of preference for one religious belief over others in a government-sponsored religious ceremony.

coeptive pressure upon religious minorities to conform to the prevailing officially approved plan is plain." (quoting Engel v. Vitale, 370 U.S. 421, 431 (1962)).

116 Lee, 505 U.S. at 640 (Scalia, J., dissenting).
118 See id. at 238-39 ("Talk can always be reinterpreted, and more talk can always be added, so religious speech and symbols need not exclude.").
119 See id. at 242 ("[I]t is largely an interpretive choice to feel excluded by the fact of other people's faith," even when—this is the context of his statement—the government is promoting that faith. Cf. Plessy v. Ferguson, 163 U.S. 537, 551 (1896) (arguing that if segregation be a badge of inferiority, "it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it.").
On the voucher issue, Feldman says that evangelicals have made little use of educational vouchers so far, because they have not been able to enact generally applicable voucher plans.\textsuperscript{121} He also predicts, no doubt correctly, that evangelicals would not like some of the other schools that would get money under a voucher plan\textsuperscript{122}—think Islamic schools, Hare Krishna schools, or left-wing anti-American schools. For both these reasons, he thinks that evangelicals should be able to give up vouchers.

He does not put it this way, but a reader might reasonably infer that he thinks that legal secularists care most about money and that values evangelicals care most about symbolism. I frankly do not know what each side cares about most. But I suspect that each side cares so deeply about both issues that no compromise is going to be acceptable until and unless imposed on both sides and established by long usage.

Feldman's failure to specify what he means by coercion creates fatal ambiguity at the heart of his proposed compromise. If he is putting school-sponsored prayer or religious instruction back in public-school classrooms, coercion is inevitable. Children will be forced—by teachers who do not know the rules or dislike the rules they know, by intense social pressure from other children, and sometimes by direct intimidation\textsuperscript{123}—to join in religious observances or to at least go through all the outwardly visible motions of religious observances. And parents who object to their children being subjected to somebody else's prayer service feel very strongly about that objection.

Alternatively, if Feldman is permitting only passive displays and no government-led religious ceremonies, he is not giving the values evangelicals more than a few crumbs. They are not going to take a deal in which they get no money for their private schools, a public school system as secular as ever, but a free hand on Nativity scenes and Ten Commandments monuments. A major part of his argument is that he offers a grand deal that is actually achievable, but this egregiously one-sided version is obviously a non-starter.

Feldman emphasizes that by abolishing 	extit{Lemon}'s secular purpose requirement,\textsuperscript{124} he also would give values evangelicals a free hand to make their religious arguments in the political process.\textsuperscript{125} I fully agree that no law should

\textsuperscript{121} See FELDMAN, supra note 16, at 248 ("Given that voucher programs are widely underused and have not spread widely, it should be relatively easy for values evangelicals to abandon them.").

\textsuperscript{122} See id. at 245-46 ("[W]hile values evangelicalism claims to advocate national unity and inclusion through shared values, school voucher programs cut exactly the other way, promoting difference and nonengagement.").

\textsuperscript{123} See Walter v. W. Va. Bd. of Educ., 610 F. Supp. 1169, 1170-73 (S.D. W. Va. 1985) (quoting testimony of Jewish child accosted for not appearing to pray during moment of silence, who was told that he would go to hell and that the Jews killed Christ, and of Catholic child who feared that if he did not stand and pray, he would get in trouble with his teacher).

\textsuperscript{124} See FELDMAN, supra note 16, at 237.

\textsuperscript{125} See id. at 222-27.
be held unconstitutional because its supporters made a religious argument.\footnote{See Douglas Laycock, *Freedom of Speech That Is Both Religious and Political*, 29 U.C. Davis L. Rev. 793, 811-12 (1996) (urging that judicial review focus on political outputs—the content and consequences of legislation—and not political inputs—the arguments made in support of that legislation).} But clarifying this point would give the evangelicals little that they don’t already have. They have the right to make their religious arguments in the political process;\footnote{See McDaniel v. Paty, 435 U.S. 618 (1978) (invalidating provision that excluded members of the clergy from the legislature); Walz v. Tax Comm’n, 397 U.S. 664, 670 (1970) (“Of course, churches as much as secular bodies and private citizens have [the] right” to “take strong positions on public issues.”).} the political arena is full of religious arguments and full of appeals to religious voters. As far as the law is concerned, churches can even create political affiliates and political action committees,\footnote{See Branch Ministries v. Rossotti, 211 F.3d 137, 143 (D.C. Cir. 2000) (holding that these alternatives eliminate any burden on free exercise from the restrictions on political speech by charities organized under 26 U.S.C. § 501(c)(3)).} although they choose not to do so, probably for good religious and political reasons.

