

# Response to Professor Kent Greenawalt's Lecture

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It is an honor for me to be able to comment on this lecture by Professor Kent Greenawalt, who is one of the people in the legal academy I admire most, as a scholar and as a person. Twenty-five years ago, at the first academic conference I ever attended, as a spectator, Kent was one of the principal speakers, and he presented a paper that helped to initiate a major and important debate on the role of religion in political decisionmaking.<sup>1</sup> A few years later, I spent a week at Columbia in a sort of mini-visit. It was December, so it was cold and dark, and I was staying alone in a heartless hotel, and during my days there it seemed that I was constantly being challenged and interrogated by one faculty member after another. One evening, though, Kent invited me over to his apartment for a friendly conversation for an hour or so. That was the highlight of my Columbia visit; I still remember the occasion fondly.

So I was excited when, a couple of years ago, the *Harvard Law Review* asked me to write a substantial review of Kent's most recent book on the Establishment Clause.<sup>2</sup> And this turned out to be an

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1. Kent Greenawalt, *The Limits of Rationality and the Place of Religious Conviction: Protecting Animals and the Environment*, 27 WM. & MARY L. REV. 1011 (1986). Kent himself has been one of the leading ongoing contributors to this debate. See, e.g., KENT GREENAWALT, *PRIVATE CONSCIENCES AND PUBLIC REASONS* (1995); KENT GREENAWALT, *RELIGIOUS CONVICTIONS AND POLITICAL CHOICE* (1988).

2. 2 KENT GREENAWALT, *RELIGION AND THE CONSTITUTION, ESTABLISHMENT AND FAIRNESS* (2008).

enjoyable and rewarding project for me—both in reading the book and writing the review. The only painful part was that I did feel compelled to make some critical observations about the book, which Kent has quoted here tonight.<sup>3</sup> However, my review also offered many laudatory comments,<sup>4</sup> and even the critical observations—about the book’s many “highly conclusory pronouncements”—were intended to be critical in a laudatory sense.

That remark may seem paradoxical, or worse, but let me explain. There seems to be widespread agreement that the jurisprudence of the First Amendment’s religion clauses is unsatisfactory. Much of my own work in this area has been diagnostic in character; it tries to ascertain what the predicament is and how we managed to get into this predicament. And one diagnosis I have sometimes offered, including in my review of Kent’s book, might be called the “exhausted tradition” account. The suggestion is that religion clause jurisprudence is unsatisfactory because it reflects the exhaustion of a centuries-long tradition of trying to reason about the proper relation between government and religion.

Here is a slightly more detailed, but still very summary, elaboration.<sup>5</sup> Modern commitments to religious freedom are derived, I would argue, from a long history of thought and action that was anchored in a dualistic Christian worldview in which God and Caesar were believed to work through independent authoritative institutions—church and state—and to impose independent but valid obligations on their subjects. “Render therefore unto Caesar the things which be Caesar’s, and unto God the things which be God’s.”<sup>6</sup> The medieval effort to free the church from Caesar’s rule—to achieve freedom of the church—was a progenitor of the modern commitment to separation of church and state. In the post-Reformation period, as the functions and dignity of the *church* came to be transferred in part to the individual *conscience*, freedom of the church gave rise to a fierce devotion to freedom of conscience—a cause for

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3. See Kent Greenawalt, *Fundamental Questions About the Religion Clauses: Reflections on Some Critiques*, 47 SAN DIEGO L. REV. 1131, 1132–33 (2010) (reporting my criticism of the book for “highly conclusory pronouncements”).

4. Steven D. Smith, *Discourse in the Dusk: The Twilight of Religious Freedom?*, 122 HARV. L. REV. 1869, 1871 (2009) (“[F]or a careful, fair-minded analysis of the cases and arguments with respect to virtually any establishment controversy that a judge or scholar may be investigating, one could hardly do better than to consult Greenawalt’s treatment.”); *id.* at 1906–07 (suggesting that Greenawalt “is, so to speak, a Jan van Eyck of legal reasoning”).

5. For a much more detailed presentation, see STEVEN D. SMITH, *THE DISENCHANTMENT OF SECULAR DISCOURSE* 107–50 (2010).

6. *Luke* 20:25 (King James).

which thousands suffered martyrdom. This cause culminated in the modern constitutional commitment to free exercise of religion.

