35 as the representatives of the American people, but as the representatives of one set of economic interests. In addition to the merchants, the legislature will consist of middling farmers and, even more importantly, "men of the learned professions" will hold the balance of power. It is they, and not the capitalists, who form "no distinct interest" in society according to Hamilton.

We should also remember that Hamilton is not the only author to praise ambition in the *Federalist*, as No. 51 makes clear. Is Hamilton's praise for the nobility of ruling more dangerous to, or incompatible with, American constitutionalism than Jefferson's pretense of a weak president combined with the reality of extra-constitutional adventures?

Thomas Cronin believes that the strong Hamiltonian executive has triumphed in modern practice. If Hamilton looked to the triumph of the "noblest minds," we may doubt that this has occurred. Perhaps even the strength of the modern executive is not fully Hamiltonian, as Koritansky implies. And that strength sometimes seems overshadowed by an even greater assertiveness in Congress and the courts. The balance of executive energy and subordination to the rule of law cannot be seen apart from that balance in the government as a whole.

LIBERAL NEUTRALITY. Edited by Robert E. Goodin[1] and Andrew Reeve.[2] London and New York: Routledge. 1989. Pp. 219. Cloth, $49.95.

Larry Alexander[3]

That the state must be "neutral" among its citizens and their various views of the "the Good" is an axiom of a popular conception of liberalism, a conception held by, among others, John Rawls,[4] David Richards,[5] Bruce Ackerman,[6] and Ronald Dworkin.[7] To the extent that this conception of liberalism is enshrined in the Constitution according to one's favorite theory of interpretation, as, for

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4. J. RAWLS, A THEORY OF JUSTICE (1971).
5. D. RICHARDS, FOUNDATIONS OF AMERICAN CONSTITUTIONALISM (1989); D. RICHARDS, TOLERATION AND THE CONSTITUTION (1986).
6. B. ACKERMAN, SOCIAL JUSTICE IN THE LIBERAL STATE (1980).
7. Dworkin, *Liberalism*, in PUBLIC AND PRIVATE MORALITY 113-43 (S. Hampshire ed. 1948).

example, Richards and Dworkin believe it is,[8] neutrality is a constitutional mandate.

In the modern era of the positive state, neutrality looks impossible to achieve. When the state teaches school, publishes newspapers, funds the arts and research, and owns playhouses, it necessarily promotes some views of the Good in preference to others, even others that are in all other respects constitutionally protected.[9]

The positive state, however, only makes obvious a problem about neutrality that is present even in the negative state. Laws restricting proselytizing and soliciting at certain public places surely will affect the Hari Krishnas more adversely than they will affect mainstream religious groups.[10] Laws against posting bills on utility poles hurt candidates and causes that lack money but not the well-heeled who can afford TV time.[11] And so on across the board. Laws cannot be neutral in effect (neutral in extension), even if they are neutral in terms of the legislative motivation (neutral in intention). Indeed, if neutrality in extension is impossible, it is not clear how neutrality in intension can be possible or even what it means.

Recognition of the difficulty of achieving practical or conceptual neutrality has led several liberal theorists—for example, Joseph Raz,[12] Vinit Haksar,[13] and arguably Michael Perry[14]—to reject neutrality as the proper liberal ideal and to propose liberalism, identified by its characteristic individual liberties rather than by neutrality, as itself a view of the Good.

This theoretical battleground about the proper conception of liberalism is the backdrop for the Goodin and Reeve anthology. Its implications for the "liberal" reading of the Constitution make the book, whose contributors are all British, of interest to American constitutional lawyers.

The most important contributions in this respect are those of Peter Jones[15] and Jeremy Waldron.[16] Both are liberals who are at-

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8. *See* D. RICHARDS, FOUNDATIONS OF AMERICAN CONSTITUTIONALISM and TOLERATION AND THE CONSTITUTION, *supra* note 5; R. DWORKIN, TAKING RIGHTS SERIOUSLY 131-49 (1977). For other "liberal" readings of the Constitution, see, e.g., R. EPSTEIN, TAKINGS (1985); S. MACEDO, LIBERAL VIRTUES (1990).

9. *See* Alexander, *Understanding Constitutional Rights in a World of Optional Baselines*, 26 SAN DIEGO L. REV. 175 (1989).