“The Court has never accepted in any context the view that religious arguments are excluded from or restricted in political debate.”\footnote{Laycock, supra note 126, at 797.} The secular purpose requirement does not lead to invalidation of laws to promote sexual morality,\footnote{Bowen v. Kendrick, 487 U.S. 589 (1988) (upholding Adolescent Family Life Act).} restrict abortions,\footnote{Harris v. McRae, 448 U.S. 297 (1980) (upholding restrictions on public funding of abortions).} close stores on Sunday,\footnote{McGowan v. Maryland, 366 U.S. 420 (1961) (upholding Sunday closing laws).} or any other religiously-motivated law that falls short of promoting or mandating a religious ritual or observance. That a law coincides with some religious group’s moral teachings does not make it unconstitutional.\footnote{Bowen, 487 U.S. at 604 n.8; Harris, 448 U.S. at 319-20; McGowan, 366 U.S. at 442.} The Court has relied on the secular purpose requirement in only a handful of cases, most of which—quite possibly all of which—could have been decided the same way on other grounds.\footnote{See supra note 46 (collecting cases).} The claim that religious arguments have no place in politics is mostly an academic argument, occasionally a political argument, but it is not the law and never has been the law. Clarifying the point might reassure some evangelicals, but this is another crumb, not a substantial gain.

Feldman’s second argument for his compromise is that it would return us to the solution that prevailed through much of our history.\footnote{See Feldman, supra note 16, at 236-37 (“I believe that the history of church and state in America that I have offered in these pages does point toward an answer.”).} This is some truth to this claim, but the history to which it appeals is not very attractive. It is certainly true that at the founding, the controversy was over financial support for
churches and the salaries of clergy. Prayer and religious ceremonies at government events did not become controversial until the nineteenth century. For most of the nineteenth and much of the twentieth centuries, there were Protestant religious ceremonies in the public schools; children were coerced to participate, by corporal punishment if necessary, and there was no money for private alternatives for children of other faiths. The Protestants argued that their religious observances in public schools were “nonsectarian,” because they simply read the Bible “without note or comment,” and thus they took no position on issues that divided different Christian denominations. Non-Christians did not count, and the Catholic view—that the Bible should be read only in a translation approved by the hierarchy and only when accompanied by the official interpretations of the magisterium—didn't count either.

Feldman is proposing some version of this nineteenth-century Protestant practice—majoritarian religious observances at government events, and no money for private schools. He does not appear to require a pretense or fig leaf of nonsectarianism. His rejection of coercion means he is not really going back to the nineteenth-century practice. His failure to define coercion affects his historical argument, too. If he would permit only passive religious displays, but not religious exercises in classrooms, he is not even approximating any practice from the American past. If he would restore religious exercise to public school classrooms, then the difference between his proposal and the nineteenth-century practice would be in the degree of coercion.

The corollary of moving back toward practices that prevailed through much of our history is that his proposal seeks to reverse the historical trend of the last generation on both issues. I do not think the changes of the last genera-

136 See Laycock, “Nonpreferential” Aid, supra note 2, at 913-19 (contrasting the founding generation’s treatment of financial and nonfinancial aid to religion).
139 See Donahoe v. Richards, 38 Me. 376 (1854) (dismissing, without reaching the merits of the underlying controversy, father’s claim for damages caused by child being expelled from public school for refusing to read the King James Bible); Commonwealth v. Cooke, 7 Am. L. Reg. 417 (Boston Police Ct. 1859) (dismissing prosecution of a teacher who beat a Catholic student with a stick for thirty minutes until he agreed to read or recite from the King James translation of the Bible); CARL F. KAESTLE, PILLARS OF THE REPUBLIC: COMMON SCHOOLS AND AMERICAN SOCIETY 1760-1860, at 171 (1983) (reporting a similar case in Oswego, New York).
140 See FELDMAN, supra note 16, at 66, 86-87; Jeffries & Ryan, supra note 83, at 300-02.
142 See FELDMAN, supra note 16, at 63-67; Jeffries & Ryan, supra note 83, at 299-300.
tion were just mistakes or random variations in doctrine. The nineteenth-century Protestant practice was appalling, and we abandoned it for good reason.

I have already explained why the Kennedy-O’Connor position—prohibiting government speech observing or endorsing religion but permitting government to fund programs of private choice that include religiously-affiliated providers of education, social services, medical care, and the like—is consistent with substantive neutrality and individual choice. The two halves of that position emerged at somewhat different times and coincided with important changes in American attitudes toward religious minorities. The first Supreme Court decisions prohibiting school-sponsored prayer, in 1962 and 1963, came at a time of growing religious pluralism and full assimilation of Catholics and Jews into the American mainstream. When the Court began to take religious minorities seriously after World War II, majoritarian religious ceremonies at public events, and especially in public schools, looked less and less tolerable.

