Lawyering Religious Liberty


Reviewed by Steven D. Smith *

Douglas Laycock has been the preeminent lawyer–scholar of religious freedom over the last quarter-century — that would be my judgment, anyway — and his influential writings, though already familiar to those who work in this area, amply repay rereading. So it is fitting, as well as convenient, that those writings are being gathered into a collected works series.  

The challenge for a reviewer, however, is daunting. There is vastly more both to praise and to question in this book of over 800 pages (the first of four projected volumes) than my competence and my modest prescribed word limit allow. So I propose to use the event of a collection of Laycock’s leading writings to attempt a more overarching appraisal. I will try to distill down the overall purpose and shape of his project, to reflect on what it has contributed to our understanding and our law, and also to note what seem to me its principal limitations.

I. Laycock’s Substantive Neutrality

First the distillation. At the heart of Laycock’s work is a (seemingly) simple, powerful proposition: we should understand the First Amendment Religion Clauses to be about religious liberty. The clauses are not designed to promote or protect religion—or secularism either; they protect liberty. 

Laycock repeatedly objects to the practice by religious believers and skeptics alike of importing their views of religion into their interpretations of the First Amendment, thereby committing what he calls the “Puritan mistake.” (Whether Laycock himself is guilty of the same transgression, if it is one, is a question we will consider later.)

* Warren Distinguished Professor of Law, University of San Diego.
1. In this respect, despite their different views, Laycock might be seen as a worthy successor to Leo Pfeffer, who was similarly both a consummate lawyer and an erudite scholar.
2. DOUGLAS LAYCOCK, 1 RELIGIOUS LIBERTY: OVERVIEWS & HISTORY (2010).
Having declared that the religion clauses are about religious liberty, Laycock next proposes what he seems to regard virtually as a truism—that a commitment to religious liberty entails an effort to minimize governmental influence over individual choice in the areas of religious belief or practice. He describes this commitment to minimizing influence as substantive neutrality; this, he says, is the central theme that runs through and unifies his work.  

Elaborating on the implications of substantive neutrality, Laycock goes on to address the concrete controversies of the day. In broad terms, he (a) generally favors what are often called free exercise exemptions, (b) approves governmental funding for religious schools and social service providers if and only if they qualify under general and neutral criteria or programs, and (c) condemns governmental religious expressions such as “under God” in the Pledge of Allegiance and publicly sponsored Christmas creches. In arguing for these premises and conclusions, Laycock engages in extensive normative theorizing, presents and draws conclusions from history, and demonstrates a consummate mastery of the lawyerly arts of analyzing cases.  

This brief summary obviously does not pretend to give the nuances and details of Laycock’s descriptions and arguments. Even so, I hope this distillation is enough to permit an appreciation of Laycock’s remarkable achievement—and also of some central questions and doubts that his work provokes.


7. See Laycock, Substantive Neutrality Revisited, supra note 4, at 247 (discussing Zelman v. Simmons-Harris, 536 U.S. 639 (2002)).

8. 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, 200 [hereinafter Laycock, Theology Scholarships, the Pledge of Allegiance, and Religious Liberty] (stating that “‘under God’ is inherently a religious affirmation” by the government).

9. Part I.A of the book is mainly devoted to such theorizing.

10. Part II of the book is mainly devoted to historical discussion and argumentation.

11. This sort of analysis occurs throughout the book, including in Part I.B’s well-crafted descriptive summaries of the law of religious freedom. The chapter discussing the Supreme Court’s 2004 decisions concerning theology scholarships and the Pledge of Allegiance is an impressively and even numbingly intricate exhibition of such analysis. See 1 RELIGIOUS LIBERTY, supra note 2, at 126–224.
II. The Context: Religious Freedom in the Ruins?

Laycock’s project in defining and defending religious liberty must be appreciated, I think, in light of the immensely challenging context in which he is working. Two troublesome features of that context are well known. First, the doctrine and case law of religious freedom are widely viewed as being in disarray. Laycock offers his own diagnoses of that disarray. Laycock, Formal, Substantive, and Disaggregated Neutrality Toward Religion, supra note 5, at 22–23 (suggesting that the Supreme Court does not base decisions on neutrality or, if it does, applies the principle inconsistently). Second, the larger society within which judges and scholars address the questions of religious freedom is deeply divided. On virtually every issue that Laycock discusses, Americans disagree, often passionately; these divisions are reflected in what Laycock and others often describe as the culture wars.

A third difficulty is less obvious but ultimately even more daunting. As I have argued at length elsewhere, modern commitments to religious freedom are derived from a long history of thought and action that was anchored in a dualist-Christian worldview in which God and Caesar were believed to work through independent authoritative institutions (church and state) and to impose independent but valid obligations on their subjects. The medieval effort to liberate the church from Caesar’s rule—to achieve freedom of the church—was a progenitor of the modern commitment to separation of church and state. In the post-Reformation period, as the functions and dignity of the church came to be transferred in part to the individual conscience, freedom of the church begat a fierce devotion to freedom of conscience—a cause for which thousands suffered martyrdom. This cause culminated in the modern constitutional commitment to free exercise of religion.

