



“A TOWERING FIGURE”

Douglas Laycock is a towering figure in the law of religious liberty. He has been a path-breaking scholar, a successful appellate litigator, a legislative advocate instrumental in the development of statutes protecting religious liberty, and a commentator known for his ability to summarize church-state law and debates cogently and with sympathy for the conflicting sides. He has defended the rights of individuals and groups of almost every possible religious view, from evangelical Christians to Santeria animist worshippers to atheists. As a result, he is respected by people on both sides of the culture wars that animate many Religion Clause controversies.

—Thomas C. Berg, “Laycock’s Legacy,”
89 *Tex. L. Rev.* 901 (2011).

AND that is only one part of Doug Laycock’s portfolio. He is also a leading figure in the law of remedies. He serves as vice president of the American Law Institute, which is an active, and not just ceremonial, role. Most of his work focuses on religious liberty and remedies, but Laycock has also published on sex discrimination, affirmative action, freedom of speech, and a range of other constitutional law topics. Not only does Laycock seem to have boundless energy, but he makes remarkable contributions wherever he devotes his attention.

Laycock is best known for his work on religious liberty, where he occupies an unusual position. As a vigorous defender of both free exercise and disestablishment, he has never been for or against religion, but for liberty with respect to religion—for believers and nonbelievers alike. He has strongly defended the rights of individuals and organized groups to believe what they will about religion, to speak about those

beliefs and attempt to persuade others, and to act on those beliefs. He has strongly opposed all efforts to get government to take sides with respect to beliefs about religion, to conduct religious exercises at government events, or to erect the symbols, texts, or displays of majoritarian religion. In *Same-Sex Marriage and Religious Liberty* (Rowman & Littlefield, 2008), and in correspondence with legislators in states considering marriage legislation, he has supported same-sex marriage and also supported religious exemptions for conscientious objectors.

Laycock's fundamental perspective of liberty for all is associated with a series of theoretical and policy principles that the academic literature generally credits to him, although he insists that none of these principles is entirely unique to him. Laycock argues for substantive, as opposed to formal, neutrality. Formal neutrality means religiously neutral categories—religion-blind government. Substantive neutrality, on the other hand, means religiously neutral incentives. The goal of substantive neutrality is to assure that government conduct, insofar as is possible, neither encourages nor discourages religion. Laycock argues that religiously neutral incentives protect religious liberty, while religiously neutral categories do not. Government routinely encourages and discourages all sorts of secular behavior. If government is to avoid encouraging or discouraging religious behavior—that is, to provide religiously neutral incentives—religion requires special treatment.

Like most religious liberty scholars, Laycock believes that the free exercise of religion sometimes requires that religiously motivated conduct be exempted from generally applicable laws, as when some faiths refuse to ordain women as clergy, or when they give sacramental wine to children and adolescents. In a pervasively regulated society, such exemptions are essential to religious liberty. Exemptions can, of course, be denied when necessary to prevent significant harm to others or to otherwise serve a compelling government interest.

Regulatory exemptions for religious practice are sometimes criticized as special treatment for religion; they are a departure from neutrality measured by religiously neutral

categories. Laycock's insight is that exemptions are often consistent with substantive neutrality, measured by religiously neutral incentives. In order to create religiously neutral incentives, exemptions are sometimes necessary, because fines, imprisonment, or loss of government benefits will obviously discourage religious practices that run afoul of some law or regulation. "But exemptions usually do not create incentives in the other direction," Laycock says. "Exemptions do not encourage people to join a religion or participate in religious practice, because much religious behavior is meaningless or personally burdensome when separated from the religious belief that gives it meaning."

Most exemptions, in other words, will not encourage strategic behavior. Substantive neutrality, with its focus on neutral incentives, attempts to reconcile the widely shared intuition that government should be neutral toward religion with the widely shared intuition that exemptions are necessary to religious liberty.

Laycock does concede the exceptional cases in which religious practice aligns with secular self-interest. His standard example is religious objections to paying taxes. Under Laycock's approach, a religious exemption from paying individual income taxes would not be neutral by any criterion. Exemptions would encourage a religious belief, and government will often have a compelling interest in avoiding large numbers of claims arising from real or feigned religious conversions.

Although most religious liberty scholars agree that exemptions from generally applicable laws are sometimes necessary to permit the free exercise of religion, the Supreme Court does not. In *Employment Division v. Smith*, 494 U.S. 872 (1990), the Court held that there is no federal constitutional right to exemptions for religious practice. As a scholar and an advocate, Laycock has been a central player in the debate over *Smith*. Laycock notes that exemptions granted by the political branches have been central to the American experience of religious liberty since the seventeenth century, and that Congress and a majority of the states have acted to make such exemptions judicially enforceable as a general matter by

statute or by interpretation of state constitutions.

Laycock argued the Supreme Court's first free exercise case after *Smith, Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993), on the right of an Afro-Caribbean religion to sacrifice small animals to its gods. Nearly everyone he consulted told him not to take the case because the facts were ugly and they feared that he would only make more bad law. Laycock won the case 9-0. He says it was all a matter of perspective; he focused the Court on the discrimination in Hialeah's ordinances.

Four years later, Laycock appeared before the Supreme Court again to defend Congress' reaction to *Smith*, but this time he did not prevail. Congress responded to *Smith* with the Religious Freedom Restoration Act, 42 U.S.C. §2000bb et seq. (2006), creating a statutory right to religious exemptions, subject to the compelling interest test. The Supreme Court held that law unconstitutional as applied to the states in *City of Boerne v. Flores*, 521 U.S. 507 (1997). *Boerne* is the Court's leading decision on the scope of congressional power to enforce the 14th Amendment. In the wake of *Boerne*, Laycock was a frequent congressional witness and the leading theoretician for the effort to enact the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. §2000cc et seq. (2006).

"How zoning and prisons came together in the same bill is an only-in-Washington political story," he says. His role was to explain how the bill was constitutional despite *Boerne* and the Supreme Court's other federalism decisions in the 1990s.

