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# I'm a Laycockian! (for the Most Part)

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RELIGIOUS LIBERTY, VOLUME ONE: OVERVIEWS & HISTORY. By Douglas Laycock. Wm. B. Eerdmans Publishing Co., 2010. 888 pages. $35.00.

## Reviewed by Jay Wexler*

You know you've made it, scholarly-wise speaking, when a major publishing house and a preeminent university approach you to ask whether they could publish a four-volume set of your collected works.[1] Such is the situation of Douglas Laycock (DL), long-time Professor at the University of Texas School of Law, now moving from the University of Michigan to the University of Virginia and most certainly on just about everyone's short list of greatest church–state scholars of the past quarter-century. Volume One of the collection was published in 2010;[2] it is subtitled "Overviews & History" and contains roughly forty pieces written by DL between 1985 and 2009.[3] Many of the pieces are academic works; some are newspaper articles or letters or various other types of nonscholarly writing. The volume, as observed by the subtitle, includes pieces that communicate DL's general views on the Religion Clauses and analyze the historical context of those crucial provisions. There is also a short section on DL's views about the Senate's role in confirming judicial nominees. Forthcoming volumes will focus on free exercise rights, statutory protection for religion, and religious speech/disestablishment, in that order.[4]

Writing a review of this new volume has presented me with some difficulties. For one thing, the book is 800 pages long.[5] That is pretty long. More important, however, is that I agree with almost everything in it. In a field that is marked by sharp debates over just about every single possible

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* Professor of Law, Boston University School of Law. The author would like to thank the editors of the Texas Law Review for putting together this book symposium and inviting me to participate. Thanks also to my co-participants, particularly Douglas Laycock.

1. This is even more amazing when the topic of the collected works is only *one* of your specialties; Laycock has also written widely on other topics, including judicial remedies, on which he is a recognized expert and casebook author. *E.g.*, Douglas Laycock, *Due Process of Law in Trilateral Disputes*, 78 IOWA L. REV. 1011 (1993); Douglas Laycock, *How Remedies Became a Field: A History*, 27 REV. LITIG. 161 (2008); Douglas Laycock, *The Broader Case for Affirmative Action: Desegregation, Academic Excellence, and Future Leadership*, 78 TUL. L. REV. 1767 (2004).

2. DOUGLAS LAYCOCK, 1 RELIGIOUS LIBERTY: OVERVIEWS & HISTORY (2010).

3. *Id.* at vii–xi.

4. *Id.* at xx–xxi.

5. Eight hundred and sixty-four, actually, if you include the appendices and the index. The book also weighs, according to Amazon, 2.6 pounds. Compare this with David Foster Wallace's mega-novel *Infinite Jest*, also listed by Amazon as weighing 2.6 pounds.

issue one can imagine, this agreement is remarkable. Indeed, I cannot think of another major scholar (DL being the major scholar here, obviously, not me) with whom I agree more wholeheartedly about the vast majority of difficult issues posed by the First Amendment's Free Exercise and Establishment Clauses.

Here is a list, likely incomplete, of the things on which DL and I agree:[6] the Supreme Court wrongly decided *Employment Division v. Smith*;[7] religious believers should have robust exemption rights from general laws under the Free Exercise Clause;[8] it will generally not violate the Establishment Clause for legislatures and administrative agencies to grant exemptions to religious believers from generally applicable laws that substantially burden their religion;[9] given *Lukumi*[10] and a number of lower court decisions on what counts as a generally applicable law, it is not clear exactly how much bite *Smith* will continue to have;[11] *Smith* was wrongly decided (did I mention that already?; it's probably worth reiterating)[12]; the Establishment Clause prohibits more than just religious coercion;[13] likewise, the Establishment Clause prohibits the support of religion generally as opposed to simply the support of one sect (in other words, we both reject the

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6. I will not bore you by providing citations to places in my own writing where I take any of these positions. Most, however, can be found somewhere in my book, JAY WEXLER, HOLY HULLABALOOS: A ROAD TRIP TO THE BATTLEGROUNDS OF THE CHURCH/STATE WARS (2009).

7. 494 U.S. 872 (1990). *See* Douglas Laycock, *Theology Scholarships, the Pledge of Allegiance, and Religious Liberty: Avoiding the Extremes but Missing the Liberty*, 118 HARV. L. REV. 156 (2004), *reprinted in* 1 RELIGIOUS LIBERTY, *supra* note 2, at 126, 177–78, 185–86 [hereinafter Laycock, *Theology Scholarships, the Pledge of Allegiance, and Religious Liberty*] (asserting that "the comparative right of *Smith* . . . still provides protection that is less inclusive, more complicated, and harder to invoke" than before).

8. *See* Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DEPAUL L. REV. 993 (1990), *reprinted in* 1 RELIGIOUS LIBERTY, *supra* note 2, at 3, 30 ("If we take seriously the constitutional right to freely exercise religion, we must restore a judicially enforceable right to religious exemption in appropriate cases.").