The religious origins of religious freedom were tersely but eloquently reflected in the explicitly theological rationales offered, for example, in James Madison’s famous Memorial and Remonstrance Against Religious Assessments and in Jefferson’s celebrated Virginia Statute for Religious Freedom. Laycock himself acknowledges that “[t]heological developments played an important role [in the establishment of religious freedom], perhaps an indispensable one.” The problem is that in contemporary circumstances

12. Laycock offers his own diagnoses of that disarray. See, e.g., Laycock, Formal, Substantive, and Disaggregated Neutrality Toward Religion, supra note 5, at 22–23 (suggesting that the Supreme Court does not base decisions on neutrality or, if it does, applies the principle inconsistently).
13. 1 RELIGIOUS LIBERTY, supra note 2, at xvi.
15. SMITH, supra note 14, at 121–27.
16. JAMES MADISON, A MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ASSESSMENTS (1785), reprinted in SELECTED WRITINGS OF JAMES MADISON 21 (Ralph Ketcham ed., 2006).
the very commitment to religious freedom has contributed, first, to an increasingly religiously (and nonreligiously) diverse population in which the classical religious premises and rationales are unlikely to enjoy universal acceptance and, second, to a general understanding that government is supposed to act only on secular rationales. In this way, religious freedom comes to snub or subvert its own supporting rationales and, thus, threatens to cancel itself out. And, indeed, some scholars have begun to call for the retirement of any special constitutional protection for religion.20

Laycock, by contrast, is not ready to relinquish the constitutional commitment to religious freedom. On the contrary, he remains a stalwart, even vehement,21 defender. At the same time, he whole-heartedly joins in the prevailing contemporary assumption that the classical religious rationales are inadmissible today. Government, he insists, cannot act on religious beliefs or reasons.22

21. Laycock does not pull punches in saying what he thinks of opposing views: terms like “nonsense,” “preposterous,” “absurd,” “phony,” and “silly” are sprinkled through his discussion. 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, 4; id. at 46, Laycock, Religious Liberty as Liberty, supra note 3, at 88; Laycock, Theology Scholarships, the Pledge of Allegiance, and Religious Liberty, supra note 8, at 133; 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, 424 [hereinafter Laycock, Church and State in the United States]; Douglas Laycock, Op-Ed., Founders Wanted Total Neutrality, USA TODAY, Aug. 12, 1985, at 8A, reprinted in 1 RELIGIOUS LIBERTY, supra note 2, at 529, 530. At one point, commenting on some past writings, he remarks that they were “a bit more combative than if I had written them today,” id. at 527, and one wonders whether he will come to second guess himself about some more recent writings. See Douglas Laycock, A Syllabus of Errors, 105 MICH. L. REV. 1169 (2007) (reviewing, in unusually harsh terms, MARCI A. HAMILTON, GOD VS. THE GAVEL (2005)). Given these tendencies, I suppose I proceed at my peril in criticizing parts of Laycock’s argument. On the whole, however, I do not find Laycock’s sometimes feisty manner off-putting, but rather refreshingly candid. He is sometimes similarly candid in confessing his own limitations. See, e.g., Laycock, Substantive Neutrality Revisited, supra note 4, at 243 (“I have been inconsistent over the years about separation.”); id. at 262 (acknowledging that “I have waffled” regarding school funding issues).
22. See Douglas Laycock, Religious Liberty as Liberty, supra note 3, 58 (arguing that beliefs about religion cannot explain or maintain support for religious liberty and that religious liberty is intuitively inconsistent with the government’s adoption of some religious beliefs and rejection of others). Unlike some theorists, however, Laycock does not argue for the exclusion of religious belief from public debate and deliberation on political issues; on the contrary, he defends the right of citizens to urge and rely on such beliefs. Id. at 93. Whether this position is consistent with his simultaneous insistence that government cannot rely on religious rationales might be questioned, as might Laycock’s consistent drawing of a strong distinction between what is proper and important for government and what is proper and important for individuals. By one familiar view, after all, government is “of the people, by the people, and for the people”: hence, any strong distinction between the reasons permitted to government and the reasons permitted to individuals would seem suspect. For discussion, see Steven D. Smith, Toleration and Liberal Commitments, in NOMOS XLVIII TOLERATION AND ITS LIMITS 243, 259–61 (Melissa Williams & Jeremy Waldron eds.,
So, if we can no longer rely on the “indispensable” religious rationales that historically grounded our commitments to religious freedom, what are we to do? This is our predicament—and Laycock’s.