Another principle closely associated with Laycock's work is church autonomy. His view is that religious organizations are entitled to manage their own internal affairs free of government interference. Church autonomy is distinct from, and independent of, the more widely understood claim of a right to regulatory exemptions on the basis of specific religious doctrines or conscientiously held beliefs—and therefore, Laycock says, it is unaffected by the Supreme Court's decision in *Smith*.

"A church's right to select its own clergy, define its own governing structure, and resolve its own internal disputes

should not depend on whether it can show in every case that its decisions are based on some specific church teaching," he says. Rather, the right to make such internal religious decisions is inherent in religious liberty and in the separation of church and state.

As in the debate over *Smith*, Laycock is once again acting as both a theorist and a practical lawyer. In October, Laycock will argue a Supreme Court case involving an important application of church autonomy when he represents the church in *Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission*. The case focuses on the "ministerial exception," the established rule in the federal courts of appeal and state supreme courts that a minister cannot sue his church for employment discrimination.

"If the rule were otherwise, courts would be in the position of deciding whether a church took an employment action for discriminatory reasons or religious reasons, and in effect, deciding whether the plaintiff was doing a good job as a minister despite the church's claim that he was not," Laycock says.

Lower courts are in agreement that this rule extends beyond pastors of congregations; it includes others who do important religious work for religious organizations. The original issue in *Hosanna-Tabor* was whether the ministerial exception includes a fourth-grade teacher in a religious school who taught religion and led worship 45 minutes a day, was required to integrate religion with the rest of the curriculum, was required to complete eight college-level theology courses in order to get the job, was "called" to her position by a vote of the congregation, and was a "commissioned minister" in the church. The Sixth Circuit said that the teacher was not a minister for purposes of the ministerial exception, because she spent most of her time teaching the secular curriculum.

In the Supreme Court, the issue has become much bigger. The EEOC and the private plaintiff now argue that the Supreme Court should repudiate the ministerial exception entirely. They would let priests, pastors, and rabbis sue their employers, subject only to some modest limits on what evi-

dence they could introduce about their religious job performance, and perhaps subject to limits on reinstatement as a remedy. It is no surprise that Laycock vigorously disagrees.

Another principle prominent in Laycock's work is that religious speech by citizens speaking in their private capacity is constitutionally protected, while the same religious speech by government employees speaking in their governmental capacity, or by private citizens with preferential access to a government forum, is constitutionally prohibited or very tightly restricted. In a 1986 article, he fully elaborated the case for guaranteeing religious speakers equal access to the public forum, including in sensitive contexts such as public schools. He has repeatedly represented evangelical Christians, or supported them in amicus briefs, in their continuing efforts to enforce such rights. But he also successfully represented parents and students who objected to prayer at Texas high-school football games in *Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000), and in articles and amicus briefs he has opposed government-sponsored crosses, crèches, and Ten Commandments monuments. Laycock sees no tension between protecting private religious speech and prohibiting similar speech by government officials or those with preferred access to a governmental forum. "The government abandons neutrality when it censors religious speech," he says, "and it abandons neutrality when it endorses the majority's religion." In his view, equal liberty for all is a powerful principle.

Laycock is a scholar and an advocate, but he is not a hired gun. In fact, he jokes that he is rarely hired at all. Most of his religious liberty litigation is pro bono. More fundamentally, he will not take a position in a brief that he would not take in a law review article. His interests are eclectic, and occasionally more theoretical than practical, but in general, he wants his scholarship to deal with practical problems and to potentially have practical consequences. And to accomplish that, he has to address multiple audiences. He has no illusion that judges or legislators are reading his many law review articles. "If you hope to influence judges, you have to write briefs," he says matter-of-factly.

Laycock's lasting contribution to our understanding and the development of the law of religious liberty will be reflected in a four-volume series published by Eerdmans Publishing and the Emory University Center for the Study of Law and Religion. The volumes collect his writings on religious liberty. *Volume 1: Overviews and History*, and *Volume 2: The Free Exercise Clause*, are already out. *Volume 3, Religious Liberty Legislation*, and *Volume 4, The Free Speech and Establishment Clauses*, are in preparation. The quote that opened this article is from Professor Thomas Berg's review of *Volume 1*. The review was titled "Laycock's Legacy," but Laycock says he's not ready to think about legacies yet; he's still working and writing.

Laycock's influential work in religious liberty is only part of his story. He is also a dominant figure in the field of remedies, and indeed, his approach to the field has helped transform it. Laycock's most important work in remedies is *The Death of the Irreparable Injury Rule* (Oxford University Press, 1991). Based on an exhaustive analysis of reported cases, the book shows that the traditional doctrinal "rule"—that no equitable remedy will issue unless legal remedies are inadequate, or in the alternative formulation, unless necessary to prevent irreparable injury—does not affect decisions at the stage of permanent injunctions or final decrees for specific performance. A version of the rule is important at the stage of preliminary relief, but the content of the rule with respect to preliminary injunctions is substantially different from the content of the rule with respect to final judgments. Based on his analysis of the cases, Laycock identified a series of more functional rules, mostly having to do with the relative costs and benefits of alternative remedies, that explain decisions at final judgment.

Readers who follow the Supreme Court may know that the Court has talked a lot about irreparable injury and adequate remedy at law lately, and that it has failed to distinguish preliminary from permanent injunctions. Laycock sees no repudiation of his thesis, but merely a continuation of the judicial behavior he described in his book. In each of the recent cases in the Supreme Court, there were clear functional reasons to refuse the injunction. And one of the central

points of his book is that when there are functional reasons to refuse the injunction, many courts find it almost irresistible to say that there is an adequate remedy at law and no irreparable injury. Usually the court will also talk about the real reasons for decisions, and the Supreme Court followed that pattern; sometimes the court will merely imply the real reasons in its statement of the facts. Either way, what courts say about adequate remedy and irreparable injury in cases where they deny the injunction is seriously inconsistent with what they say about adequate remedy and irreparable injury in cases where they grant the injunction. Laycock notes that when the Supreme Court reviews injunctions it wants to affirm, the irreparable injury rule does not stand in the way—not in the cases he reviewed in 1991, and not in 2011 either.

