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RESEARCH ARTICLE

Defining Neutrality, Combating Polarization: Laycock's Essential Contributions

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Abstract

Douglas Laycock's career in Religion Clause scholarship and advocacy spans two periods marked by two distinct concerns at the heart of the debates. This article connects them. In the first period, from the 1980s into the 2000s, the central issue was what general value or principle should drive Religion Clause decision-making. Laycock's approach, substantive neutrality toward religion, focused on minimizing government effects on religious choices and thus led the way in reconciling two key values: neutrality on the one hand, and religious liberty or voluntarism on the other. In the second period, from the mid-2000s forward, religious liberty became caught up in the United States' cycle of polarization. Laycock again led the way; his work on Religion Clause neutrality supports the effective defense of religious liberty in a polarized age. In particular, he called for aggregating neutrality: recognizing that any policy can have differing effects on the religious choices of different relevant actors and comparing those effects with the goal of minimizing burdensome effects on religious choices overall. This approach, done with care, can take account of the effect on competing sides and thus productively address polarized conflicts.

Keywords: religious liberty; neutrality toward religion; socio-political polarization; religious voluntarism; First Amendment Religion Clauses; substantive neutrality; aggregated neutrality; religious liberty and LGBTQ rights

Douglas Laycock's long, eminent career in Religion Clause scholarship and advocacy has spanned two periods marked by two distinct concerns at the heart of the debates. He has been a towering figure in both periods. In this article, I seek to connect them.

In the first period, from the 1980s into the 2000s, the central issue was what general value or principle should drive decision-making under the Religion Clauses. As the U.S. Supreme Court abandoned the strong version of church-state separation it had applied through the 1970s—particularly in cases about government funding of religiously affiliated entities—the question became what core value should replace separation. Should the court emphasize treating religion equally with other moral or ideological views and activities? Or should it preserve distinctive constitutional treatment of religion—but now not so much to separate religion from government as to preserve private choice or liberty in religious matters in the face of pervasive government?[1]

[1] For a summary of the three values, see Thomas C. Berg, *Slouching Toward Secularism: A Comment on* Kiryas Joel School District v. Grumet, 44 Emory Law Journal 433, 441–55 (1995).

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The court's replacement of strict separation with other values became most clear as it held that religious persons and entities can, even must, be included in programs of government aid generally available to others.[2] The debate between those other values—equal treatment of religion (often called *neutrality*) and preservation of religious choice—became most clear in the question whether the Free Exercise Clause required exemptions for religion from generally applicable laws. That is, does the clause require distinctive treatment of religion in order to preserve liberty to exercise religion? The court rejected such exemptions in *Employment Division v. Smith*,[3] setting off an extended debate and series of reactions.

Laycock set the terms of debate on these issues. As to religious exemptions, he became their most successful proponent: *Smith*'s most successful opponent. He wrote classic defenses of exemptions on doctrinal and originalist grounds,[4] helped lead successful efforts to restore exemptions through federal religious-freedom statutes,[5] and successfully argued for key limits on *Smith* as both scholar and Supreme Court advocate.[6] As to government aid, he argued that the equal inclusion of religious beneficiaries in aid programs was consistent with the best understandings of religious neutrality and religious liberty.[7]

Laycock presented these specific arguments within a general approach for reconciling the values of neutrality and liberty. He called it *substantive* neutrality. In contrast to formal neutrality, which requires that a law's terms neither favor or disfavor religion as against other views or activities, substantive neutrality requires that a law in its effect neither encourage nor discourage religion: that is, religion should be left "as wholly to private choice as anything can be."[8] By focusing on protecting religious choice, the substantive version of neutrality largely coincided with the value of religious liberty or "voluntarism."[9]

In the second period of Laycock's career, from the mid-2000s forward, a different concern came to dominate Religion Clause debates. Religious liberty became caught up in America's increasingly serious cycle of political and cultural polarization. As I have described in a recent book, "religious liberty has become one of the key issues that polarize Americans into angry and fearful competing camps," as liberals and conservatives clash over matters like equal freedom for Muslims and religious liberty versus LGBTQ rights.[10] This "bitterness of religious-liberty disputes arises from, but also feeds into, the overall bitter polarization of our society."[11]

[2] *See, e.g.*, Zelman v. Simmons-Harris, 536 U.S. 639 (2002) (religious schools can be included in voucher programs assisting parents); Agostini v. Felton, 521 U.S. 203 (1997) (religious schools can be included in some direct-aid programs); Rosenberger v. Rector & Visitors of the University of Virginia, 515 U.S. 819 (1995) (student religious publications must be included in university student-organization funding).

[3] 494 U.S. 872 (1990).

[4] *See, e.g.*, Douglas Laycock, *The Remnants of Free Exercise*, 1990 Supreme Court Review 1 (hereinafter "Laycock, *Remnants*"); Douglas Laycock, *Regulatory Exemptions of Religious Behavior and the Original Understanding of the Establishment Clause*, 81 Notre Dame Law Review 1793 (2006) (hereinafter "Laycock, *Regulatory Exemptions*").

[5] Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb–2000bb-4; Religious Land Use and Institutionalized Persons Act, 42 U.S.C. §§ 2000cc–2000cc-5.

[6] *See, e.g.*, Douglas Laycock & Steven T. Collis, *Generally Applicable Laws and the Free Exercise of Religion*, 95 Nebraska Law Review 1 (2016); Church of the Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520 (1993) (argued by Laycock); Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC, 565 U.S. 171 (2012) (argued by Laycock).

[7] Douglas Laycock, *Churches, Playgrounds, Government Dollars—and Schools?*, 131 Harvard Law Review 133 (2017); Douglas Laycock, *The Underlying Unity of Separation and Neutrality*, 46 Emory Law Journal 43 (1997). See also Thomas C. Berg & Douglas Laycock, *Espinoza, Government Funding, and Religious Choice*, 35 Journal of Law and Religion 361 (2020).

[8] Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DePaul Law Review 993, 1001–02 (1990).