He approaches the challenge as a lawyer working within the American constitutional tradition. As noted, Laycock engages in extensive normative theorizing. But his primary goal is not to produce a theory to be admired by political philosophers for its elegance or sophistication. Rather the reverse: his development of general principles, he explains, has been “inductive” and has occurred “in the course of proposing solutions to specific controversies.” Laycock’s goal has been to devise a plausible account of the religion provisions of the United States Constitution that can be used to resolve contemporary controversies.

Not every scholar will conceive of his calling in this way. Still, Laycock’s is surely a worthy purpose. And it is important to keep this purpose in mind, I think, because what might look like lapses in Laycock’s analysis may claim an excuse, perhaps even a justification, if we recall that he is using theory and history for the purpose of doing law, not vice versa.

So, how does Laycock pursue his lawyerly project in the face of the difficulties noted above? I have already observed that Laycock repeatedly emphasizes that the religion clauses are about promoting religious liberty. That is the bedrock on which he tries to build his position, and for good reason: it is quite possibly the strongest foundation currently available. For one thing, even in the midst of divisions and culture wars, most Americans probably have a favorable attitude toward the notion of religious freedom, at least in the abstract. For another, by labeling his position substantive neutrality (as opposed to the stiffer and less inviting formal neutrality from which he distinguishes it) and by emphasizing that religious liberty is neither for nor against religion, Laycock seeks to stay on diplomatic terms with all factions in the culture wars.

In addition, like many academics and many modern Supreme Court decisions, Laycock argues that current interpretations of the Religion Clauses should be broadly faithful to founding-era understandings—but only at the level of general principles, not specific expectations. And on the plane of general principles, it seems entirely plausible—platitudinous even—to say

---

2008). However, Laycock’s major essay on the permissibility of religion in political discourse, Douglas Laycock, Freedom of Speech That is Both Religious and Political, 29 U.C. DAVIS L. REV. 793 (1996), has been reserved for a later volume, so I will not pursue these questions here.

23. 1 RELIGIOUS LIBERTY, supra note 2, at xix.

24. See Douglas Laycock, Original Intent and the Constitution Today, in THE FIRST FREEDOM: RELIGION AND THE BILL OF RIGHTS 87 (James E. Wood ed., 1990), reprinted in 1 RELIGIOUS LIBERTY, supra note 2, at 594, 596 (“So the search for intent is not for the Founders’ specific applications . . . . The search for intent must be for principles that are consistent with the text and as broad as the text . . . .”).
that the enactors of the First Amendment were attempting to secure religious liberty.

Add to these advantages Laycock’s ample prowess as an advocate and his apparently tireless zeal for the cause—he has defended religious liberty not only as a scholar but also as a litigator, 25 lobbyist, 26 and op-ed writer 27—and you have a formidable constitutional force. It is no wonder that Laycock has exercised considerable influence—far more than the typical academic would enjoy, at least—over the legal thinking about religious liberty in this country.

My own judgment is that the country is very much in his debt for this contribution. Even so, it is a reviewer’s job to raise objections, and I think Laycock’s substantive neutrality provokes some fundamental ones. So let us consider two sets of likely criticisms, one set naturally arising from the secular side of the culture and the other from the more devout side.

III. Why Religious Liberty?

An objection likely to arise from a secular orientation asks why religious belief and conduct (and institutions 28) should be singled out for special constitutional protection. Sometimes this question is posed as a general theoretical matter, but more often it arises in discussions of free exercise exemptions: if nonreligious objectors to a law are required to obey, why should religious objectors enjoy a presumptive exemption? 29

Some theorists, such as John Garvey and myself, have suggested that it may be impossible to justify special protection for religious freedom except on the basis of religious rationales similar to the classical rationales that gave rise to the constitutional commitment in the first place. 30 Laycock emphatically rejects this approach. As noted, he acknowledges that

28. One of Laycock’s important and pioneering articles argued that the Free Exercise Clause protects not only individuals but also churches. See Douglas Laycock, 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). That article and issue have been reserved, however, for a later volume.
29. Laycock to some extent blunts the force of this more specific challenge by defining the scope of “religion” broadly, much in the way the draft exemption cases did.
30. See, e.g., JOHN H. GARVEY, WHAT ARE FREEDOMS FOR? 42–57 (1996) (suggesting that religion should be protected because it is inherently important); Smith, supra note 20, at 149 (1991) (arguing that the original rationale for protecting religious freedom was itself based on religious premises).
theological rationales may have been indispensable in the historical development of the constitutional commitment, but he is adamant that such reasons are inadmissible today. Instead, he adopts a different strategy, which we might call the “recasting” strategy. “Religious reasons have to be recast,” he says, “in the form of a statement about what some people believe.”31 Government today, in short, cannot join with Jefferson’s Virginia Statute in affirming that “Almighty God hath created the mind free.”32 But government can say that some people believe that Almighty God created the mind free.