The shift to permitting funding of religious schools began in the 1980s, gathered momentum in the 1990s, and came to fruition at the turn of the millennium. In the 1980s, the evangelicals switched sides on this issue, moving from intense opposition to intense support. Free marketeers making economic arguments for school choice became much more numerous and got more attention in a political environment more interested in market solutions. In the 1960s and 1970s, religious schools had been actual or potential refuges from desegregation, but by the 1990s, frustrated black parents in inner cities were demanding school choice. As this broad coalition joined Catholics in demand-

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143 See supra text accompanying notes 105-110.
145 See generally WILL HERBERG, PROTESTANT - CATHOLIC - JEW (1955) (arguing that by the 1950s, these three religions had come to constitute three accepted branches of the American civil religion). The first Catholic President was elected in 1960.
146 See Laycock, Theology Scholarships, supra note 5, at 166 (collecting cases).
147 See Laycock, Underlying Unity, supra note 5, at 58-59 (describing evangelical opposition to funding for religious schools in Lemon v. Kurtzman, 403 U.S. 602 (1971), and continuing up to 1980).
148 In the online catalog of the main libraries of the University of Michigan, http://mirlyn.lib.umich.edu, there were 195 entries when I searched for “school choice” as a phrase in the subject matter index on September 24, 2007. The earliest entry was published in 1976. Four were published in the 1970s, 14 in the 1980s, 90 in the 1990s, and 87 between 2000 and 2007.
149 See Laycock, Underlying Unity, supra note 5, at 61-62 (briefly describing the segregation academies and the desegregation claim in Lemon v. Kurtzman, 403 U.S. 602 (1971)).
150 See William G. Howell et. al, What Americans Think About Their Schools: The 2007 Education Next-PEPG Survey, EDUC. NEXT, Fall 2007, at 12. This article reports a survey in which 68% of African-Americans completely or somewhat favored the use of “government funds to pay the tuition of low-income students who choose to attend private schools.” Id. at 17. See also THOMAS C. PEDRONI, MARKET MOVEMENTS: AFRICAN AMERICAN INVOLVEMENT IN SCHOOL VOUCHER REFORM (2007) (reviewing the participation of African-American activists in the campaign for vouchers in Milwaukee).
ing money for private schools, and as Protestant hostility to Catholics faded further into the past, aid to private schools looked less like a special interest demand for Catholics; it became much easier to see the issue in terms of neutrality and private choice.

Feldman's nineteenth-century model was a Protestant model that imposed Protestant preferences on both issues—on government speech and on government money. Both halves of the nineteenth-century Protestant model were deeply rooted in anti-Catholicism. Anti-Catholic feeling has faded, but the problem with the nineteenth-century model is more general. The Protestant model served a nineteenth-century anti-Catholic agenda because—precisely because—both halves of that solution catered to the religious majority and overrode the needs and views of religious minorities. The changes of the past sixty years on these two issues represent progress toward greater tolerance and equality; it would be a mistake to roll back the clock on either issue.

Feldman's second reason for his proposal, his desire to push all sides toward the middle, is more subtly stated. Only on rereading Feldman did I realize that this was part of his argument. But I think it is a more fundamental source of our disagreement. Feldman and I come to opposite solutions on both sets of concrete issues because we make opposite judgments on a more fundamental question: how can Americans live together in peace and equality despite our deep religious differences? My answer to that question is to maximize religious liberty for each American. I want to minimize government influence on religious choices and commitments—this is the very definition of substantive neutrality—and let each American live his life as freely as possible in accord with his own beliefs and commitments. Feldman does not. His solution is to push us all to take more moderate positions, reducing the scope of liberty or leaning on us not to fully exercise the liberties we have.

Values evangelicals very much want government sponsorship for religion, so Feldman says that legal secularists should swallow their objections. It is not so bad to see religious displays on government walls, and although he is ambiguous on this, he may think it is not so bad to have to sit quietly through someone else’s prayer service. The public school monopoly encourages a “cohesive national identity that evangelicals have wanted to restore or re-create,” vouchers are bad because they empower groups that want to teach other traditions or other identities, and they will inevitably provoke political battles about whether some schools are too radical or un-American to be funded. He thinks we will get along better if we all moderate our views and reduce our differences.

I think that is unlikely to happen. We always will have an extraordinary diversity of religious opinions, including fire-breathing believers and fire-

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151 See supra text accompanying notes 135-142.
152 See FELDMAN, supra note 16, at 238-42.
153 Id. at 244.
154 See id. at 245-46.
breathing nonbelievers. Given that reality, we will get along better if we agree to leave each other alone with respect to our beliefs and commitments about religion. The virtues of leaving each other alone are nicely illustrated by the difference between classroom prayer, which was deeply polarizing, and the Equal Access Act, which enables thousands of student prayer clubs (and gay rights clubs) to meet on their own time without imposing on their classmates. Whatever the relative merits of competing empirical predictions about the possibility of moderating religious conflict, I think that liberty with respect to religious matters is both intrinsically valuable and a deeply rooted constitutional commitment. My solution seeks to maximize liberty; Feldman's solution seeks to constrain the exercise of liberty and to encourage moderation.

Professor Feldman and I recently had an exchange at Harvard that clarified our differences and clarified some of the positions in his book. Of course he should not be held responsible for my attempts to summarize his informal oral remarks. But the exchange was sufficiently revealing to deserve summary here.