[9] *Id.*

[10] Thomas C. Berg, Religious Liberty in a Polarized Age 4 (2023).

[11] *Id.*

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In the second period, Laycock has again led the way in defending religious liberty, now against the threat posed by polarization. Religious liberty, he emphasizes, cannot be special pleading for one group; that undermines its credibility.[12] It must protect all faiths and be part of a fabric of liberties that protect all Americans. Accordingly, Laycock has continued to advocate liberty for all faiths. And in articles, Supreme Court briefs, and legislative submissions, he has advocated both equality rights for LGBTQ people and liberty rights for conservative religious believers. I have been privileged to collaborate with him on such efforts.[13]

These first and second periods connect through Laycock's work on Religion Clause values, which also supports the effective defense of religious liberty in a polarized age. The principles of neutrality Laycock has articulated can help counteract polarization. I have argued that religious liberty, properly understood, can calm rather than inflame polarization, "play[ing] its historic role of countering cycles of suffering, fear, and resentment."[14] Laycock has provided essential tools for religious liberty to perform that task.

Substantive Neutrality (that is, Voluntarism) and Polarization

Laycock's first, foundational contribution to the concept of religious neutrality is *substantive neutrality*. Substantive neutrality reconciles neutrality and religious liberty, and it provides resources to counter the polarization of views on religious liberty.

Substantive Neutrality, Voluntarism, and Religious Liberty

Laycock's key accomplishment with substantive neutrality was to articulate a foundational principle that reconciled special constitutional concern with religion in some cases—most notably, religious exemptions from neutral and generally applicable laws—with equal treatment of religion in other cases—most notably, in cases of private religious speech and government funding. Put differently, substantive neutrality reconciled the concept of neutrality toward religion (often thought of as treating religion equally with other ideas) and the concepts of voluntarism, non-coercion, and religious choice (which, in a pervasively regulated society, may require treating religion differently from other ideas). As he put it in 2007:

> Regulation of religious practice often restricts religious liberty, yet regulatory exemptions for religious practice are often attacked as departures from neutrality. Do we have to choose between liberty and neutrality, or is there an understanding of liberty and neutrality that reconciles the two approaches?

[12] Douglas Laycock, *Religious Liberty as Liberty*, 7 Journal of Contemporary Legal Issues 313, 353 (1996) ("Religious liberty only or principally for people of one's own views would not be religious liberty at all; that was the Puritan mistake in seventeenth-century Massachusetts.").

[13] As to articles and book chapters, see, for example, Douglas Laycock & Thomas C. Berg, *Protecting Same-Sex Marriage and Religious Liberty*, 99 Virginia Law Review Online 1 (2013) (hereinafter "Laycock & Berg, *Protecting*"); Douglas Laycock, *Afterword*, in Same-Sex Marriage and Religious Liberty: Emerging Conflicts 189 (Douglas Laycock & Robin Fretwell Wilson eds., 2008) (hereinafter "Laycock, *Afterword*"). As to Supreme Court briefs, see, for example, Brief of Douglas Laycock et al. as Amici Curiae in Support of Petitioners, Obergefell v. Hodges 576 U.S. 644 (2015) (No. 14-556), 2015 WL 1048450. (hereinafter "*Obergefell* Brief"); Brief of Christian Legal Society et al. as Amici Curiae in Support of Petitioners, *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, 138 U.S. 372 (2017) (No. 16-111), 2017 WL 4005662. On legislative submissions, *see, e.g.*, the letters collected at ARCHIVE: Memos/Letters on Same-Sex Marriage and Religious Liberty, Mirror of Justice (August 2, 2009), https://mirrorofjustice.blogs.com/mirrorofjustice/2009/08/memosletters-on-religious-liberty-and-samesex-marriage.html.

[14] Berg, Polarized Age, *supra* note 10, at 343.

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> I offered substantive neutrality as that reconciliation. Neutral incentives, neither encouraging nor discouraging religion, is a coherent conception of neutrality that is consistent with religious liberty and consistent with regulatory exemptions for religious behavior.... [It[is more consistent with religious liberty and religious voluntarism than [is] formal neutrality.[15]

Laycock has explained many times why exemptions usually coincide with substantive neutrality. Here is an early explanation:

> [O]ne must consider the incentive effects of denying exemptions and of granting them. It is clear that criminal punishment of religious practice discourages believers from practicing their faith. But in most contexts, an exemption for religious practice does not encourage non-believers to join the faith. Much religious activity is self-restraining, burdensome, or meaningless to non-believers.... The magnitude of encouragement incident to an exemption is generally less than the magnitude of discouragement incident to criminalization, and so exemption comes closer to substantive neutrality.[16]

Substantive Neutrality and Polarization

Substantive neutrality (or alternatively phrased, voluntarism) also provides several resources for addressing and mitigating religiously grounded polarization. It aims to minimize government influence on religious choice. But it does not do so by consigning religious activity to a narrow corner of life. Such a restriction alienates believers, since as Laycock recognizes, "beliefs about religion are often of extraordinary importance to the individual—important enough to die for, to suffer for, to rebel for, to emigrate for, to fight to control the government for."[17] He emphasizes that the right to exercise religion includes the right to exercise it in public aspects of life.[18] Substantive neutrality takes the claims of religious believers seriously, even as it prevents government from imposing their faith on others.

Substantive neutrality can aid in addressing polarization first because it provides one of the strongest cases for broad religious freedom and, in particular, for religious exemptions from burdensome laws of general applicability. Strong protection of religious freedom is one essential component in calming religiously based conflict, whether it is Muslims facing hostile or indifferent laws, religious conservatives facing overly burdensome nondiscrimination

[15] Douglas Laycock, *Substantive Neutrality Revisited*, 110 West Virginia Law Review 51, 65 (2007). Some general approaches to the Religion Clauses emphasize multiple principles that may or may not be reconcilable with each other. *See, e.g.*, John Witte, Jr., Joel A. Nichols & Richard W. Garnett, Religion and the American Constitutional Experiment ch. 3 (5th ed. 2022) (listing "the essential rights and liberties of religion"). In my view, Laycock's approach does not reduce religious liberty entirely to the principle of substantive neutrality. As the text notes, he recognizes a variety of values such as equality, neutrality, and noncoercion or voluntarism; substantive neutrality attempts to draw them together and find the places where they overlap. But when multiple principles that are prima facie valid govern an area, decision-makers need some sort of metric, like substantive neutrality, for deciding among them. *See, e.g.*, Thomas C. Berg, *Religion Clause Anti-Theories*, 72 Notre Dame Law Review 693 (1997).