10. *Cf.* Heffron v. International Society for Krishna Consciousness, Inc., 452 U.S. 640 (1981) (upholding constitutionality of restrictions on soliciting donations at state fair).

11. *Cf.* City Council v. Taxpayers for Vincent, 466 U.S. 789 (1984) (upholding constitutionality of ban on posting bills on utility poles).

12. J. RAZ, THE MORALITY OF FREEDOM chs. 14, 15 (1986).

13. V. HAKSAR, EQUALITY, LIBERTY, AND PERFECTIONISM (1979).

14. M. PERRY, MORALITY, POLITICS, AND LAW: A BICENTENNIAL ESSAY (1988).

15. Peter Jones, *The Ideal of the Neutral State* (at 9-38).

16. Jeremy Waldron, *Legislation and Moral Neutrality* (at 61-83).

tracted to the idea that the state must be "neutral," but both are acutely aware of the difficulties associated with that idea. Both ask what neutrality demands and whether it is possible, and both identify difficulties with several different conceptions of neutrality.

The principal value of Jones's piece is his excellent summary of theoretical problems associated with liberal neutrality—for instance, can there be neutral allocations of welfare, of resources, and of liberty? All of the problems Jones identifies have been raised elsewhere,[17] but Jones gives us a handy compendium.

Waldron points out that there are different conceptions of neutrality, each resting on different arguments. Before we can decide *what* neutrality demands of the state, we must know *why* neutrality is demanded. Is neutrality demanded because we are skeptics about the possibility of knowing the Good? Is it demanded because knowledge of the Good is best furthered if a variety of lifestyles are allowed to flourish? Is it demanded because respect for autonomy is a more important value than choosing a correct version of the Good? Each argument for neutrality entails a separate conception of what neutrality requires.

Waldron usefully identifies two questions that liberal neutrality must address that are part of identifying the conception of neutrality demanded: *who* must be neutral—only the state, private citizens when acting politically, or private citizens as private citizens?—and *what* must they be neutral about? With respect to the first question, the difficult category is that of private citizens acting politically. Must such citizens vote "neutrally" even when their vision of the Good demands non-neutrality, and can we expect them to see the correctness of this demand?[18] (Consider Catholics, who believe in a vision of the Good that demands that the state take a particular side on the question of abortion: what argument could they accept for remaining neutral?[19])

With respect to the second question, the demand for neutrality cannot require one to remain neutral about *it*. What this implies—and here the two questions connect—is that neutrality is only re-

17. *See* C. LARMORE, PATTERNS OF MORAL COMPLEXITY (1987); Alexander, *Liberalism as Neutral Dialogue: Man and Manna in the Liberal State*, 28 UCLA L. REV. 816 (1981); Alexander and Schwarzschild, *Liberalism, Neutrality, and Equality of Welfare v. Equality of Resources*, 16 PHIL. & PUB. AFFAIRS 85 (1987); Alexander, *supra* note 9, at 186-87; Arneson, *Liberalism, Distributive Subjectivism, and Equal Opportunity for Welfare*, 19 PHIL. & PUB. AFFAIRS (1990); Arneson, *Neutrality and Utility*, 20 CANADIAN J. OF PHIL. 215 (1990); Dworkin, *What Is Equality? Part I: Equality of Welfare*, 10 PHIL. & PUB. AFFAIRS 185 (1981); Nagel, *Moral Conflict and Political Legitimacy*, 16 PHIL. & PUB. AFFAIRS 216 (1987).

18. *See* Nagel, *supra* note 17.

19. *See* K. GREENAWALT, RELIGIOUS CONVICTIONS AND POLITICAL CHOICE (1988).

quired among views of the Good that themselves recognize the value of neutrality. It is this deep paradox that undoubtedly has led some liberals to reject neutrality as the core value of liberalism.[20]

The remaining selections in the anthology are of less direct relevance to American constitutional law, which is not to say they are wholly irrelevant. Each examines the requirements of neutrality within a particular institution rather than the more abstract issues dealt with by Jones and Waldron. A.T. O'Donnell's chapter on neutrality in the free market[21] is the farthest afield from the concerns about liberalism: no one would argue that market neutrality as defined by O'Donnell is either sufficient or necessary for liberal neutrality.