9. *See* Douglas Laycock, *Regulatory Exemptions of Religious Behavior and the Original Understanding of the Establishment Clause*, 81 NOTRE DAME L. REV. 1793 (2006), *reprinted in* 1 RELIGIOUS LIBERTY, *supra* note 2, at 709, 758 (contending that the argument that regulatory exemptions fall under the Establishment Clause "can suggest results inconsistent with . . . underlying principles" of disestablishment and free exercise).

10. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993).

11. *See* Douglas Laycock, *The Supreme Court and Religious Liberty*, 40 CATH. LAW. 25 (2000), *reprinted in* 1 RELIGIOUS LIBERTY, *supra* note 2, at 359, 360–69 (observing that *Smith* and *Lukumi* have left "considerable disagreement" over neutral and generally applicable laws); Laycock, *Theology Scholarships, the Pledge of Allegiance, and Religious Liberty*, *supra* note 7, at 177–87 (chronicling ambiguities left by *Smith*'s holding still unresolved after *Lukumi* and other lower court decisions).

12. *See supra* note 7.

13. *See* Douglas Laycock, *"Noncoercive" Support for Religion: Another False Claim About the Establishment Clause*, 26 VAL. U. L. REV. 37 (1992), *reprinted in* 1 RELIGIOUS LIBERTY, *supra* note 2, at 617, 621 [hereinafter Laycock, *"Noncoercive" Support for Religion*] (pointing out that if the Establishment Clause only covered religious coercion, it would be redundant with the Free Exercise Clause).

theory of "nonpreferentialism");[14] the Court's "endorsement test" protects important interests;[15] the Court has often misapplied its "endorsement test";[16] "under God" in the Pledge of Allegiance violates the First Amendment;[17] so do Ten Commandments monuments like the one in Austin that the Court upheld in 2005;[18] the rules on funding religion with public money used to be silly but are much more rational now;[19] school voucher programs such as the Cleveland program upheld by the Court in 2003 are generally constitutional;[20] individuals—including public officials—should feel and be free to speak in religious terms on policy issues and anything else;[21] the Senate has an important obligation during the judicial confirmation process;[22] and Noah Feldman's recently articulated counterintuitive position that the

14. *See* Douglas Laycock, *"Nonpreferential" Aid to Religion: A False Claim About Original Intent*, 27 WM. & MARY L. REV. 875 (1986), *reprinted in* 1 RELIGIOUS LIBERTY, *supra* note 2, at 531, 572–73 [hereinafter Laycock, *"Nonpreferential" Aid to Religion*] (arguing that all governmental aid to religion is preferential with respect to atheists or agnostics and therefore there is no governmental aid that is "nonpreferential").

15. *See* Douglas Laycock, *The Benefits of the Establishment Clause*, 42 DEPAUL L. REV. 373 (1992), *reprinted in* 1 RELIGIOUS LIBERTY, *supra* note 2, at 33, 38–41 (claiming that the abolition of the endorsement test would be a serious loss to religious liberty).

16. *See* Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, *supra* note 8, at 19 (stating that the endorsement test has been "often disaggregated" into two separate tests); Douglas Laycock, *Free Exercise Clause and Establishment Clause: General Theories*, *in* RELIGION AND AMERICAN LAW: AN ENCYCLOPEDIA (Paul Finkelman ed., 2000), *reprinted in* 1 RELIGIOUS LIBERTY, *supra* note 2, at 103, 113 [hereinafter Laycock, *Free Exercise Clause and Establishment Clause*] (claiming that the endorsement test lacks clarity and is "impossible . . . to predict").

17. *See* Laycock, *Theology Scholarships, the Pledge of Allegiance, and Religious Liberty*, *supra* note 7, at 200–05 (arguing that it is difficult to fit the Pledge of Allegiance within any of the defined exceptions to the Establishment Clause).

18. Van Orden v. Perry, 545 U.S. 677 (2005); *see also id.* at 215 (maintaining that "[l]arge textual displays of the Ten Commandments should be an easy case" of endorsement under the First Amendment).

19. *See id.* at 134–39 (stating that until 1986 religious funding cases involved "much-ridiculed distinctions," which have since become somewhat reconciled).

20. *See* Douglas Laycock, *Substantive Neutrality Revisited*, 110 W. VA. L. REV. 51 (2007), *reprinted in* 1 RELIGIOUS LIBERTY, *supra* note 2, at 225, 262 (reasoning that "subsidizing secular subjects in a school is fundamentally different from subsidizing religious functions in a church").

21. *See* Douglas Laycock, *Continuity and Change in the Threat to Religious Liberty: The Reformation Era and the Late Twentieth Century*, 8 MINN. L. REV. 1047 (1996), *reprinted in* 1 RELIGIOUS LIBERTY, *supra* note 2, at 651, 683–85 [hereinafter Laycock, *Continuity and Change in the Threat to Religious Liberty*] (contending that "religious arguments in politics are protected by the text of the Free Speech and Free Exercise Clauses, and by the constitutional structure of democracy"); Douglas Laycock, *Religious Liberty as Liberty*, 7 J. CONTEMP. LEGAL ISSUES 313 (1996), *reprinted in* 1 RELIGIOUS LIBERTY, *supra* note 2, at 54, 93 ("[P]rivate religious speakers should be as fully protected as though they were discussing politics").

