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QUESTIONS AND ANSWERS TO PANEL 5

QUESTION: I am extremely interested in Professor Kay's list of noncoercive injuries. And I would like to pick up Professor Laycock's point and be sure that his point gets added to your list; there is a very important kind of noncoercive injury that comes when government tries to persuade people. I do not look on that as a light-weight kind of harm, because another way of saying "persuasion" is "indoctrination." And, especially in the arena of the public schools, I believe that type of injury becomes a very serious kind of injury.

In *Engel*¹ and *Schempp*,² the Supreme Court cases dealing with prayer and Bible reading in the schools, the Supreme Court Justices made a point of saying that they did not consider this kind of activity coercive. So presumably there would not be a Free Exercise Clause issue there. And if coercion is also required to show an Establishment Clause violation, then there would not be protection against this kind of harm.

I think we keep assuming, when we talk about injuries that the Establishment Clause can cause, that we have two kinds of people: we have the people whose religion is favored and those whose religion is disfavored. And those whose religion is favored, the harm to them is maybe dilution or weakening of their religion; for others, the harm is offense to them or humiliation or the communication of a message that they are outsiders. But it seems to me that we have another class of people, and those are the uncommitted. And especially children who have not yet made their decision. And in our society where religious choices are so fluid, people do change opinions. So it seems to me there is harm in government attempting to influence the religious decision at all. And if we do not call that coercive, it is the kind of harm that is hard to detect; it is one of those harms that the more severe it is, the harder it is to detect. How do parents know how their children are being indoctrinated? How do you measure that? And that is another reason why, when you say: "Well, maybe it is not so bad in England; we just have this

1. *Engel v. Vitale*, 370 U.S. 421 (1962).

2. *Abington Sch. Dist. v. Schempp*, 374 U.S. 203 (1963).

little problem in the schools," to me it looms very large. I just want to be sure that gets added to the list of noncoercive injuries. You might even want to call that a form of coercion; and that may bear on what we mean by religious freedom: we mean freedom to influence our own children, not let the government do that.

RICHARD KAY: There is little to disagree with in what you said. If we have a difference, I suppose it is a classification question; it is just a quibble. As to the kind of harm that arises when government attempts to persuade, I think we can break it down into two different kinds of injuries. On the one hand there is, as you said, the persuasion which becomes indoctrination, which I would then essentially assimilate under the idea of coercion. And I think the prayer cases really could very easily be understood as coercion. And I have not read the cases in a while but I thought that, in discussing the effect of the opting-out part of the laws in those cases, that coercion — indirect coercion — was an element of the decisions. And, insofar as we find no coercive influence, then I think it would fall under one of the other categories that I mentioned and that Professor Laycock mentioned about the other affronts which that kind of a speech can effect. But as I say, this is just a question of your category and mine; in substance, I agree.

MARK TUSHNET: This picks up on something Professor Laycock said, and also that came up earlier. It is something I have been campaigning unsuccessfully about, but I should try it again. It is the argument that: "Why not try it twice rather than once?" — or in Professor Hartigan's version, I "give up on one of the branches of government." The presentations of that argument are always one-sided in giving the necessary cost/benefit analysis. The analysis goes, the cost of giving judicial review up is that you are relinquishing the chance of getting another institution to consider this. What harm can come from that? And occasionally benefit can come.

There is a harm that can come from having judicial review. As my comment indicates, legislatures can act mindlessly; courts have to explain what they are doing. In Oregon, the imposition of the requirement on the Native Americans was mindless; it communicated nothing about the society's view of their practice. Justice O'Connor writes an opinion explaining why, while we sort of regret that we have to do this to you, the imperatives of the war on drugs are so great as to overcome this burden that we are placing on your

religion.³ Or even worse in *Lyng*,⁴ where the acknowledgement of the harm to the religious interests is even more direct.

