Reviews of a Lifetime


Reviewed by Douglas Laycock*

Thomas Berg, Steven Smith, and Jay Wexler have offered reviews that are at once extraordinarily generous and deeply thought provoking. Getting to read their introductions was like Tom Sawyer getting to attend his own funeral and hear what a perfect child he had been.1

Those passages were pleasant but not very enlightening. I learned much more when the reviewers began to disagree with me. In my allotted space, I can respond only in part.

I. My Puritan Mistake?

Professor Smith thinks that I have committed a version of the Puritan mistake that I often warn others against.2 He does not say that I would protect only people who share my religious beliefs, but he does think that I have let my views on religion drive my views on religious liberty. Devout believers tend to think the religious side should win all the cases that are the least bit arguable; committed secularists tend to think the secular side should win all the cases that are the least bit arguable. I am a thoroughly secular agnos-

* Armistead M. Dobie Professor of Law, Horace W. Goldsmith Research Professor of Law, and Professor of Religious Studies, University of Virginia, and Alice McKean Young Regents Chair in Law Emeritus, University of Texas at Austin. I am grateful to the Texas Law Review and to Professors Berg, Smith, and Wexler for this symposium, to Joseph Wood for research assistance, and especially to John Witte at the Emory Law School for conceiving the idea of the book here reviewed and arranging for its publication.

1. See MARK TWAIN, THE ADVENTURES OF TOM SAWYER 131 (Lee Clark Mitchell ed., Oxford Univ. Press 1993) (1876). For readers from abroad and anyone else who might not know, Tom and his friends were missing and presumed dead when in fact they were camped out on an island having a grand time. They sneaked into the church loft and listened to the praise-filled eulogies at their own funerals. As this episode suggests, Tom was very far from a perfect child.

2. See Douglas Laycock, Religious Liberty as Liberty, 7 J. CONTEMP. LEGAL ISSUES 313 (1996), reprinted in DOUGLAS LAYCOCK, 1 RELIGIOUS LIBERTY: OVERVIEWS & HISTORY 54, 98 (2010) (describing the Puritan mistake as defending religious liberty only or principally for one’s own faith group); Douglas Laycock, Religious Liberty: Not for Religion or Against Religion, but for Individual Choice, 3 UT L. MAG., Spring 2004, at 42, reprinted in 1 RELIGIOUS LIBERTY, supra at 123, 123 (describing the Puritan mistake in practice as thinking that religious liberty means either whatever is good for religion or whatever is good for secularism); Douglas Laycock, Remarks on Acceptance of National First Freedom Award from the Council for America’s First Freedom (Jan. 15, 2009), in 1 RELIGIOUS LIBERTY, supra at 268, 268 ("If I am remembered for anything after my career is over, I hope it will be that I avoided the Puritan mistake, and that I warned others against it.")
tic who respects believers and bears them no ill will, and I think that both the religious and secular “sides” should win on some issues and lose on others.

More specifically, I think that government should be neutral toward religion and that this neutrality should extend even to government speech, so that government takes no position on religious questions. After finding my reasons for this position wanting, Professor Smith concludes that “Laycock thinks the First Amendment committed the government to the same sort of respectful, neutral agnosticism that he himself embraces.” But, he says, this is not “an egregious failing,” because it is inevitable that people’s views on religion will drive their views on religious liberty.

He may not think that this would be an egregious failing, but I do. Religious liberty is supposed to ameliorate the problems arising from deep religious disagreements. Religious liberty cannot serve that function if everyone’s views about religious liberty are derived from underlying views about religion. The resulting disagreements about religious liberty would simply replicate our religious disagreements. It is only to the extent that we distinguish our views on religious liberty from our views on religion that religious liberty can contribute towards solving the underlying problem.

But this is no response at all to Professor Smith; he made this point long ago. He thinks that our disagreements about religious liberty do just replicate our underlying disagreements about religion, and hence, that a coherent theory of religious liberty is impossible. Thus the thesis and title of his first book: the quest for a constitutional theory of religious freedom is a foreordained failure.

As he notes, I am a more practical-minded kind of guy. I am not searching for a grand philosophical theory; I am trying to implement a constitutional principle in a messy world. “Good enough for government work” is one way to describe it, and not unfair; in a similar vein, Professor Winnifred Sullivan recently said that I am “committed to a sort of muddling through,” adding that she meant that “in a very positive sense.” As close as we can come, or the best that we can do, is how I more often think of it.

