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The Philosopher's Brief

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I.

One of Kent Greenawalt's greatest virtues is his eminent reasonableness and his ability to listen. In the classroom and in print, he offers a fair hearing to the welter of contending viewpoints on law and religion, is ready with a thoughtful response to those views, and offers careful and well-reasoned views of his own. In life 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 those of us who follow his careful work somewhat short of a definitive standard by which to judge its success. Like full many a 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*. The very first page of his second volume says:

> [M]y approach to the subject is grounded on the following three premises: (1) Neither free exercise nor

* Associate Professor, University of Alabama School of Law. I am grateful to Rick Garnett and the participants in the roundtable discussion of Kent Greenawalt's books at Notre Dame Law School. Mostly, and 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] Kent Greenawalt, *Religion and the Constitution: Free Exercise and Fairness* (2006) [hereinafter Greenawalt, *Free Exercise and Fairness*]; Kent Greenawalt, *Religion and the Constitution: Establishment and Fairness* (2008) [hereinafter Greenawalt, *Establishment and Fairness*].

> 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 approaches is from the "bottom up" – addressing discrete issues in their rich complexity and investigating conflicting values over a range of issues.[2] (*Establishment and Fairness*, 1.)

Elsewhere, Greenawalt expands on this approach, writing that, given the difficulty of reconciling the multiple values that have to be traded off where the Religion Clauses are concerned, 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."[3] The difficulty of reconciling conflicting values and appreciating the nuances involved in such arguments means that "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 provisionally right, or at least useful, answers in a broad array of "standard" cases.[4]

Greenawalt might insist 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.

I share Greenawalt's view that there is and can be no Unified Field Theory of the Religion Clauses. No single value or approach can satisfy anyone thinking and working in the field of law and religion – particularly if, as Greenawalt does, one seeks to reconcile that value not only with some general picture of the Religion Clauses, but also with the Court's own tangled precedents, and with such post-founding developments as the ratification of the Fourteenth Amendment.

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2 Greenawalt, *Establishment and Fairness, supra* note 2, at 1.
3 Greenawalt, *Free Exercise and Fairness, supra* note 2, at 6.
4 *Id.* at 7.

Some scholars argue that history can do all the work that is needed. But without rehashing the whole debate, I find this argument unpersuasive. Not least, we have to clarify what we mean by such an approach. If one means that an examination of original meaning (in whatever precise formula one wishes to use) leads to right answers about what the Religion Clauses mean, the diversity of views that existed even at the outset of our history (even if one attempts to distill them into a few discrete strands, as John Witte has done[5]) are so complex and conflicting that I doubt that any compelling "right answer" can be found here – at least to the interesting questions. If, on the other hand, we take this approach to a slightly greater level of abstraction and argue that history reveals particular prevailing values that should go into our interpretation of the Religion Clauses, we are left more or less where we started – with a set of conflicting values, now suitably pedigreed, but which still demand reconciliation. History does not give us the metric by which to accomplish that task. For reasons that space does not permit me to expand on here, I am equally skeptical that most of the general theories of the Religion Clauses that have been offered, revolving around one big value such as equality, neutrality, and so on, will do the necessary work.

What, then, are we left with? Greenawalt's answer appears to be that we should ask questions about the Religion Clauses, "not in the abstract but by focusing on concrete issues in context."[6] We are left, in other words, with the careful, thoughtful, nuanced, situation-by-situation inquiry that fills out these two masterful volumes.

But I wonder how we should characterize this approach, and how we can ultimately judge its persuasiveness in each of the specific areas that Greenawalt examines. Is it, as Steve Smith asks, a "common lawyerly" approach that attempts to crunch cases one by one?[7] If so, it is a superb example of the

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5 *See* John Witte Jr., *Religion and the American Constitutional Experiment* (2nd ed. 2005).

6 Greenawalt, *Establishment and Fairness, supra* note 2, at 543.

7 *See* Steven D. Smith, *Discourse in the Dusk: The Twilight of Religious Freedom*, Harv. L. Rev. (forthcoming) (reviewing Greenawalt, *Establishment and Fairness, supra* note 2).

craft. But this is not simply an effort to understand the cases as cases. Greenawalt believes that some cases are more or less right or wrong; the Constitution "somehow subsists independent of precedent" in Greenawalt's work.[8] Although Greenawalt's books will be of great value to lawyers, this is thus not simply a lawyer's map of the field.