He agrees that he failed to specify what he meant by coercion. He now says that, for everyone who is not an elementary school student, he means Justice Scalia's understanding of coercion. So after elementary school, people would indeed have to sit through other people's religious exercises at government events. Many people complain to him about having been subjected to government-sponsored prayers, but none of the complainers was ever converted and many report being strengthened in their own faith in reaction to the unpleasant experience. He thinks that government-sponsored religious exercises deliver no message about the truth or value of any religion, but simply a message that one religion is the choice of a local majority—an uncontroversial fact that everyone already knows.

More fundamentally, he sees no difference between a majority exercising its religion privately or through the organs of government, because he thinks the state action doctrine is a laughable fetish. By contrast, I think that state action is definitional in the Religion Clauses: the difference between protected free exercise and prohibited establishment is precisely the presence or absence of state action in a religious ritual or activity. The difference is as clear as day and night—including cases of dusk, where the presence of state action is debatable and cases on either side of the line do not seem very different from each other. But we must draw the line as best we can, in close cases as well as easy cases, or the Religion Clauses become incoherent.

Feldman's definition of coercion clarifies what evangelicals would get from his proposed compromise. They would get prayer at football games, Christmas carols without a legal cloud, more religion-friendly perceptions from administrators, and the like. Presumably they would get prayer in classrooms as

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156 See Laycock, Liberty, supra note 5, at 316-23 (arguing that religious liberty reduces conflict and human suffering, and that reasons for keeping government out of religion extend to noncoercive intrusions).
well, at least after elementary school. He does not want a quarter of the population to feel that the public schools are a hostile environment.

Feldman also emphasizes that evangelicals would get intelligent design and creationism in public schools, taught not as science but as a theological belief widely held in the American population. Feldman and I agree that under existing law, schools could do much more than they do to accommodate religious objections to evolution. They could teach more about the boundaries of science and the difference between naturalism as a method of inquiry (a method that defines the reach of science) and naturalism as an ultimate truth (a question for religion or philosophy), thus making clear that science simply does not address any question about the role of God in causing or directing evolution or in creating the evidence that supports evolution. Perhaps schools would feel freer to take these steps if they were free to teach religion. But if schools were free to teach religion, they could teach intelligent design and creationism as true. If not—if Feldman means only that schools could teach that many people believe in intelligent design or creationism—then again he has changed nothing, because schools clearly can teach sociological or demographic facts about what many Americans believe. Whatever schools might teach about intelligent design and creationism under Feldman’s proposal, he thought that it should not be taught in a science class. But that would seem to be merely a pedagogical preference; if schools are constitutionally free to teach something, it is hard to see any constitutional reason why they can teach it in one class but not in another.

With respect to money, he thinks politics is about money and not symbolism, and that the wars of religion and lesser forms of religious conflict were about money and institutional control, not about symbolism. The point here seemed to be that if money goes to religious institutions, we will fight about it. This formulation is also open to the interpretation that he proposes victory for the secularists on what is important—money—and victory for the evangelicals on what is not important—symbolism.

My exchange with Professor Feldman was friendly and clarifying for both of us, but neither of us made much progress toward persuading the other. For me, the fundamental fact continues to be that money can be distributed to individuals and used consistently with individual choice, but that a religious exercise at a government event imposes on everyone present the religious exercise and all the religious choices inevitably contained within it.

IV. LAYCOCK AND GEY

Professor Gey has a more traditional objection. He wants neither financial nor verbal support for anything connected to religion. To him, separation means no government aid to any religiously-affiliated organization and a completely secular environment in any place even touching on the governmental sphere. He would go further, “prohibiting accommodation of religiously man-

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157 See Gey, supra note 97, at 5-12.
dated behavior beyond the scope of religious expression,"\textsuperscript{158} refusing to allow regulatory exemptions even when an exemption would permit believers to practice their faith and would impose no cost on those around them.\textsuperscript{159} He believes that the Establishment Clause limits the free speech rights of religious speakers.\textsuperscript{160} He may be the only American religious liberty scholar to defend the French decision to prohibit students from wearing conspicuous religious dress or symbols in public schools.\textsuperscript{161} The sum of these positions is why I do not think of him as a centrist.

It is no surprise that he opposes government money flowing to religious schools, even if they teach all the secular subjects and even if the money is routed through parents who choose from a broad array of schools.\textsuperscript{162} He is concerned about the conscience of taxpayers who object to these religious schools. In his view, if I do not like the religious views being taught in evangelical or Catholic schools, I should not have to pay tax money for their support.\textsuperscript{163} And, of course, he appeals to the American founding; he thinks that this is precisely the issue the Establishment Clause was intended to resolve.\textsuperscript{164}

I would agree with him 100\% if we were giving money to support the religious functions of churches. How to finance the church was the central issue of church-state relations in late-eighteenth century America, and the issue was resolved in favor of purely private funding.\textsuperscript{165} It is still the law, although almost never litigated, and thus little noticed, that government may not subsidize the religious functions of a church. That rule creates a special category consisting only of religion, so it is not a formally neutral rule. Government is free to subsi-


\textsuperscript{159} See id. at 182-84 (arguing that schools may not constitutionally exempt a religious student from a requirement to wear shorts in gym class).

