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THE PHILOSOPHER'S BRIEF

Paul Horwitz*

I

One of Kent Greenawalt's signal virtues is his eminent reasonableness and his ability to listen. In the classroom and in print, he offers a fair hearing to the contending viewpoints on law and religion, and offers thoughtful views of his own. In person and on the printed page, he is the seminar leader *par excellence*.

This is at once a great strength and a surprising flaw of Greenawalt's extraordinary new contribution to law and religion scholarship, the two-volume work *Religion and the Constitution*.¹ Greenawalt's voice in these books is the voice of reason, and it is an attractive one. At the same time, it leaves its readers somewhat short of a definitive standard by which to judge its success. Like many a full seminar class, we may emerge from a study of his work a good deal wiser, but still uncertain about what we have learned about religion and the Constitution.

The passage that best illustrates this comes at the beginning of both volumes of *Religion and the Constitution*. He writes:

[M]y approach to the subject is grounded on the following three premises: (1) Neither free exercise nor nonestablishment is reducible to any single value; many values count. (2) Sound constitutional approaches to the religion clauses cannot be reduced to a single formula or set of formulas, although we can identify major considerations that should guide legislators and judges. (3) The most profitable way to develop sensible

* Associate Professor of Law, University of Alabama School of Law. phorwitz@law.ua.edu. I am grateful to Rick Garnett and the participants in the roundtable discussion of Kent Greenawalt's books at Notre Dame Law School. Mostly, notwithstanding the criticisms I offer here, I am grateful to Kent Greenawalt himself. I was privileged to be one of his students, and he has been a consummate mentor and a good friend.

1. 1 KENT GREENAWALT, *RELIGION AND THE CONSTITUTION: FREE EXERCISE AND FAIRNESS* (2006) [hereinafter GREENAWALT, *FREE EXERCISE AND FAIRNESS*]; 2 KENT GREENAWALT, *RELIGION AND THE CONSTITUTION: ESTABLISHMENT AND FAIRNESS* (2008) [hereinafter GREENAWALT, *ESTABLISHMENT AND FAIRNESS*].

approaches is from the “bottom up”—addressing discrete issues in their rich complexity and investigating conflicting values over a range of issues. (p. 1).

Elsewhere, Greenawalt adds that given the difficulty of reconciling the multiple values underlying the religion clauses, one must approach such questions with a suitable “modest[y] about the opportunities for our practical reason to produce demonstrably correct conclusions for troublesome issues.”² On this view, “no simple formulas are available to resolve difficult questions” about the religion clauses. However, “a similar range of considerations or factors figures for many problems,” so that he can offer at least some guidance in a broad array of “standard” cases.³

Greenawalt might say that a sufficiently careful “bottom-up” approach can impose *some* order on the religion clauses. But, in his insistence that no value or formula can sum up the religion clauses, I see an acknowledgement of the irresistible, unavoidable messiness of the religion clauses.

Greenawalt is right. There is and can be no “Unified Field Theory of the Religion Clauses.” No single value or approach to law and religion can satisfy everyone—particularly if, as Greenawalt does, one seeks to reconcile that value not only with the religion clauses in the abstract, but also with the Court’s own tangled precedents, and with such post-founding developments as the ratification of the Fourteenth Amendment.

What, then, are we left with? Greenawalt suggests that we should address the religion clauses “not in the abstract[,] but by focusing on concrete issues in context” (p. 543). We are left, in other words, with the careful case-by-case inquiry that fills out these two masterful volumes.

I wonder, however, how we should ultimately judge the persuasiveness of this approach in each of the specific areas that Greenawalt examines. Is it a “common lawyerly” approach that attempts to crunch cases one by one?⁴ If so, it is a superb example of the craft; but it is more than that. Greenawalt believes that some cases are more or less right or wrong; the Constitution “subsists independent of precedent.”⁵ Although Greenawalt’s

2. GREENAWALT, *FREE EXERCISE AND FAIRNESS*, *supra* note 1, at 6.

3. *Id.* at 7.