Laycock is also the sole author of the leading casebook, *Modern American Remedies: Cases and Materials* (4th ed., Aspen 2010). The first edition of that book, in 1985, reorganized the field, arranging the material in remedies categories (compensatory damages, punitive damages, injunctions, declaratory judgments, restitution, etc.), instead of cause-of-action categories (remedies for breach of contract, remedies for personal injury, remedies for loss of property, etc.). Many law students now learn remedies the Laycock way. Not only is his book the leader in the field, but all of the competing books have moved substantially in the direction of his organization.

Keeping up with two seemingly unrelated fields keeps Laycock stretched rather thin at times, but both fully engage his interest. And every area of law presents remedies issues, including religious liberty cases, for which he has written remedies briefs. Laycock regrets not having time to write amicus briefs in the Supreme Court's recent injunction cases. He has no illusions that he might have changed any of the results, but he wonders if he might have helped the Court provide more sophisticated explanations.

Laycock was once spread even more thinly than he is now. He taught employment discrimination for ten years, and co-authored important articles on sex discrimination in insurance with his wife, Teresa Sullivan (now president of the

University of Virginia), Lea Brilmayer (now at the Yale Law School), and Richard Hekeler (now a demographer in the insurance industry). Brilmayer and Laycock were the lawyers; Sullivan and Hekeler were the demographers—the scholars who study life expectancy and mortality.

He also taught commercial law for ten years. His knowledge of commercial law and the basics of bankruptcy turned out to be indispensable when a religious liberty issue broke out in consumer bankruptcies in the 1990s. The issue involved consumers who made contributions to a church every week, and later filed for bankruptcy. Bankruptcy trustees began to argue that the contributions were fraudulent transfers, because the consumer got nothing of value in exchange. It followed that the churches had to give back all the contributions received within the statute of limitations, which could be as long as six years in some states. Because 97 percent of consumer bankruptcies were no-asset cases, churches were becoming the principal source of funds for distribution to creditors.

Laycock argued *In re Young*, 154 F.3d 841 (8th Cir. 1998), the leading case holding that imposing this liability on churches violated the Religious Freedom Restoration Act (still in effect as applied to federal law), and he helped draft the Religious Liberty and Charitable Donations Protection Act, codified in scattered sections of the Bankruptcy Code, which fixed the problem for religious and secular charities alike.

He gave up commercial law and employment discrimination not for lack of interest, but for lack of time. He says he's not sure he ever encountered a legal problem that failed to arouse his interest. But he couldn't be an expert in so many different fields. "I eventually disciplined myself not to follow up on most of the legal problems I encountered," he says.

Laycock has not always kept that promise. He served for fourteen years as an adviser to the *Restatement (Third) of Restitution and Unjust Enrichment* (2011), and now he is writing about restitution. The creation of the modern remedies course caused classes in restitution to drop out of the curriculum, and he thinks that was a mistake. Restitution is a

source of distinctive remedies, which are part of his remedies course. But restitution is also a source of distinctive causes of action addressing the myriad ways in which one person can wind up in possession of another's property without having breached a contract or committed a tort. Despite his best efforts at doing so, he believes these causes of action cannot all be jammed into the interstices of a remedies course.

"I learned a lot of restitution law serving as an adviser," he says. Now there are writing projects growing out of the final publication of the new *Restatement*. He is doing a book review of the *Restatement* for the *Michigan Law Review*, hoping to explain why it should be on the shelf of every litigator and why someone (he is not volunteering) should do a casebook, so the subject can be restored to the curriculum.

In September, Laycock was as busy as ever. He finished the reply brief in *Hosanna-Tabor*, he had an oral argument to prepare for, and he has some writing projects from last year to wrap up. It will be a busy year—like all the years before it. When you write for academics, and for courts, and for legislators, and when you're a "towering figure" in two fields that barely intersect, you're a busy guy.

EXCERPT

THE RELIGIOUS EXEMPTIONS DEBATE

11 *RUTGERS J.L. & RELIGION* 139 (2009)

THE INAUGURAL DONALD C. CLARK PROGRAM IN LAW AND RELIGION LECTURE

AVAILABLE AT: WWW.LAWANDRELIGION.COM

DOUGLAS
LAYCOCK

The United States claims religious liberty as one of its great contributions to the world, but we cannot seem to agree on what that means. American debates over religious liberty have had remarkable persistence. Political fights over religious observance in public schools date to the creation of the public school system in the second quarter of the nineteenth century. Debates over public funding of religious education started about the same time. Those are the Johnny-come-lately issues.

Debates over exempting religiously motivated behavior from government regulation have continued off and on since the seventeenth century. The colonies exempted Quakers from swearing oaths and exempted dissenters from paying taxes to support the established church. They exempted members of pacifist faiths from bearing arms in person, although those conscientious objectors had to perform alternative service or pay extra taxes to support the war effort. Military service was as important then as it is now, and more dependent on compulsory service, so this last exemption was the subject of much political debate.

The exemption issue arose intermittently in the antebellum state courts, with cases going both ways, and in the United States Supreme Court in the late nineteenth and early twentieth centuries, where the religious claimants lost. The issue eventually appeared to be settled by the Warren and Burger Courts, in *Sherbert v. Verner* and *Wisconsin v. Yoder*. Large majorities in those cases held that the Free Exercise Clause requires a compelling government interest to justify any government-imposed burdens on the exercise of religion. The settlement, however, was short lived.

The Reagan Administration saw the *Sherbert-Yoder* rule as a prime example of judicial activism. Reagan did not run on the issue, and his advisers did not want the evangelical part of his base to know what they were doing, but his Justice Department initiated the current round of the exemptions debate, quietly hammering at the Free Exercise Clause in briefs to the Supreme Court. That effort bore fruit after Reagan left office. *Employment Division v. Smith* distinguished *Sherbert* and *Yoder*, interpreting those precedents narrowly and shrinking the scope of the Free Exercise Clause.