\textsuperscript{160} See Steven G. Gey, \textit{When Is Religious Speech Not "Free Speech"?}, 2000 U. ILL. L. REV. 379, 381 ("[T]he First Amendment itself limits the extension of free speech protection to religious speech whenever that protection would undermine the separation of church and state.").


\textsuperscript{162} See Gey, supra note 19, at 739 (arguing that in the voucher cases, "the government is not only actively touting the virtues of one religion over another; it is also using its coercive taxing authority to force one person to support another person’s faith").

\textsuperscript{163} See, e.g., id. at 776 (arguing, in the context of the school funding cases, that "[f]orcing one set of adherents to pay for the sectarian activities of their religious adversaries is quintessentially coercive").

\textsuperscript{164} See, e.g., id. at 745 (arguing that the theory of the voucher cases "leads to the conclusion that Patrick Henry was correct and James Madison was wrong about the basic requisites of religious liberty").

\textsuperscript{165} Compare Laycock, \"Nonpreferential" Aid, supra note 2, at 894-902 (reviewing foundering-era debates over government-paid clergy), with id. at 913-19 (reviewing lack of debate about nonfinancial support of religion).
dize anything else it chooses—education,\(^{166}\) farmers,\(^{167}\) ethanol,\(^{168}\) bridges to nowhere,\(^{169}\) you name it. For decades we subsidized tobacco farmers\(^{170}\) while simultaneously subsidizing medical care for smokers.\(^{171}\) Every other interest group is free to seek subsidies for its core functions. But churches are not.

That rule is not formally neutral, but it is as close as we can come to substantively neutral. No subsidies to churches and no taxes from churches is the best we can do to prevent the fiscal operations of the government from either encouraging or discouraging churches. And if the substantively-neutral course is a little murky here, it is clarified by the cognate principle of voluntarism—religious people should fund their own churches in their own way—and by the history of the founding.

I said above that if I could link substantive neutrality with separation, then one side or the other had made a mistaken judgment about the meaning of neutrality or the meaning of separation. I think that is in fact what happened. I think it happened in the nineteenth century, when the Protestant majority equated funding of schools with the funding of churches. Certainly there is overlap: religious instruction goes on in churches, and religious instruction goes on in religious schools. Even worship goes on in both places. And if government pays the entire cost of a religious school, it will pay for the school’s religious instruction.

\(^{166}\) Every state operates a system of free public schools.

\(^{167}\) See, e.g., David M. Herszenhorn, Farm Subsidies Seem Immune To an Overhaul - Crop Prices Are Good, but Lobby Is Strong, N.Y. TIMES, July 26, 2007, at A1 (reporting substantial failure of political effort to limit farm subsidies); Andrew Martin, Making Waves in Dairyland: Lawmaker Raises Hackles with Plan for Deep Cuts in Subsidies to Farmers, N.Y. TIMES, June 22, 2007, at C1 (reporting that federal government paid $16 billion in farm subsidies in 2006).

\(^{168}\) See, e.g., Alexei Barrionuevo, 6 Get Grants From U.S. to Support Bio-Refineries, N.Y. TIMES, Mar. 1, 2007, at C3 (reporting that “corn-based ethanol . . . has relied for many years on a 51-cent-a-gallon subsidy to be competitive with gasoline,” and that government “would provide up to $385 million in six bio-refinery projects that would produce cellulosic ethanol”).

\(^{169}\) The “bridge to nowhere,” made famous in 2005 debates about earmarked Congressional appropriations, would have gone from Ketchikan, Alaska, on the mainland, to the city’s airport on Gravina Island, population 50. Congress appropriated the money to the state of Alaska and let the state choose whether to use it for this bridge. See, e.g., William Yardley, Alaska Bridge Projects Resist Earmarks Purge, N.Y. TIMES, Mar. 6, 2007, at A13. The Governor of Alaska, however, decided that “the bridge really was going nowhere” and officially abandoned the project. Alaska Seeks Alternative to Bridge Plan, N.Y. TIMES, Sept. 23, 2007. Of course, this was a political decision not to build the bridge, not a decision about lack of government authority to build the bridge.

\(^{170}\) See, e.g., Simon Romero, In Tobacco Country, Growers Keep Their Fingers Crossed for a Windfall, N.Y. TIMES, July 26, 2004, at A10 (describing plan to buy out “tobacco production quotas created by a Depression-era subsidy program”).

\(^{171}\) State payments for medical care for diseases caused by tobacco, under programs such as Medicaid, were the basis for the state claims that led to the large settlements between states and tobacco companies. See Doug Rendleman, Common Law Restitution in the Mississippi Tobacco Settlement: Did the Smoke Get in Their Eyes?, 33 GA. L. REV. 847, 852-55 (1999).
But secular instruction also goes on in these schools. They satisfy the compulsory education requirements. They teach skills and knowledge that government also teaches in its public schools. To refuse to pay for a child’s education because of her parents’ religious choices is very different from refusing to pay the salary of the clergy.