[16] Laycock, *Remnants*, *supra* note 4, at 16–17. *See also* Berg & Laycock, *supra* note 7, at 375 ("The threat of civil or criminal penalties or loss of government benefits profoundly discourages the regulated religious practice. Exempting the religious practice from regulation eliminates that discouragement, and it rarely encourages the exempted practice.").

[17] Laycock, *supra* note 12, at 317.

[18] *See, e.g.*, Douglas Laycock, *Religious Liberty for Politically Active Minority Groups: A Response to NeJaime and Siegel*, 125 Yale Law Journal Forum 369, 372 (2016) ("Religious conservatives do not forfeit their right to conscientious objection by making political arguments about the laws they object to, and they do not forfeit their right to make political arguments by invoking their right to conscientious objection.").

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rules, or other situations. Strong protection of religious freedom for all "can help calm fear and alienation, promoting civic peace, by providing the sense of security that one's deepest commitments will not be penalized except in cases of necessity."[19] Religious freedom must have limits; civic peace also requires that (as do our constitutional history and tradition). But only strong religious-freedom protection has a chance of quelling the fear and alienation of religious believers.

Laycock does not treat reducing social conflict as religious liberty's sole purpose. Equally important, today and historically, is the fact that religious beliefs "are often of extraordinary importance to the individual."[20] When people are coerced to violate their deep commitments, they suffer either the coercion itself or the distress of violating the commitments. In fact, Laycock explains, the harm of personal suffering connects to the harm of social conflict and polarization. The importance of religion to individual believers is "an independent reason to leave religion to the people who care about it most"; but it is also "why governmental efforts to impose religious uniformity had been such bloody failures."[21] When people suffer impositions on their deep commitments, they resent and resist the impositions and retaliate in kind when they have power.

Substantive neutrality and voluntarism also support religious freedom for all faiths. Protection only for favored faiths does not promote religious choice but distorts it. As Laycock put it some years ago, "defend[ing] religious liberty for my own faith group, or ... some group in strategic or tactical alliance with my own faith group," is "the Puritan mistake."[22] That phrase was prescient: today selectivity in protecting religious freedom has contributed greatly to polarization over it. Moreover, Laycock argues for extending religious-freedom protections to atheism and agnosticism and even to deep secular moral views.[23]

But substantive neutrality also includes freedom from government imposition of religious practice. Religion should be as free as possible from government influence, whether in favor of (religion in general, or any faith) or against. The purpose of exempting religious exercise from generally applicable laws, Laycock emphasizes, is not to promote religion, but to promote liberty in religious matters. This principle operates both at the level of justifications for religious freedom and at the level of substantive rules. As to the former, Laycock resists justifying religious freedom through theological propositions—for example, "God exists, so people should be free to worship" or "true religion must be voluntary." Although he acknowledges the importance of such justifications in the founding period, and their appeal to some audiences, he observes that they "can neither persuade nontheists nor speak equally to all the varieties of theistic religious experience."[24]

As to substantive rules that prevent government promotion of religion, Laycock has consistently supported significant Establishment Clause limits on government sponsorship of religious rituals or symbols. "With respect to government speech," he argues, "in many contexts government silence is more neutral than attempts at even-handed speech": "It is very hard to discuss religion in a way that is neutral and fair to the myriad of competing

[19] Berg, Polarized Age, *supra* note 10, at 119.

[20] *See supra* note 17 and accompanying text. See also Laycock, *supra* note 12, at 317 ("[G]overnmental attempts to suppress disapproved religious views had caused vast human suffering in Europe and in England and similar suffering on a smaller scale in the colonies that became the United States.").

[21] *Id.*

[22] *Id.* at 353. The Puritans of course fled repression in England only (in order) to impose it in New England.

[23] *Id.* at 326–37. His argument on atheism and agnosticism is that explicit government promotion of these explicit positions on religion would be a kind of religious establishment, and thus a prohibition on them would be a prohibition on the exercise of religion. *Id.* at 330.

[24] *Id.* at 324.

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views. When government prays, it models a particular form of prayer.... When government celebrates Christmas, it puts its influence behind a particular version of how to celebrate Christmas ... always a public [that is, official] version."[25]

Explicit government religious expression will "predominant[ly]" express "majoritarian religious views, diluted to appeal to the largest possible coalition, with occasional nods to influential minorities."[26] Thus, with respect to explicit expression, "[g]overnment influence on religion is generally minimized by government silence and a public forum that is wide open to the broad range of views about religion that compete in the private sector."[27]

This position likewise holds hope of reducing polarization. At the least, it will reduce controversy over what religious messages the government should send. Those controversies have been real; consider, among others, the repeated flare-ups over who should pray at legislative meetings and what the prayers should say.[28] Admittedly those controversies seem almost quaint compared with the bitter, almost existential clashes between LGBTQ-rights proponents and religious conservatives. But the two are related for the purposes of religious liberty. As matter of principle, protection of religious dissenters in LGBTQ cases and protection of dissenters against government-imposed religion in prayer or symbols cases reinforce each other. Consistent protection in both cases reinforces that religion is a particularly sensitive matter in which government should avoid intervening, and that even subtle forms of coercion should be presumptively invalid—whether the coercion is to practice religion or not practice it.[29]

To clarify: my claim concerning polarization is not that courts should decide religious-liberty cases by determining in any given instance what result will most likely reduce polarization or division. Such case-by-case management of division, which Justice Breyer often seemed to advocate in his opinions,[30] has received persuasive (in my view) criticism that it is beyond courts' competence to implement fairly.[31] Rather, my claim is that courts should decide cases by following principles of religious liberty for all, and that this overall commitment will ultimately reduce division—at least compared with alternative courses like allowing suppression of religious practices or allowing government promotion of its favored religious view(s). James Madison put it this way: "[e]qual and compleat liberty ... does not wholly eradicate" religious conflict, but it "sufficiently destroys its malignant influence on the health and prosperity of the State."[32] As I have written elsewhere, "the First Amendment is a wager in favor of a particular method of reducing division: namely, leaving religion as much as possible to the choices of private individuals and groups."[33]

[25] *Id.* at 351.