More specifically, Laycock contends that religious freedom can be securely supported on the basis of three secular propositions. First, because people care deeply about religion, attempts to impose or suppress religion have historically given rise to a great deal of suffering and conflict.33 Second, beliefs about religion are “often of extraordinary importance to the individual,” sometimes leading people to fight, rebel, and even die.34 Conversely, and third, religious beliefs are “of little importance to the civil government.”35 From these propositions, none of which looks theological in character, Laycock believes we can extract a strong commitment to religious liberty—which he understands, once again, to mean keeping religion as private as possible.36

So, how solid is this position? A predictable objection is that even if Laycock’s three propositions are accepted, they do not quite answer the initial question: Why religious liberty? The propositions do not seem limited in their scope of application to religion, and indeed Laycock acknowledges that secular critics may argue that other strong personal commitments should have been protected as well.37 His response to this objection is noteworthy, underscoring the practical and lawyerly nature of his project. We protect religion and not other concerns to which his secular propositions might also extend, he says,

for the sufficient reason that other strong personal commitments had not produced the same history. The [constitutionally] protected liberty is religious liberty, and although the word “religion” must be construed in light of continuing developments in beliefs about

31. Laycock, Religious Liberty as Liberty, supra note 3, at 67 (emphasis added).
33. Laycock, Religious Liberty as Liberty, supra note 3, at 59.
34. Id.
35. Id.
36. See, e.g., Laycock, The Benefits of the Establishment Clause, supra note 21, at 33 (asserting that “the Religion Clauses are designed to make religious practice and nonpractice, belief and nonbelief, wholly matters of private choice insulated from government influence or control”).
37. Laycock, Religious Liberty as Liberty, supra note 3, at 64.
religion, we cannot rewrite the Constitution to say that religious liberty should not receive special protection.38

A more theory-bound scholar might huffily dismiss this contention as unresponsive, maybe even intellectually irresponsible. How can a central challenge to a normative position be shrugged off with “Good point, but that’s not what the Constitution says”?39

I think this dismissive response would be misdirected. Once again, Laycock is not trying to develop a theory for theory’s sake; he is trying to give an attractive account of the content of the First Amendment. His prescriptions and conclusions depend, as he says, “far more on history than on logic.”40 Laycock is hardly alone in supposing that normative theories may help to illuminate the content of the Constitution;41 at the same time, it would be surprising if a constitutional provision like the First Amendment were perfectly aligned with any particular normative theory. To the scholar primarily concerned with constitutional law, such incongruities may not be especially troublesome: a normative theory may persuade and guide even though the Constitution is over and underinclusive relative to that theory.

More generally, it may well be that Laycock’s strategy of “recast[ing] [religious rationales] in the form of a statement about what some people believe” is the best approach available for protecting religious liberty in a pluralistic and heavily secular legal culture.42 The position he stakes out, though it shows the marks of stretching and patching in places, may be good enough for government work, as they say, and it is after all government work that we are involved in here.

Even so, Laycock’s recasting strategy, and the mismatch between normative theory and constitutional meaning that it produces, may leave us uneasy. The incongruity between Laycock’s constitutional position and the normative rationales he enlists to support it mean that he has to put great weight on constitutional text and history—on the claim that we should do one thing and not something else just because “‘the Constitution says so.’”43 But in an age of “living constitutionalism,” in which constitutional provisions are expanded or pared down or reshaped seemingly at judicial pleasure, can pounding on the table of constitutional text and historical understanding carry the argument?

---

38. Id. at 64–65.

39. Id. at 58.

40. See generally, e.g., RONALD DWORKIN, TAKING RIGHTS SERIOUSLY (1978) (contending that legal theory generally must have normative as well as conceptual components).

41. Laycock, Religious Liberty as Liberty, supra note 3, at 67.

42. Id. at 56.
IV. Beyond Religious Liberty?

Maybe. Devout citizens, at least, might happily agree with Laycock’s contention that the Constitution gives special protection to religious liberty. But these people may question Laycock’s insistence that all religious expressions by government—the words “under God” in the Pledge of Allegiance, Nativity scenes in publicly sponsored Christmas displays, and the like—are constitutionally forbidden. And here history is less Laycock’s friend than something he has to fight to fend off.

Laycock acknowledges that early presidents and Congresses approved legislative chaplains, proclaimed national days of prayer, and invoked religion routinely in their unofficial and official statements and actions. They evidently believed that the Constitution permitted such expression. Laycock says that they were mistaken, and that they were, in fact, acting from “unreflective bigotry.” Even though the enactors did not realize it, the “principle” contained (though not actually stated) in the Establishment Clause forbids such expression.

If this sort of argument were not so numbingly familiar in modern constitutional jurisprudence, Laycock’s claim would seem truly audacious. Is it not just a bit presumptuous to declare, two centuries after the fact, that a constitutional provision enacts a “principle” that the enactors themselves were unaware of having put there, that their conduct suggests they did not favor, and that the text does not articulate? And notice that Laycock’s interpretation pushes us to classify as manifestations of “unreflective bigotry” some of the most powerful and revered expressions in our political tradition—Jefferson’s Virginia Statute (“Almighty God hath created the mind free”), the Declaration of Independence (all are endowed “by their Creator” with unalienable rights), Lincoln’s Gettysburg Address (“this nation, under God”) and Second Inaugural Address—not to mention inaugural addresses by every president from Washington to Obama.