Similarly, it seems to me not irrelevant that Professor Laycock says: "Justice O'Connor has the right test, but she never knows it when she sees it." The origins of the endorsement test are in her opinion in *Lynch v. Donnelly*.⁵ I do not need a Supreme Court Justice to get up there, using the authority of my government, to say I am unreasonable in believing that a nativity scene communicates a message of exclusion. She makes us think that a reasonable Jew would not regard the communication as a message of exclusion. But who is she to tell me that sort of thing? Given who the Justices are likely to be, the chance of their articulating bad things about religion when they do the balancing is pretty high, and that is a cost that has to be factored into this overall balance of the costs and benefits of judicial review.

DOUGLAS LAYCOCK: I agree that some of the things the Court says are outrageous, and its opinions can sometimes do real harm by giving prominence and legitimacy to repressive or offensive views on these issues. I am not sure you can eliminate that. You can make that cost greater or smaller, but you can not get rid of it by simply saying: Let's get the court out of this business. Cases are going to be filed; and then, in the cases where they get out of the business, they are going to say some outrageous things. And then in subsequent cases looking for exceptions and loopholes and trying to chip away at it, they are going to say some more outrageous things. Trying to get out of these cases in *Smith*, the Court in effect said it is open season on religious minorities, and a lot of lawyers for political actors are reading it exactly that way. Nothing they could say in the course of entertaining a claim and then rejecting it would hurt worse than that.

I do not have a whole lot of confidence in courts. But I have considerably more confidence in courts than in state legislators and city councils. There have been religious persecutions in this country. There are localized persecutions right now. I am representing some of those people. We have not gotten any of them off yet, although we have gotten some judgments delayed, and we may accomplish

3. *Employment Div. v. Smith*, 494 U.S. 872, 903-07 (1990) (O'Connor, J., concurring).

4. *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988).

5. 465 U.S. 668, 688, 690-94 (1984).

something more permanent. I can at least say the Hare Krishnas are going to have a temple to worship in for two years longer than they would have if we had not had a federal appeal to take.⁶ Some of these cases will be won, but many of them will be lost. There have been periods in the past when a larger percentage of these cases were won.

Even if the record is not all that good, there is no reason whatever in my view to think that, on average, unpopular minorities will do better with legislators than they will do with courts. That may just be an empirical disagreement between the two of us.

DANIEL CONKLE: If I could add one comment. There are not just legislators and there are not just federal courts; there are state courts. And although the state courts are not overwhelmingly — for example, on the *Smith* free exercise issues — moving away from the United States Supreme Court, some are.⁷ So there is a path where you have — depending on the way that they are elected or whether they are appointed — at least somewhat politically detached judges at the state court level who may have different views from the current Supreme Court.

JOHN GARVEY: This is a question for Professor Kay. You asked, “How would we do without the Establishment Clause?” And you supposed that free exercise would take care of coercion. Then you said there are two kinds of noncoercive harms. The second of these was the problem of humiliation. The first you divided into (1)(A) and (1)(B). (1)(A) was institutional harm to the church (and maybe its members) of being degraded, or being in bed with government, or changing its views from what they should be. (1)(B) was the institutional harm to the government.

I want to ask you about (1)(B). I am not sure I know what it is. I can see type (1)(A) harm to a church, measured by the church’s own standard or ideal of what to be or how to act. As an individual I can relate to type (2) harm — humiliation. But in the case of

6. See *International Soc’y for Krishna Consciousness v. George*, 111 S. Ct. 1299 (1991), *vacating and remanding* 262 Cal. Rptr. 217 (1989) (awarding a judgment of three million dollars, more than five million dollars with interest added, that would have been collected by judicial sale of all Krishna temples and monasteries). For the initial judgment on remand, see 4 Cal. Rptr. 2d 473 (1992) (remanding for new trial on punitive damages, and reinstating a judgment for \$1,837,500 in compensatory damages).

7. See, e.g., *Donahue v. Fair Employment & Hous. Comm’n*, 2 Cal. Rptr. 2d 32 (1991), *review granted*, 825 P.2d 766 (Cal. 1992); *Minnesota v. Hershberger*, 462 N.W.2d 393 (Minn. 1990).

(1)(B), of the harm to the government, is there some ideal form that is broken when government deals with religion? Or are you talking about the consequences that will follow from government dealing too closely with religion? And if you are talking about consequences, then aren't you talking about either coercion or type (1)(A) or (2) harm?

