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KENT GREENAWALT'S ELUSIVE CONSTITUTION

*Steven D. Smith**

In his magisterial opus which culminates with *Religion and the Constitution: Establishment and Fairness*,[1] Kent Greenawalt makes claims—many of them—about what "the Constitution" forbids, permits, and demands. But what conception of "the Constitution," or of constitutional interpretation, informs these claims? It is easier, I think, to say what Greenawalt's conception is *not* than to say what it *is*.

Original meaning? It is clear, for example, that Greenawalt is not relying on an originalist conception. He tells us so: original meaning is something to consider, but it is not determinative.[2] His second chapter, which offers an extended discussion of the original meaning of the establishment clause, might mislead an inattentive reader. Greenawalt's purpose in this chapter is defensive: he attempts to say not so much what the original meaning *was*, but what it *was not*.

More specifically, he criticizes at length the interpretation (proposed in various versions by, among others, Justice Thomas, Akhil Amar, and myself[3]) which holds that the enactors did not mean to adopt *any* substantive principle of religious freedom. Instead, they basically intended to confirm what virtually everyone at the time agreed on—namely, that the matter of "establish-

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* Warren Distinguished Professor of Law, University of San Diego. I benefitted from comments and general discussion at the roundtable conference on Professor Greenawalt's book at Notre Dame in October 2008. This essay is adapted from part of a more comprehensive review essay entitled *Discourse in the Dusk: The Twilight of Religious Freedom?*, 122 HARV. L. REV. ___ (forthcoming).

1. This volume completes the project begun in KENT GREENAWALT, RELIGION AND THE CONSTITUTION: FREE EXERCISE AND FAIRNESS (2006) [hereinafter GREENAWALT, FREE EXERCISE AND FAIRNESS].

2. *See, e.g.*, GREENAWALT, FREE EXERCISE AND FAIRNESS, *supra* note 1, at 12.

3. *See, e.g.*, Elk Grove School Dist. v. Newdow, 542 U.S. 1, 49–50 (2004) (Thomas, J., concurring); AKHIL REED AMAR, THE BILL OF RIGHTS 34 (1998); STEVEN D. SMITH, FOREORDAINED FAILURE: THE QUEST FOR A CONSTITUTIONAL PRINCIPLE OF RELIGIOUS FREEDOM (1995).

ment of religion" would remain within the jurisdiction of the states, not the national government. If accepted, this interpretation could be embarrassing to the more expansive constitutional jurisprudence favored by many today—including Greenawalt, who accordingly resists the jurisdictional interpretation.

Whether or not his conclusions are correct in this respect,[4] however, nothing in his project hinges on these questions. In his own analyses of establishment clause controversies, Greenawalt does not rely on original meaning for support; on the contrary, he concedes that much in modern establishment clause jurisprudence, and many of his own conclusions, are at odds with the understandings and expectations of the Framers.[5] Indeed, Greenawalt's bottom line on original meaning is almost startlingly negative in character:

> The modern Supreme Court's treatment of the scope of the religion clauses cannot be justified on originalist grounds . . . . But the latitude with which the Supreme Court has departed from these original understandings is no greater than it has exhibited with other parts of the First Amendment and with other guarantees in the Bill of Rights. Whatever bases one may have to criticize the Supreme Court's religion clause jurisprudence, it is not *distinctly* unfaithful to original understandings (pp. 38–39).

Text plus precedent? Greenawalt rejects originalism because he thinks courts need to be able to develop constitutional meanings "in light of changing social conditions and evolving moral and political premises" (p. 193). This emphasis on the need for judicially evolved meanings, together with Greenawalt's extensive and careful attention to the Supreme Court's modern case law, might suggest that he adopts the common lawyerly view that "the Constitution" consists of the text *plus* judicial precedent.