44. Id. at 571.
46. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).
48. Abraham Lincoln, Second Inaugural Address (Mar. 4, 1865). This address, now engraved on the wall of the Lincoln Memorial, was, as one historian observed, a “theological classic,” containing within its twenty-five sentences “fourteen references to God, many scriptural allusions, and four direct quotations from the Bible.” ELTON TRUEBLOOD, ABRAHAM LINCOLN: THEOLOGIAN OF AMERICAN ANGUISH 135–36 (1973).
49. See, e.g., George Washington, First Inaugural Address (Apr. 30, 1789) (“[M]y fervent supplications to that Almighty Being who rules over the universe”); Abraham Lincoln, Second Inaugural Address (Mar. 4, 1865) (“The Almighty has his own purposes”); Franklin Delano Roosevelt, First Inaugural Address (Mar. 4, 1933) (“In this dedication of a Nation we humbly ask
In the face of this history, what is the warrant for Laycock’s claim that the Establishment Clause contains a “principle” forbidding religious expression by government? His argument is, and has to be, that the principle is somehow logically entailed by the clause’s fundamental commitment to religious freedom. Thus, if Laycock’s argument for giving special protection to religious freedom depends “far more on history than on logic,” the opposite is true for his claim that the Establishment Clause prohibits public religious expression.

Except that the logic in this instance seems frail. For these purposes, we might analyze Laycock’s argument into three steps or claims. **Claim 1**: The First Amendment affirms a constitutional commitment to religious liberty. **Claim 2**: The constitutional commitment to religious liberty means that government should strive to minimize its influence over individual choices in the areas of religious belief and practice. **Claim 3**: The constitutional commitment to minimizing influence means that government should not endorse religion or engage in any religious expression. Laycock seems to suppose that these claims constitute a single unified position—that Claim 1 (religious liberty) is equivalent to or at least entails Claim 2 (minimize influence), and that Claim 2 entails Claim 3 (no endorsement). But is his supposition sound?

As a logical and practical matter, I think, Claim 1 need not entail Claim 2. You can attempt to influence or persuade other people without intruding on their liberty. Indeed, far from infringing liberty, persuasion can actively promote liberty by enhancing understanding and offering options. Laycock’s volume itself is a massive exercise in influencing and persuading; it does not thereby constrict anyone’s liberty. Similarly, as Laycock acknowledges, government routinely tries to influence and persuade citizens on all sorts of matters without infringing on their liberty. Does the government curtail people’s liberty when it tries to influence them not to smoke or use drugs? There may be good reasons why government should not attempt to influence citizens in matters of religion. But a commitment to liberty, by itself, is not a sufficient reason.

---

50. Laycock, Religious Liberty as Liberty, supra note 3, at 58.
51. Notice, for instance, how Laycock presents a tautology as if it were an argument and then purports to deduce a conclusion about liberty: “If government minimizes the extent to which it either encourages or discourages religion, government neutrality will be maximized, government influence on religion will be minimized”—this is the tautology—“and religious liberty will be maximized for both believers and non-believers.” Laycock, Free Exercise Clause and Establishment Clause, supra note 6, at 107.
52. See Laycock, The Benefits of the Establishment Clause, supra note 21, at 34 (“There is no other area of our life where we say that government cannot even try to persuade you. On political issues, persuasion is a large part of what government does. Government leads; government tries to mold opinion.”).
Moreover, even if we agree that government should not attempt to influence people’s religious choices (Claim 2), it does not necessarily follow that government must refrain from all religious expression (Claim 3), as in the national motto and the Pledge of Allegiance. A person (or a group of persons, acting through their government) may express a view or value for all sorts of purposes, admirable or ignoble, other than influence or persuasion. Nor is it obvious that bland affirmations like “In God We Trust” have any significant effect of influencing religious choices.

In this respect, Laycock describes Noah Feldman’s view that governmental endorsements of religion, while offensive to many, do not influence people in their own religious choices. “Many people complain to [Feldman],” Laycock reports, “about having been subjected to government-sponsored prayers, but none of the complainers was ever converted and many report being strengthened in their own faith in reaction to the unpleasant experience.”

Feldman may well be right; indeed, while rejecting Feldman’s normative position, Laycock does not actually contend that Feldman is wrong as an empirical matter. Perhaps the most vociferous critic of government religious expression in the nation today is Michael Newdow, but Newdow’s objection is surely not that he is afraid of becoming pious.