RICHARD KAY: I think we can break it down this way. We can talk about (1)(B)(1) and (1)(B)(2). First it may be that the association which we are talking about may portend, in the long run, an atmosphere in which the institutions, the political institutions, may end up in activity which would be proscribable under a free exercise rubric. So again, this might in fact go on the coercion side. As to the second, you know, I am really not sure about it. I was picking up on some of the things which have been said here by Professors Marshall and Lupu. I do believe that the expression of this risk assumes that there is some right way of governmental decisionmaking. It involves a certain humility and tolerance to which an association with religion may pose a risk. To the extent this is a serious fear, then the Establishment Clause — again, it would certainly be an indirect consequence — the Establishment Clause might be set down as some kind of protection of that as well. But I think all of the assumptions which you found lurking in that categorization are, in fact, there.

WILLIAM MARSHALL: Professor Laycock, not surprisingly my question is to you. I want to make my position clear if I did not before, that I do not believe the Establishment Clause stands for the proposition that religion cannot get involved in political issues. If in fact it did, it would come in conflict with the Free Speech Clause which would demand that the religious values be infused by whoever wants to infuse them into the public dialogue. What I see the Establishment Clause standing for — or actually not the Establishment Clause but this privatization theory — is that there should be a legitimate rhetorical objection to be made when religion comes into the public square. Now, if religion wants to recognize this objection and then say: "Okay, we recognize this but we really need to come in here because this is important!" as it frequently has in our political history, then so be it. I was not going to comment on this because I thought it was fairly obvious what our differences were, but you brought up the David Duke campaign, and as long as you did, that is the perfect example. The man ran on the idea of bringing

Christian principles back into government. And he did not mask that; he masked his racism, but he said outwardly: "This is just putting Christian values back into government." I want the rhetorical response still to be available when that kind of campaigning takes place. I do not want this objection eliminated as a matter of constitutional theory. In short, I think it is appropriate that, when religion is used in that sort of way, that it is a legitimate criticism to say that religion has got no place coming into the public square through this kind of interplay. And I just want your response to that.

DOUGLAS LAYCOCK: "Religion has no place coming into the public square," and "Religion has no place coming into the public square in this kind of interplay," are profoundly different statements. I do not know what you mean by "this kind of interplay." And I suspect it would take us a lot of exchanges to work that all out. But what "in this kind of interplay" adds is: There can be good ways and bad ways, and we have got to do something about the bad ways. I do not disagree with that.

But when you say, "Religion has no business coming into the public square," I hear you making the Bruce Ackerman argument that this is a state in which religious values cannot be considered and should not be spoken out loud.⁸ I think that is preposterous. You say you do not mean that, but that is what I hear without the qualifier.

With respect to the particular example of Duke, I think the response that he drew from many religious leaders is far more effective as a political matter than your response: "This isn't Christianity. You are a racist, Nazi phony trying to invoke the symbols and language of Christianity; and that is not what our religion teaches. This is not real Christianity." Simply as a political matter, you're going to persuade more people with the religious response than with the secularist response.

WILLIAM MARSHALL: Maybe, if you are fortunate enough to be able to get that response in those particular circumstances. Now, you have pointed out the supposed inconsistency in what I seem to be saying. But if I may point back, if you admit that there is some

8. See BRUCE A. ACKERMAN, *SOCIAL JUSTICE IN THE LIBERAL STATE* (1980). I had thought that Kathleen Sullivan took this position, but she disclaims it in the published version of her paper. Kathleen M. Sullivan, *Religion and Liberal Democracy*, 59 U. CHI. L. REV. 195, 196 (1992). Her position is far from clear; I think she says that religious believers can make their arguments but government can never act on them.

legitimate concern with religious involvement in the public square, then you must recognize that there is a problem.

DOUGLAS LAYCOCK: I think there are good arguments and bad arguments, right? And there are good and bad religious arguments and there are good and bad secular arguments. When the Catholic bishops teach on social justice, I like what I hear although I think they may go a little too far; when they teach on abortion, I say I disagree. But I do not think their arguments are any more or less acceptable in the public sector depending on whether I agree with them or not.