[26] *Id.*

[27] *Id.* See also Laycock, *supra* note 15, at 71, 72 ("[A] school-sponsored prayer at the opening of every class, or at every meeting of the school board, or at every graduation ceremony ... is not substantively neutral. ... [Government prayers cannot] be delivered in a way that is consistent with individual choice. ... Neither can scriptures, creeds, Christmas displays, or any other government speech promoting or denigrating religion.").

[28] *See, e.g.*, Christopher C. Lund, *Legislative Prayer and the Secret Cost of Religious Endorsements*, 94 Minnesota Law Review 972 (2010).

[29] *See* Berg, Polarized Age, *supra* note 10, 257–300.

[30] *See, e.g.*, Van Orden v. Perry, 545 U.S. 677, 702–03 (2005) (Breyer, J., concurring in the judgment) (voting to uphold 10 Commandments display on ground that it had caused little or no controversy); Zelman v. Simmons-Harris, 536 U.S. 639, 723–26 (2002) (Breyer, J., dissenting) (advocating to invalidate school-voucher programs on ground that they cause controversy).

[31] *See, e.g.*, Richard W. Garnett, *Religion, Division, and the First Amendment*, 94 Georgetown Law Journal 1667 (2006).

[32] James Madison, Memorial and Remonstrance Against Religious Assessments ¶ 11 (1785), Founders Online, https://founders.archives.gov/documents/Madison/01-08-02-0163 (last visited April 30, 2026).

[33] Berg, Polarized Age, *supra* note 10, at 148.

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The Limits of Substantive Neutrality

However, substantive neutrality alone cannot fully address the challenges of polarization. It disapproves of impositions on choice in religious matters, that is, the choice to practice religion or not. But it does not address the effects of religious activity on other choices that do not inherently involve religion. Substantive neutrality toward religion cannot alone address the conflict between, for example, same-sex family rights and religious objectors' rights. Nor, taken alone, does it give clear guidance on the boundaries of religious freedom as against government interests in public safety, peace, or order. Substantive neutrality alone does not provide the principles for drawing lines when states seek to stop COVID-19 spread by restricting religious gatherings or mandating vaccinations, or in the many other cases where religious exercise and secular civil laws collide. Substantive neutrality explains why religious exemptions are justified in those circumstances, and why those exemptions should give strong protection. But it gives only limited guidance on the precise scope of exemptions.

To fix the lines between religious exercise and other personal choices, or between religious exercise and government interests, requires analyzing two other matters: (1) what constitutional rights protect those other personal choices and (2) what principles determine the government interests that are important enough to limit religious exercise. On the first point, no theory of the Religion Clauses, including substantive neutrality or voluntarism, can alone generate those other constitutional rights (for example, family or other privacy rights). They rest on their own separate grounds. On the second point, substantive neutrality gives only partial guidance on whether the boundary of free exercise rights should be set by compelling governmental interests, some level of intermediate scrutiny, or another standard. Laycock has consistently—and successfully—defended the compelling interest test, and I have joined him in doing so.[34] But that line does not follow directly from substantive neutrality.[35]

Aggregated Neutrality: Comparing Burdens on Differing Rights

Laycock's 1990 article made another point about neutrality—one that has attracted less attention but is as important as "substantive neutrality" in countering polarization and protecting the rights of all Americans. Neutrality, he said, must not be "disaggregated."[36]

Aggregated Neutrality in Religion Cases

Laycock's call for "aggregating" neutrality arose from his criticism of *Aguilar v. Felton*,[37] the most extreme of the Supreme Court's "no-aid" Establishment Clause decisions, which had invalidated a federal program under which public-school teachers gave remedial classes in

[34] *See, e.g.*, Douglas Laycock & Oliver B. Thomas, *Interpreting the Religious Freedom Restoration Act*, 73 Texas Law Review 209, 226–28 (1994); Douglas Laycock & Thomas C. Berg, *Protecting Free Exercise Under* Smith *and After* Smith, 2021 Cato Supreme Court Review 33, 41–51.

[35] Substantive neutrality places one clear limit on religious exemptions. It says that exemption should not apply when, on balance, it would encourage or incentivize people to adopt a religious practice, because the behavior in question coincides too much with secular self-interest. Laycock has consistently noted that this concern applies to military-draft exemptions or tax exemptions given solely to religious behavior. In such cases, the exemption should be expanded to a broader range of activity including but not limited to religion, or at least government should provide for some alternative burden to reduce the incentive to adopt or feign religious practice. *See, e.g.*, Laycock, *supra* note 8, at 1017; Laycock, *supra* note 15, at 85 n.178 ("The problem becomes much more difficult if religious behavior aligns with self-interest, as in conscientious objection to serving in the military or paying taxes. Then exemptions must be denied or conditioned on the imposition of some alternative burden.").

[36] Laycock, *supra* note 8, at 1007.

[37] 473 U.S. 402 (1985).