But this reading seems mistaken. In fact, though he is generally sympathetic to the Supreme Court's doctrine and decisions, Greenawalt is also highly critical of some precedents,[6] and

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4. For what it is worth, I think Greenawalt's conclusions are plausible but not the *most* plausible interpretation of the original meaning. For a lengthy defense of the jurisdictional interpretation against the objections of Greenawalt and others, *see* Steven D. Smith, *The Jurisdictional Establishment Clause: A Reappraisal*, 81 NOTRE DAME L. REV. 1843 (2006).

5. Greenawalt acknowledges that "the founders would have accepted various measures that had a religious purpose and a main effect of supporting religion" (p. 76; see also pp. 38, 39, 65).

6. For example, Greenawalt criticizes the decisions in Rosenberger v Regents, which ruled that a Christian newspaper should not be excluded from a university pro-

indeed of whole lines of precedent. For example, he opposes the trend toward allowing greater financial aid to religious schools (pp. 400–24). So it seems that some judicially evolved meanings are consistent with "the Constitution" and some are not. Clearly "the Constitution" for Greenawalt somehow subsists independent of precedent.

Tradition? If the evolving constitutional meanings are not to be supplied by precedent, then perhaps they derive from something more intangible but also more earthy and democratic—something like the "traditions and collective conscience" of the American people? Greenawalt says more than once that constitutional law ought to be congruent with culture and traditions.[7] And he occasionally defers to traditions that he plainly thinks are in principle undesirable or unconstitutional, such as the tradition of "mild endorsements" of religion (p. 540).

Nonetheless, Greenawalt never actually attempts to show how his views and prescriptions flow from any deliberate or developed interpretation of the American political tradition. Nor could he, I suspect. That is because, by-and-large, Greenawalt's commitments run strongly contrary to pervasive and well-entrenched American traditions. We might put the point this way: although he attempts fairly to represent all sides, and although he comes closer to achieving a fair presentation than almost any contemporary scholar could do, still, in the end, Greenawalt consistently comes down on what James Davison Hunter described as the secular, "progressive" side in the culture wars and *against* the more tradition-oriented side.[8]

Thus, Greenawalt comes close to being categorical in insisting that government (as opposed to ordinary citizens) cannot make, express, or act on theological judgments or religious beliefs (pp. 57, 190, 195, 492–93, 523–24). This proscription would have the effect of repudiating, or at least rendering suspect, the longstanding American tradition—one honored over the years by all branches of government (executive, legislative, judicial) and all levels of government (federal, state, local)—of including

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gram subsidizing student publications (pp. 203–04), and in Zorach v. Clauson, which upheld an off-premises "release time" program of religious instruction for public school students (pp. 67–68).

7. *See, e.g.*, GREENAWALT, FREE EXERCISE AND FAIRNESS, *supra* note 1, at 4 ("I will be making claims that rest on the country's political and legal traditions and on undeniable facts about its present condition.").

8. JAMES DAVISON HUNTER, CULTURE WARS: THE STRUGGLE TO DEFINE AMERICA (1992).

religious language in enactments, displays, and official proclamations of various sorts.[9] Nearly every state constitution expresses deference to a being denominated "God," "Almighty God," "the Supreme Ruler of the Universe," or "the Sovereign Ruler of the Universe"[10]: Greenawalt says that all of these expressions are probably unconstitutional (p. 65 n.27). And every President has included religious language in an Inaugural Address[11]: this practice would also seem to transgress Greenawalt's constitutional principles. Thus, it seems that on Greenawalt's view, Lincoln's much revered Second Inaugural Address ("with malice toward none, with charity for all") should be sandblasted off the wall of the Lincoln Memorial: the speech was, as one historian observed, a "theological classic," containing "fourteen references to God, many scriptural allusions, and four direct quotations from the Bible."[12]

But perhaps Greenawalt is not so much interested in tradition as reflected in *past* expressions and facts, but rather in what sort of political community tradition has made us into, *now*. To be sure, past luminaries like Washington, Jefferson, and Lincoln routinely invoked God in their official declarations. But tradition is an evolving matter, and by now and in our more secular and diverse society we understand that such expressions are divisive and inappropriate.[13] Don't we?