Thus, Laycock’s conclusion condemning religious endorsements does not follow automatically or even very closely from his primary premise favoring religious liberty. That condemnation, it seems, is the product of other considerations—most likely of the same nonalienation rationale that Justice O’Connor gave for the no-endorsement doctrine, and that Laycock recites with approval. Governmental endorsement of religion is objectionable because it alienates nonbelievers, or different believers, and causes them to feel like outsiders.

This concern about alienation is surely a legitimate one: it is good for government to avoid alienating citizens. Even so, the nonalienation policy provokes doubts that in other contexts Laycock himself articulates. In analyzing the implications of “substantive neutrality,” Laycock frequently criticizes what we might call “one-side-of-the-ledger” accounting. That is, he objects to advocates who worry only about governmental advancement of

53. Laycock, Substantive Neutrality Revisited, supra note 4, at 257.
54. See, e.g., Newdow v. Lefevre, 598 F.3d 638, 640 (9th Cir. 2010) (challenging the use of the national motto on coins); Newdow v. Rio Linda Union Sch. Dist., 597 F.3d 1007, 1013 (9th Cir. 2010) (challenging the words “under God” in the Pledge of Allegiance).
55. Laycock, The Benefits of the Establishment Clause, supra note 21, at 39; Laycock, Religious Liberty as Liberty, supra note 3, at 64.
56. To say that the concern is legitimate is not to say that it is the concern that was embodied in the First Amendment. Insofar as Laycock supports his conclusions about expression and endorsement on the basis of considerations other than religious liberty, his connection to what he says about founding-era understandings is weakened.
religion, or governmental inhibition of religion, but not both. Neutrality, he sensibly insists, requires looking at both kinds of effects. In objecting to governmental expressions of religion, however, Laycock commits the same accounting error: he considers only the alienation felt by citizens who disagree with or object to such expressions, while declining to credit the alienation felt by citizens who perceive the removal of traditional religious symbols and expressions as an official disapproval of their views. The phenomenon is hardly hypothetical: Noah Feldman observes that “constitutional decisions marginalizing or banning religion from public places have managed to alienate millions of people who are also sincerely committed to an inclusive American project.”

In Laycock’s accounting, the alienation felt on this side of the ledger somehow does not seem to count. But why not?

Critics of governmental religious expression sometimes discount anger or alienation felt by religious citizens because these citizens are already ostensibly mainstream or part of the majority. To his credit, Laycock does not rely on this sort of dubious sociology. He recognizes, rather, that as Will Herberg observed decades ago, “America is pre-eminently a land of minorities,” and that “each group perceives itself as a mistreated minority.” But then the question remains: If the goal is to reduce alienation, why doesn’t the alienation caused by the elimination of public religious expression count?

Sometimes Laycock suggests that the constitutional obligation of neutrality has one major exception: government need not be neutral toward the kind of religion that seeks public support or expression, because the

---

58. Id. at 17–23; Laycock, Substantive Neutrality Revisited, supra note 4, at 235.
59. In one brief passage, Laycock does allude to the problem. He describes Michael McConnell’s argument that complete silence by government in matters of religion also distorts public discourse and departs from neutrality. Laycock, Religious Liberty as Liberty, supra note 3, at 96. Laycock does not directly disagree with McConnell’s point but instead tries to deflect it with the observation that it is impossible for government to “‘exactly mirror[,] the culture as a whole.’” Id. at 96–97 (quoting Michael W. McConnell, Religious Freedom at a Crossroads, 59 U. Chi. L. Rev. 115, 193 (1992)). Probably, but it hardly follows that forbidding religious expression altogether is the best way to approximate either “the culture as a whole” or a position of substantive neutrality.
60. NOAH FELDMAN, DIVIDED BY GOD: AMERICA’S CHURCH-STATE PROBLEM—AND WHAT WE SHOULD DO ABOUT IT 15 (2005).
Constitution itself rejects that position. At least as applied to public religious expression like the national motto, however, this response seems to me simply to assume what is at issue. Recall that we are not talking about the overt theocracy favored by a few outliers like the so-called Christian Reconstructionists, but rather about the sort of ecumenical public religion favored in one form or another by Washington and Adams and Lincoln and millions of Americans—quite possibly a majority of them—from the founding to the present. It is hardly obvious that the Constitution rejected that kind of public religiosity; whether it did—or does—is precisely the question at issue.

So then if the alienation experienced by many religious citizens is somehow disqualified from consideration, there must be some other reason. I suspect that the reason derives from Laycock’s own version of the Puritan mistake.

V. Laycock’s “Puritan Mistake”?

Implicit (and often explicit) in Laycock’s writings is a particular notion of what religion is. More specifically, religion is, and consists of, essentially private choices about what to believe (and how to act) with respect to a set of ultimate questions about God and the cosmos. But if religion by its nature just is an inherently private affair, then people who think government should express support for some religious view, as in the national motto (“In God We Trust”), are in effect officiously demanding that government put its imprimatur on their own essentially private sectarian beliefs. And that is an unreasonable demand that must be rejected—even if the citizens making the demand are angered or alienated as a result. Conversely, by insisting over and over again that religion ought to be left as much as possible to private choice, Laycock is merely asking that government treat religion as what it essentially is.