Now, it may be that what you were principally thinking about is something I am hardly thinking about at all, which is, people who say: "Everyone should vote for candidate X or you'll go to hell." Right? All right, if that is what you are concerned about, I agree with you. That is an inappropriate form of argument; it is not an argument we hear much; it is not an argument that is very effective in a pluralistic society. I do not disagree, but I think it is such a tiny slice of religious arguments that I . . . if you are confined to that, then I think you have got to single that out and say that is what you mean.

What I hear you saying and Ackerman saying is that it is illegitimate to appeal to the religious basis of moral values. It is illegitimate to say: "One reason for putting more money into the welfare programs is the Sermon on the Mount and the values that are expressed there." No, that argument I find preposterous. And no caution flag goes up for me when I hear somebody make that argument.

EDWARD GAFFNEY: The last colloquy recalls the feeling of humiliation that Professor Kay described as a noncoercive harm. One of my difficulties with Professor Marshall's claim is that the feeling of being humiliated is very subjective. I assume that many people felt bad about many of the ugly racial comments that David Duke made in his recent campaign to be governor of Louisiana. For example, President Bush has told us how offended he was at some of Duke's rhetoric. For someone who allowed his campaign to exploit racial fear with the Willie Horton ads in the 1988 campaign, I suppose that is saying a lot, but it does not get the analysis very far.

I would like to ask two questions of Professor Kay. First, is your suggestion about noncoercive harms meant to be like one of those emotional injury torts for which juries in California might award lots of money, or is it meant to suggest some kind of a standard,

what do you do with the reluctance of the Court in cases like *Valley Forge* to grant standing for what it has called "generalized grievances?"⁹

Second, would you please interact a bit more with Professor Gilles? I would like to learn whether your knowledge of Canadian constitutional law would lead you to concur with her report about the public funding of religious schools in the United Kingdom. For example, has the Canadian practice of public funding of nongovernmental schools created a noncoercive harm or a negative impact that we should be aware of on this side of the border?

RICHARD KAY: As to the second question, I really cannot help you very much. I can say something else about funding of education in Canada, but I do not know if it is responsive to your question. Funding of religious education is fairly universal. One argument which favors the situation we in the United States have, where there is no funding, is that I know that in Canada it is a source of serious contention and argument. It is also a fairly fruitful source of litigation. One of the more troublesome things about it is that, especially in Quebec and Ontario, it tends to be associated with the linguistic differences. So it kind of throws up another constitutional hook which people who really have language and ethnic differences can latch on to. Now again, how serious is that? Is it worth the candle? I leave that to you.

On the question of humiliation, what I was trying to suggest was not really an identification of a standard of injury which then would support litigation, but to talk, in general, about what benefits might be reaped from the Establishment Clause, stripped of its coercive aspects. To the extent that government association with religion is reduced by Establishment Clause jurisprudence, even it is not eliminated. I think, to that extent, the problem of feeling debased and abashed by this government association is also reduced. And that is something you lose if you give up on Establishment Clause jurisprudence altogether. Whether it is the principal purpose of it; whether it again — I will say the same as I said last time — whether that is enough to justify the jurisprudence altogether, that depends on the cost. That is just the benefit side, it is one of the benefits; it depends on what the cost is.

9. *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464 (1982).

QUESTION: I wanted to get at an Establishment Clause hypothetical by addressing the education issue. As Professor Gilles said, on the one hand, you have the English situation in which there is direct funding of religious schools, which clearly would not — and, I think, should not — pass the establishment test. But on the other hand, in our country we have a situation in which many people argue the educational system has, in effect, served the sociological purpose that the church once did; so now it is the focal point of unity. To the point that, now, many Evangelicals and Fundamentalists feel the way Catholics did in the 1840s and 1850s when Protestants told them they were having a neutral public educational system.¹⁰

And so on the one hand, you have got the idea of direct funding of private education, which would not work. On the other hand, you have a situation in which many people cannot feel comfortable in putting their kids into the public school system because it promotes an ethos which is contrary to some of their deepest religious convictions, whether it is an indifferent ethos or sometimes perceived as an antagonistic ethos to their deepest convictions.