The problem, of course, is that religious and secular education are combined in these schools. The government is forbidden to pay for one and obliged to pay for the other, but the two courses of instruction share facilities and staff and sometimes may be commingled in textbooks and lesson plans, though my impression is that usually they are not. No solution is perfect, but that is hardly unusual. It is very difficult for government to have no effect on people’s religious incentives; government is the 800-pound gorilla in the society. Government spends a third of gross domestic product;¹ seventeenth it also has the power to regulate behavior and to throw people in jail. In a regime of substantive neutrality, the magnitude of effects matters; we must sometimes choose a small degree of support for religion to avoid a very large penalty on religion, or vice versa.¹ eighteenth This is such a case. It is more nearly neutral, and allows more private choice — more liberty — for government to pay the cost of education in secular subjects, offered in a religious environment, than to offer large education subsidies only to those families willing to abandon the religious environment.

I am inclined to add, although the Court apparently is not, that government can never pay the full cost of a religious school.¹ ninetynine The rationale that the state is paying for secular courses, whether delivered in a secular or religious environment, implies that some reasonable portion of the cost should be allocated to the religious function, and the school should pay that part itself. But there are counterarguments. This allocation requires someone to investigate the school’s curriculum to determine the percentage of cost allocable to religious instruction. Ideally, government would do that allocation in round numbers and in a minimally intrusive way, but ideals are hard to achieve. If the number thus determined is never reviewed, a school could increase its proportion of religious instruction and still collect the same government funds. If the number is reviewed at frequent intervals, there is persistent pressure on schools to reduce their religious instruction and collect more government funds. Maybe it would be better to think of vouchers as a purchase of services at a fixed price; if the

¹ seventeenth See United States Census Bureau, Statistical Abstract of the United States: 2007, at 266 tbl. 420 (126th ed., 2007), available at http://www.census.gov/compendia/statab/ (total current expenditures of state and local governments in 2005 were $1,686,400,000,000); id. at 307 tbl. 458 (total federal outlays in 2005 were $2,472,200,000,000); id. at 428 tbl. 648 (gross domestic product in 2005 was $12,487,100,000,000).

¹ eighteenth See Laycock, supra note 4, at 1008 (“Substantive neutrality always requires that the encouragement of one policy be compared to the discouragement of alternative policies.”).

¹ ninetynine See Laycock, Theology Scholarships, supra note 5, at 169-71 (noting that the Court’s “true private choice” theory implies that the religious content of the instruction purchased with the voucher is irrelevant).
government gets the secular value it bargained for, the school’s cost of delivering those services should be irrelevant. I have waffled before on the choice between these two rules, and suggested that the choice might depend on context, and I am no closer to a confident judgment now.

Even if the private school must pay for religious instruction itself, it is enormously easier for churches to run these schools if government pays for the secular part of the program. But it is enormously more difficult to run these schools if government offers a free secular education to all children and withholds that support from anyone who chooses a religious education.

My view that subsidizing secular subjects in a school is fundamentally different from subsidizing religious functions in a church is one of the central points on which Professor Gey and I disagree. Subsidizing a religiously-affiliated school aids religion, and for him, that makes schools the equivalent of churches. Assessing the Court’s recent decisions, he says that “government can provide financial assistance for religious education, which is one of the primary mechanisms by which churches cultivate their young members and attract new adherents.” I suspect that these schools do much better at cultivating young members than at attracting new adherents, but I do not disagree with his basic point. Religion benefits when government helps fund church-affiliated schools. For Gey, that is the end of the analysis; for me, it is only half the analysis. We must compare that benefit to the consequences of any alternative policy, and the alternative is for government to offer up to $10,000 for education to those families, and only those families, who surrender their constitutional right to get that education in a religious environment. The coercive effect of that conditional offer dwarfs the benefit to religion of making the money available on equal terms.

This disagreement also can be thought of as a baseline question. Gey would measure the impact on religion from a baseline of the government doing nothing—or at least, doing nothing relevant to a decision on whether to fund religious schools. If government did nothing, these schools would have to fully fund themselves, in secular and religious subjects alike; compared to that, any government money is aid.

I would measure the impact on religion from a baseline of what the government is already doing, or, to put it another way, from a baseline of how

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175 See id. at 170-71.
176 Gey, supra note 19, at 776.
177 I put this question to Rev. Andrew Greeley, the Chicago priest and sociologist. He was not aware of any data on conversion rates for students enrolled in religious schools. Anecdotally, he recalled that in the early years of black Protestant enrollment in Catholic schools in Chicago, some priests pressured families to convert. The resulting conversions rarely lasted, wiser heads prevailed within the church, and the effort was abandoned. Interview with Andrew M. Greeley, in Grand Beach, Michigan, August 4, 2007. The practice might be different among evangelical schools, and the result may be that families of other faiths or of none are less willing to enroll in such schools.
government treats the same activity—education in reading, math, etc.—in a wholly secular environment. These two baselines were the same in 1785, when there were no public schools and when government funded almost nothing in the private sector. But they are not the same today. From the perspective of what government is already doing, government offers to spend money for education, and one who chooses religious education forfeits that money.