64. Laycock, The Benefits of the Establishment Clause, supra note 21, at 35; Laycock, Religious Liberty as Liberty, supra note 3, at 60–61.
65. See JOHN WITTE JR., GOD’S JOUST, GOD’S JUSTICE: LAW AND RELIGION IN THE WESTERN TRADITION 246–48 (2006) (encapsulating John Adams’s vision of religious liberty, which “require[d] the state to balance the freedom of many private religions with the establishment of one public religion”).
66. See WITTE, supra note 65, at 245, 248–56 (chronicling the dominance of Adams’s “one public religion” model of religious liberty from 1776 until 1940, followed by the rise of Jefferson’s “free exercise” and “disestablishment of religion” model from 1940 to 1985).
67. Laycock, The Benefits of the Establishment Clause, supra note 21, at 33; Laycock, Church and State in the United States, supra note 21, at 399, 428; Laycock, Religious Liberty as Liberty, supra note 3, at 83; Laycock, Substantive Neutrality Revisited, supra note 4, at 241, 243; Laycock, Theology Scholarships, the Pledge of Allegiance, and Religious Liberty, supra note 8, at 129; Douglas Laycock, Vouching Towards Bethlehem, RELIGION IN THE NEWS 2 (Summer 2002), reprinted in 1 RELIGIOUS LIBERTY, supra note 2, at 390, 390.
An analogy may help. Stephen Carter famously suggested that secular liberals view religion as something akin to a personal hobby:68 some people build model airplanes as a hobby, others play golf, and still others recite prayers or go to church. If that is the sort of thing religion is, then people who favor public religious expressions are like golfers who are not content with being allowed to golf; they want the government to put its seal of approval on *their* hobby, while at least implicitly devaluing *other people’s* hobbies. It is natural to reject that sort of self-serving demand, and to dismiss as illegitimate the resentment felt by the pro-golfing lobby when their unreasonable demand is denied. Same for religion.

This view of what religion is seems to underlie Laycock’s solicitude for people who are alienated by public religious expression and his simultaneous refusal to count alienation provoked by the elimination of such expression. The problem is that, although for some Americans religion may be merely a set of private choices, for many others this is manifestly a misdescription. The description overstates the role of “individual choice” in religion;69 even more importantly, it neglects the un compartmentalizable, communal, and, yes, public dimension of many citizens’ faith. Take as an instance Washington’s affirmation that “it is the duty of all nations”—notice that the duty applies to *nations*, not just to private individuals—“to acknowledge the providence of Almighty God, to obey His will, to be grateful for His benefits, and humbly to implore His protection and favor.”70 Or John Adams’s declaration that “the safety and prosperity of nations ultimately and essentially depend on the protection and the blessing of Almighty God, and *the national acknowledgment of this truth is . . . an indispensable duty which the people owe to Him.*”71 Some such conviction no doubt has informed the numerous instances of public prayer or endorsement of prayer—by *all* Presidents, for example, including (notwithstanding secularist protestations to the contrary) Jefferson72—and it surely lies behind public support for

---

72. Consider Jefferson’s Second Inaugural Address:
   “I shall need . . . the favor of that Being in whose hands we are, who led our fathers, as Israel of old, from their native land and planted them in a country flowing with all the necessaries and comforts of life, who has covered our infancy with His providence and our riper years with His wisdom and power, and to whose goodness I ask you to join in supplications with me . . . .

Thomas Jefferson, Second Inaugural Address (Mar. 4, 1805), *reprinted in id.* at 206.
expressions such as the national motto. No doubt this sort of view is held by different citizens and politicians with varying degrees of intensity, reflection (or lack thereof), and sincerity (or hypocrisy), but it is undeniably a powerful and persistent theme in the American political tradition.

In dismissing this tradition as “unreflective bigotry” and in basing his interpretation of religious freedom on his own (contested) understanding of religion as a set of private choices, Laycock commits a version of the error (if it is one) that he attributes to the Puritans and others. In an especially punchy passage notable both for its calculated sarcasm and its unintended irony, Laycock observes that in American culture today some people believe religion is a good thing while others believe it is dangerous, and both sides tend to interpret the First Amendment accordingly. “Each side claims that it won the late-twentieth-century culture wars and took over the government—two hundred years ago,” he chortles. Then, without pausing for a paragraph break, Laycock immediately goes on to make exactly the same kind of claim on behalf of his own view of religion-as-private-choice. “What happened two hundred years ago,” he declares, “is that conflict over theology, liturgy, and church governance was confined to the private sector [and] the federal government was declared a permanent neutral . . . .”