4. See Steven D. Smith, *Discourse in the Dusk: The Twilight of Religious Freedom*, HARV. L. REV. (forthcoming) (reviewing GREENAWALT, *ESTABLISHMENT AND FAIRNESS* (2006)).

5. *Id.*

books will be of great value to lawyers, this is thus not simply a lawyer's map of the field.

Instead, I think that *Religion and the Constitution* is best understood as a work grounded in theory: one in which "constitutional meaning is obtained by interpreting the materials in accordance with the best available political-moral theory."⁶ It is a "philosopher's brief" for the religion clauses, albeit it is distinctly a *legal* philosopher's brief. It proceeds in a philosophical manner: laying out in exquisite detail the problems to be examined, the multiple values that apply in each case, and the best answers that "practical reason" can provide.

I find many of Greenawalt's specific answers persuasive, and I admire their provisional tone. But I cannot help but wonder just how we should evaluate them. If "many values count" and "no single formula or set of formulas" is available to us, then how, exactly, do we deal with the "rich complexity" and "conflicting values" that the religion clauses present? By what metric do we judge just how "reasonable" any given answer is?

There is no good answer to this question. We could simply throw up our hands and conclude that the religion clauses implicate a range of incommensurable values and historical compromises. Greenawalt does not end at this point, however. He writes that "if one is willing to accept an 'approach' or 'discourse' in which a court enumerates relevant values and affords some idea about how it makes trade-offs, then a viable theory may well be available" (p. 436).

"Discourse" is the *mot juste* here. It suggests, in Stanley Fish's terms, that there is a recognizable "practice" of the religion clauses—like the practice of, say, baseball, in which particular moves are simply part of the game, and in which our sense of good or bad play is as much intuitive as reasoned.⁷ Religion clause practice is just what those of us who are members of the religion clauses' interpretive community understand to be a set of acceptable moves.

In that narrow sense, there is no doubt a recognizable "discourse" of law and religion, and Greenawalt's volumes make a great contribution to it. But does he offer a viable *theory*? Can it be evaluated—proved or disproved—on anything other than its own terms? Is there any way to say that Greenawalt's own con-

6. *Id.*

7. See Stanley Fish, *Dennis Martinez and the Uses of Theory*, 96 YALE L.J. 1773, 1777-78 (1987).

clusions are more or less *right*, and not just more or less conventional or acceptable?

Here I am not so sure. To say something satisfying about the religion clauses and their animating values, surely we must say something explicit about our commitments: which values count and for how much, and how to measure and prioritize competing values. It is not enough to say that we can simply do this from the bottom up, any more than it is possible to reason from analogy without understanding the values that animate our particular choices of analogy—why foxes are more like wild beasts and less like domestic animals, and so on.⁸ Either we are going to have to make explicit value judgments and impose them from the top down, or we are, to some degree, lost. Greenawalt's answers to these questions certainly look reasonable to me in many cases. But my sense is that the values underlying law and religion are now so contested that we cannot simply accept such answers as "reasonable"—or, at least, we should not be completely *satisfied* by them.

I am thus left with the sense that although Greenawalt's treatment of various religion clause issues is indeed reasonable, it cannot be genuinely bottom-up. There must be implicit values and value *judgments* at work here, and if left unvoiced they will lead us into crippling doubt. Conversely, if this work truly *is* a bottom-up effort, we are left without a strong sense of how to evaluate and engage with the individual answers to particular problems that comprise the bulk of this project.

In short, I do not think we can have a philosopher's brief for the religion clauses without a more clearly articulated *philosophy*. We might be able to have a very broad discussion about the boundaries of acceptable "practice" where the religion clauses are concerned. But stronger judgments beyond that point will be impossible.

For that reason, I am not sure why Greenawalt gives up on giving up, so to speak. Although we can accept that there is a conventional *practice* of the religion clauses, and argue about which values will be an acceptable part of that practice, I am not so sure that there can be a *theory* of the religion clauses. And without it, I'm not sure what we can say about individual cases beyond a very limited point.