---

4. Id. at 932.
6. Id.
7. See Smith, supra note 3, at 921 (“[H]is primary goal is not to produce a theory to be admired by political philosophers for its elegance or sophistication. . . . Laycock’s goal has been to devise a plausible account of the religion provisions of the United States Constitution that can be used to resolve contemporary controversies.”).
8. Id. 924.
resist letting the perfect be the enemy of the good; I think we do a lot of good by achieving as much religious liberty as we can.

II. Avoiding the Puritan Mistake

Different views about religion imply different views about religious liberty. But it is impossible for government to act on all the different religious views, and it is self-defeating to import our underlying religious premises into our efforts to implement religious liberty.

I tried to escape this circle by building a "religion-neutral case for religious liberty."\textsuperscript{10} I tried to state secular reasons for religious liberty that do not reject religion and that can be accepted by religious and secular citizens alike. I also tried to give a supporting role to the religious reasons for religious liberty by recasting them in terms that secularists can understand and accept.

First, I said that attempts to suppress dissenting religious views had caused vast human suffering and social conflict. This is about as uncontroversial a claim as there can be about human history. Second, I said that beliefs about religion are often of extraordinary importance to the individual. This too seems to me to be a relatively uncontroversial claim, verifiable by observing human behavior, past and present. And third, I said that "beliefs at the heart of religion—beliefs about theology, liturgy, and church governance—are of little importance to the civil government."\textsuperscript{11} Certainly they are less important to the government than to the individuals and groups that hold the beliefs. This third claim is obviously more controversial, especially in its more absolute formulation: little importance. It is still debatable, but I think much less so, in its comparative formulation: less important to the government than to believers.

I think that all three of these points were part of the Founders' reasons for adopting a regime of religious liberty in both the state and federal constitutions. Of course there were also other reasons, both secular and religious.\textsuperscript{12} The religious reasons that I would recast in secular terms were essential, because the demand and the political muscle for disestablishment came from the dissenting churches, who were mostly the evangelical Christians of the time.\textsuperscript{13}

A. Barring Religious Justifications by the Government

Professors Berg and Smith each take me to task, on somewhat different grounds, for my effort to justify religious liberty in exclusively secular

\begin{itemize}
\item \textsuperscript{10} Laycock, \textit{Religious Liberty as Liberty}, supra note 2, at 58–61.
\item \textsuperscript{11} \textit{Id.} at 59.
\item \textsuperscript{12} \textit{Id.} at 66–69 (providing other explanations, including self-interest, fear of central government, and the religious reasons).
\item \textsuperscript{13} \textit{Id.} at 88–91.
\end{itemize}
I now see that I was not clear about just what limits I proposed to put on justifications for religious liberty. I certainly did not mean to exclude religious arguments from the public debate, and I did not even mean to exclude public officials from relying on religious motivations.

I intended a much narrower proposition: government cannot announce its commitment, as government, to a disputed religious proposition. It cannot declare that Jesus of Nazareth was or was not the Son of God, that salvation is or is not by faith alone, or that salvation is or is not a meaningful concept. It cannot declare that only voluntary religious faith and actions are efficacious, that government aid to religion corrupts religion, or that humans owe duties to God that are superior to all temporal obligations.15 Because government cannot take these religious positions, the government cannot justify religious liberty on these grounds.

Professor Smith takes me to insist that government “cannot act on religious beliefs or reasons,”16 and Professor Berg may read me the same way.17 That is a common enough secular view, and I failed to explicitly disclaim it in the passage they cite.18 I have repudiated it elsewhere, in an article slated for volume 4.19 When American governments guaranteed religious liberty, or when they freed the slaves, or when they provide medical care for the poor in our time, I do not care whether individual voters or legislators or Executive Branch officials were motivated by religious or secular reasons or by both. Their personal motivations for acting, even in their official capacity, raise no constitutional question. There was a recent campaign to change Alabama’s regressive tax laws on the explicit ground that they are unchristian.20 The campaign failed, but if it had succeeded, an Establishment Clause attack on the new tax code would have been frivolous. When voters or legislators have religious reasons for adopting policies that I would vote against, an Establishment Clause attack is still frivolous. I still do not care why they acted; my political complaint is about what they did. The