22. Douglas Laycock with Sanford V. Levinson, Letter to Senators Joseph R. Biden and Strom Thurmond, *in* NOMINATION OF ROBERT H. BORK TO BE ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES (1987), *reprinted in* 1 RELIGIOUS LIBERTY, *supra* note 2, at 490, 491 [hereinafter Laycock & Levinson, Letter to Senators Biden and Thurmond] (stating that the Senate's role in selecting judges is equally as important as the President's).

Court toughen up on funding and ease up on religious symbols is, frankly, unpersuasive.[23]

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23. *See* Laycock, *Substantive Neutrality Revisited*, *supra* note 20, at 245–58 (contrasting Feldman's views on government religious speech and government funding with the author's). Feldman's position is set out in NOAH FELDMAN, DIVIDED BY GOD: AMERICA'S CHURCH-STATE PROBLEM—AND WHAT WE SHOULD DO ABOUT IT (2005). At the risk of going slightly off my main topic, *but see* Laycock, *"Nonpreferential" Aid to Religion*, *supra* note 14, at 531–32 (DL explaining that, despite how his symposium contribution was supposed to be a comment on a paper by Philip Kurland, he would nonetheless engage in "a fairly common academic maneuver" by "present[ing] [his] own paper that was vaguely related to [Kurland's]"), I'd just like to take a moment to comment on Feldman's position myself. Feldman argues that courts should abandon the endorsement test as part of a compromise experiment intended to advance civil peace on matters of religion and government in the United States. FELDMAN, *supra*, at 235–49. According to Feldman, we should "offer greater latitude for public religious discourse and religious symbolism, and at the same time insist on a stricter ban on state funding of religious institutions and activities" because doing so would "both recognize religious values *and* respect the institutional separation of religion and government as an American value in its own right." *Id*. at 237. On the subject of symbols, specifically, Feldman argues that religious minorities need not feel excluded by government-sponsored symbols and that this feeling of exclusion is "largely an interpretive choice." *Id*. at 242.

I should point out that I agree with Feldman on a couple of things. For one, I agree that we need to move toward some sort of compromise on these church–state issues. And I also agree that we should tolerate public religious speech and not insist that religious believers pretend like they are not religious when they start talking about public issues and whatnot. But unlike Feldman I do not think we (or the courts) should tolerate government-sponsored religious displays and symbols. Feldman says that these displays just remind religious minorities of their minority status. *See id.* at 239 (claiming that religious minorities have no right to be shielded from the "brute fact" that their faith is in the minority). But nonbelievers (like me—I grew up Jewish and am now an atheist) are reminded of our minority status already, thank you very much, by the fact that *we are minorities*. As minorities, we are already surrounded by Christian talk and symbols all the time everywhere we look. But just because private individuals can talk about God and Jesus as much as they want, thereby reminding me that I am a minority, it does not follow that the *government*, which purportedly represents me and my interests in addition to everybody else's, should have the right to put up a display pointing out that it too thinks my views on ultimate reality are wrong.

Feldman's argument is that the most natural view of a religious symbol on government property is that it is just an acknowledgement of the religious majority's power and influence, rather than an endorsement of the religion. *Id*. at 238–44. Moreover, even if this is not the most natural view, Feldman says that potential plaintiffs can still make an "interpretive choice" to view the symbol as an acknowledgement rather than an endorsement, and therefore courts should require them to make such a choice. *Id*. at 242. In my view, the first part of the argument is unpersuasive, and the second one unfairly shifts the burden of avoiding harm from the perpetrator to the victim. Also, the "interpretive choice" thing assumes that we live in something more like an advanced philosophy colloquium than anything resembling the real world.

What is the most natural view of a religious symbol on government property? I think it is a safe bet that most people, when they see a religious symbol they do not share on government property, react by thinking that the government is endorsing that symbol. That is how symbols work. Unless they have lost a bet or gone insane, when a person or an entity of some sort displays a symbol, they do it because they believe in the symbol's truth or value. Why would the government, which is after all just a group of people making decisions about how to run things, be any different? When the government displays the American flag, a stamp of Martin Luther King Jr., or the Liberty Bell, we assume that the government is endorsing patriotism, equality, and liberty, not just that a majority of the country's citizens happen to believe in these things and got the government to go along with displaying them. Why would religious symbols be any different?