Smith triggered a fierce political reaction, which made the exemptions debate far more contentious than it had ever been before. The modern debate has been more public, although it still gets remarkably little attention from the press. Congress enacted a series of statutes to protect religious liberty: the Religious Freedom Restoration Act, the American Indian Religious Freedom Act Amendments, the Religious Liberty and Charitable Donations Protection Act, and the Religious Land Use and Institutionalized Persons Act. Sixteen states enacted state Religious Freedom Restoration Acts, and many state courts have interpreted their state constitutions to mean something more like *Sherbert-Yoder* than like *Smith*. *Smith* is still the law of the federal Free Exercise Clause, and it has now been the law for longer than *Wisconsin v. Yoder* was the law, at least in the original understanding of *Yoder*. But there are many other sources of law more protective of free exercise, so *Smith* is the effective law in fewer than half the states. On the other hand, most of the new state provisions are relatively untested.

There is also a split in the circuits over what *Smith* actually means. *Smith* says that neutral and generally applicable laws are not subject to judicial review under the Free Exercise Clause, but if a law burdens religion and is not neutral, or is not generally applicable, then the burden on religion must be justified by a compelling government interest. So what counts as a generally applicable law? Some courts have said that all laws are generally applicable unless they were enacted with anti-religious motive or single out religion for uniquely disadvantageous treatment. Other courts have said

that a law that is generally applicable is a law that applies to everybody. If a law has a secular exception that undermines its purpose, then it must also have a religious exception—or a compelling reason why not.

There is only one Supreme Court decision since *Smith* that casts any light on the meaning of neutral and generally applicable—*Church of the Lukumi Babalu Aye v. City of Hialeah*. There are facts and language in *Smith* and in *Lukumi* to support either the singling-out interpretation or the one-secular-exception interpretation. There is very little to support the bad-motive interpretation, and seven Justices refused to join a bad motive opinion in *Lukumi*, but that has not stopped government lawyers from arguing for it, or some lower courts from adopting it.

All this legislation and litigation has sustained a serious academic debate about religious exemptions from regulation. This round of the debate is now approaching its thirtieth year, counting from those first briefs filed by the Reagan Justice Department, or its twentieth year, counting from *Smith*.

The disagreement is about cases in which one of America's remarkably diverse religious practices comes into conflict with one of its diverse and remarkably pervasive regulatory laws. Whether and when to exempt religious practices from regulation is the most fundamental religious liberty issue in the United States today. What is at stake in the debate over religious exemptions is whether people can be jailed, fined, or otherwise penalized for practicing their religion in the United States in the twenty-first century. This issue arises in widely varied contexts instead of a few recurring patterns, so it is hard for the press to cover. Here are some examples, nearly all from real controversies, and the rest from real regulatory threats:

Can a city prohibit believers in Santeria from sacrificing small animals, which is the central ritual of their faith?

Can the federal government punish religious use of a tea that contains a mild hallucinogen and is part of the central ritual of a faith?

Can a city designate a church as a landmark and refuse to permit any expansion of the building, even though the

church is regularly turning people away from Mass?

Can a trustee in bankruptcy force churches to repay contributions, made in good faith by donors who subsequently went bankrupt, for the benefit of the donor's creditors?

Can a city police department require its officers to be clean shaven, forcing Muslim officers to resign or to violate what they understand to be a religious duty?

Can zoning authorities exclude the Metropolitan Community Church from a city, probably because of the city's hostility to the church's mission to gay and lesbian Christians (but of course that motive would be hard to prove)?

Can zoning authorities exclude a Methodist church from a city, on the basis of resistance to church tax exemptions or vague claims about traffic?

Can suburban authorities prohibit a church from replacing its 36-square-foot sign, on its frontage facing an interstate highway, with a 250-square-foot sign?

Can authorities penalize a church that refuses to perform gay weddings? (So far, this is just a much discussed hypothetical rather than a real case.)

Can authorities penalize a religious association that refuses to let its gazebo be used for a same-sex civil commitment ceremony?

Can the state refuse a driver's license to a Christian woman who wants no graven image (i.e., no photograph) on her license, or to a Muslim woman who is willing to be photographed only while wearing her veil?

Can a school board refuse to allow Muslim girls to wear long sweat pants, instead of shorts, in coed gym classes?

Can prison authorities refuse to provide kosher meals to Jewish prisoners?

As these examples illustrate, there are endless variations in religious commitments, and endless variations in regulation. Some of the laws at issue are important. Some are trivial. Some are stupid. Some of the religious commitments are central to the faith; some are marginal. Some seem sympathetic to outside observers; some seem incomprehensible; some seem repulsive.

Another reason the issue of religious exemptions gets less

public attention than Establishment Clause issues is that it splits both left and right, so that neither side campaigns on it. Religious conservatives tend to think that exemptions for religious practice are central to religious liberty; secular conservatives tend to think that any right to religious exemptions encourages judicial activism. Civil libertarian liberals think that religious exemptions are a core civil liberty; anti-religious liberals think that they provide preferential treatment for a mostly conservative interest group. And all sides tend to waffle in application, depending on what they think of the competing secular interest. Religious conservatives, religious liberals, and secular civil libertarians made up the wall-to-wall coalition that supported the Religious Freedom Restoration Act. That coalition broke apart in the late 1990s over the question whether civil rights in general, and gay rights in particular, are such compelling interests that they universally trump any claim of religious liberty, in any context, without regard to the facts of individual cases.

For the religious believers—especially the believers whose faith is at odds with the culture—and for the civil libertarians, the argument for religious exemptions is simple and straightforward. There can be no coherent understanding of religious liberty without the right to actually practice your religion. When the state says, “You can believe whatever you want but you can never act on it,” that is not religious liberty, and it is certainly not the free exercise of religion. “Exercise,” now and in the Founders’ time, means actions and conduct.