---

14. See Thomas C. Berg, Laycock’s Legacy, 89 TEXAS L. REV. 901, 909–10 (2011) (arguing that religious reasons for religious liberty were essential at the founding and better fit the views of the American people today); Smith, supra note 3, at 919 (arguing that modern commitments to religious liberty are derived from, and depend on, a long history of Christian thought).
15. Laycock, Religious Liberty as Liberty, supra note 2, at 67–69 (noting these important religious reasons for religious liberty).
16. Smith, supra note 3, at 920.
17. See Berg, supra note 14, at 909 (taking me to question “whether religious or theological arguments may serve as significant public reasons for America’s system of religious liberty”).
18. They each cite Laycock, Religious Liberty as Liberty, supra note 2, at 58.
19. Douglas Laycock, Freedom of Speech That is Both Religious and Political, 29 U.C. DAVIS L. REV. 793, 793–807 (1996); see also id. at 806 (extending from voters to government officials the argument that political actors may act on the basis of religious motivations).
Establishment Clause limits political outputs—the laws government enacts and the actions it takes—not political inputs—the arguments that voters or legislators can make. When a government employee acting in his official capacity leads a prayer, or erects a Nativity scene, I take the government to be engaged in inherently religious conduct. But when the government protects religious liberty, or takes any other policy action within its regulatory domain, it is doing something secular and governmental, and its actions are not invalidated by the possible religious motivations of the individuals who were empowered to determine government policy on the matter.

The Legislative and Executive Branches in modern times rarely issue policy statements justifying religious liberty, so they have few occasions to run afoul of the restriction I would impose. Such arguments do not appear even where they might be expected. Official statements justifying the Religious Freedom Restoration Act argued the importance of free exercise with conclusory appeals to the Founders and the first colonists. More substantial secular arguments might be too theoretical for legislative consensus. Certainly the legislative cause would not have been advanced by trying to agree on religious reasons for religious liberty.

Judicial opinions do sometimes state reasons for religious liberty, and judges need to maintain religious neutrality. Mary Ann Glendon once complained that the Justices gave Protestant reasons that exclude Catholics and Jews.

I try to interpret the Religion Clauses in the same religiously neutral way in which I try to justify them. This is what I meant when I said, somewhat inartfully, that "religious beliefs cannot be imputed to the Constitution." Unlike many state provisions and state proposals of the founding era, the federal Religion Clauses do not limit religious liberty to Protestants, to Christians, or even to monotheists. I interpret the Religion Clauses broadly to protect all Americans of every faith and of none. The Religion Clauses become incapable of mediating religious conflict if they are limited to late-eighteenth-century Protestant perspectives or captured by any other view about religion.

B. Weakening the Case for Religious Liberty?

Professor Berg emphasizes a different objection—that we weaken the case for religious liberty when we omit the religious reasons.25 Professor Smith probably shares this objection,26 although he does not urge it here.

Whether omitting the religious reasons weakens or strengthens the argument is entirely a matter of audience. When addressing religious audiences, I emphasize the religious reasons too. But those reasons are worse than useless with the secular audiences most resistant to claims of religious liberty. These audiences tend to think that if religious liberty cannot be justified without appeals to religion, then obviously it cannot be justified at all. These secular audiences are where the principal problem is: what do we say to them?

The only reasons that can justify religious liberty to a broad audience in a religiously diverse society are reasons that do not require acceptance or rejection of any propositions of religious faith. Of course such a scheme will not persuade everybody, and perhaps in the end it will not persuade anybody. But that is what I was trying to do. I am happy to supplement the argument with religious reasons when speaking to audiences that might be persuaded by them.

At one point Professor Berg offers a formulation that seems logically equivalent to mine:

The various religious justifications for religious freedom need not rest on confidence that God, or a higher realm, exists. They might rest on simply recognizing the potential that a higher power exists and the potential cost of interfering with individuals’ duties or fulfillment in that realm—coupled with the proposition that the government is not competent to make judgments about the true nature of any such power or realm.27

If many Americans believe in such a realm, and if government cannot take positions on religious questions (my formulations), then the belief in such a realm may be either true or false, and thus it is potentially true (Professor Berg’s formulation). And we agree that the cost of interfering with that belief is very high. If there is a disagreement here, it is exceedingly narrow.

26. See id. at n.61 (citing for this proposition Steven D. Smith, The Rise and Fall of Religious Freedom in Constitutional Discourse, 140 U. PA. L. REV. 149, 149 (1991)).
27. Id. at 912.
III. Government Speech About Religion

A. Why No Endorsements?

My view that government should not endorse any view for or against religion will be the subject of much of volume 4, but it also appears repeatedly in the overview articles in volume 1. Professor Smith takes this view to grow out of my Puritan mistake. This charge is partly based on his view that none of us can avoid the Puritan mistake and partly on his view that the reasons I have offered for the rule against endorsements are plainly insufficient.