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math and reading to low-income children in private, including religious, K-12 schools. *Aguilar* had held that the program unconstitutionally promoted religion because the religious-school environment might influence the teachers to teach religion—and that supervising them to prevent such teaching would excessively entangle church and state.[38] Laycock explained the key error in this reasoning:

> Substantive neutrality always requires that the encouragement of one policy be compared to the discouragement of alternative policies. The principal effect of *Aguilar* was to greatly increase the cost of providing remedial programs to children in private schools. After *Aguilar*, the government or the school must provide separate off-campus facilities and the children must travel to those facilities and back again. The effect of increasing the cost was to reduce the number of children who could be served. So, thousands of our least advantaged citizens are now forced to choose: forfeit their right to remedial instruction in math and reading, or forfeit their right to education in a religious environment. That effect discourages religion, and dwarfs the risk that the government's remedial math or reading teacher might suddenly start proselytizing.[39]

Laycock called this error "disaggregated neutrality," meaning that the court "look[ed] only at one side of the balance of advancing or inhibiting [religion]. Because absolute zero is not achievable, it is always possible to find some effect of advancing or inhibiting religion. Thus, if you look only at one side of the balance, you can always find a constitutional violation."[40] As he later put it: "It is very difficult for government to have no effect on people's religious incentives; government [as both funder and regulator] is the 800-pound gorilla in the society." Therefore, "[i]n a regime of substantive neutrality, the magnitude of effects matters; we must sometimes choose a small degree of support for religion to avoid a very large penalty on religion, or vice versa."[41]

As these quotations indicate, "aggregating" neutrality is part of pursuing substantive neutrality. The latter aims to minimize, overall, the effect that government has on private religious choices. Government policies have multiple effects, and all must be considered.

Assessing neutrality in the aggregate—that is, comparing the relative effects of competing rules on the relevant actors—has been crucial to Laycock's analysis of key issues. Recall, for example, his reasoning about free exercise exemptions: "one must consider the incentive effects of denying exemptions and of granting them," and in that balance "exemption comes closer to substantive neutrality."[42] In another example, he explained why, in the aggregate, equal funding of the education in religious K–12 schools is "more nearly [substantively] neutral, and allows more private choice—more liberty"— than does withholding such funding: "Religion benefits when government helps fund church-affiliated schools.... [But that] is only half the analysis. We must compare that benefit to the consequences of any alternative policy, and the alternative is for government to offer up to $10,000 for education to those families, and only those families, who surrender their constitutional right to get that education in a religious environment. The coercive effect of that conditional offer dwarfs the benefit to religion of making the money available on equal terms."[43] And "[a]s to the taxpayers who object to funding religious education," Laycock

[38] *Id.* at 408–14.
[39] Laycock, *supra* note 8, at 1008 (internal citations omitted).
[40] *Id.*
[41] Laycock, *supra* note 15, at 83.
[42] Laycock, *Remnants*, *supra* note 4, at 16; see *supra* text at note 16.
[43] Laycock, *supra* note 15, at 83–84.

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argued, "any effect on them is just too small and too attenuated to outweigh the effect, on families choosing schools, of funding some options and not others."[44]

A final example comes from Laycock's amicus brief with Christopher Lund in *Kennedy v. Bremerton School District*.[45] The brief supported the school district's discretion to forbid Coach Joseph Kennedy from praying immediately postgame at midfield, and it explained why his claim to exercise religion should fail while other teachers' claims—for example, a Muslim teacher's claim to wear a headscarf in class—should succeed. The "fundamental explanation lies in the asymmetry of the burdens involved": "[I]f the Muslim teacher is allowed to wear the veil, she will exert the tiniest amount of pressure on her students to become Muslim. But if she is not allowed to wear the veil, she will lose her government job because of her faith. … In the name of reducing the pressure on students from nearly nothing to absolutely nothing, a rule forbidding religious headwear would make observant Muslim women categorically ineligible to work in an entire field of public employment."[46]

But Kennedy's activity, Laycock and Lund argued, "presents the reverse danger. Here also the burdens are asymmetric, but in the other direction."[47] On one side, the record showed that Kennedy's prayers "put genuine religious pressure on his students": his players had joined his earlier prayers, and some parents reported that their children had felt coerced.[48] "[O]n the other side of the balance, Petitioner has ample ways to avoid putting that religious pressure on his students" while still exercising his religion, by praying a bit later or "unobtrusively on the sidelines, as a Buddhist coach did, without the public display inherent in kneeling or walking to the fifty-yard line or both."[49]

Because of the asymmetry of burdens, Laycock and Lund argued, ruling for Kennedy would extend his free exercise and free speech rights so far as to subordinate Establishment Clause principles prohibiting coercion of students through his official powers as teacher and coach. The Supreme Court disagreed, upholding Kennedy's rights and ruling, based on a confined view of the record, that he had not coerced any students during the three postgame events narrowly at issue.[50] The court said that many cases of religious speech in public simply present no conflict between free exercise and non-establishment: speech in one's individual capacity cannot be official coercion.[51] That is generally true. But in *Kennedy*, the individual was acting in the very place and time where he also acted as an official. In that situation, the principles of individual free speech and official non-coercion overlapped, and the court had to decide which of the two properly governed the case.

When rights overlap or conflict if each is pushed too far, as in *Kennedy*, the method that Laycock and Lund used is a powerful tool of conflict management and resolution. One compares the burdens on each side, asking if players experienced meaningful pressure from Kennedy's practice and if he could pray in a less coercive way that still met his obligation to give postgame thanks. This approach, done with care, appropriately takes account of the interests of each side.

[44] *Id.* at 85 ("Each taxpayer's money goes into an enormous pool, making an infinitesimal fraction of the government's budget, and government then spends a small fraction of that budget to support secular education in religious institutions[.]").

[45] 597 U.S. 507 (2022). See Brief of Baptist Joint Committee for Religious Liberty *et al.* as Amici Curiae in Support of Respondent, Kennedy v. Bremerton, 597 U.S. 507 (2022) (No. 21-418), 2022 WL 1032638.

[46] Brief of Baptist Joint Committee, *supra* note 45, at 12–13.

[47] *Id.* at 13.

[48] *Id.*

[49] *Id.* at 15–16 (internal citations omitted).

[50] *Kennedy*, 597 U.S. at 536–39.

[51] *Id.* at 532–33.