More fundamentally, the choice of baseline depends on the practical incentives that will ensue. If government money is equally available for any school, then the family’s choice can be made on the educational and religious merits of the schools, and the government money will have no effect on the choice. Generalizing this point, the equal treatment baseline minimizes the government’s effect on incentives in government spending programs, so long as all the funded institutions offer a genuine secular service that government can fund in either a religious or a secular context.\(^{178}\) Of course government has to monitor enough to confirm that the secular service is really being delivered. But at least for schools, that monitoring is already in place: government has to confirm that a private school satisfies the compulsory education laws.

As to the taxpayers who object to funding religious education, I would explain that they are paying for secular education, and the church is paying for the religious instruction. Probably this would mollify very few of them. But any effect on them is just too small and too attenuated to outweigh the effect, on families choosing schools, of funding some options and not others. Each taxpayer’s money goes into an enormous pool, making an infinitesimal fraction of the government’s budget, and government then spends a small fraction of that budget to support secular education in religious institutions, and that expenditure makes it easier for those institutions to teach religion with their own funds. This is not nearly a big enough effect to outweigh the large penalty we traditionally impose on the choice to be educated in a religious environment.

Any grievance on behalf of the taxpayer is further ameliorated by the fact that his money is spread, on an equal opportunity basis, across schools teaching a wide range of views. His money goes to schools he supports as well as to those he opposes, and the schools he supports also get taxes from his ideological enemies. The ideological benefit and burden to each taxpayer is small to begin with, and it tends to balance out. The Court has emphasized the balancing-out effect of viewpoint neutrality in its cases on using state-authorized dues and fees to support private political speech. Dissenters have a right to withhold

\(^{178}\) In the free exercise cases, where government prohibits conduct that is the exercise of religion for some people, the baseline of government doing nothing usually minimizes the effect on incentives. Regulation and threat of penalty discourages religion; exemption usually does little to encourage religion. See supra text accompanying notes 21-22. But the problem becomes much more difficult if religious behavior aligns with self-interest, as in conscientious objection to serving in the military or paying taxes. Then exemptions must be denied or conditioned on the imposition of some alternative burden. See Laycock, supra note 4, at 1016-18. For a more extensive analysis of the problem of choosing baselines, see Laycock, Liberty, supra note 5, at 349-52.
the part of their dues and fees that goes to such uses, but not if the money is distributed on a viewpoint-neutral basis.

I have been analyzing an ideal program in which government provides equal funding for any school a family chooses, subject only to the constraint that government cannot pay for that part of a school’s cost that is reasonably allocated to the religious part of the education it offers. Of course, this does not describe any actual program. Programs enacted by the political process depart from this ideal in multiple ways.

In Cleveland, as in most such programs, the financial incentives still tipped toward the secular public schools. Students got a bigger government subsidy if they chose a secular public school, although many of those who chose a private school got a second subsidy from the private school. The opinions give little information about the size of the two subsidies combined, but the subsidy from private schools appears to generally be small. More important, families paid less if they chose a public school. Private schools could charge low-income students $250 in cash in addition to the voucher, and could charge other students the full difference between the school’s tuition and the state’s voucher. Public schools were free. This is considerably less than full substantive neutrality, but because the discrimination is against religion, it in no way suggests a violation of the Establishment Clause.

Nor do I argue that this discrimination is unconstitutional, which is to say, I do not argue that voucher programs are constitutionally required. Government may discriminate between public schools and private schools, even if that discrimination has disparate impact on religion. It is difficult or impossible to construct a plausible doctrinal argument that government must create privat-

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181 See Zelman v. Simmons Harris, 536 U.S. 639, 646-48, 654 (2002). Ohio spent far more per student on public schools than it paid in vouchers. Compare id. at 646 (voucher for private school capped at $2250), with id. at 647-48 (per student spending of $7746 in public schools).

182 Justice Souter cites average tuition figures from a variety of sources, ranging from well below the voucher amount at the average Catholic elementary school to “about $4,000” at nonreligious schools. Zelman, 536 U.S. at 705-06 & n.14 (Souter, J., dissenting). He also cites data suggesting that part of the reason religious schools can charge lower tuition is that they get subsidies from their church and secular private schools do not. Id. at n.14. If we take his $4000 figure for tuition at secular private schools as a reasonable measure of the cost of a private education, then the combined public and private subsidy to a low-income voucher student would still be well below the subsidy of more than $7000 available to that student in free public schools. It should be emphasized that all these numbers are from the 1990s, so they would be higher now, and that there is wide variation around these averages.