Nonfinancial government support for religion appears to have been uncontroversial in the Founders' time, because the country was overwhelmingly Protestant and disagreements among Protestants were not so large that Protestant congressional chaplains or religious appeals by government officials became a serious issue. These "endorsements" of Protestant beliefs were part of a much larger set of governmental practices and attitudes. In the states, there were blasphemy laws, religious qualifications for voting and holding public office, Sunday laws (with vigorous enforcement in some places), and pervasive anti-Catholicism. It was this whole constellation of practices that I meant to describe as "unreflective bigotry"—not just religious appeals in political rhetoric, and certainly not Lincoln's Second Inaugural considered in isolation.

Professor Smith says that my position on endorsements depends more on logic than history, and with respect to the eighteenth century, there is something to that. But I do not claim that the Founders enacted a principle that they did not know about, did not favor, and regularly violated. I think that even in the eighteenth century there were relevant principles that the Founders recognized or would have recognized and that they repeatedly acted on. It was a commonplace of founding-era arguments for disestablishment that government is not a competent judge of religious


31. Id. at 571.

32. Smith, supra note 3, at 925.

33. Id. at 926.

34. Id. at 925.
Stating that point a little differently—this is my paraphrase and not a frequent statement of the time—the founding generation believed that government should stay out of religious controversies. Forms of support for religion that became controversial among Protestants were soon abandoned. These principles were most prominently and explicitly applied to government coercion, and John Locke had applied them only to coercion. Applying these principles to persuasion is an extension. But even in the eighteenth century, symbolic indications of preference for particular denominations—a form of endorsement—were attacked and eliminated.

Government’s inability to judge religious truth did not meaningfully restrict speech invoking generic Protestantism, because universally accepted Protestant truths did not require judgment or arouse any real controversy. Those statements were simply accepted as true. Such statements did not present an issue on which the Founders had any intent; it was an issue they had no occasion to think about.

My principal appeal to history on issues of government speech about religion is not to the eighteenth century, but to the nineteenth. When government created public schools, what it said about religion did become controversial, even among Protestants. When the large Catholic immigration began to arrive, the controversy became intense, producing mob violence and church burnings, new political parties, amendments to state constitutions, and an unsuccessful attempt to amend the federal Constitution. With a more religiously diverse population, neutral instruction in Christianity became impossible, and the attempt to do it anyway produced the kind of intense religious conflict that the Founders undoubtedly had hoped to avoid. This nineteenth-century history is relevant to constitutional interpretation in my view because we can and must interpret

---

35. See JOHN LOCKE, A Letter Concerning Toleration (1689), reprinted in JOHN LOCKE, TWO TREATISES OF GOVERNMENT AND A LETTER CONCERNING TOLERATION 215, 220 (Ian Shapiro ed., Yale Univ. Press 2003) ("For, there being but one truth, one way to heaven, what hopes is [sic] there that more men would be led into it, if they had no other rule to follow but the religion of the court.").

36. Id. at 219–20.


38. See Douglas Laycock, Original Intent and the Constitution Today, in THE FIRST FREEDOM: RELIGION AND THE BILL OF RIGHTS (James E. Wood ed., 1990), reprinted in 1 RELIGIOUS LIBERTY, supra note 2, at 594, 596 (arguing that, in searching for original intent, little weight should be given to "cases that were not controversial in [the Founders'] time," because such cases "received no serious scrutiny").


40. Id. at 632.

41. Id. at 632–33.
constitutional principles in light of experience and in light of the changing conditions to which those principles must be applied.\textsuperscript{42}

The large Catholic immigration extended meaningful religious diversity in America beyond Protestantism; a little later, the large Jewish immigration extended it beyond Christianity. Still later, non-European immigration extended religious diversity to include Muslims, Buddhists, Hindus, and many smaller faiths from around the world.

The biggest change is the emergence of a large minority of nonbelievers—15% or more by some measures,\textsuperscript{43} although answers to polling questions on this issue cannot be taken entirely at face value. Whatever the exact percentage, we are talking about tens of millions of people, disproportionately among the highly educated—among those who are most able to effectively complain. Religious diversity in meaningful numbers now extends beyond theism, and the conflict between intense believers and secularists is the principal alignment of religious conflict in the country today.\textsuperscript{44}

The emergence of a substantial nonbelieving minority in a society of believers will destabilize long-held assumptions and institutional practices. If the number of nonbelievers gets large enough, this change will be as destabilizing as the Protestant Reformation in Catholic Europe or the Catholic immigration to Protestant America. We have probably learned enough to skip the violence this time, but the scope of rights and of acceptable governmental practices will come under pressure from new conditions. Practices that aroused no religious controversy in 1791 do arouse religious controversy today. It is the function of the Religion Clauses to mediate this new religious conflict, and to protect the rights of both sides, just as those clauses mediated earlier religious conflicts between Catholics and Protestants\textsuperscript{45} and between different denominations of Protestants.\textsuperscript{46} To claim that the interests of the nonbelieving minority do not inform constitutional interpretation, because the Religion Clauses were adopted by a Protestant nation that made no