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Comparative Burdens and Polarization

Comparing the burdens of various policies on the various people and rights involved can be a means of mitigating polarized conflicts. A key feature of polarization is that people not only conflict in their claims of right but refuse to give the slightest weight to the other side's claims. For example, in the conflict between LGBTQ persons and religious conservatives, as Laycock has said, "both sides are protecting what is extremely important to them, and seeking to minimize any claim of right on the other side."[52]

Indeed, social scientists tell us that today's polarization is especially entrenched because it is "negative" and "affective." It is negative, rather than positive, in that people on each side "hang together mainly out of sheer hatred of the other team, rather than a shared sense of purpose."[53] And it is "affective" in that extends beyond issue disagreements to a broad dislike and fear of the other side.[54] Attacking the other side is not the mere byproduct of an ideological project; it almost becomes the project.

In such conditions, reducing fear and resentment requires, among other things, taking all parties' interests and rights seriously. As far as the Religion Clauses go, this means protecting all religious positions, including the right to adhere to any faith and the right to reject any or all faiths. It means preventing burdens on the practice of religion as well as pressure or inducement to practice a religion. And when a specific scenario involves plausible assertions of burdens or pressure both ways—when it lies close to the line between one person's right and another's—taking all persons' rights and interests seriously requires assessing the relative burdens. It requires aggregated neutrality.

Comparing Burdens on Differing Rights: The LGBTQ Cases

In other cases, however, the conflict of constitutional or moral interests goes beyond religious-freedom rights. LGBTQ people base their claims to equal freedom not on the Religion Clauses but on other constitutional or statutory provisions: equal protection, unenumerated family and privacy rights, nondiscrimination statutes. (Many same-sex couples, of course, understand their marriages as having a religious basis; but their legal claims to marry do not depend on that basis.) The conflict between LGBTQ people and religious conservatives cannot be resolved solely by religious neutrality, even a neutrality that aggregates and considers all competing religious claims.

Nevertheless, the method of aggregating claims—comparing burdens—can also apply to clashes between different constitutional claims such as religious freedom and nondiscrimination. At one end of the spectrum of such cases are those involving the ministerial exception, which imposes an absolute barrier to lawsuits challenging a religious organization's hiring, dismissal, control, or discipline of its leaders.[55] This strength reflects the exception's grounding in history;[56] but it also reflects, as Laycock and I have emphasized, the asymmetry of burdens in this category of cases: "The shield is absolute partly because of the severity of the burden [that such suits impose]. Interference with a religious organization's

[52] As quoted in Albert Mohler, The Future of Religious Liberty in America: A Conversation with Law Professor Douglas Laycock, Sept. 16, 2020, https://albertmohler.com/2020/09/16/douglas-laycock/.

[53] Alan Abramowitz & Stephen Webster, *"Negative Partisanship" Explains Everything*, Politico, Sept./Oct. 2017, https://www.politico.com/magazine/story/2017/09/05/negative-partisanship-explains-everything-215534. For a summary of social-science analysis of negative polarization, see Berg, Polarized Age, *supra* note 10, at 33–34.

[54] *See, e.g.*, Berg, Polarized Age, *supra* note 10, at 25–33.

[55] Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission, 565 U.S. 171 (2012); Our Lady of Guadalupe School v. Morrissey-Berru, 591 U.S. 732 (2020).

[56] See, e.g., *Hosanna-Tabor*, 565 U.S. at 182–85; Thomas C. Berg et al., *Religious Freedom, Church-State Separation, and the Ministerial Exception*, 106 Northwestern University Law Review Colloquy 175, 178–84 (2011).

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key governance decisions, including who should fill 'key roles,' tends to affect not just one of its practices but many."[57] And "religious bodies' internal government has less effect on societal interests.... Ministers can find another congregation, denomination, or other religious entity, or any secular occupation."[58]

But the interests were asymmetrical the other way when some religious conservatives asserted that protecting religious freedom required rejecting same-sex civil marriage. As Laycock and I wrote as amici in *Obergefell v. Hodges*: "No one can have a right to deprive others of their important liberty as a prophylactic means of protecting his own.... [E]ach claim to liberty in our system must be defined in a way that is consistent with the equal and sometimes conflicting liberty of others."[59] Religious-liberty issues arise not from "[t]he mere recognition of same-sex civil marriage," but only when the state "pressures religious organizations or believer to recognize or facilitate [a] marriage [against] their religious commitments." And that valid concern can be addressed through religious exemptions from nondiscrimination laws.[60]

Finally, Laycock has analyzed comparative burdens in the cases that have drawn the most attention: commercial vendors who refuse to provide goods or services for same-sex weddings. He has consistently supported religious-liberty protection but limited to the class of small vendors who provide personal goods or services such as videography or custom-designed cakes or flowers. They suffer a significant burden, he argues, if forced to choose between violating their beliefs and exiting the profession; notably, he supports this assertion with evidence from the history leading to the First Amendment. "Forcing [a person] to choose between his business and his conscience is an historic means of religious persecution," one known to the framers of the constitution.[61] Eighteenth-century England excluded Catholics from numerous businesses and professions, including civil offices, schoolmaster, barrister, solicitor, notary, and (in Ireland at least) any business having more than two apprentices. "The Free Exercise Clause must be understood at least to address [these] historically familiar means of religious persecution."[62] On the other side, small vendors' refusal typically places no material restriction on gay couples' access to goods or services, since multiple alternative providers usually exist—and when they do not, as perhaps in some rural areas, Laycock would override the religious claims to ensure access.[63]

That leaves, as an argument for the LGBTQ-rights side, the *dignitary* interest in preventing the insult or indignity that comes with every refusal of services. Laycock's answer, in which I join, is that this harm, although real, cannot override a claim of religious conscience on the other side. That is because religious objectors also suffer indignity and emotional harm if they are compelled to violate their faith: "Those bakers willing to turn away good business for religious reasons believe that they are being asked to defy God's will, disrupting the most important relationship in their lives, a relationship with, an omnipotent being who controls their fates.... These are among the harms religious liberty is intended to prevent."[64]

Whatever conclusion is proper for that specific conflict, some such comparison of burdens is necessary if we are to protect both rights. So far, each side has sought mostly

[57] Laycock & Berg, *supra* note 34, at 56 (quoting *Our Lady*, 591 U.S. at 747) ("'[A] wayward minister's preaching, teaching, and counseling could contradict the church's tenets and lead the congregation away from the faith.'").