Well, actually, no: *we* don't—not unless the "we" is understood to refer a smaller and more select fellowship (like, say, devout readers of the *New York Times*?). Thus, a more present-

9. For a collection of such expressions, *see* JOHN T. NOONAN, JR. & EDWARD MCGLYNN GAFFNEY, JR., RELIGIOUS FREEDOM: HISTORY, CASES, AND OTHER MATERIALS ON THE INTERACTION OF RELIGION AND GOVERNMENT 201–08, 210–12, 308–12 (2001).

10. For a compilation, *see* WILLIAM J. FEDERER, THE TEN COMMANDMENTS AND THEIR INFLUENCE ON AMERICAN LAW 52–55 (2003). The United States Constitution is importantly different in this respect. For consideration of the significance of the national Constitution's agnosticism, *see* Steven D. Smith, *Our Agnostic Constitution*, 83 NYU L. Rev. 120 (2008).

11. FEDERER, *supra* note 10, at 49–51.

12. ELTON TRUEBLOOD, ABRAHAM LINCOLN: THEOLOGIAN OF AMERICAN ANGUISH 135–36 (1973). To be sure, Greenawalt suggests that government officials should be free to express religious opinions when not speaking "for the government" (p. 62): perhaps Lincoln's majestic address could be salvaged with the aid of some such distinction. But in fact this qualification hardly seems to fit. In their inauguration ceremonies our chief executives surely understand themselves—and are understood—to be speaking *as President*, and their addresses are presented as such.

13. *See* p. 65 ("Although assertions about a beneficent God were prevalent at our country's founding, are contained in the Declaration of Independence, and remain in many state constitutions, nevertheless government should not now make formal, serious claims about a beneficent God." (footnotes omitted)).

oriented approach to tradition might help Greenawalt a little, but not much. It may be that objections to governmental religious expression are more widespread today than in the past. But such objections do not yet amount to anything like a dominant or consensus position. Presidents and other public figures still routinely invoke God in their official speeches and declarations. Despite judicial efforts to censor such expression, states and local communities still actively assert their right, *as communities*, to maintain religious symbols and expressions of various sorts: the host of cases about Ten Commandments monuments are evidence of this sentiment.[14] A Circuit Court that tries to excise the words "under God" from the Pledge of Allegiance still calls forth a torrent of bipartisan outrage.

Theory? Another possibility might be that Greenawalt is appealing to some sort of Dworkinian Constitution, in which constitutional meaning is obtained by interpreting the materials in accordance with the best available political-moral theory.[15] But in fact Greenawalt seems decidedly ambivalent about whether any such theory is even possible. He insists, repeatedly, that the religion clauses cannot be understood in terms of "any single formula or set of formulas" (p. 432). And he finds inadequate the leading examples of more theoryish approaches that he considers—the "substantive neutrality" of Douglas Laycock and Michael McConnell, and Christopher Eisgruber's and Lawrence Sager's "equal liberty" approach (pp. 451–56, 462–79).

To be sure, Greenawalt sometimes suggests that a satisfactory theory of religious freedom might be devisable (p. 436), and he devotes a chapter to the refutation of "religion clause skeptics" (such as myself) who doubt the possibility of any such theory. Here he confronts the objection which asserts that any such theory would necessarily depend on judgments about more ultimate and contested matters, such as the nature and purpose of government, human nature and, most crucially, the *nature and truth of religion*. Greenawalt concedes the point, but suggests that it is in principle possible to investigate such matters and make informed judgments about them (pp. 442, 446).

This suggestion seems plausible (at least if the "in principle" is heavily underscored): still, this response to theory skepticism seems curious coming from Greenawalt, since his virtually cate-

14. *See, e.g.*, Van Orden v. Perry, 545 U.S. 677 (2005).