8. See, e.g., RICHARD A. POSNER, *OVERCOMING LAW* 518–22 (1995).

Again, I frequently agree with Greenawalt's own conclusions. Were our courts staffed with philosopher-judges of Greenawalt's stripe, I might be pleased to live under such a regime. But, at the same time that I doubt that a "Unified Field Theory of the Religion Clauses" is possible, I think that its absence makes it very difficult for us to stand outside the conventional practice and do more than tell just-so stories about the religion clauses. Even *if* we were ruled by philosopher-judges who took the same care as Greenawalt does, absent a specific theory of how to reconcile conflicting religion clause values, the plurality of religious and political backgrounds from which these judges come would lead to a very thoughtful and polite cacophony.

II

My second observation about Greenawalt's books differs from the first, although it is related to his "philosopher's brief" approach. Greenawalt's philosophical orientation may at times give short shrift to deeper questions of social fact, and how to accommodate them within the religion clauses. To be sure, Greenawalt's treatments of various issues are deeply concerned with questions of judicial administration, and he often provides useful background on particular religious practices. But this is still a philosopher's work, and one sometimes feels that those social facts are an appetizer for his abstract treatment of the issues, rather than the meal itself.

We might benefit in this area from looking at the religion clauses on a more practical *institutional* level. Rather than rely on abstract models, often involving *individual* religious practitioners or objectors, we might instead think about how religions function as *institutions*. How do those institutions fit within the broader social framework; what kinds of practices do they engage in, and what forms of self-regulation constrain them; and how do these institutions fit within the broader constitutional structure? Such questions might in turn suggest something about other institutional players. To what extent, for example, are courts competent to evaluate religious institutional practices; when are those practices figuratively or literally beyond their jurisdiction; and how and when should courts defer to religious institutions' social practices, or even treat them as legally autonomous non-state associations?

Recent work has begun to address these questions.⁹ Of course, such an approach requires a theory of its own. But perhaps one of the motivations for such work has been precisely the sense that, *if* religion clause theories are hard to come by, and *if* one no longer places full faith in the ability of public reason to provide sound answers here, then it is worth building a somewhat different model of “bottom-up” reasoning about the religion clauses. In this model, we start with what we know about religious institutions and their vital role in the social and constitutional constellation, and think about how the law might profitably address religious entities as non-state institutions.

Greenawalt at times flirts with these institutional questions. But for the most part he does so for different reasons, relating to how courts should administer Free Exercise claims brought by *individuals*.¹⁰ This is not really a thorough-going account of churches *as* institutions.

For those who are interested in building a genuinely bottom-up understanding of the religion clauses, we might do well to focus on the role and function of religious institutions in a pluralistic liberal democracy. On that view, courts might openly consider whether particular religious institutions effectively fall outside the jurisdiction of the legal regime. Such an approach would focus on drawing boundaries between religious institutions and practices and proper “state” concerns, and its boundaries would be institutional and fact-bound rather than relying on strictly *legal* analytical categories.

I do not know whether such an approach would result in a different set of outcomes than the ones that Greenawalt proposes. But the mode of analysis would be quite different. Certainly, some theory would necessarily underlie this approach. In practice, however, such an approach might focus more on particular institutions and institutional practices, and less on the abstract value-reconciliation and the use of strictly legal tools and concepts that figure heavily in the courts’ current approach, and in Greenawalt’s volumes.

I do not know what Greenawalt would make of such an approach. But I would like to.

9. See, e.g., Paul Horwitz, *Churches as First Amendment Institutions: Of Spheres and Sovereignty*, 44 HARV. C.R.-C.L. L. REV. 79 (2009); see also Richard W. Garnett, *Do Churches Matter? Towards an Institutional Understanding of the Religion Clauses*, 53 VILL. L. REV. 273 (2008).

10. See, e.g., GREENAWALT, FREE EXERCISE AND FAIRNESS, *supra* note 1, at 83, 99.