[58] Laycock & Berg, *supra* note 34, at 57.

[59] *Obergefell* Brief, *supra* note 13, at 11.

[60] *Id.* at 12.

[61] *Masterpiece* Brief, *supra* note 13, at 32–33. See also Laycock, *Afterword*, *supra* note 13, at 201.

[62] *Masterpiece* Brief, *supra* note 13, at 33.

[63] Laycock, *Afterword*, *supra* note 13, at 199–200. Laycock and I, along with others, have written memos and letters to legislators in various states urging these positions. See ARCHIVE, *supra* note 13.

[64] *Masterpiece* Brief, *supra* note 13, at 31.

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to protect its own rights and minimize or denigrate the other's.[65] But we should protect both sides' important interests, in part because there are significant parallels between them. As Laycock has written, gays/lesbians and religious believers make "parallel and mutually reinforcing claims against the larger society": both claim "that some aspects of human identity are so fundamental that they should be left to each individual, free of all nonessential regulation, even when manifested in conduct."[66] In work over the last fifteen years, he and I have detailed the parallels. Both same-sex couples and religious conservatives claim protection for central, pervasive features of identity (the relationship to partner or to God). Both orientations are painful at best to change, and in both cases "the conduct that follows from that orientation [is likewise] central to a person's identity."[67] Both groups "seek to live out their identities in public"—in civil society rather than in the closet or solely in religious worship services—and both are "viewed as evil by a substantial portion of the population" and thus face "substantial risks of intolerant and unjustifiably burdensome regulation."[68]

If we appreciate the commonalities between these interests—not in their content, but in the role that they play in people's lives—it can help increase sympathy across ideological lines and increase the motivation to protect both. And protecting both sides reduces the cycle of fear, resentment, and retaliation that intensifies polarization. To this extent, then, a serious effort to understand and compare the burdens on conflicting rights can mitigate polarization and its harms.

The Comparison of Burdens and the Current Court

But even if comparison of burdens can protect conflicting sides and mitigate polarization, is the current Supreme Court interested in such an approach? Constitutional law doctrine can compare burdens on a case-by-case basis through situation-specific balancing tests. It can also compare them in categories of cases by setting rules balancing the interests typical of each category—the sort of analysis, described above for the ministerial exception,[69] that has also been prominent in free speech caselaw.[70] But the current court speaks negatively of balancing tests, and increasingly even of the tiers of scrutiny that reflect category-based comparisons of interests.

In *New York State Rifle & Pistol Assn. v. Bruen*,[71] the majority held that for Second Amendment cases, the sole question is whether a given "firearms regulation is part of the historical tradition that delimits the outer bounds of the right to keep and bear arms"; any element of "means-end scrutiny" is inappropriate."[72] The majority said that means-end scrutiny wrongly focuses courts on policy and too easily defers to the legislature; instead, the balance is struck

[65] The differing grounds for LGBTQ claims and religious-freedom claims give each side opportunity to promote the claims it cares about and denigrate those of the other side. Many social conservatives deny not only that LGBTQ rights can be found in the Constitution, but also that legislatures should protect them. And many liberals and progressives refuse to accept any religious-freedom claim against nondiscrimination laws—showing their disdain by putting *religious freedom* in scare quotes. But no solution to this issue is possible without taking both claims seriously.

[66] Laycock, *Afterword*, *supra* note 13, at 189.

[67] Laycock & Berg, *Protecting*, *supra* note 13, at 4.

[68] *Id.* at 4, 5. See also Thomas C. Berg & Douglas Laycock, *Protecting Same-Sex Marriage* and *Religious Liberty*, in Religion and Equality: Law in Conflict 167 (W. Cole Durham, Jr. & Donlu Thayer eds., 2016).

[69] See *supra* notes 55–58 and accompanying text.

[70] *See, e.g.*, Joseph Blocher, *Categoricalism and Balancing in First and Second Amendment Cases*, 77 New York University Law Review 375, 389 (2009) (describing how "First Amendment's categorical coverage rules were derived ... by weighing contemporary interests in light of the Amendment's core values").

[71] 597 U.S. 1 (2022).

[72] *Id.* at 19.

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by the text and "by the traditions of the American people."[73] Now Justice Kavanaugh has applied the criticism to all areas of constitutional doctrine and to all the tests "variously known as means-end scrutiny, heightened scrutiny, tiers of scrutiny, rational basis with bite, or strict or intermediate or intermediate-plus or rigorous or skeptical scrutiny. Whatever the label of the day, that balancing approach is policy by another name."[74] Although Kavanaugh stops short of suggesting overruling the many decisions applying tiers of scrutiny, he argues that they should not be "the ordinary approach" or extend to new areas.[75]

Under the history-and-tradition approach, it is unclear whether the court cares much about considering or acknowledging the conflicting interests in a way that might ease reception of its decisions in a divided nation. Some justices apparently think there is nothing the court can do to mitigate polarization.[76]

But the evaluation of competing interests is likely to remain a significant part of religious-liberty decision-making. First, such consideration is sometimes required by the governing legal standards. Both free exercise and free speech case law employ the tiers of scrutiny; even Kavanaugh does not suggest overturning those precedents. Federal religious-freedom statutes also explicitly require the courts to assess government interests, under strict scrutiny, when a law substantially burdens religious exercise.[77]

Moreover, one can gauge the relevant interests by looking (perhaps heavily) to history and tradition. An example is *Ramirez v. Collier*,[78] where the court held that Texas lacked a compelling interest in preventing a capital prisoner, being executed by lethal injection, from having his pastor pray aloud and lay hands on him during the execution. In determining the state's interest to be insufficient, the court relied first on "the rich history of clerical prayer at the time of a prisoner's execution."[79]

Laycock has similarly used history to show the seriousness of a burden on religion or to apply other general principles. For example, as noted above, he demonstrated how exclusions from businesses and professions were a significant example of English impositions on religious liberty, an example known to the founders.[80] And he has presented extensive originalist/historical arguments why regulatory exemptions do not violate the Establishment Clause but in fact follow from the Free Exercise Clause.[81]

Finally, and significantly, I doubt that the court can apply the history-and-tradition approach without some consideration of the competing interests in the case. Consider *Ramirez v. Collier* again. As already noted, the court relied first on the history of prayers at executions to show that bans on such prayers were not necessary to serve compelling

[73] *Id.* at 26.

