

Response to Professor Kent Greenawalt's Lecture

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The discussion of law and religion can take various forms. One form is conceptual: What is religion? How are religious claims different from moral claims or metaphysical ones? Is the method of evaluating religious claims for their truth—the epistemology of religious claims—different from the methods of evaluation of moral claims or metaphysical ones? And so on.

Another form the discussion might take I will loosely label as sociological. What role does religion play in peoples' lives? How do they view others' religions—or nonreligion? What do they think about various forms of government involvement or noninvolvement in religious matters? And so on.

Still another form the discussion might take is a discussion of how the Constitution regulates the government's involvement in religious matters. What does the Constitution forbid the government from doing? What does it require that government do? What is government permitted to do but not required to do?

Finally, one can discuss law and religion from the standpoint of political philosophy. As an ideal matter, what is the proper relation between the government, the citizen, and the citizen's religion? Is the government forbidden from knowing and supporting what most of its citizens claim to know? Must it allow citizens to engage in practices that most citizens believe to be religious error? Must it do so even at some cost to the rest of the citizenry? And so on.

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Professor Kent Greenawalt's lecture, like the body of his prior writings on law and religion, is difficult to categorize in the terms I have just employed. The lecture largely elides the conceptual questions I flagged, except that Kent would categorize borderline cases of religion and religious claims by asking how similar the case is to the core instances of religion and religious claims.¹ And although the lecture is surely informed by a rich understanding of the role of religion in people's lives in the contemporary United States, it is surely not primarily a sociological work.

That leaves constitutional law and political philosophy. Is the lecture one, or the other, or both? Well, it does not read like a work of political philosophy. I am not even sure, as I have written elsewhere, that one can have a satisfactory philosophical account of the proper treatment of religion either in terms of Establishment Clause issues or in terms of Free Exercise Clause issues. The matter is too complex for me to elaborate fully here, but the crib notes version goes something like this: Any account of what a just society looks like will conflict with some people's views of the matter. How then, as a matter of justice and social welfare, should people be treated who reject that account of justice and social welfare? That treatment will always be from the perspective that those dissenters are in error. Their religious qualms about the regime and its requirements are no different. From the regime's point of view, their point of view is mistaken. Their distress may be real. And it may be right—again, from the regime's point of view—to be sensitive to that distress and to see that burdens on the dissenters be relieved as much as possible while still being fair to those who—rightly—endorse the regime's laws. Perhaps it would be desirable to establish an institutional structure, such as judicial review of legislation, to help ensure that all possible means of just accommodation have been explored. Nonetheless, the regime's laws will necessarily deny that dissenting views, including religious ones, are correct. No political philosophy, and no legal regime reflective of a political philosophy, can treat opposing views, religious or nonreligious, as other than wrong. A regime—any regime—will therefore “establish” some views and will restrict some religiously motivated acts.

The lecture, as I said, does not read like a work of political philosophy. That leaves constitutional law, which I believe is the correct genre. If there is an underlying theory, it is a theory of the U.S. Constitution's religion clauses.

1. See Kent Greenawalt, *Fundamental Questions About the Religion Clauses: Reflections on Some Critiques*, 47 SAN DIEGO L. REV. 1131, 1147 (2010).

But what is a “theory” of constitutional causes a theory *of*? Is it a theory about the original meaning of the clauses? Is it a theory that rationalizes all the court decisions under the clauses?

Kent eschews grand theorizing about the religion clauses. He calls his approach a “bottom-up” approach and his view of constitutional interpretation an “eclectic” one.² The latter is a nonordered combination of the Constitution’s original meaning, the underlying principles that prompted that meaning, prior legal decisions and their underlying principles, national traditions, contemporary values and understandings, judicial administrability of standards, and clear guidance to officials and citizens.³ Kent gives no lexical ordering to these various ingredients in constitutional interpretation.⁴ Indeed, I do not believe they can be coherently ordered at all. They are a dog’s dinner of incommensurable items. Some are facts—the original meaning, legal decisions, traditions—and some are values. I do not know how to weigh facts and values. And even the values seem incommensurable. Is this smorgasbord of considerations what we mean when we proclaim the parchment in the National Archives to be the fundamental law?

My own view, for what it is worth, is that Constitution *is* its original meaning—nothing more or less. Now that original meaning may direct us to look at the list of considerations Kent adduces—though I sincerely doubt it. How could the original meaning be consistent with *overriding* the original meaning? I confess, I am not sure what the original meaning of the religion clauses is—though I suspect that meaning is narrow and jurisdictional and bears very little on current controversies.

In the end, I view Kent’s approach as one of how a very sensible and sensitive kadi operating in contemporary American culture would resolve a variety of religious controversies. That is to say as a matter of *my* personal preferences, I like most of Kent’s particular resolutions of these controversies. I doubt, however, that they can be justified by reference to the Constitution and imposed by judges in the name of the fundamental law of the land.

2. *Id.* at 1132, 1142.

3. *See id.* at 1142–43.

4. *See id.* at 1142.