Now, the alternatives that are increasingly gaining currency are voucher-type schemes in which the arguments are: “Well, funding will go not to the schools, as in England, and they won’t go directly into a governmental school system; but rather they’ll go to the parents of the school children, who can opt for the type of education they wish.” And the argument would be that would go to Jewish parents and Fundamentalist parents and Missouri Synod Lutheran parents and Catholic parents.

Now, my question is: Do you believe that type of funding — and I think we are going to see it within the next ten or fifteen years; I mean, it is going to happen, and I would expect it’s going to be litigated, perhaps under the Establishment Clause — do any of you have any beliefs about whether that type of scheme would be a violation of the Establishment Clause? Because, although it is nondiscriminatory, nevertheless I guess Jewish people would set up Jewish schools and Marxists perhaps — if they can get together — would set up Marxists schools and Fundamentalists would set up their Fundamentalist schools.

DANIEL CONKLE: If you are asking what the United States Supreme Court would rule, my belief would be that the Supreme

10. See, e.g., DIANE RAVITCH, *THE GREAT SCHOOL WARS* (1974).

Court — depending on how the program was structured — would probably approve it. It is not entirely clear from what the Supreme Court has previously decided. But I think it is likely, given the direction the Court has taken in previous cases — particularly *Bowen v. Kendrick*¹¹ and some of the earlier parochial aid cases that approved tax deductions and credits for parents who sent their kids to religious schools. It seems to me that the Court probably would approve it. Whether it would run into state constitutional problems would be a separate issue, and the policy wisdom of vouchers, I think, is a separate issue that I am not really prepared to comment on.

DOUGLAS LAYCOCK: It would run into state constitutional problems because nearly all the state constitutions have much more explicit provisions, enacted during a wave of nineteenth-century anti-Catholicism, that expressly talk about funds to sectarian schools while preserving Protestant devotional services in the public schools.¹² So it might not be sufficient for the United States Supreme Court to say vouchers are okay. It might also have to say vouchers are constitutionally required, which no court is likely to say.

On the underlying policy matter, I part with most other separationists here. I would not allow the Christmas tree; I think it is an establishment. But I would allow a voucher scheme if it were implemented in a way that avoids the kinds of unfairness that Professor Gilles described in the English system.

The existing system is a classic unconstitutional condition. The state says to these people: "You have a constitutional right to a private, religiously-affiliated education or you have a state constitutional right to a free education, but you can't have both. You have to choose. And if you want the religious education, you forfeit the \$2000 or the \$4000 that the state is otherwise willing to spend on educating your child."

If you want to think through the arguments about that, read Pro-

11. 487 U.S. 589 (1988).

12. For the history of these provisions, see 2 ANSON P. STOKES, *CHURCH AND STATE IN THE UNITED STATES* 69-70 (1950); CARL ZOLLMAN, *AMERICAN CHURCH LAW* §§ 62-66, at 75-80 (2d ed. 1933). For typical state provisions, see CAL. CONST. art. IX, § 8; IDAHO CONST. art. IX, § 5; MASS. CONST. art. XVIII, § 2; MINN. CONST. art. XIII, § 2; N.H. CONST. pt. 2, art. 83; N.Y. CONST. art. XI, § 3.

fessor McConnell's article on school funding and abortion funding.¹³ There is hardly anybody in the country with a consistent position on those two issues. The pro-choice people tell us it is an unconstitutional condition not to fund abortions for poor women, but it would be an establishment to fund religious education for poor children. Those two positions do not fit together. Funding cannot be a forbidden subsidy for education but a required part of the constitutional right for abortion. The political right is equally inconsistent. These issues are very hard, and few of us have thought them all the way through.

SUSAN GILLES: I would like to address this issue from an English point of view. I think you described two different schemes. One is an opt-out scheme for those with (I presume you would say) conscientious objections, as well as religious-based objections.

QUESTION: I would say for any reason whatever.

SUSAN GILLES: For any ideological reason?

QUESTION: Yes.

SUSAN GILLES: If you do that, I do not think you walk into establishment problems and you avoid the British problem of defining what qualifies as a religion. But I do want to emphasize, having grown up in a system which does separate school children based on religion, you would have a cost there. You would have a loss of understanding of other religions. And one way to fix it, which is part of the British idea, is to have compulsory religious education so everybody understands everybody else's religion. If you are going to allow everyone to opt out, are you going to require people to understand other's religions as part of the tolerance which we expect in the United States?