The religious origins of religious freedom were tersely but clearly reflected in the explicitly theological rationales offered, for example, in James Madison's famous *Memorial and Remonstrance* and in Jefferson's celebrated Virginia Statute for Religious Freedom. The problem is that in contemporary circumstances many scholars and jurists—including Kent—argue that it is constitutionally impermissible, under the Establishment Clause, for government to rely on such religious rationales.<sup>7</sup> In this way, religious freedom comes to snub or subvert its own supporting rationales, and thus threatens to cancel itself out. And the discourse comes to have an unmoored quality. I have argued that in these circumstances it becomes difficult to explain why religion deserves special constitutional treatment or give persuasive rational justifications for the various positions for which people want to argue; the unsatisfactory condition of religious clause discourse reflects these difficulties.<sup>8</sup>

Kent's recent volumes provide valuable—albeit unintended—support for this explanation, I have suggested, but not because Kent's reasoning is deficient. On the contrary, his book reflects the exhaustion of the tradition precisely because he is so careful and honest in his reasoning. Other advocates sometimes try to make it appear that “reason” supports their conclusions by slighting the requirements of reason. So they neglect to notice some of the arguments that run contrary to their position. Or they present those arguments in a tendentious way. Or they engage in subtle—or not so subtle—ad hominem criticism of their opponents. Kent, by contrast, is too honest and scrupulous to resort to such tactics. He carefully and fairly presents all of the significant arguments on both sides of a contested issue.

And the result, usually, is a kind of impasse. There are pro and con arguments, and reasoning cannot decisively vindicate either side, and so there is nothing left but to declare which side one favors—on the basis of considerations or influences that elude rational articulation and that are necessarily more personal or perhaps political in nature. It seems to me that Kent's lecture tonight does not so much contest this account of

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7. Kent explains his reasons for drawing this conclusion in Part III of the present lecture. See Greenawalt, *supra* note 3, at 1139.

8. I argued for this point at length in Steven D. Smith, *The Rise and Fall of Religious Freedom in Constitutional Discourse*, 140 U. PA. L. REV. 149, 180–96 (1991).

our condition as embrace it, suggesting that this is the best we can do. He may well be right. His example of Dan and Daisy certainly rings true to me. But this conclusion, I think, simply underscores the limitations of reason, at least in this area.

It is probably apparent that Kent's work tries more than my more diagnostic work does to provide practical guidance on the contested issues of the day. But I think my diagnosis, if it is correct, is not entirely lacking in practical implications. More specifically, I think my diagnosis suggests the wisdom of greater judicial deference in this area than many people, including Kent, favor. If you want a court to invalidate some legislative enactment, you are on firmest ground if you can persuasively argue—depending on your view of constitutional interpretation—that (a) the enactment is inconsistent with the original meaning of First Amendment,<sup>9</sup> or (b) the enactment is inconsistent with a contemporary consensus of “We the People” as to what government can properly do, or (c) the enactment is inconsistent with some persuasive normative theory. Conversely, if none of these arguments can persuasively be made, the case for invalidation is weak.

Take the example Kent has mentioned tonight of the words “under God” in the Pledge of Allegiance.<sup>10</sup> Kent briefly reiterates the position taken in his book—that that these words should in principle be declared unconstitutional—although, given the popular opposition such a ruling would provoke, this might be a rare case in which courts should hold back for purely prudential reasons. But I do not understand him to contend that the words in the pledge violate the original understanding of the Establishment Clause or that they are at odds with any current consensus of “We the People,” and he expressly refrains from offering any normative theory that could condemn those words. So I believe this case illustrates how the limitations of reasoning that Kent discusses—and that he performatively demonstrates precisely by being so careful and scrupulous in his own reasoning—count against the kind of active judicial review he advocates.

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9. This is the approach that Professor Alexander's response advocates. See Larry Alexander, *Response to Professor Kent Greenawalt's Lecture*, 47 SAN DIEGO L. REV. 1153, 1155 (2010).

10. Greenawalt, *supra* note 3, at 1143.