\textsuperscript{44} Douglas Laycock, \textit{Church and State in the United States: Competing Conceptions and Historic Changes}, 13 \textit{IND. J. GLOBAL LEGAL STUD.} 503 (2006), \textit{reprinted in} 1 \textit{RELIGIOUS LIBERTY, supra} note 2, at 399, 406–09 [hereinafter Laycock, \textit{Church and State in the United States}].

\textsuperscript{45} See \textit{id.} at 405–06 (describing Protestant–Catholic conflict over religion in public schools, and over government funding for private schools, as the dominant religious conflict during the nineteenth and early twentieth centuries).

\textsuperscript{46} See \textit{id.} at 403–04 (describing the conflict between established and dissenting Protestant denominations as the dominant religious conflict at the time of the founding).
provision for nonbelievers, would strip the Religion Clauses of credibility among nonbelievers and among millions of sympathetic believers with largely secularized worldviews.

B. Equal Respect

Professor Smith has another pair of interconnected objections. He thinks I count the alienation of nonbelievers as a reason to keep the government from endorsing religious beliefs, but that I do not count the parallel alienation of believers who expect government to endorse their religious beliefs. He thinks the alienation of nonbelievers is the only argument sufficiently plausible to actually motivate me, and that I weigh it more heavily because I am a nonbeliever myself—the Puritan mistake again.

Taking the second objection first, making nonbelievers feel like second-class citizens is only one reason why I think government should refrain from taking positions on religious questions. Taking religious positions violates the principle that government is not a competent judge of religious truth, and there are many reasons for that principle. Taking religious positions is an obvious departure from neutrality, with effects on the religious incentives of both the speakers and the target audience.

I agree with Professor Smith that government-sponsored religious observances rarely move anybody from nonbelief to belief or from one strong faith to another. But whether or not anyone is induced to believe, everyone is induced to go through the motions: to participate, or give every outward appearance of participating, in someone else's religious observance. Substantive neutrality means not just that government should not encourage or discourage belief, but also that it should not encourage or discourage religious practice. A religion with a tradition of martyrs who went to the lions or the stake rather than go through the motions cannot credibly dismiss as insignificant the burden of feigning religious participation.

Government sponsorship also affects the public practices of believers. Government-sponsored religion becomes a subject of political decision making and, sometimes, of open political controversy. Government-sponsored prayer must hold a majority in the school board or the city council. In tolerant communities, government prayer tends to a mushy ecumenism; in

47. Smith, supra note 3, at 927–29.
48. Id. at 929–32.
49. Id. at 927.
50. Laycock, Substantive Neutrality Revisited, supra note 28, at 248.
intolerant communities, it tends to a heavy-handed imposition of majoritarian practice. Whether to pray in Jesus’ name is an utterly intractable question when it is government leading the prayers. We can think of these effects as encouraging believers to adjust their religious practice as necessary to hold their majority, or more simply as government support corrupting religion, a problem much noted by the Founders. Either way, these effects mark a departure from substantive neutrality, especially in light of the related cluster of values that I have always said should and do inform the meaning of the Religion Clauses.

The potential effect on belief is not on resistant nonbelievers or resistant adherents of other faiths, but on marginal believers. Some will be driven away; others may be nudged from one form of observance to another. We can infer from the dramatic decline of the formerly established churches here and in Europe that many believers will be put off by government religion and become less likely to believe or practice whatever the government is offering. For those who are not driven away, some may know only the government’s model of religion. Whatever form of religious observance government adopts, it repeatedly and persistently models that form in preference to all the alternatives. In a society where most Americans claim to believe but many know little about their religion, the government model of religion—the model chosen by the political process—will be the model some inactive believers know best.