QUESTION: I would like to pick up on something that Professor Laycock said at the very beginning of his talk, in which he mentioned that the two clauses, the two religion clauses, should be interpreted as mutually supporting and interrelating. I would like to then deal with that in terms of some of the things that Professor Bradley said in the panel before, and the implications to the Establishment Clause of the *Smith* decision and what happened in the free exercise

13. Michael W. McConnell, *The Selective Funding Problem: Abortions and Religious Schools*, 104 HARV. L. REV. 989 (1991).

scenario. And I would be pleased if someone could show me how the scenario that I am about to describe is wrong because this is how I see it progressing.

We have Justice Scalia fairly adamantly decrying the confusion in the religion field — the seeming schizophrenia, the uncertainty of doctrine, the confusion in this area. And there is an attempt to sort of simplify this all, partially, in *Smith*. At the same time, we see him joining Justice Rehnquist's decision in *Jaffree*¹⁴ on the Establishment Clause, trying to, in essence, simplify the history of the Establishment Clause and hold it to that history. And he says — this is Rehnquist — in its most simplified form, as we infuse meaning into the Establishment Clause, it means that there should not be a single national established church or there shall not be political discrimination among the sects.

Then you see *Smith*, which says, "No constitutionally compelled accommodations, but individual legislators can make separate accommodations as they see fit. And if it affects some religions differently than others, that is the way the political cookie crumbles." And so you would have a situation, for example, where there would be an exemption for the use of wine for ritual sacraments, but maybe not for the use of peyote for religious sacraments. That would seem to me to fall into the very limited description, the historical description, of the Establishment Clause set up in the *Jaffree* decision — discrimination between sects.

Consequently, what I find is that even to avoid the schizophrenia and the confusion, the simple historical description of the Establishment Clause needs to be rejected for *Smith* to be able to be sustained. Otherwise, we continue with the same confusion that Scalia was talking about. No preference among sects must be rejected, and we need to move to a situation where coercion — which is basically the same type of thing as the Free Exercise Clause — coercion becomes the rule for the Establishment Clause. Because otherwise, even in this very limited perspective of the Establishment Clause, *Smith* becomes just as subject to the difficulties that Scalia is trying to avoid as the earlier jurisprudence was.

DOUGLAS LAYCOCK: I think you are clearly right that, under the

14. *Wallace v. Jaffree*, 472 U.S. 38, 91-114 (1985) (Rehnquist, J., dissenting). Justice Scalia was not on the Court at the time of *Jaffree*, but he appears to have endorsed at least the general thrust of Rehnquist's dissent in that case. See *Edwards v. Aguillard*, 482 U.S. 578, 636 (Scalia, J., dissenting).

regime of *Smith*, some religions will be allowed to practice either because their practices do not get picked up by a majoritarian legislature in the first place or because they secure exemptions. You are right that other religions with seemingly analogous and indistinguishable practices will be picked up in the statute and will not get exemptions and will not be allowed to practice. The Court is going to have to deal with that and it is going to be messy.

The realist in me says they will deal with it largely by denying the problem; they will always find that the two cases are distinguishable and there really isn't any discrimination. But they have got that problem under free exercise and under equal protection as well as under establishment. And certainly the victimized religion whose practice is prohibited is being coerced; so cutting the Establishment Clause back to coercion does not help solve the Court's problem. So I guess I do not see how the Establishment Clause plays into your question.

But I think the problem is a very real one; and there are going to be cases about it. One of the cases I am involved in at the moment is one of the ones I had mind when I said there are localized persecutions going on: the set of ordinances in Hialeah that are carefully drafted to protect kosher ritual slaughter but to outlaw Santaria ritual sacrifice of small animals. The lower courts were wholly uninterested in the rather obvious discrimination; I was surprised when the Supreme Court said it might be interested.¹⁵ But *Smith* produces that kind of problem: accepted groups get exemptions and unaccepted groups do not.