It is true that the government might choose, as Feldman says, to acquiesce in a group's request "for an opportunity to acknowledge their holiday or tradition." *Id*. at 239. The most natural way

In addition, we have both written not particularly flattering reviews of Jesse Choper's *Securing Religious Liberty*[24] but extremely flattering letters to the Senate praising then-nominee-to-the-Tenth-Circuit Michael McConnell[25] (DL was McConnell's Professor at University of Chicago,[26] and his letter was likely about 8,000 times more important to the Senate Judiciary Committee than mine). Both of us started our careers more classically

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that the government would do this would be to set aside a public area where religious groups can put up their symbols. Majority traditions would then most likely have the greatest representation in that public area, either with a greater number of displays, larger displays, or more elaborate displays or whatever. But minority traditions too would have a chance to put up their symbols, even if they have to be smaller or made of aluminum foil or drawn with crayons. The Supreme Court decided a case about such a public forum for the placement of religious symbols and decided that a reasonable person would not view a religious symbol in such an area (assuming it is appropriately marked) as a government endorsement of religion. *See* Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 764–65 (1995) (holding that private religious speech on a public government forum that is equally open to all participants would not violate the endorsement test). This decision was correct, but it involved a much different context than when the government itself puts up a majority religious symbol, and just a majority religious symbol, on its property. Especially because the government always has the ability to create one of these public areas for religious symbols, the Court is right to assume that a reasonable person would see a symbol actually erected by the government as an endorsement of that symbol. *Cf.* Richard C. Schragger, *The Relative Irrelevance of the Establishment Clause*, 89 TEXAS L. REV. 583, 595–96 (stating that the Court does not look to the actual purpose of the government, but the purpose apparent to a reasonable observer, as part of the endorsement test).

This brings us to the second part of Feldman's argument. Now, when Feldman says that viewing a religious symbol as an endorsement is an "interpretive choice," in a way I guess he is right, in the same way that if somebody called me a "stupid Jew" I would choose to interpret that to mean that the person thinks I'm a "stupid Jew" instead of choosing to interpret his words to mean that in fact he hates himself and wishes he was Jewish and is just projecting his own self-hatred onto me, or maybe that he was raised by bigots and is really making a cry for help and that I should give him my psychiatrist's card and suggest he make an appointment. With lots of effort and practice, I could probably train myself to react differently than I ordinarily would react to a lot of things, but that does not make the natural reaction less natural or valid. The fact that with a bit of intellectual gymnastics some people might be able to convince themselves that a government-sponsored religious symbol just represents an acknowledgement of religion rather than an endorsement is not a reason to place the burden of avoiding offense on the viewers rather than the government. This is particularly true because, although perhaps a few people might go around the world self-consciously making all sorts of "interpretive choices," the rest of us do not act so hyper-rationally. We see what we see, and we react the way we react, and the courts should respect this rather than asking us to go around "interpreting" the world in all sorts of counterintuitive ways.

24. JESSE H. CHOPER, SECURING RELIGIOUS LIBERTY: PRINCIPLES FOR JUDICIAL INTERPRETATION OF THE RELIGION CLAUSES (1995); Douglas Laycock, Book Note, *Reviewing Jesse H. Choper's* Securing Religious Liberty: Principles for Judicial Interpretation of the Religion Clauses, 44 POLITICAL STUDIES 1015 (1996), *reprinted in* 1 RELIGIOUS LIBERTY, *supra* note 2, at 485 [hereinafter Laycock, *Reviewing Jesse H. Choper*]; Jay D. Wexler, Book Note, *Cleaning the Mess?*, 49 STAN. L. REV. 677 (1997).

25. Douglas Laycock, Letter to Senator Patrick Leahy, *in* 1 RELIGIOUS LIBERTY, *supra* note 2, at 500.

26. *Id.*; *see also* Chris Mooney, *Impaired Faculties?*, THE AMERICAN PROSPECT (Nov. 4, 2002), http://www.prospect.org/cs/articles?article=impaired_faculties (discussing the strong support McConnell received from liberal law professors).

separationist than we are now.[27] Neither of us believe in God.[28] Both of us do believe that what one believes about God should have no effect on how one interprets the First Amendment.[29] My middle name is Douglas.[30]

Lest this review turn into an unadulterated lovefest, however, I should note I am not (yet, anyway), a complete and unadulterated 100% Laycockian. I have a few reservations about some of DL's most important points. I would like to discuss briefly my most important reservation here before moving on to some reflections about the volume itself and how it functions as a book.[31]

One of DL's most important contributions to church–state law discourse (I would say it is his most important),[32] has to do with the concept of "neutrality." The Supreme Court has talked about neutrality in connection with the religion clauses for a long time,[33] and it continues to talk about it today,[34] but it has never been particularly consistent or clear about what it means by the term.[35] In 1990, in a classic article called *Formal, Substantive, and Disaggregated Neutrality Toward Religion*,[36] published in the *DePaul Law Review* and reprinted as the very first piece in the volume under review here,[37] DL pointed out that there are two main types of neutrality—"formal" neutrality, meaning, in the words of Philip Kurland, "that government cannot

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27. Laycock, *Religious Liberty as Liberty*, *supra* note 21, at 99 ("All my early sympathies were with the nonbelieving minority.").

28. I am an atheist; DL is an agnostic. *See id.* at 101 ("[M]y agnostic view of religion predisposes me to an agnostic explanation for religious liberty.").

29. Douglas Laycock, *Remarks on Acceptance of National First Freedom Award from the Council for America's First Freedom*, *in* 1 RELIGIOUS LIBERTY, *supra* note 2, at 268.