15. Dworkin's most extensive argument for this view is in RONALD DWORKIN, LAW'S EMPIRE (1986).

gorical insistence that government must *not* act on the basis of theological judgments would seem to forbid such an investigation, at least for purposes of developing a theory that would govern governmental behavior. Indeed, Greenawalt reiterates in this chapter that he "agree[s] with Smith that any theory that judges and other officials are directly to employ cannot be based on an assumption that any particular religious view is correct" (p. 449).[16] But unless the qualifiers "directly" and "particular" are made to do a good deal of work, this prohibition precludes precisely the determinations about background beliefs that Greenawalt seemed to be recommending as a possible basis for a governing theory.

Whether or not a theory of religious freedom is possible in principle, however, it is clear that Greenawalt himself proposes no such theory. His approach is not "theory down" but rather "bottom up," as he says. So it seems that Greenawalt is not employing a Dworkinian Constitution in reaching his various conclusions.

Justice, fairness, prudence? So if Greenawalt is not using an originalist conception of the Constitution, or a "text plus precedent" conception, or a tradition-rooted conception, or a Dworkinian theory-oriented conception, then what sort of Constitution *is* Greenawalt invoking as he declares that the Constitution permits some things and forbids other things?

Sometimes Greenawalt almost seems to equate what the Constitution ostensibly demands with "what ought to be done, all things considered."[17] At other times, though, Greenawalt explicitly distinguishes between constitutional demands and the prescriptions of prudence or fairness.[18] But he offers no clear ex-

16. My own claim, actually, is not that officials "cannot" act on such assumptions either in the sense that they are incapable of doing so or in the sense that they are somehow constitutionally forbidden to do so. On the contrary, I think that government ultimately *cannot avoid* making judgments about theological issues. *See, e.g.*, Steven D. Smith, Barnette's *Big Blunder*, 78 CHI.-KENT L. REV. 625, 653–58 (2003). The claim, rather, is that if governments determine the scope for religious choice in accordance with judgments that accept some religious beliefs and reject others, they are not be acting in accordance with a "theory of religious freedom" of the sort that modern thinkers have aspired to provide. *See* STEVEN D. SMITH, GETTING OVER EQUALITY: A CRITICAL DIAGNOSIS OF RELIGIOUS FREEDOM IN AMERICA 45–57 (2001).

17. Thus, after presenting a highly nuanced discussion of how religion should and should not be treated in the public school curriculum (pp. 122–34), Greenawalt asserts that "constitutionally permissible teaching largely coheres with what I have claimed is appropriate or desirable teaching" (p. 134).

18. *See, e.g.*, p. 240 (contrasting "constitutionality" with "legislative and judicial wisdom"); pp. 280, 284 (contrasting "policy considerations" with "constitutional principles").

planation—none that I could discern, at least—of how this distinction is being drawn.

Does it matter? Of course, Greenawalt is hardly the only constitutionalist around who declines to propose a clear account of how the Constitution gets its meaning. And in any case, I am hardly in a position to cast the first stone. Moreover, the absence of any clear account of what "the Constitution" is might be unobjectionable—it might be just a piece of commendable realism—except for the fact that Greenawalt expects "the Constitution," and the judiciary, to play such a major role in the disposition of religious freedom controversies.

Thus, one can imagine a view that would hold that because the original meaning of the establishment clause is unascertainable or no longer germane, and in the absence of a satisfying alternative account of just how constitutional meaning is created, controversies about religious freedom ought normally to be settled without invoking commands or prohibitions supposedly emanating from "the Constitution." This conclusion might in turn entail that the courts should have a relatively modest role in effecting or imposing such settlements.

But this is clearly not Greenawalt's view. On the contrary, he envisions an expansive Constitution and an active, intensive supervisory role for the courts. And so the absence of any clear account of what "the Constitution" is and where its meaning comes from is troubling.