QUESTION: I guess this question is probably for Professor Laycock, too. To what extent are you concerned about the expropriation of government by religious organizations and then the acquiescence of the governmental entity to that expropriation under the noncoercive level that you were talking about?

DOUGLAS LAYCOCK: "Expropriation" meaning what?

QUESTION: The expropriation of governmental symbols or governmental approval. The claims by religious entities that they have certain governmental blessings, either subtly or explicitly. And then the concomitant actions or inaction by government against that. And

15. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 723 F. Supp. 1467 (S.D. Fla. 1989), *aff'd mem.*, 936 F.2d 586 (11th Cir. 1991), *cert. granted*, 112 S. Ct. 1472 (1992).

that could be in the form of what Jerry Falwell used to do. It could be in the form of a religious entity attempting to put up a symbol on a public forum in front of a governmental office or whatever. And then the government not doing anything to counter the impression that may come about by that.

DOUGLAS LAYCOCK: Okay. One question that I've never thought about, and one that I have. So let me talk about the second one.

The private placement of religious symbols on the public square seems to me a fairly straightforward public forum problem, although it has not been treated that way. If the government lets lots of groups put up symbols there, then certainly religious groups ought to be included. And I think the better policy is, the government ought to let lots of groups set up symbols in some appropriate place in the community. And I think if we did that, a whole lot of this crèche litigation would be solved. There is no reason for the city government to put it up if the association of churches can put it up.

The other problem — the televangelist flying the flag and interweaving patriotism and religion — is not one I have ever thought about. Although I guess my instinct is: it is demeaning to religion, but there are a lot of bad religions out there and there is not much the government can or should do about it. Lots of secular groups do the same sort of thing. It is probably protected by the Speech Clause and the Free Exercise Clause.

QUESTION: I am not sure if this rises to the level of a question or just an expression of a concern. But I will state it, and I guess anyone on the panel can respond if they want to. It is related to what the previous questioner asked about the standard in *Smith* where Justice Scalia says, "If the locals pass a law and it incidentally infringes on your religion, basically it's too bad for you because that wasn't the intent of it." So you have that standard emerging from the Court on the one hand.

And then, I will use for an example something that Dean Gaffney said earlier, when he said about — I believe it was — the law school association that passed a regulation that said you had to not discriminate in hiring against anyone because of their sexual preference; and this impacted on religious law schools who as a basic tenet of their faith see homosexuality as a violation of that.

I guess I am trying to see how those two things can be reconciled. And from my own perspective as a parent in a community in a minority religion, I have concerns as to how the oftentimes state-spon-

sored legislation — which has a sort of common denominator element to it — impacts on me and the way that I want to raise my children when, if the defense that can be given is: “The state legislature passed it; so if it impacts on your religion, it’s too bad,” even when it goes to something fundamental. But I want to issue to lawyers a challenge. When preparing briefs and doing litigation, I think there has to be some foresight to suggest remedies to judges and courts that somehow make common sense and provide a right way of reasoning to go forward from here. That makes a way for the court to — if you want to say — do the right thing. Violating one side against the other as little as possible. But I guess I would like to know if anybody has any response to my concern.

DANIEL CONKLE: I share your concern. And I guess that my only point is to state again that I think, at least for the United States Supreme Court and other federal courts, I am very pessimistic as to whether these kinds of claims will be taken seriously in the foreseeable future. The other avenues of appeal are state courts and trying to sensitize and educate legislators and local decisionmakers. I do not know whether such efforts will be successful.

DOUGLAS LAYCOCK: Scalia’s quite clear: it does not matter how central or fundamental the religious obligation is. And keep in mind the facts in *Smith*. This is a worship service. Suppression of a worship service raises no issue under the Constitution of the United States and requires no justification. That is the law of the land at the moment.

RICHARD KAY: I would like to add to that, so that we do not leave with the wrong impression, that the result of that decision is not that there can be no religious exemptions. As Professor Conkle just pointed out, there are alternative avenues to pursue, both constitutional in terms of state systems, and in terms of political redress. Now, that might not avoid what we regard as an injustice in every case. But it is not the situation that, by this opinion, all religious exemption was eliminated.