30. *See, e.g.*, my birth certificate (on file with author). I was informed by DL, subsequent to the preparation of the first draft of this review, that "Douglas" is in fact DL's middle name also; he has another first name which he almost never uses.

31. I would also describe myself as less gung ho about the constitutionality of voucher programs than DL, and, therefore, also more accepting of programs, like the one in *Locke v. Davey*, 540 U.S. 712 (2004), that exclude religious schools or courses from those programs. My main concern about these programs is not that they might promote religion as opposed to non-religion (I think DL is right to say that the programs simply increase choice for those with religious views) but rather how they tend to assist some religions—those with the resources and inclination to form schools and courses—but not others. For more on this, in the context of Cleveland's Buddhist and Muslim communities, *see* WEXLER, *supra* note 6, at 154–76.

32. DL lists it first when he discusses the principles "associated with [his] work." 1 RELIGIOUS LIBERTY, *supra* note 2, at xvii. Interestingly, Witte lists it fourth, although neither DL nor Witte explicitly purport to be ranking the principles in any meaningful order. John Witte, Jr., *Foreword* to 1 RELIGIOUS LIBERTY, *supra* note 2, at xiv.

33. Everson v. Bd. of Educ., 330 U.S. 1, 18 (1947) ("[The First] Amendment requires the state to be neutral in its relations with groups of religious believers and non-believers.").

34. Zelman v. Simmons-Harris, 536 U.S. 639, 652 (2002) ("[W]here a government aid program is neutral with respect to religion . . . the program is not readily subject to challenge under the Establishment Clause.").

35. *See* Schragger, *supra* note 23, 597 (discussing the Court's "uneven jurisprudence" regarding "nonendorsement and neutrality").

36. Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, *supra* note 8.

37. *Id.* at 3.

utilize religion as a standard for action or inaction,"[38] and "substantive" neutrality, meaning, in the words of DL, that "the Religion Clauses require government to minimize the extent to which it either encourages or discourages religious belief or disbelief, practice or nonpractice, observance or nonobservance."[39] DL has spent much of his career defending and applying his conception of substantive neutrality as the lodestar for Religion Clause jurisprudence, and his positions on all sorts of specific controversies (like most of those listed three paragraphs above) generally follow from his application of substantive neutrality to whatever controversy he is talking about.[40] In DL's opinion, applying substantive neutrality will tend to promote religious liberty, which is what he thinks the Religion Clauses are best understood to promote.[41]

Although DL's specification of substantive neutrality as a distinct and desirable form of neutrality has marked a thousandfold improvement over how the Court and commentators previously treated the concept of neutrality, I am still not convinced that it is worth using the word "neutrality" at all when talking about the Religion Clauses. As DL points out, neutrality by itself is not "self-defining" and requires further "specification" to give it meaning.[42] So, we need to explain more specifically what we mean when we use the word. Still, though, it only makes sense to use the word, I would think, if the specification we provide still bears some resemblance to some common understanding of the word's core meaning. In other words, to take an absurd example, if we defined neutrality to mean something like "promotion of Taoism over all other religious faiths," it would hardly make sense to call that neutrality. We could do it, of course—much like the Clean Water Act defines "navigable waters" as "waters"[43]—and then when someone objected that it does not really sound anything like neutrality to say that promoting Taoism is neutral, we could respond that promoting Taoism is in fact neutral, given that we have defined "neutral" as "promoting Taoism," but still, it would not make much sense.

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38. *Id.* at 11 (quoting Philip B. Kurland, *Of Church and State and the Supreme Court*, 29 U. CHI. L. REV. 1, 96 (1961)).

39. *Id*. at 13.

40. *See, e.g.*, Douglas Laycock, *Church and State in the United States: Competing Conceptions and Historic Changes*, 13 IND. J. GLOBAL LEGAL STUD. 503 (2006), *reprinted in* 1 RELIGIOUS LIBERTY, *supra* note 2, at 399 (incorporating his theory into a primer on American law of church and state); Douglas Laycock, *Substantive Neutrality Revisited*, *supra* note 20 (clarifying and defending his views on substantive neutrality); Douglas Laycock, *The Underlying Unity of Separation and Neutrality*, 46 EMORY L.J. 43 (1997) (arguing that substantive neutrality allows for individual rights and the government's "obligation of neutrality").

41. *See* Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, *supra* note 8, at 14 ("The autonomy of religious belief and disbelief is maximized when government encouragement and discouragement is minimized.").

42. *Id*. at 6–10.

43. 33 U.S.C. § 1362(7) (2006).