Put differently, Laycock thinks the First Amendment committed the government to the same sort of respectful, neutral agnosticism that he himself embraces. Anyone who supposes the First Amendment constitutionalized his own view of religion is “engaged in self-delusion,” Laycock says. Perhaps, but it seems that Laycock himself has not managed to escape the collective deception.

Indeed, in one sense Laycock’s version of the Puritan mistake is more severe than the versions of which others may be guilty. For example, John Garvey is one scholar to whom Laycock ascribes this error. And it is true that Garvey understands and defends religious freedom in accordance with

73. Laycock, Religious Liberty as Liberty, supra note 3, at 55.
74. Id. (emphasis added).
75. In an unusual autobiographical passage, Laycock explains his own agnosticism—an agnosticism notable, I would say, for its honesty, humility, and genuine respect for those of differing views or faiths. Laycock, Religious Liberty as Liberty, supra note 3, at 100–01.
76. Laycock, Religious Liberty, supra note 4, at 124.
77. Laycock points out that individuals are agnostic for epistemological reasons, while government must be agnostic for constitutional reasons. Laycock, Religious Liberty as Liberty, supra note 3, at 101. Could not the theorists and scholars he criticizes—John Garvey, for example—say much the same for their own favored interpretations? Laycock also pleads that “[i]f we could all agree on the principle of government neutrality toward religion, we could all abandon our efforts to influence government on religious matters, and devote all that energy to religious practice and proselytizing in the private sector.” Id. at 64 (emphasis added). Maybe so, but of course the proponents of any position can say as much. “If only we could all agree on [Catholicism, Protestantism, scientific naturalism, . . . or agnosticism], we could live peacefully . . . .” and so forth.
78. Id. at 57, 65.
theistic premises. But Garvey does not conclude that the Constitution requires government to espouse or promote theism or, as Laycock somewhat tendentiously suggests, that religious liberty is somehow a "guarantee of religion." Laycock, by contrast, takes an agnostic and privatizing view of religion, and he goes on to conclude that religious liberty requires government itself to be agnostic and to confine religion to the private realm.

As it happens, I myself do not regard this as an egregious failing. On the contrary, I think any account of religious freedom will necessarily depend on what the theorist believes to be true with respect to religion, government, and other matters. Laycock himself has loftier aspirations, though—or at least different ones. "[M]y views on religion were and should be irrelevant," he says, "to my views on religious liberty." I do not think Laycock should impose that requirement on himself, and in any case I do not think he can meet it.

VI. Conclusion

In the course of this Review, I have expressed some criticisms and reservations regarding Douglas Laycock’s substantive neutrality. These criticisms and reservations, however, in no way preclude praise for Laycock’s extraordinary contribution. The writings in this volume alone (and as noted, there are three more volumes to come, and these do not count Laycock’s work in other fields, or his future work) would be proof and product of a magnificent scholarly and public career. Despite some significant disagreements, I have long admired Laycock’s work, but until rereading these writings as a body, I had not fully appreciated the magnitude of his achievement.

I would go further. At one point, Laycock notes that although he believes governmental religious expressions should be constitutionally forbidden, if he had to give up one component of Establishment Clause doctrine, this would be it. I would make, tentatively, a parallel concession. I do not think that Laycock’s general condemnation of public religious expression is well supported by law, history, or political prudence. More generally, I favor a smaller role in this area for constitutional law, and for courts, than Laycock does. Even so, I would concede that of the major interpretations of constitutional religious freedom that seem at the moment to

79. See Garvey, supra note 30, at 49 ("The best reasons for protecting religious freedom rest on the assumption that religion is a good thing.").
80. Laycock, Religious Liberty, supra note 4, at 123.
82. Laycock, Religious Liberty as Liberty, supra note 3, at 98 (emphasis added); see also Laycock, Substantive Neutrality Revisited, supra note 4, at 245 (“My ideal is that one’s views on religion should not predict one’s views on religious liberty.”).
have some significant measure of respectability, Laycock’s substantive neutrality may be the most attractive. The nation could do much worse than be governed by substantive neutrality; as a political matter, I am not sure that it is likely to do better—under current circumstances, at least.

One parting point. A legal scholar who actively involves himself in litigation, legislation, and public polemics may do good (or bad) in the real world that the more secluded academic scholar cannot, but he also incurs risks. There is a real risk that intellectual integrity will sometimes bend under the force of partisan passions or rhetorical expediency; we have seen recent instances, I believe, in this very field. Impressively, Douglas Laycock seems to have resisted this temptation. He notes that he has often been in both agreement and disagreement with political parties and interest groups on all sides of the political spectrum, but “they have generally respected my integrity when we disagreed.”84 From what I know, the respect is warranted. Whatever doubts one may have about Laycock’s general position or his various arguments (and as this Review reflects, I have quite a few), his extraordinary lawyerly–scholarly defense of religious liberty commands our admiration.

84. 1 RELIGIOUS LIBERTY, supra note 2, at xx.