More fundamentally, religious liberty that does not include the right to actually practice the religion does not solve the problem that religious liberty was designed to solve. The most obvious problem was conflict and human suffering for sake of conscience; people were penalized for things they were unwilling to give up because they believed them to be ordained by God. If Massachusetts says, as it once did, that Quakers are banned from the jurisdiction, that is a violation of religious liberty. If Massachusetts says, “OK, you can live here, but you have to attend the established Congregational worship service, and you can't have public worship of your own,” that does not solve the problem. A conscientious

Quaker still cannot live in Massachusetts. Now suppose Massachusetts says, “Alright, we’ll waive the explicitly religious requirements. You can live here, and you can conduct your Quaker meetings, but you have to serve in the military, and you can’t testify in court unless you swear an oath.” It still has not solved the problem. A conscientious Quaker cannot serve in the military, and he cannot swear an oath, and if he can’t testify in court, his neighbors can cheat him or steal from him at will, knowing he can never testify against them. So he still can’t live in Massachusetts, and if he tries, he will be in frequent conflict with the state. Bans on practices central to a faith are equivalent to a ban on adherents. Meaningful religious liberty requires allowing people to practice their faith, not just to believe it.

This is the core of the argument for regulatory exemptions, although this core is so obvious to supporters of exemptions that it is not explicitly stated as often as it should be. There is much more to be said about constitutional text, original understanding, historical practice and experience, judicial doctrine, practicality and implementation, and all the other modes of constitutional argument. But the core of the argument is that bans on important religious practices are equivalent to a ban on adherents. Even bans that are neutral and generally applicable in form are experienced as religious persecution by the victims, and because resistance provokes reaction, even bans that appear neutral and legitimately motivated at the outset can easily transform into active and aggressive persecution by enforcers of the law.

The text of the constitution applies to all forms of religious practice, central or peripheral. Still, the argument against oppression is strongest with respect to the most important religious practices, and weaker with respect to marginal practices that believers might be willing to give up. But the importance of religious practices varies from person to person, and is difficult for courts to assess. The Court is right that it would be a mistake to hold that practices central to a religion are constitutionally protected and that practices below some threshold of centrality are not constitutionally protected. A far better rule is that all exercise of religion is

constitutionally protected, but that less weighty government interests can justify burdens on less weighty religious practices. A threshold requirement of centrality would be an all-or-nothing rule; it would treat a continuous variable—religious significance—as though it were a dichotomous variable, and it would thereby greatly magnify the consequences of the inevitable errors in assessing religious significance. Such a threshold requirement would wholly deny protection, instead of according somewhat less protection, when religious significance is somewhat underestimated. But the impossibility of fairly administering a threshold requirement of centrality does not mean that the courts should wholly ignore the importance of the religious practice when they are asked to decide a claim to exemption. The compelling interest test is best understood as a balancing test with the thumb on the scale in favor of protecting constitutional rights. The best way to formulate the question is whether the government interest compellingly outweighs the religious interest. The compelling interest test is not often formulated that way, but I think that it must operate that way in practice, and sometimes in the course of applying the test, the Court seems to say as much. To borrow and correct Justice Scalia’s example, it is easier for the government to justify a ban on throwing rice at weddings than to justify a ban on getting married in church.

The argument against religious exemptions is more diverse; people oppose exemptions for different reasons. Some opponents appear to say that any exemption for religion is bad policy, or an unconstitutional preference for religion, or both. These people are mostly academics or secular activists. They have no votes in any legislature, and few votes in any court. The coalition that successfully argued for the Religious Freedom Restoration Act was wall-to-wall, religious and secular, left and right. And there are some two thousand specific exemptions in state and federal statute books, many of them not at all controversial.

Those who oppose all exemptions are not always clear about their proposed solutions, but they offer a range of possibilities. Some at least imply that regulatory exemptions on

grounds of conscience should be totally banned; others leave open the possibility that exemptions should be permitted if granted to all people with intense personal objections to a law, religious and secular alike. To those who say that any exemption from regulation violates the Establishment Clause, the answer to them is brief. Government does not establish a religion by leaving it alone; government does not benefit religion by first imposing a burden through regulation and then lifting that burden through exemption, and, in most cases, such exemptions do not encourage anyone to engage in a religious practice unless he was already independently motivated to engage in the practice. The Supreme Court has repeatedly and unanimously rejected the argument that religious exemptions generally, or in principle, violate the Establishment Clause, and eight Justices reaffirmed that view, with no dissent from the ninth justice, when the Court invalidated a particular exemption as discriminatory and not needed to relieve a regulatory burden on the free exercise of religion. There is absolutely no support in the original understanding for the claim that exemptions raise Establishment Clause issues. Whether it is more nearly neutral to leave religion alone or to treat it just like analogous secular activities is a question of baselines that is treated elsewhere.

The more common opposition to exemptions is to argue that they can be created only by legislatures, but never by courts in the interpretation of a constitution. These opponents of exemptions divide into two further categories.

Some would let legislatures enact general religious liberty statutes, such as a Religious Freedom Restoration Act (RFRA). These acts say that no other law enacted under the authority of the same jurisdiction shall be applied in any way that substantially burdens the exercise of religion, unless that burden is the least restrictive means to serve a compelling government interest. The reference to laws of the same jurisdiction simply means that the federal RFRA applies to federal law, the Pennsylvania RFRA applies to Pennsylvania law, and so on.

This general formulation sends the problem back to the courts for detailed implementation, but with some impor-

tant differences from the same compelling-interest test as a matter of constitutional interpretation. The courts act with a modern legislative mandate (and at least for a while, a recent legislative mandate). This legislative mandate addresses the exemption issue in more specific language than the language of the Free Exercise Clause. And because the right is statutory, it is subject to legislative amendment. If the legislature doesn't like the judicial interpretation that emerges, or even if it feels threatened by pending litigation or hypotheticals, it can amend its RFRA. State legislatures have exercised this power, not always wisely.

Other opponents of judicial exemptions say that neither a modern legislative mandate, nor leaving final authority to the legislature, is enough to justify a general standard for the grant of exemptions. They insist that the legislature must strike the balance itself and enact specific rules for every instance of conflict between religious practice and secular law.

Such case-by-case legislation is obviously unworkable as a matter of legislative calendars and attention spans, and it does not appear to be the Supreme Court's position. The Court unanimously upheld the Religious Land Use and Institutionalized Persons Act against Establishment Clause attack, and it has shown no interest in constitutional attacks on the Religious Freedom Restoration Act as applied to federal law.