So what about the alienation of those who perceive government silence about religion as hostility? What about those who believe that the nation must worship as a nation and not merely as individuals? Such feelings are real, and no doubt a cost of robustly protecting religious liberty for others. It is not that such feelings don’t count. It is certainly not that I treat religion as something like a mere hobby. If I thought religion were a mere hobby, I would not insist that it is far more important to believers than to government, and I would not have so vigorously and persistently defended regulatory exemptions for religiously motivated conduct. To the extent that I cannot satisfy the needs of those who believe we should worship as a nation, I would

55. Laycock, “Noncoercive” Support for Religion, supra note 37, at 646.
56. See Pew Forum on Religion & Public Life, U.S. Religious Knowledge Survey (Sept. 28, 2010), http://www.pewforum.org/Other-Beliefs-and-Practices/U-S-Religious-Knowledge-Survey.aspx (finding that Americans on average could correctly answer about half of a series of multiple choice questions about religion—questions that for the most part were not difficult or esoteric).
57. See Smith, supra note 3, at 930–31 (noting belief that it is the duty of nations, and not merely of individuals, to pray for God’s protection and thank Him for His blessings).
58. Id. at 929–30.
offer those people other solutions, and to the extent that those solutions are inadequate, I think these people are making impossible demands.

Serious believers are better off running religious observances themselves than having the government do it for them. This point is implicit in what I have already said about government corrupting religion and embroiling religion in political controversy. It is most clearly illustrated by comparing the enormous success of the Equal Access Act\(^5\) to the serious difficulties of school-sponsored prayer. The Equal Access Act has permitted tens of thousands of student prayer clubs to meet in public schools with remarkably little social conflict (after the initial round of obstructionist litigation by school boards\(^6\)). These clubs control the religious content of their own meetings, which need not be watered down to hold a majority in the school board and need not be confined to one or two minutes to avoid inflaming the objections of all the people who don't want to be there. The point can be generalized. Given robust protections for freedom of religious speech, which I support,\(^6\) the public square would never be naked. It would be filled with the messages of believers, undistorted by the limitations that accompany government sponsorship.

Those who believe we should worship as a nation necessarily lose. As to them, my proposals are not neutral. I understand that; I even regret it. But I can't fix it. A coherent understanding of religious liberty requires a sort of categorical imperative: religious liberty must be defined in such a way that it can be equally guaranteed to all. I cannot have a liberty to do things that prevent you from doing the same things. Nor can I have a right to do things at the margins of constitutional liberty that prevent you from doing things closer to the core. These are structural limitations on elaborations of liberty, and they gore oxen on both sides of the religious-secular divide.

Conservative Christians cannot have the right to use the instruments of government to exercise their religion, or to worship "as a nation," because it is impossible to generalize that right. It is impossible to simultaneously let conservative Christians, liberal Christians, Jews, Muslims, Wiccans, and all the others conduct their worship "as a nation." That is simply not a right that can be included in a coherent understanding of religious liberty. At most we could say that the majority religion—or the most intense and well-organized minority religion—has such a right but that no other religion has such a right. That is not religious liberty at all; that returns (at least for this issue) to religion as something that dominant groups impose on weaker groups.

---

\(^6\) Laycock, Religious Liberty as Liberty, supra note 2, at 93.
The secular counterpart to those who believe we should worship as a nation are those who believe they should be protected from exposure to private religious speech. There are many of these people; sympathetic government officials have repeatedly litigated their claim to the Supreme Court, and they have repeatedly lost. They cannot have an implied right not to be exposed to religious speech, because that would impose a huge limitation on other Americans' express right to speak. Many secular Americans, many Jews, and many members of other religious minorities are alienated by what they see as the aggressive religious speech of evangelical Protestants. My proposals are not neutral as to these complaints either. Once again, I understand it, regret it, and can't fix it. People on both sides of the culture wars are precluded from defining their own rights so expansively that they shrink the rights of others to something smaller than what they claim for themselves.

Professor Smith notes that I once gave a different answer to this question. I still adhere to that answer, even though I have added a less hypothetical answer here. I said that only if we agreed on government neutrality toward religion could we end the political battles to determine which religious group would control the government and get to impose on all the others. Professor Smith says we could get the same result if we could all agree on one religion. Fair enough. But I did not call for agreement on one religion; I called only for agreement on a principle of religious liberty. Assuming agreement on religion would assume away the problem religious liberty is supposed to solve. Hoping for agreement on religious liberty may be utopian, but it does not assume away the problem to be solved.

C. Generic Endorsements and the Pledge of Allegiance

Professor Smith especially questions my resistance to bland and generic endorsements like the national motto. I think that in principle government should take no position on any religious question, even whether God exists. But in practice, there will always be a de minimis exception, and I have even suggested to the Court a set of criteria for drawing the line—a line that will inevitably be an unprincipled matter of degree.