[74] United States v. Rahimi, 602 U.S. 680, 731 (2024) (Kavanaugh, J., concurring) ("[Level-of-scrutiny approach] requires judges to weigh the benefits against the burdens of a law and to uphold the law as constitutional if, in the judge's view, the law is sufficiently reasonable or important.").

[75] *Id.* at 732.

[76] Justice Alito, for example, was recently quoted as saying, "I wish I knew [how to mitigate polarization]. I don't know. ... We have a very defined role, and we need to do what we're supposed to do. But this is a bigger problem. This is way above us." As quoted in Asma T. Uddin, *Our Divided Nation Needs the Supreme Court to Be a Unifying Force*, Deseret News, June 15, 2024, https://www.deseret.com/opinion/2024/06/15/divided-nation-supreme-court-polarization-alito/.

[77] See Religious Freedom Restoration Act (RFRA), 42 U.S.C. § 2000bb-1; Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. §§ 2000cc, 2000cc-1.

[78] 595 U.S. 411 (2022).

[79] *Id.* at 427.

[80] *See supra* notes 61–62 and accompanying text.

[81] Laycock, *Regulatory Exemptions*, *supra* note 4; Brief for Christian Legal Society et. al. as Amici Curiae Supporting Petitioner at 8–22, Fulton v. City of Philadelphia, Pennsylvania, 593 U.S. 522 (2021) (No. 29-247), 2020 WL 4078340.

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interests.[82] But the court then acknowledged that there remained a question whether that history applied to the issue currently before it: "[W]e recognize that audible prayer could present a more serious risk of interference during the delicate process of lethal injection than during the method of execution (hanging) that was used in most of the historical examples we have cited."[83] Ultimately, it concluded—persuasively—that the state could prevent distracting noise or intrusive touching during lethal injection by means less restrictive than total bans on praying aloud or touching the prisoner.[84] But the court had to do the analysis; the tradition did not define its own scope.

One could answer that *Ramirez* interpreted a statute (RLUIPA) that explicitly requires assessing government interests (under strict scrutiny). But then consider *United States v. Rahimi*, the court's first application of history and tradition under the Second Amendment after *Bruen.* There the question was whether the federal prohibition on gun possession by a person subject to a domestic-violence order fit within a tradition of regulation—or as the court put it, "whether the challenged regulation is consistent with the principles that underpin our regulatory tradition."[85] Because analogies to previous laws need not be exact, the majority said, "[a] court must ascertain whether the new law is 'relevantly similar' to laws that our tradition is understood to permit"—and "[w]hy and how the regulation burdens the right are central to this inquiry."[86] Thus the possession law was sufficiently similar to two historical traditions: (1) surety laws requiring bonds for gun possession by persons with records of misbehavior and (2) "going armed" laws prohibiting open carrying of "'dangerous or unusual weapons'" to "'terrify the good people of the land.'"[87] The federal possession law fit within this tradition because it served a similar goal—"restrict[ing] gun use to mitigate demonstrated threats of physical violence," rather than "broadly restrict [ing] arms use by the public generally"—and it imposed a similar burden—applying only after "judicial determinations [that] a particular defendant likely would threaten or had threatened another with a weapon."[88]

Again, in *Rahimi*, determining whether the tradition applied required analyzing the law's scope, the nature and extent of the burden that it imposed, and the interest that it served. True, the court compared the burdens and interests involved not to free-floating notions of seriousness or importance, but to the burdens and interests involved with the relevant traditions. Nevertheless, the court still assessed burdens on the right and interests underlying the law.

I have already discussed *Kennedy v. Bremerton School District.*[89] There the court emphasized that it reads the Establishment Clause in the light of "historical practices and understandings,"[90] but it paid that criterion no more than lip service. The purported focus on history generated no more than the very general principles that (1) religious speech and exercise are highly protected and (2) government coercion is invalid.[91] How indeed could history dictate anything more specific, when public high schools were nonexistent at the time of the First Amendment and high school football coaches are a twentieth-century development? And in any event, the court had to analyze the facts and the comparative

[82] *See supra* note 78 and accompanying text.
[83] *Ramirez*, 595 U.S. at 429.
[84] *See id.*
[85] United States v. Rahimi, 602 U.S. 680, 692 (2024).
[86] *Id.* (quoting New York State Rifle & Pistol Assn. v. Bruen, 597 U.S. 1, 29 (2022)).
[87] See *id.* at 694–97; *id.* at 697–98 (quotation to Blackstone omitted; cleaned up).
[88] *Id.* at 699.
[89] See *supra* notes 45–51 and accompanying text.
[90] *Kennedy v. Bremerton School District*, 597 U.S. 507, 535–36 (2022) (quotations omitted).
[91] See *id.* at 536 ("coercing worship amounts to an Establishment Clause violation on anyone's account of the Clause's original meaning").

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interests to determine whether Kennedy was praying in his capacity as an individual or as a public-school employee,[92] and whether his acts were coercive.[93]

Conclusion

Doug Laycock's work on religious freedom is monumental for its incisiveness, comprehensiveness, consistency over time, and integration of careful scholarship and powerful advocacy. These qualities all show in how Laycock's work speaks to today's challenge of polarization, which threatens the health of religious freedom. The principles he has articulated for four decades provide essential resources for protecting religious freedom and reducing polarization over it.

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[92] *Id.* at 527–31.
[93] *Id.* at 536–39.

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