BIBLIOGRAPHY

REMEDIES

BOOKS

Modern American Remedies: Cases and Materials (Aspen, 4th ed. 2010; 3d ed. 2002; 2d ed. 1994; 1st ed. 1985).

The Death of the Irreparable Injury Rule (Oxford University Press, 1991).

BOOK CHAPTER

“Remedies,” in Stanley N. Katz, ed., 5 *Oxford International Encyclopedia of Legal History* 125 (Oxford University Press, 2009).

ARTICLES

- “The Neglected Defense of Undue Hardship,” 4 *J. Tort L.* ---- (2011) (forthcoming).
- “How Remedies Became a Field: A History,” 27 *Rev. Litig.* 161 (2008).
- “Symposium, Remedies: The Bottom Line of Justice: Introduction,” 27 *Rev. Litig.* 1 (2007).
- “Choosing Remedies: The Misleading Irreparable Injury Rule,” *Advocate*, Fall 2005, at 7.
- “Due Process of Law in Trilateral Disputes,” 77 *Iowa L. Rev.* 1011 (1993).
- “The Triumph of Equity,” *Law & Contemp. Probs.*, Summer 1993, at 53.
- “The Death of the Irreparable Injury Rule,” 103 *Harv. L. Rev.* 687 (1990).
- “The Remedies Issues: Compensatory Damages, Specific Performance, Punitive Damages, Supersedeas Bonds, and Abstention,” 9 *Rev. Litig.* 473 (1990).
- “The Scope and Significance of Restitution,” 67 *Tex. L. Rev.* 1277 (1989).
- “Consent Decrees Without Consent: The Rights of Nonconsenting Third Parties,” 1987 *U. Chi. Legal F.* 103.
- “Continuing Violations, Disparate Impact in Compensation, and Other Title VII Issues,” *Law & Contemp. Probs.*, Autumn 1986, at 53.
- “Federal Interference with State Prosecutions: The Cases Dombrowski Forgot,” 46 *U. Chi. L. Rev.* 636 (1979).
- “Federal Interference with State Prosecutions: The Need for Prospective Relief,” 1977 *Sup. Ct. Rev.* 193.

REPORT

Preliminary Report on a Restatement 2d of Restitution: A Report to the Director of the American Law Institute (1987).

BOOK REVIEWS

- Review of Edward I. Yorio, *Contract Enforcement: Specific Performance and Injunctions* (1989), 45 *Bus. Law.* 1377 (1990).
- “Injunctions and the Irreparable Injury Rule,” 57 *Tex. L. Rev.* 1065 (1979) (reviewing Owen M. Fiss, *The Civil Rights Injunction* (1978)).

RELIGIOUS LIBERTY

BOOKS

- Religious Liberty: Volume I—Overviews and History* (Wm. B. Eerdmans, 2010).
- Religious Liberty: Volume II—The Free Exercise Clause* (Wm. B. Eerdmans, 2011).
- Religious Liberty: Volume III—Religious Liberty Legislation* (Wm. B. Eerdmans) (in preparation).
- Religious Liberty: Volume IV—The Free Speech and Establishment Clauses* (Wm. B. Eerdmans) (in preparation).
- Same-Sex Marriage and Religious Liberty: Emerging Conflicts* (editor with Anthony R. Picarello, Jr. and Robin Fretwell Wilson) (Rowman & Littlefield, 2008).

BOOK CHAPTERS

- “Afterword,” in Douglas Laycock, Anthony R. Picarello, Jr., and Robin Fretwell Wilson, eds., *Same-Sex Marriage and Religious Liberty: Emerging Conflicts* 189 (Rowman & Littlefield, 2008).
- “Employment in Religious Organizations” (with Patrick J. Schiltz), in James A. Serritella et al., eds., *Religious Organizations in the United States: A Study of Identity, Liberty, and the Law* 527 (Carolina Academic Press, 2006).
- “La Religion et l’État aux États-Unis: Affrontement des Théories et Changements Historiques,” in Elisabeth Zoller, ed., *La Conception Américaine de la Laïcité* 35 (Daloz, 2005).
- “Zoning” (with Thomas C. Berg), in Catharine Cookson, ed., *Encyclopedia of Religious Freedom* 519 (Routledge, 2003).
- “Theories of Interpretation: Free Exercise and Establishment Clause: General,” in Paul Finkelman, ed., *Religion and American Law: An Encyclopedia* 516 (Garland, 2000).
- “Original Intent and the Constitution Today,” in James E. Wood, ed., *The First Freedom: Religion and the Bill of Rights* 87 (J.M. Dawson Institute of Church-State Studies, 1990).
- “Tort Liability, Spiritual Counseling, and the First Amendment,” in *Tort and Religion* 23 (American Bar Association, 1990).
- “The Right to Church Autonomy as Part of Free Exercise of Religion,” in Dean M. Kelley, ed., *Government Intervention in Religious Affairs II* 28 (Pilgrim Press, 1986).