64. Laycock, Religious Liberty as Liberty, supra note 2, at 64.

65. Smith, supra note 3, at 931 n.77.

66. Id. at 928–29.

67. Laycock, Theology Scholarships, the Pledge of Allegiance, and Religious Liberty, supra note 28, at 215 & n.529.
The best argument for permitting generic endorsements of religion is that they are not really controversial, and so do not require a government judgment on any live religious dispute. There is something to that, but less and less as the nonbelieving population grows. The reason we now have cases that we never had before—cases challenging Christmas displays, Ten Commandments monuments, and government nods to generic theism—is not just that the judicial doctrine has changed, but also that the facts on the ground have changed. The religious demography of the American people and the principal alignments of religious conflict are and always have been highly relevant to interpreting the Religion Clauses.

Even if nonbelieving views become dominant, there will still be vestiges of government religious speech; there is no imaginable scenario in which the Court will be absolutist about this. The Court will not order cities and states to change religious place names, and it will not tell the President what he can say at his inauguration (which is his personal free speech in any event) or even in a Thanksgiving proclamation (which I think is governmental). For some issues, the only remedies are political, and the political solution is more likely to add recognition of nonbelievers than to eliminate every last endorsement of traditional faiths.

"[U]nder God" in the Pledge of Allegiance is a generic endorsement that raises unique issues. I say that every day we are asking children in public schools for a succinct affirmation of faith, and that it is unconstitutional to do that. Professor Berg agrees that "government should not conduct prayers or make official statements taking religious positions," and that "under God" in the Pledge "is constitutionally troublesome." But he also worries that eliminating the phrase might imply that our government is a government of unlimited powers, subject to no higher authority, and that many religious citizens might be unwilling to pledge allegiance to such a government.

69. See McCreary Cnty., Ky. v. ACLU of Ky., 545 U.S. 844, 859–81 (2005) (striking down a Ten Commandments display recently erected with explicit religious motivation); Van Orden v. Perry, 545 U.S. 677, 688–92 (2005) (plurality opinion) (upholding a forty-year-old Ten Commandments display on the grounds of the state capitol); id. at 702–03 (Breyer, J., concurring in the judgment).
71. Laycock, Church and State in the United States, supra note 44, at 403–09.
72. Laycock, Theology Scholarships, the Pledge of Allegiance, and Religious Liberty, supra note 28, at 200–05.
74. Id. at 913.
75. Id. at 914.
I do not doubt the sincerity of this argument. I do doubt that many Americans would so interpret a secularized Pledge on their own initiative. Americans recited the Pledge without "under God" from 1892 to 1954, and I doubt that it ever occurred to any of them that they were pledging allegiance to an unlimited government. "With liberty and justice for all" can easily be read as a limitation on government, not merely as descriptively or aspirationally, and protections for liberty and justice are the principle limitations we care about. But none of this matters now. Professor Berg's interpretation is now in circulation, and millions of Americans would instantly subscribe to it as soon as it appeared on the conservative talk shows and became part of the political argument for keeping "under God" in the Pledge.

Christopher Eisgruber and Lawrence Sager proposed "one Nation, of equals" in an amicus brief in the Pledge case. After the filing deadline, they thought of the more felicitous "one Nation, under law," which fits the familiar rhythms and states Professor Berg's central point that government is limited. Some believers might say that law is itself man-made, and thus an insufficient limit on government. But other believers might with equal plausibility interpret "under law" to refer to natural law, which would seem to fully satisfy the desire for an external limit on government. Those who do not believe in natural law could interpret "under law" to mean the Constitution, or the rule of law more generally. "Under law" would help finesse the nation's deep disagreements over faith.

But it would not succeed, at least not for a long time. Still other believers would say that substituting "under law" for "under God" equates law with God and is idolatrous. When God was not in the Pledge, nobody missed Him there. But once He is in, meanings and expectations change, and taking Him out would not restore the previous status quo until a whole generation passed away—if then.

In any event, this is a wholly academic discussion. "[U]nder God" in the Pledge is not going away. Forced to consider the issue by Michael Newdow's first lawsuit, I gave the principled answer that the current Pledge is unconstitutional. But nothing good can come from Newdow's litigation, which is many decades premature. The nonbelieving minority is not yet large enough or influential enough to have such a politically aggressive claim taken seriously. If Newdow ever gets the Supreme Court to consider his claim on the merits, he will almost certainly lose, and the opinion may do much broader damage to Establishment Clause doctrine. If he were to win, the victory would be Pyrrhic, leading to a constitutional amendment, widespread defiance of the Court, or both.

77. Berg, supra note 14, at 914.
My amicus brief in *Newdow*, to be reprinted in volume 4, was an attempt at damage control. I made the argument for why the Pledge is unconstitutional, not in any hope of winning, but hoping only to get the Court to take the issue seriously and write a more cautious opinion. And then I suggested a way to uphold the Pledge that would do the least damage to surrounding doctrine. I am not campaigning to amend the Pledge. Here too, the perfect should not be the enemy of the good.