183 See id. at 646 (opinion of the Court).

184 Id.

185 Id. at 654.
ized options for the services it provides.\textsuperscript{186} I do think it is unconstitutional for government to discriminate between secular private schools and religious private schools,\textsuperscript{187} but the only Supreme Court decision so far upholds such discrimination,\textsuperscript{188} in an ambiguous opinion of unclear scope.\textsuperscript{189}

Other features of real-world voucher programs arguably encourage families to choose religious schools. In most cities, there are more religious private schools than secular private schools, so the newly-available choices are disproportionately religious. In Cleveland, the suburban public schools refused to participate; the state lacked the political will to require them to participate; and the political conditions that generated these results are likely to be quite common. The Cleveland public schools were dysfunctional, so that pursuit of educational quality might lead some families to choose religious schools even if they objected to the religious content. The vouchers were small, more attractive to a school operating on a shoestring budget, and therefore, on average more attractive to religious private schools than to secular private schools. Because the political party that supports vouchers opposes taxes to fund government programs, the political conditions that generated such a small voucher also are likely to be quite general.

This is not the forum to consider all the issues relevant to ideal or reasonable or minimally-acceptable implementation of a voucher plan. But a few points can be made in general terms. The encouragement to choose a religious school suggested by these factors is partially or entirely counterbalanced by the financial incentive still running the other way: vouchers in Cleveland required a copayment, and the political conditions that led to that requirement are likely to be quite general, but the public schools are always free. To say that religious schools are disqualified if they provide too good an education would create bizarre and perverse incentives.\textsuperscript{189} An offer of better quality does not constrain

\textsuperscript{186} See Laycock, \textit{Theology Scholarships}, supra note 5, at 173 (noting that claims to discrimination against religion “arise only after the state makes a voluntary decision to fund attendance at private institutions”).

\textsuperscript{187} See \textit{id.} at 195-200 (arguing that government discretion to include or exclude religious institutions from funding programs is the worst of all possible worlds).

\textsuperscript{188} Locke v. Davey, 540 U.S. 712 (2004).

\textsuperscript{189} On the fundamental ambiguity of Davey, see Laycock, \textit{Theology Scholarships}, supra note 5, at 184-87 (noting that opinion may be confined to the training of clergy or expanded to cover all funding programs); Berg & Laycock, \textit{supra} note 5, at 229-30 (explaining that the opinion has two independent rationales, one of which would be confined to the training of clergy and one of which would reach all funding programs).

\textsuperscript{190} In the context of halfway houses for parolees, Judge Posner hyperbolically predicted a race to the bottom. If religious providers were disqualified whenever they offered higher quality programs than their secular competitors, Posner feared that they would reduce quality to remain eligible for vouchers, and secular private providers would reduce their quality to make their religious competition ineligible. See Freedom from Religion Found. v. McCallum, 324 F.3d 880, 884 (7th Cir. 2003). The fallacy here was to implicitly assume that providers care about nothing except the eligibility of religious providers. One need not go that far to reject a rule that vouchers can be
choice; it expands choice. More generally, substantive neutrality is designed to implement liberty, and offering additional choices increases liberty. Students in Cleveland are better off with a choice of weak public schools and better private schools than with weak public schools only, even if they are not entirely happy with either choice.

Even if you find these points utterly unpersuasive and remain convinced that the Cleveland plan steered students toward religious schools, you have to consider the alternative. Any encouragement to choose religious education would be a considerably smaller departure from substantive neutrality than the enormous encouragement to choose secular schools inherent in offering to spend thousands of dollars on each child who chooses a secular school but zero on each child who chooses a religious school.

Choice would be eliminated, and students would be forced into religious schools, if there were not enough seats in secular schools to meet the demand. This is not a problem in primary and secondary education, where the public schools guarantee a seat to all comers, but it is a problem in social services. I have testified that the Bush Administration's faith-based initiative is "a fraud" unless accompanied by enough funds to actually implement the original commitment to guarantee a secular alternative to every program beneficiary who requests one. And a gerrymandered program that deliberately steered students to religious schools might well be unconstitutional, although there may be insuperable problems in creating a judicially-administrable rule to implement that intuition. This and other problems of implementing voucher plans require further analysis.

V. CONCLUSION

I doubt that I have persuaded many readers to abandon long-held positions on either funding religious schools or government-sponsored religious observances. I do hope that I have induced a bit of doubt and expanded lines of thought, and that I have helped clarify the source of disagreements among me, Professor Feldman, Professor Gey, and the Supreme Court. Getting government out of the way of religious choices, and minimizing the pressure that government brings to bear on either believers or nonbelievers, is an attractive goal. Achieving that goal may require rethinking some old assumptions.

used at bad religious schools but not at religious schools good enough to attract students on the basis of educational quality.

191 Constitutional Role of Faith-Based Organizations in Competitions for Federal Social Service Funds, Hearing Before the Subcommittee on the Constitution of the House Comm. on the Judiciary, 107th Cong., Serial No. 17, at 48 (2001) (statement by Douglas Laycock) ("[W]e will protect the beneficiary by really making available an alternate provider. You have got to really do that or this program is a fraud."); see also id. at 25 (emphasizing in written statement that ready availability of secular providers is essential but difficult to provide in social service programs); id. at 55 ("If funding continues to shrink, this thing will not work at all.").