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Eclecticism

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Kent Greenawalt has produced an impressive two-volume work in which he argues that a coherent, sensible approach to the religion clauses is not impossible—just irreducibly intricate.[1] That is a meaningful difference. In the place of skepticism, he offers a sophisticated method that he thinks is capable of generating sensible answers to the full range of questions concerning the free exercise and establishment clauses. He argues that no single value or formula can capture everything that the religion clauses can or should signify; instead, a sound interpretive strategy begins by looking at ground-level conflicts and extrapolating, as far as possible, to more general guidelines (p. 1).[2] Having done this work, Greenawalt reports that no fewer than nine values (pp. 6–13) and four principles ought to (and frequently do) drive judicial decisions in this area (pp. 15, 53–68).

How are we to evaluate this sort of eclecticism? To my mind, it is not sufficient to simply point out that it carries drawbacks, some of which are evident. Chief among these is the concern that such a flexible approach will not offer sufficient guidance to the many interpreters who are less capable than Greenawalt himself. Eclecticism often yields attractive results in his hands, but it may not produce consistent or compelling outcomes in other institutional settings. (Rule of law concerns also come to mind.) Still, in order to adequately evaluate the project it is necessary to compare its advantages and disadvantages to those of its chief competitors.

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1. KENT GREENAWALT, RELIGION AND THE CONSTITUTION: FREE EXERCISE AND FAIRNESS (2006); KENT GREENAWALT, RELIGION AND THE CONSTITUTION: ESTABLISHMENT AND FAIRNESS (2008).

2. *See also* p. 451 (describing his approach as "more eclectic" than one competitor).

In what follows, I examine eclecticism by showing how it answers a specific question: whether government ought to be able to single out religious actors and entities for exclusion from its support programs without violating the Constitution.[3] I then briefly address two alternative approaches to the same issue and conclude that while eclecticism will not convince everyone—it raises some concerns in my own mind—it nevertheless rightly exerts a strong claim on our attention.

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Excluding religion is the practice of selectively denying government support to religious actors and entities. So long as the term "support" is understood broadly, assessing the constitutional permissibility of excluding religion requires thinking across several of Greenawalt's discussions. Here, I will address only two issues: government funding of religious schools and equal access by private religious groups to public facilities.

Consider first whether and how government may exclude religious education from its aid programs. Greenawalt is broadly sympathetic to *Locke v. Davey* and its approval of selective denials of aid that go beyond what is required by the establishment clause (p. 432).[4] Whether the Supreme Court agrees will depend in part on the prospect that *Davey* will be extended beyond the training of clergy and other intensely religious endeavors (p. 432). Although he says that funding only private schools other than religious schools is politically infeasible and would be "grossly unfair" (p. 388), he also thinks that "states should be able to bar substantial public funds from going to religious schools if they choose" (p. 432). Ultimately, he concludes that states ought to be able to implement "some" exclusions of religion that are not constitutionally required, but that the boundaries of that power should be determined by a case-by-case balancing of free exercise and antiestablishment considerations unencumbered by presumptions in one direction or the other (p. 427). One comes away from the discussion with a sense that the outcome in any given case will depend on a fine-grained analysis.

Second, think of the equal access cases, which generally hold that if a government opens up its facilities for private speech then it must make them available to religious speakers on the same terms (p. 196).[5] According to these decisions, excluding

3. *See* Nelson Tebbe, *Excluding Religion*, 156 U. PA. L. REV. 1263 (2008).
4. 540 U.S. 712 (2004).
5. Rosenberger v. Univ. of Va., 515 U.S. 819 (1995); Capitol Square Review &

religion is disallowed or at least disfavored. Greenawalt endorses most cases in this line, and yet he stops short of fully embracing *Rosenberger*. A distinction ought to be drawn, he says, between equal access to government facilities and cash aid for core religious advocacy (p. 201). Had the Court appreciated that difference in *Rosenberger*, it would have permitted the University of Virginia to deny aid to religious student groups—and further, it may have required the university to do so (pp. 203–04). Even more interestingly, Greenawalt also criticizes *Good News Club*.[6] At first glance, that case seems to present a paradigmatic equal access situation, in which a school refused to allow a Christian club to meet in the building after hours, even though it permitted other organizations to use its rooms for "moral and character development." Yet for him three differences ought to have been dispositive: the case concerned elementary students, not older ones in secondary school or college; it involved evangelization by an outside group; and the meetings were to be held directly after the end of the school day (p. 206). School administrators ought to have been given leeway to decide that younger students could not understand the difference between private religious messages and school endorsement and would have felt pressured to attend (p. 206). So depending on the circumstances, it might, in his view, be constitutionally permissible for government to exclude religious speakers even under conditions in which it opens its buildings to other private expression.

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Greenawalt's take on exclusions of religion illustrates some of eclecticism's virtues and vices: on the one hand, its capacity for extraordinary nuance and sensitivity and, on the other hand, its difficulty generating predictable results and guiding/restraining courts. Eclecticism draws fine distinctions among cases concerning selective funding and equal access, distinctions that carry significant appeal ex post but may have little predictive power ex ante. The question remains how its mix of costs and benefits compares to the net attractiveness of its competitors. While it is impossible to perform a complete analysis here, it is feasible to get a sense of how Greenawalt himself sizes up his method.

Advisory Bd. v. Pinette, 515 U.S. 753 (1995); Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384 (1993); Widmar v. Vincent, 454 U.S. 263 (1981).

6. Good News Club v. Milford Cent. Sch., 533 U.S. 98 (2001).

One prominent alternative is the no-influence theory, which requires government to minimize its impact on choices concerning religion (p. 451). Although considering the influence of government on private choice can provide helpful guidance in some cases, it alone underdetermines outcomes, according to Greenawalt (p. 455). That is partly because considering government influence can only tell us about the impact of a policy on religion, not whether that impact is justified (pp. 455–56). With regard to exclusions of religion, Greenawalt appears to think that considering both sides of the equation would mean that a denial's impact on religious choice could sometimes be overbalanced by good justifications, some of which may draw on antiestablishment values. In *Good News*, for instance, the exclusion was justified (if not required) by the school's legitimate concerns about possible evangelization of young children. Strict adherence to the no-influence approach would have disallowed such considerations—presumably a serious cost.

Another contender is equal liberty, as defined and defended by Christopher Eisgruber and Lawrence Sager.[7] They believe that the linchpin of constitutional interpretation in this domain ought to be a prohibition on discrimination on the basis of religion in either direction. A difficulty of this approach from Greenawalt's perspective is that some cases cannot sensibly be resolved from the standpoint of discrimination alone (p. 467). So while equal liberty is skeptical of excluding religion, eclecticism would sanction the practice in certain cases—*Rosenberger* and *Good News*, for instance. Another complication is that equal liberty in practice sometimes does not hew to an exclusive focus on antidiscrimination to the degree that might be expected from Eisgruber and Sager's initial descriptions (pp. 472–79). That strengthens its attractiveness but weakens its distinctiveness.

Of course, Greenawalt concludes that eclecticism offers the most desirable mix of advantages and drawbacks. While I may prefer a solution to the problem of excluding religion that provides greater guidance to judges and other constitutional interpreters, my point here is only that eclecticism cannot intelligently be evaluated in isolation from the alternatives. Not everyone will warm to Greenawalt's approach or to his conclusions, but his work demands careful study by serious students of religious liberty.

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7. CHRISTOPHER L. EISGRUBER & LAWRENCE G. SAGER, RELIGIOUS FREEDOM AND THE CONSTITUTION 4–21 (2007).