Smith asks whether Greenawalt's work might be understood instead as a theory-oriented work, in which "constitutional meaning is obtained by interpreting the materials in accordance with the best available political-moral theory."[9] With the important reservations that follow, that is precisely how I think *Religion and the Constitution* can best be understood and appreciated. It is a "philosopher's brief" for the Religion Clauses,[10] albeit it is distinctly a *legal* philosopher's brief. If there is a compass for both volumes, it is that they are fundamentally philosophical in nature. By that, I mean that they proceed as many philosophically inclined lawyers do: by trying to lay out in exquisite detail the problems to be examined, the multiple values that may be applied to each problem, all the nuances that influence each application of each value, and the best answer that "practical reason" can provide in each case.

This approach is surely influenced by history, although Greenawalt does not see history as outcome-determinative in most cases. It is also influenced by broad notions of political theory concerning what is acceptable in a liberal democracy. But history and political theory mostly serve here to frame or limit the philosopher's careful work in each case: to give some sense of the givens that constrain the range of answers available to practical reason in the circumstances.

I cannot emphasize enough how persuasive I find many of the answers that Greenawalt's method suggests, or how much I admire the provisional tone of his answers. But neither can I help but wonder just how we should evaluate them. If "many

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8 *Id.*

9 *Id.*

10 *Cf.* Ronald Dworkin *et al., Assisted Suicide: The Philosopher's Brief*, N.Y. Rev. of Books, Mar. 27, 1997, at 41.

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 us with? By what metric do we judge just how "reasonable" any given answer is, beyond the fairly general conclusion that it is a "reasonable" effort to come to a decent all-things-considered result?

I don't see a good answer here. 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."[11]

"Discourse" is exactly the right word here. It suggests that there is a recognizable modality of argument about the Religion Clauses, in Philip Bobbitt's terms.[12] In Stanley Fish's terms, it suggests that there is a recognizable "practice" of the Religion Clauses (like the practice of, say, baseball, in which we must accept particular moves as part of the game, and in which our sense of good or bad play is as much intuitive as reasoned).[13] This practice is just what those of us who are members in good standing of the interpretive community of scholars working within the Religion Clauses understand to be a set of acceptable moves.

In that 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? Even *on* its own terms, is there any way we can meaningfully say that any given conclusion that Greenawalt draws is more or less right, as opposed to more or less conventional or acceptable?

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[11] Greenawalt, *Establishment and Fairness, supra* note 2, at 436.

[12] *See* Philip Bobbitt, *Constitutional Fate: Theory of the Constitution* (1982).

[13] *See* Stanley Fish, *Dennis Martinez and the Uses of Theory*, 96 Yale L.J. 1773 (1987).

Here I am not so sure. If we do not just surrender at the point at which we say that the Religion Clauses involve multiple and potentially incommensurable values, then I think we have to say something explicit about our commitments: about which values count and for how much, and about how to measure and prioritize competing values. It is not enough, I think, 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 dogs, and so on.[14] 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.

We could simply take a rough estimate of how we usually reconcile conflicting values in a liberal democracy that closely resembles our own, and examine how well particular cases fit that ideal picture. But this is still more of a *practice*, not a theory. You can get here from *here*, but you can't go anywhere else. For Greenawalt to offer a theory, and thus to give us a useful measure of the success of his individual treatments of particular Religion Clause issues, I think we need an explicit statement about how we go about selecting particular values for inclusion in the Religion Clause canon, and how and why some count more than others in particular cases. In practice, Greenawalt's answers to these questions look very reasonable to me in many or most 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 perforce left without a strong sense of how to evaluate and engage with the

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[14] *See, e.g.,* Richard A. Posner, *Overcoming Law* 518-22 (1995).

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 particularized *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 are impossible beyond that point.

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 value stances – theological, political, and otherwise – 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.