So, does DL's concept of substantive neutrality seem enough like what we generally think of as the core meaning of neutrality to justify calling it neutrality? I'm not sure. To begin with, note that the definition of substantive neutrality requires "minimizing" the effect on individual religious choices, rather than eliminating that effect.[44] The question will often be which of two possible actions (accommodating religion, for example, or not accommodating it) will minimize the effect of government action on religious choices. Some government action that affects religious choices, then, will still be substantively neutral. As DL concedes, for instance, some judicial exemptions from general laws will have some tendency to attract nonbelievers to the exempted faith, but not enough of a tendency to outweigh the negative effect on the exempted faith that would exist if the exempted faith were not exempted.[45] So, if we decided that judicially exempting members of the Native American Church (NAC) from eating peyote would have an overall effect of minimizing the effect on private religious choices (because now those who want to participate in the NAC will do so, instead of refraining for fear of prosecution), that exemption would be substantively neutral even if some non-members of the NAC may start to investigate the NAC because they are interested in finding out what eating peyote is like.[46]

Second, like everyone else who supports judicial exemptions, DL supports the idea that exemptions—even to laws that substantially burden religious practice—must bend in the face of a compelling state interest.[47] I did not get much of a sense of what DL would consider as counting as such a compelling state interest from reading this volume (I would think more on this may appear in the next volume), but surely things like stopping murder, child abuse, and other sorts of physical harm would count as compelling state interests. But laws that prohibit these things certainly affect some religious practices—potentially quite enormously. A religion that demands human sacrifice is going to have an infinitely easier time flourishing in a society that grants religious exemptions from murder laws than in a society that does not. And as we saw in the post-*Sherbert*/pre-*Smith* era, courts as a practical matter

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44. *See supra* text accompanying note 39.

45. Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, *supra* note 8, at 31 ("[T]he most nearly neutral course will not be very neutral.").

46. *Cf.* Laycock, *Religious Liberty as Liberty*, *supra* note 21, at 95–96 (DL noting that he thinks peyote would make him "throw up").

47. *See* Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, *supra* note 8, at 30–31 (arguing that exemptions are subject to "the government's proof of a compelling reason to deny it"). *But see* Douglas Laycock, *Reflections on Two Themes: Teaching Religious Liberty and Evolutionary Changes in Casebooks*, 101 HARV. L. REV. 1642 (1988) (reviewing JOHN T. NOONAN, JR., THE BELEIVER AND THE POWERS THAT ARE: CASES, HISTORY, AND OTHER DATA BEARING ON THE RELATION OF RELIGION AND GOVERNMENT (1987), *reprinted in* 1 RELIGIOUS LIBERTY, *supra* note 2, at 465, 480 ("I have digressed a long way from Noonan's book on religious liberty, and have surely committed the sin of complaining that he did not write a different book.").

did find strict scrutiny to be satisfied in a good number of cases,[48] so the compelling interest proviso to the minimization rule of substantive neutrality is likely to be much broader in practice than my aforementioned extreme human sacrifice example (think polygamy bans, prison regulations, destruction of a forest believed by a religious group to be sacred, etc.). By the way, it is probably worth noting that the fact that we seemingly do not have many flourishing religions in the United States that require physical violence is not necessarily evidence that such religions are insignificant;[49] it may simply be evidence that they become insignificant in a culture that prohibits violence and does not grant violent religions exemptions from those prohibitions.

Finally, I take it that DL would agree that the government can take positions, through its speech and actions, that happen to be inconsistent with some believers' views about the world, even if, in some cases, it must exempt the religious believer from having to hear these views directly.[50] As I have suggested elsewhere,[51] the government takes positions on nearly every contested matter of fact and morals pretty much all the time, through the symbols it displays, the lessons it teaches in schools, the policies it chooses, and everything else it does. The government, just to choose three examples, subsidizes beef production,[52] teaches evolution,[53] and celebrates Martin Luther King Day.[54] These actions (and, just to emphasize, thousands (millions?) more like them every day) have potentially significant effects on religious belief and practice. Some religions do not allow the consumption of beef.[55] Some religions do not believe in evolution.[56] And some religions

48. *See, e.g.*, Douglas Laycock, *A Survey of Religious Liberty in the United States*, 47 OHIO ST. L.J. 409 (1986), *reprinted in* 1 RELIGIOUS LIBERTY, *supra* note 2, at 272, 293–303 (discussing the post-*Sherbert* free exercise era).

49. JOHN L. ALLEN JR., OPUS DEI: AN OBJECTIVE LOOK BEHIND THE MYTHS AND REALITY OF THE MOST CONTROVERSIAL FORCE IN THE CATHOLIC CHURCH 165 (2007) (noting that "'mortification' is part of the daily spiritual program of all Opus Dei members").

50. *Cf.* Laycock, *The Benefits of the Establishment Clause*, *supra* note 15, at 40 ("[O]n matters of governmental policy, somebody has to decide.").

51. *See* Jay D. Wexler, *Intelligent Design and the First Amendment: A Response*, 84 WASH. U. L. REV. 63, 86–88 (2006) (noting that the United States is so religiously diverse that government can hardly avoid conflicting with religious views).

52. *See* Steve Lopez, *Plenty of Reasons for a Crowded California*, L.A. TIMES, Apr. 18, 2004, 2004 WLNR 19769820 (discussing federal livestock subsidies paid to California farmers).

53. *See* Michael Peltier, *Florida Will Teach Evolution But Only as Theory*, REUTERS (Feb. 19, 2008), http://www.reuters.com/article/idUSN1929595320080219 (reporting on new state legislation mandating the teaching of evolution in schools).