IV. What Does Neutrality Have to Do With It?

Professor Wexler generally likes the substance of my interpretation of the Religion Clauses, but he thinks it more misleading than helpful to call it "neutrality." He notes that I accept three important limits on the pursuit of neutrality. First, government cannot avoid encouraging or discouraging religion; the best we can hope for is to minimize its influence. Second, I would allow burdens on religion where necessary to serve compelling government interests. And third, I would allow government to take positions on secular issues, such as evolution, even though that makes it more difficult to sustain religions that view the issue as religious and reject the government's position on religious grounds.

This objection raises two rather different questions. The first is whether short-hand labels in general are more confusing than helpful. The second is whether this particular short-hand label is especially confusing because these three limitations turn my proposed standard into something that is not neutrality at all.

My label, substantive neutrality, has drawn many objections over the years from people who insist that neutrality is impossible and from others who insist that formal neutrality is the only conceivable meaning of neutrality. Professor Wexler's objection is different, but I think it is ultimately a variation on the claim that neutrality is impossible. What I propose is in his view so far removed from true substantive neutrality that it is more confusing than helpful to call it neutrality.

All short-hand labels omit qualifications, omit detail, and otherwise oversimplify. Yet we cannot easily communicate without them. Professor Wexler's summary statement of my actual proposal takes four full lines; we cannot recite all four lines every time we refer to it. There must be a usable name, and he does not suggest an alternative.

---

79. Id. at 20–29.
Labels have costs as well as benefits. Once a label is proffered, people argue about the label. Once a label becomes established, it is difficult to change. Formal neutrality requires neutral categories; substantive neutrality requires neutral incentives. So I wish I had thought of the labels suggested by Michael McConnell and Richard Posner: category neutrality and incentive neutrality. But my labels caught on and theirs did not, and it is probably too late now.

I proposed the modifiers, formal and substantive, but I took "neutrality" from the pre-existing literature and cases. "Neutrality" was well-entrenched as a core purpose of the Religion Clauses, and people were attacking regulatory exemptions for religious behavior as departures from neutrality. I offered substantive neutrality as a coherent understanding of neutrality that was consistent with robust protections for religious liberty, including regulatory exemptions. It never occurred to me to argue that neutrality should be irrelevant. But if it had occurred to me, it would have seemed much more promising to explain how neutrality could be consistent with liberty than to argue that neutrality should not be a goal of the Religion Clauses.

With respect to all three of what Professor Wexler views as my departures from neutrality, my response is that I would have the government pursue neutrality as far as possible. It is helpful to specify substantive neutrality as the goal even though it is not fully achievable. If I tell someone to go north as far as he can, I give clear guidance, even though for most of us it would be quite impossible to get anywhere close to the North Pole. I think of substantive neutrality in similar terms, even if the instruction is less precise.

It is utterly impossible for government to have no effect on religious incentives. Government spends one-third of gross domestic product, it regulates pervasively, it can take citizens' property in taxes and fines, and it can send people to jail. The best we can hope for is that government will minimize its effects on religious incentives.

Something like the compelling-interest exception is common to many constitutional rights, and no one familiar with constitutional law could be confused by it. This is a matter of what is practically and politically possible. Constitutional rights have costs as well as benefits, and when the costs become prohibitively large in a particular application, courts will not and should not rigidly enforce the constitutional right. As a political matter they cannot; the political branches and the voters would find ways to obstruct.

---


85. Id. at 26–28; Laycock, Substantive Neutrality Revisited, supra note 28, at 240–41.
enforcement of judicial decisions taking too absolutist a view of constitutional rights.

Professor Wexler's third objection is also a matter of what is possible. Government is not a competent judge of religious truth, and in my view it cannot compete with religions by taking positions on religious questions. But religions take religious positions on all sorts of questions that can also be addressed from wholly secular perspectives. Government could not function if it could not take a position on any secular question that some religion somewhere had treated as a religious question.

I do not think that these limitations on the pursuit of neutrality, individually or collectively, turn my proposals into something other than the pursuit of substantive neutrality. I think they are all consistent with pursuing substantive neutrality as far as practically possible.

V. Conclusion

There is much more to be said, and no doubt Professors Berg, Smith, and Wexler could say much more in support of their side of this discussion. All four of us have pressed against the word limits, at least in this venue. But this is not the only venue. The criticisms in these reviews will help inform my future work, and for that I will owe them a continuing debt.