Peter Gardner's chapter on education[22] deals with a subject that is widely recognized as difficult if not insoluble under the premise of liberal neutrality, since the state as teacher would appear inevitably and constantly to be influencing, if not endorsing and rejecting, views of the Good.[23] And, of course, given the orthodox "content-neutral" reading of the first amendment, the problems of neutrality in education have plagued first amendment law as it bears on public education.[24] Gardner gives a very good summary of the contending positions concerning the proper teaching methods and curriculum for a liberal state, but he offers no easy way out of the theoretical mess.

Ken Newton's chapter on neutrality in the communications media[25] deals with another topic that has found legal expression in first amendment jurisprudence.[26] Given the scarcity of media of communication—meaning not only available electronic frequencies, but also ink, paper, sound trucks, and parks—as well as the marked differences among media in terms of their potential audience sizes and types as well as their impact, what counts as a "neutral" allocation? Newton defines the requirement of neutrality to be "presenting as full an account of the news, and as wide a range of opinion as possible, leaving citizens to make up their own mind."[27] He imme-

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20. *See* authors cited at notes 12-14, *supra*.

21. A.T. O'Donnell, *The Neutrality of the Market* (at 39-60).

22. Peter Gardner, *Neutrality in Education* (at 106-29).

23. *See* Alexander, *supra* note 9; Alexander, *Liberalism as Neutral Dialogue: Man and Manna in the Liberal State*, *supra* note 17, at 853-58.

24. *See* Hazelwood School Dist. v. Kuhlmeier, 484 U.S. 260 (1988); Board of Education v. Pico, 457 U.S. 853 (1982); Wisconsin v. Yoder, 406 U.S. 205 (1972).

25. Ken Newton, *Neutrality and the Media* (at 130-56).

26. *See* Mets. Broadcasting, Inc. v. FCC, 110 S. Ct. 2997 (1990); FCC v. League of Women Voters, 468 U.S. 364 (1984); Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974); Columbia Broadcasting Sys. v. Democratic Nat'l Comm., 412 U.S. 94 (1973).

27. Newton, *supra* note 25, at 132-33.

diately notes, however, that "this is no easy task."[28] Indeed, I'm not sure it is a coherent task. Given that we citizens have finite capacities for and interests in absorbing information and opinion, that there is no satisfactory way to define an item of news or opinion or to enumerate the possible positions about them, and that positions and accounts can be expressed through the media more or less cogently to audiences that possess more or less in the way of critical abilities, the aspiration to neutrality in the media appears to founder on the same shoals as the aspiration to neutrality in education.

All in all I believe the book will be of great value to American constitutional lawyers in understanding the theoretical dilemmas that underlie doctrinal issues, particularly with regard to those constitutional provisions, such as the speech and religion clauses, where liberalism as neutrality has had its greatest influence. Although the book offers no algorithms for resolving these dilemmas, it frames them well.[29]

THE EDITOR, THE BLUENOSE, AND THE PROSTITUTE: H. L. MENCKEN'S HISTORY OF THE "HATRACK" CENSORSHIP CASE. Edited by Carl Bode. Niwot, Colorado: Roberts, Rinehart, Inc. 1988. Pp. 174. Cloth, $29.95.

Norman L. Rosenberg[1]

H.L. Mencken, the celebrated journalist and social-literary critic, insisted that he "had a lot of fun" putting together this account of the 1926 effort, headquartered in Boston, to suppress an issue of his *American Mercury* magazine. Although Carl Bode, a Mencken biographer who compiled this version, claims that Mencken annotated the " 'Hatrack' history more fully than anything else he ever wrote," it remained unpublished for more than fifty years. Mencken himself filed away the manuscript, intending that it be deposited, along with other papers, in the New York Public Library. Subsequently, however, it went to the Enoch Pratt Library in Mencken's beloved Baltimore, the repository for a lode of

28. *Id.* at 133.

29. I have omitted discussion of Hugh Ward's chapter, *The Neutrality of Science and Technology* (at 157-92), the focus of which is somewhat tangential to the main concerns of the book, and Goodin's and Reeve's chapter, *Do Neutral Institutions Add Up to a Neutral State?* (at 193-210), which primarily rehashes arguments made elsewhere in the book.

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