ARTICLES

- "Edward Schempp," 36 *J. Sup. Ct. Hist.* ---- (forthcoming).
- "Sex, Atheism, and the Free Exercise of Religion," 88 *U. Det. Mercy L. Rev.* ---- (2011) (forthcoming).
- "Government-Sponsored Religious Displays: Transparent Rationalizations and Expedient Post-Modernism," 61 *Case W. Res. L. Rev.* 1211 (2011).
- "Reviews of a Lifetime," 89 *Tex. L. Rev.* 949 (2011).
- "Conference Introduction: American Religious Liberty, French Laïcité, and the Veil," 49 *J. Cath. Legal Stud.* 21 (2010).
- "A Conscripted Prophet's Guesses about the Future of Religious Liberty in America," 2010 *Fides et Libertas* 62.
- "The Religious Exemptions Debate," 11 *Rutgers J.L. & Religion* 139 (2009).
- "Church Autonomy Revisited," 7 *Geo. J.L. & Pub Pol'y* 253 (2009).
- "Why the Supreme Court Changed Its Mind About Government Aid to Religious Institutions: It's a Lot More Than Just Republican Appointments," 2008 *BYU L. Rev.* 275.
- "High-Value Speech and the Basic Educational Mission of a Public School: Some Preliminary Thoughts," 12 *Lewis & Clark L. Rev.* 111 (2008).
- "Substantive Neutrality Revisited," 110 *W. Va. L. Rev.* 51 (2007).
- "Regulatory Exemptions of Religious Behavior and the Original Understanding of the Establishment Clause," 81 *Notre Dame L. Rev.* 1793 (2006).
- "Church and State in the United States: Competing Conceptions and Historic Changes," 13 *Ind. J. Global Legal Stud.* 503 (2006).
- "Religious Liberty in America: A Rapid-Fire Overview," *Hum. Rts.*, Summer 2006, at 3.
- "Roundtable Discussion: Religious Organizations Filing for Bankruptcy" (with others), 13 *Am. Bankr. Inst. L. Rev.* 25 (2005).
- "Theology Scholarships, the Pledge of Allegiance, and Religious Liberty: Avoiding the Extremes but Missing the Liberty," 118 *Harv. L. Rev.* 156 (2004).
- "The Mistakes in *Locke v. Davey* and the Future of State Payments for Services Provided by Religious Institutions" (with Thomas C. Berg), 40 *Tulsa L. Rev.* 227 (2004).
- "Religion in the Workplace: Proceedings of the 2000 Annual Meeting of the Association of American Law Schools Section on Law and Religion" (with others), 4 *Employee Rts. & Employment Pol'y J.* 87 (2000).

- "The Supreme Court and Religious Liberty," 40 *Cath. Law.* 25 (2000).
- "Debate 2: Should the Government Provide Financial Support for Religious Institutions That Offer Faith-Based Social Services?" (with others), 1 *Rutgers J.L. & Religion* No. 1 (2000).
- "State RFRAs and Land Use Regulation," 32 *U.C. Davis L. Rev.* 755 (1999), reprinted in 2000 *Zoning & Plan. L. Handbook* 655.
- "Conceptual Gulfs in *City of Boerne v. Flores*," 39 *Wm. & Mary L. Rev.* 743 (1998).
- "Religious Freedom and International Human Rights in the United States Today," 12 *Emory Int'l L. Rev.* 951 (1998).
- "Round Table Discussion on International Human Rights Standards in the United States: The Case of Religion or Belief" (with others), 12 *Emory Int'l L. Rev.* 973 (1998).
- "Supreme Court Review," 34 *Proc. Nat'l Meeting Diocesan Attys.* 5 (1998).
- "The Underlying Unity of Separation and Neutrality," 46 *Emory L.J.* 43 (1997).
- "Religious Liberty as Liberty," 7 *J. Contemp. Legal Issues* 313 (1996).
- "Freedom of Speech That Is Both Religious and Political," 29 *U.C. Davis L. Rev.* 793 (1996).
- "Continuity and Change in the Threat to Religious Liberty: The Reformation Model in the Late Twentieth Century," 80 *Minn. L. Rev.* 1047 (1996).
- "Academic Freedom, Religious Commitment, and Religious Integrity," 78 *Marq. L. Rev.* 297 (1995).
- "RFRA, Congress, and the Ratchet," 56 *Mont. L. Rev.* 145 (1995).
- "Interpreting the Religious Freedom Restoration Act" (with Oliver S. Thomas), 73 *Tex. L. Rev.* 209 (1994).
- "Free Exercise and the Religious Freedom Restoration Act," 62 *Fordham L. Rev.* 883 (1994).
- "The Religious Freedom Restoration Act," 1993 *BYU L. Rev.* 221.
- "The Rights of Religious Academic Communities," 20 *J.C. & U.L.* 15 (1993).
- "The Benefits of the Establishment Clause," 42 *DePaul L. Rev.* 373 (1992).
- "Summary and Synthesis: The Crisis in Religious Liberty," 60 *Geo. Wash. L. Rev.* 841 (1992).
- "'Noncoercive' Support for Religion: Another False Claim About the Establishment Clause," 26 *Val. U. L. Rev.* 37 (1992).
- "The Remnants of Free Exercise," 1990 *Sup. Ct. Rev.* 1.

- “Formal, Substantive, and Disaggregated Neutrality Toward Religion,” 39 *DePaul L. Rev.* 993 (1990).
- “Text, Intent, and the Religion Clauses,” 4 *Notre Dame J.L. Ethics & Pub. Pol’y* 683 (1990).
- “The Supreme Court’s Assault on Free Exercise, and the Amicus Brief that Was Never Filed,” 8 *J.L. & Religion* 99 (1990).
- “Academic Freedom and the Free Exercise of Religion” (with Susan E. Waelbroeck), 66 *Tex. L. Rev.* 1455 (1988).
- “Equal Access and Moments of Silence: The Equal Status of Religious Speech by Private Speakers,” 81 *Nw. U.L. Rev.* 1 (1986).
- “Nonpreferential’ Aid to Religion: A False Claim About Original Intent,” 27 *Wm. & Mary L. Rev.* 875 (1986).
- “A Survey of Religious Liberty in the United States,” 47 *Ohio St. L.J.* 409 (1986).
- “Tax Exemptions for Racially Discriminatory Religious Schools,” 60 *Tex. L. Rev.* 259 (1982).
- “Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy,” 81 *Colum. L. Rev.* 1373 (1981).

REPORT

God Alone Is Lord of the Conscience: Policy Statement and Recommendations Regarding Religious Liberty (with Committee on Religious Liberty and Church/State Relations) (Presbyterian Church (U.S.A.), 1989), reprinted in 8 *J.L. & Religion* 331 (1990).