54. *See* Sheryl Gay Stolberg, *Marking King Day, From Oval Office to Soup Kitchen*, N.Y. TIMES, Jan. 19, 2010, at A19 (reporting the wide observance of Martin Luther King Day celebrations in the United States).

55. Xanthe Clay, *Meat Off the Menu as Windsor Castle Goes Vegan*, DAILY TELEGRAPH (Nov. 2, 2009), http://www.telegraph.co.uk/foodanddrink/6488123/Meat-off-the-menu-as-Windsor-Castle-goes-vegan.html ("The Daoists avoid red meat, while Buddhists and Sikhs are generally vegetarian. Hindus don't eat beef . . . .").

do not believe in racial equality.[57] These religions will have greater difficulty flourishing in the United States, in terms of attracting believers, retaining believers, receiving positive reinforcement and press from nonbelievers, etc., than they would if the government had not adopted these positions and policies. Notice that none of my examples involves anything close to an "establishment" of nonreligion; I would agree with DL that the government may not explicitly endorse or support nonbelief (as opposed to positions that happen to be consistent with nonbelief) any more than it can endorse or support belief.[58]

The relationship between the government actions/speech and the religious choices of individuals will in some cases be fairly direct and in other cases rather attenuated, but the relationship will exist in all cases to some degree nonetheless. In the more direct cases, like teaching evolution, substantive neutrality may mandate that the government exempt nonbelievers from having to hear the speech itself, but this only helps minimize the negative effect of widespread evolution teaching on religious faiths that disavow evolution; it does not eliminate it. The society is still significantly affected by the fact that government schools generally teach evolution (and that government funding agencies fund scientific research based on evolution and fund museums that assume the truth of evolution, and so on and so on), and surely fewer people will believe in a religion that rejects evolution in a society where this teaching occurs than in a society where the teaching does not occur. Likewise with the beef and MLK examples. Surely fewer people will join a faith that rejects the eating of beef in a society where beef is cheaper because of subsidization than in a society where beef is more expensive. Surely fewer people will join a faith that believes in the superiority of the white race in a society that celebrates Martin Luther King's accomplishments than one that does not.

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56. Some Christian denominations that support Creationism include the Seventh Day Adventist Church, *Fundamental Beliefs*, OFFICIAL WEBSITE OF THE SEVENTH DAY ADVENTIST CHURCH, http://www.adventist.org/beliefs/fundamental/index.html ("God is Creator of all things, and has revealed in Scripture the authentic account of His creative activity. In six days the Lord made 'the heaven and the earth' and all living things upon the earth, and rested on the seventh day of that first week.") and the Southern Baptist Convention, *Resolution on Scientific Creationism*, OFFICIAL WEBSITE OF THE S. BAPTIST CONVENTION (June 1982), http://www.sbc.net/resolutions/amResolution.asp?ID=967 ("The theory of evolution has never been proven to be a scientific fact . . . the Southern Baptist Convention . . . express our support for the teaching of Scientific Creationism in our public schools.").

57. *Fundamentalist Church of Jesus Christ of Latter-Day Saints*, S. POVERTY L. CENTER, http://www.splcenter.org/get-informed/intelligence-files/groups/fundamentalist-church-of-jesus-christ-of-latter-day-saints ("Warren Jeffs' sermons have him proclaiming, 'The black race is the people through which the devil has always been able to bring evil unto the earth.'").

58. Laycock, *Religious Liberty as Liberty*, *supra* note 21, at 73.

So, importing these three points,[59] we might reformulate DL's conception of substantive neutrality to something like this: government must minimize (not eliminate) the effects of its actions on private religious choices, unless it has a compelling interest and unless it is just sort of going about its business taking positions on contested issues that will have potentially significant effects on some religious beliefs and practices. Now, I guess we could call this a "specification" of neutrality, but I think we could just as well use some other word to describe it, like maybe "rutabaga."[60] Okay, perhaps that is taking it a little too far, but you see what I am saying. At some point, the specification of neutrality wanders so far from what we generally think of as neutrality that it no longer makes sense to call it neutrality. This is especially true because when courts continue to insist on using a word with some generally understood core meaning even though they in fact mean something very specific and kind of far from what most people think of when they say that word, they inevitably cause substantial confusion among potential litigants, the press, and the general public. If I had a dime, for example, for every time I have heard an evolution critic argue that public schools should not teach evolution because it is not neutral toward religion[61] (a claim that I think is true but constitutionally irrelevant), I would have many, many dimes. I think abandoning the word "neutral" may be overall in our best interest. Why not just define the relevant standard as I have done up in the first sentence of this paragraph following the colon, or in some other way that communicates the standard's many subtleties and complexities? It would not be as simple a formulation as "substantive neutrality," but, then again, why try to pretend that a doctrine is more simple than it actually is?