Put a little differently, I think Greenawalt's approach – a little bit of careful lawyering, a little bit of careful philosophy, but no heavy-duty effort to explicate a particular *theory* of the Religion Clauses – leaves us in doubt as to the precise nature of and audience for these works. It is too much a philosopher's brief to be a true lawyer's treatise; it is addressed as much to philosopher-judges as to the down-and-dirty world of legal practice and lower court judging. But absent an overarching and clearly spelled out theory, it is necessarily confined to particular issues, and perhaps lacks or leaves unspoken the fundamental basis on which we can tie everything together.

Again, I cannot emphasize how valuable I believe these books are, and how often I agree with Greenawalt's careful treatment of the issues. 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 is somewhat different from the first, although it is again related to his "philosopher's brief" approach. My impression is that his philosophically oriented method may at times give short shrift to deeper questions of social fact, and how to accommodate them within the Religion Clauses. I want to be very clear in making this claim. There is no doubt that Greenawalt's treatments of various issues are deeply concerned with questions of judicial administration, and that he often provides useful background on particular religious practices and the conflicts they present. It is by no means an abstract work. But it is certainly a philosopher's work, and one sometimes feels that those social facts are a prelude to his philosophical treatment of the issues rather than the meal itself. Interdisciplinarily speaking, it draws mostly on philosophy and a very general application of political theory, generally having to do with the aims of liberal democracy, along with conventional legal analysis. No other tools for uncovering and applying complex questions of social fact are especially prominent here.

I wonder whether we would benefit more in this area from looking at the Religion Clauses on a more practical and *institutional* level. That is, rather than rely on somewhat abstract models, often involving particular *individual* religious practitioners or objectors contending with a somewhat idealized judge, we might instead think about how religions function as *institutions*: how those institutions fit within the broader social framework; what kinds of practices those institutions engage in and what forms of self-regulation they engage in; and how those institutions fit within the *constitutional* structure. That in turn might suggest something about other institutional players: when and to what extent, for instance, are courts competent or incompetent to evaluate religious institutional practices; when are those practices

figuratively or literally beyond their jurisdiction; and how and when should courts defer to institutions' social practices, or even treat those institutions as legally autonomous non-state associations?

Some recent work has begun attending to these questions.[15] 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 come to sound answers in the field, or *if* one believes that conventional approaches to public reason have failed to adequately account for some key social facts concerning religion, 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 thinking about religious institutions as institutions. But for the most part he does so for different reasons, having to do with how courts can sensibly administer Free Exercise claims brought by *individuals*. Thus, in several chapters of his first volume, he suggests that in evaluating religious claims to exemptions, courts might look at whether an individual claimant falls within a set of identifiable practices drawn from particular and recognizable faith communities.[16] I am not totally convinced by his conclusions on these points. But in any event, religious groups in such cases are really being used as part of a decision-making heuristic for judges. This is not a thorough-going treatment of churches *as* institutions.

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[15] If you will pardon the self-citation, see Paul Horwitz, *Churches as First Amendment Institutions: Of Spheres and Sovereignty*, Harv. C.R.-C.L. L. Rev. (forthcoming 2009). Rick Garnett has also written very valuably in the same vein. *See, e.g,* Richard W. Garnett, *Do Churches Matter? Towards an Institutional Understanding of the Religion Clauses*, 53 Vill. L. Rev. 273 (2008).

[16] *See, e.g.,* Greenawalt, *Free Exercise and Fairness, supra* note 2, at 83, 99.

For those who are interested in building a bottom-up account of constitutional practice in and around the Religion Clauses, we might do well to redraw our mental picture in a way that is more attentive to the role and function of religious institutions in a pluralistic liberal democracy. On that view, courts might openly consider whether particular religious institutions, and their practices, effectively fall outside the jurisdiction of the legal regime altogether. Although it would certainly involve legal analysis, such an approach would focus more on drawing boundaries between religious institutions and practices and proper "state" concerns, and its boundaries would be more institutional and fact-bound rather than relying on strictly *legal* analytical categories.

I do not know whether such an approach would come up with a completely different set of recommended outcomes than the courts have offered, or than the ones that Greenawalt has proposed. But the mode of analysis would be quite different. Certainly, as I have said, there is necessarily an underlying theory at work here too. But in practice, 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.