BOOK REVIEWS

- “A Syllabus of Errors,” 105 *Mich. L. Rev.* 1169 (2007) (reviewing Marci Hamilton, *God vs. the Gavel: Religion and the Rule of Law* (2005));
- “God vs. the Gavel: A Brief Rejoinder,” 105 *Mich. L. Rev.* 1545 (2007).
- “The Many Meanings of Separation,” 70 *U. Chi. L. Rev.* 1667 (2003) (reviewing Philip Hamburger, *Separation of Church and State* (2002)).
- Book Note, 44 *Pol. Stud.* 1015 (1996) (reviewing Jesse H. Choper, *Securing Religious Liberty: Principles for Judicial Interpretation of the Religion Clauses* (1995)).
- Book Note, 31 *J. Church & State* 303 (1989) (reviewing Mark Tushnet, *Red, White, and Blue: A Critical Analysis of Constitutional Law* (1988)).

- “Responding to the Nonpreferentialists,” 4 *J.L. & Religion* 241 (1986) (reviewing Thomas J. Curry, *The First Freedoms: Church and State in America to the Passage of the First Amendment* (1986), and Leonard W. Levy, *The Establishment Clause: Religion and the First Amendment* (1986)).

OTHER CONSTITUTIONAL LAW

BOOK CHAPTER

- “Protecting Liberty in a Federal System: The US Experience,” in Jörg Fedtke & Basil S. Markesinis, eds., *Patterns of Federalism and Regionalism: Lessons for the UK* 119 (Hart Publishing 2006).

ARTICLES

- “Voting with Your Feet Is No Substitute for Constitutional Rights,” 32 *Harv. J.L. & Pub. Pol’y* 29 (2009).
- “The Clear and Present Danger Test,” 25 *J. Sup. Ct. Hist. Soc’y* 161 (2000).
- “Federalism as a Structural Threat to Liberty,” 23 *Harv. J.L. Pub. Pol’y* 67 (1999).
- “Individual Liberty and Constitutional Architecture: The Founders’ Prompt Correction of Their Own Mistake,” 16 *Harv. J.L. Pub. Pol’y* 75 (1993).
- “Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law,” 92 *Colum. L. Rev.* 249 (1992).
- “Vicious Stereotypes in Polite Society,” 8 *Const. Comment.* 395 (1991).
- “Equality and the Citizens of Sister States,” 15 *Fla. St. U. L. Rev.* 431 (1987).
- “Constitutional Theory Matters,” 65 *Tex. L. Rev.* 767 (1987).
- “The Ultimate Unity of Rights and Utilities,” 64 *Tex. L. Rev.* 407 (1985).
- “Due Process and Separation of Powers: The Effort to Make the Due Process Clauses Nonjusticiable,” 60 *Tex. L. Rev.* 875 (1982).

REPORT

Report of the Task Force on Assembly and Expression (University of Texas at Austin, 2003).

BOOK REVIEWS

- Review of Robert H. Bork, *The Tempting of America: The Political Seduc-*

- tion of the Law* (1990), 101 *Ethics* 661 (1991).
- “Notes on the Role of Judicial Review, the Expansion of Federal Power, and the Structure of Constitutional Rights,” 99 *Yale L.J.* 1711 (1990) (reviewing Robert F. Nagel, *Constitutional Cultures: The Mentality and Consequences of Judicial Review* (1989)).
- “Taking Constitutions Seriously: A Theory of Judicial Review,” 59 *Tex. L. Rev.* 343 (1981) (reviewing John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (1980)).

DISCRIMINATION

BOOK CHAPTERS

- “Desegregation, Affirmative Action, and the Ten-Percent Law,” in Richard A. Holland, ed., *The Texas Book: Profiles, History, and Reminiscences of the University* 177 (University of Texas Press, 2006).
- “Introduction,” in Kumar Percy, comp., 1 *Hopwood v. Texas Litigation Documents, Part 1: Trial in the Federal District Court for the Western District of Texas* (1992–1994) xv (William S. Hein & Co., 2002).

ARTICLES

- “The Broader Case for Affirmative Action: Desegregation, Academic Excellence, and Future Leadership,” 78 *Tul. L. Rev.* 1767 (2004).
- “Statistical Proof and Theories of Discrimination,” *Law & Contemp. Probs.*, Autumn 1986, at 97.
- “The Efficient Use of Group Averages as Nondiscrimination: A Rejoinder to Professor Benston” (with Lea Brilmayer and Teresa A. Sullivan), 50 *U. Chi. L. Rev.* 222 (1983).
- “Sex Discrimination as ‘Actuarial Equality’: A Rejoinder to Kimball” (with Teresa A. Sullivan), 1981 *Am. B. Found. Res. J.* 221.
- “Sex Discrimination in Employer-Sponsored Insurance Plans: A Legal and Demographic Analysis (with Lea Brilmayer, Richard W. Hecker, and Teresa A. Sullivan), 47 *U. Chi. L. Rev.* 505 (1980).

LEGAL EDUCATION

ARTICLES

- “Introduction: International Litigation Symposium Honoring the

- Distinguished Career of Professor Russell J. Weintraub,” 38 *Tex. Int’l L.J.* 1 (2003).
- “Charles Alan Wright and the University of Texas School of Law,” 32 *Tex. Int’l L.J.* 367 (1997).
- “That and Which,” 2 *Scribes J. Legal Writing* 37 (1991).
- “Why the First-Year Legal Writing Course Cannot Do Much About Bad Legal Writing,” 1 *Scribes J. Legal Writing* 84 (1990).

BOOK REVIEWS

- “The *Maroonbook* v. The *Bluebook*: A Comparative Review,” 1 *Scribes J. Legal Writing* 181 (1990).
- “Reflections on Two Themes: Teaching Religious Liberty and Evolutionary Changes in Casebooks,” 101 *Harv. L. Rev.* 1642 (1988) (reviewing John T. Noonan, Jr., *The Believer and the Powers That Are: Cases, History, and Other Data Bearing on the Relation of Religion and Government* (1987)).
- “A Case Study in Pedagogical Neglect,” 92 *Yale L.J.* 188 (1982) (reviewing Richard E. Speidel, Robert S. Summers, and James J. White, *Teaching Materials on Commercial and Consumer Law* (3d ed. 1981)).

CIVIL PROCEDURE

ARTICLE

- “Dispositive Pre-Trial Motions in Illinois—Sections 45, 48, and 57 of the Civil Practice Act,” 9 *Loy. U. Chi. L.J.* 823 (1978).