Now on to a few words about the book as a book. In the Preface to the volume, DL suggests that the book's primary virtue is that it makes previously nonaccessible writing more readily available to scholars, particularly those scholars whose primary field is not law. "We hope that this collection will make this [previously not-too-accessible] work available to religious leaders and religious scholars," DL writes, "and to scholars

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59. And there are other indeterminacies and complexities as well—for example, in the school funding context. *See* Laycock, *Substantive Neutrality Revisited*, *supra* note 20, at 261 (discussing the issue of funding religious schools through vouchers and concluding that "[i]t is very difficult for government to have no effect on people's religious incentives; government is the 800-pound gorilla in the society").

60. DL informed me, after reading a draft of this Review, that he once made a frighteningly similar fruit/vegetable related point, when he claimed that the "irreparable injury" rule might usefully be called "orange banana." DOUGLAS LAYCOCK, THE DEATH OF THE IRREPARABLE INJURY RULE 241 (1991). These similarities are getting kind of creepy, wouldn't you agree?

61. R. Robin McDonald, *Evolution, Creation Collide in Fed Court: Some Cobb Parents Challenge Disclaimer in Biology Textbook*, FULTON COUNTY DAILY REP., Nov. 5, 2004, 2004 WLNR 23364429; Robert Royal, *Lawsuits Over Intelligent Design and Evolution Pose a Democratic Dilemma*, NAT'L CATHOLIC REP., Oct. 21, 2005, 2005 WLNR 26283645; Terrence Tobin, *Tax Dollars in Support of Atheism*, L.A. TIMES (Nov. 27, 1994), http://articles.latimes.com/1994-11-27/local/me-1987_1_john-peloza-evolution-laguna-hills.

studying these issues from the perspective of political science, sociology, or other disciplines."[62] John Witte's Foreword makes much the same point.[63] I think that both DL and Witte are correct about this virtue of the volume, and I am glad to see that the book is priced in a way that will truly make it accessible to individuals working in these cognate fields, as well as to libraries.[64]

Given the purpose of the book—to collect DL's writings on religious liberty in one convenient place—it is probably unlikely that many readers will in fact read the volume from beginning to end (unless, perhaps, he or she is writing a dissertation on DL's work, which is surely something that someone might do). Having been tasked with reviewing the book, however, I did read it from beginning to end, and I have to say that I found it well put together and enjoyable to read in that fashion. The articles engage in a good amount of repetition, but I found that to be a virtue, in that by the end I felt like I had a real sense for DL's positions on a whole host of issues that I might not have had otherwise, without going back and re-reading previous pieces (things do not often sink in for me the first time I read them). The mix between longer pieces and shorter ones, scholarly ones and those written for different audiences, is well done and shows off DL's ability (not so often found in the world of legal academia) to write lucid prose that just about anyone can read without getting a headache. Indeed, as someone who flinches at the notion of reading too many law review articles in any given two-week period, I can honestly say that even the most hardcore of DL's scholarly writings—the *Harvard Law Review* piece on *Locke v. Davey* and the Pledge of Allegiance case[65]—is written with an obvious (and, again, rather unusual, given the field) interest in *communicating* with readers.

But this last point leads me to one sort of nagging wish about the book. As I worked my way through the volume's eight hundred or so pages, I kept wondering whether the time and money and other resources spent on putting this collection together might otherwise have been better spent at producing a shorter and fully original book setting out DL's views on religious liberty and the First Amendment for the general public. Now, of course, this "I think you should have written a different book" position is the classic unfair line to take when writing a book review,[66] and far be it for me to suggest to

62. 1 RELIGIOUS LIBERTY, *supra* note 2, at xx.

63. Witte, *supra* note 32, at xiv–xv.

64. Eerdman lists the book at $35. Expensive, yes, but nothing like the absurd amounts academic books are often sold for. *Religious Liberty, Volume 1: Overviews and History*, EERDMAN'S CATALOGUE, http://www.eerdmans.com/shop/product.asp?p_key=9780802864659.

65. Douglas Laycock, *Theology Scholarships, The Pledge Of Allegiance, and Religious Liberty*, *supra* note 7, at 126–224.

66. *But see* Douglas Laycock, *Reflections on Two Themes: Teaching Religious Liberty and Evolutionary Changes in Casebooks*, 101 HARV. L. REV. 1642 (1988) (reviewing JOHN T. NOONAN, JR., THE BELEIVER AND THE POWERS THAT ARE: CASES, HISTORY, AND OTHER DATA BEARING ON THE RELATION OF RELIGION AND GOVERNMENT (1987), *reprinted in* 1 RELIGIOUS

DL or to John Witte or to Eerdmans what they should be doing with their time and money. Still, though, I think that DL's ability to write clearly and effectively, when coupled with his passion for the subject and willingness to follow his principles wherever they may take him (to say nothing of the extreme erudition he brings to his work), practically screeches out for a book that speaks to readers outside the academy. Okay, enough complaining. Maybe such a book is in DL's future. Maybe it is not. Either way, we have got (or at least, we will soon have) this four-volume collection, and that is more than enough accomplishment for one career.

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LIBERTY, *supra* note 2, at 465, 480 ("I have digressed a long way from Noonan's book on religious liberty, and have surely committed the sin of complaining that he did not write a different book.").