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Judicial Enforcement of the Establishment Clause

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There is—no surprise!—nothing doctrinaire, rigid, or formulaic about Kent Greenawalt's study of the establishment clause. He works with principles and values, not "rules" or "tests" (although he finds more to admire in the "*Lemon* test" than many courts and commentators do[1]). In *Establishment and Fairness*, the discussion and analysis are almost always highly sensitive to context, the conclusions almost always fact-bound. There is, throughout the project, a consistent openness to the possibility—indeed, to the likelihood—that different circumstances will call for different results.[2] His approach, he says, is a "sensible, nuanced" one, which "involves a number of debatable choices and does not reduce to any simple formula" (p. 433). In his view, the way to understand how the Constitution's religion clauses "should best be understood" is not by asking questions "in the abstract but by focusing on concrete issues in context" (p. 543).

Clearly, this wonderful book is a great achievement. It is impossible not to admire the reasonableness, humility, and charity that characterizes and animates this work, and Greenawalt's entire scholarly career. That said, one has to ask: Is Greenawalt's reluctance, in the establishment clause context, to settle on bright-line rules a "good thing" or a "bad thing"? Is his "sensible, nuanced approach" the right one, or even an attractive one? And if it is—if Greenawalt's approach to establishment-and-fairness questions, his appreciation for the values that are at stake in the relevant cases, and his sense that the relevant princi-

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1. *See, e.g.*, p. 52 ("I . . . contend that what the Court has done in respect to establishment is, overall, more cohesive and reasonable than many scholars of the religion clauses believe."). *See generally* pp. 157–80 (examining the *Lemon* test).

2. *See, e.g.*, p. 195 (noting that "conditions of scarcity" with respect to public facilities "could vary [the] conclusion" that, as a general matter, "[t]here is no reason to make public facilities available only for religious groups").

ples *are* basically sound—then what are the implications of his approach for the challenge of finding and implementing the establishment clause's *judicially enforceable* content? "It is," Greenawalt insists, "in the nature of fundamental constitutional principles that their full content is never settled once and for all" (p. 543). Perhaps. We do, however, routinely ask judges to identify and "settle"—at least for the time-being—the implications of such "principles" in the context of real-world lawsuits. Should we?

Early in the book, Greenawalt addresses various forms of "skepticism" about "tests for the Establishment Clause," including the view that "the clauses reflect such complex, often conflicting, values, that no tests can do them justice" (pp. 51, 52). In my view, this "skepticism" is well founded, and Greenawalt does not dismiss it.[3] The truth in these doubts should give us some pause: What, exactly, and with what justification are judges deciding establishment clause cases doing when they invalidate or approve the actions of governments and officials in the name of "complex, often conflicting values"? Even if "the rule of law" is not *only* a "law of rules,"[4] is it troubling to think that resolving disputes about matters so important and basic as the place of religion in public life, and the connections and boundaries between religious and political authorities, depends on the deployment of imperfect, incomplete doctrine by judges who will not always be as learned and sensible to "complex, often conflicting values" as is Kent Greenawalt? If deciding establishment-and-fairness cases involves—if it *inescapably* involves—questions like "whether instituting a moment of silence will *significantly* endorse prayer and will have a detrimental effect on those of minority faiths and nonbelievers" (p. 118) (emphasis in original); if "[j]udges reviewing school efforts to teach about religion face hard questions about supervision and control" (p. 135); if "judicial determinations of improper purpose" are inevitably attended by "various subtleties" (p. 163); if these cases necessarily present (to a greater extent than every interesting legal question does) questions of degree, balancing, trade-offs, and multiple values, then why should we believe that they are best, or even better, re-

3. P. 52 ("Justices can resolve [establishment clause] cases . . . according to some coherent pattern, but whether that pattern can be verbalized into a coherent set of tests and standards is debatable. . . . These are serious obstacles, but one needs a closer look . . . before admitting defeat.").

4. Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989).

solved by judges through litigation than by citizens, officials, and legislators through politics?

These and similar questions could reflect (at least) two, related concerns: First, we might think that judges are neither better equipped nor more likely than are politically accountable actors to identify the outcome that best respects the "complex, often competing" values that are in play in establishment clause cases. In addition, we might suspect—even if we *do* believe that courts are the institutions to which these disputes should be entrusted—that "judicially manageable standards" are not available.[5] These and similar worries could, in turn, convince us to treat (for the most part) the establishment clause as stating, in Thayer's words, a "maxim[] of political morality"[6] for general consideration rather than as promulgating a prohibition that can, or should, be enforced to the full extent of its meaning by judges. We might even say not only that judges should be *deferential*—applying a "rule of the clear mistake"[7]—when evaluating legislative action in light of the establishment clause, but that they should settle for constructing and enforcing only those clear and straightforwardly administrable rules that are essential to vindicating the clause's core, clear meaning and guarantees.[8] On this view, they should, for example, give up on identifying the dusk-twilight point at which permissible recognition or accommodation of religion becomes impermissible endorsement or privileging, and focus instead on vindicating the self-government rights of religious institutions.[9]

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5. *See generally* Richard H. Fallon, Jr., *Judicially Manageable Standards and Constitutional Meaning*, 119 HARV. L. REV. 1274 (2006).

6. James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 130 (1893). For a recent and engaging defense of a Thayerian approach to disputes regarding the constitutionality of the death penalty, abortion restrictins, and refusals to recognize same-sex unions, see MICHAEL J. PERRY, CONSTITUTIONAL RIGHTS, MORAL CONTROVERSY, AND THE SUPREME COURT (2009).

7. *See* Michael J. Perry, *Is Capital Punishment Unconstitutional? And Even if We Think it Is, Should We Want the Supreme Court to So Rule?*, 41 GA. L. REV. 867 (2007) (discussing Thayer and Bickel).

8. There is a rich and growing literature suggesting a distinction, and a gap, between the Constitution's meaning and judicially crafted implementing doctrines. *See generally, e.g.*, Mitchell Berman, *Constitutional Decision Rules*, 90 VA. L. REV. 1 (2004); Fallon, *supra* note 5; Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212 (1978).

9. I have argued elsewhere for the centrality of "church autonomy" and the religion-protecting distinction between the institutions and authorities of religion, on the one hand, and those of the state, on the other. *See generally* Richard W. Garnett, *The Freedom of the Church*, 4 J. CATH. SOC. THOUGHT 59 (2007).

Greenawalt repeatedly acknowledges questions like the ones raised above. He engages, for example, Steve Smith's arguments concerning the "impossibility of the court's developing adequate legal principles regarding religious freedom" and his suggestion that we "should ask ourselves whether the courts might profitably play less of a role than they do in circumscribing church-state relations" (p. 438). He recognizes that "[o]ne might believe that a fair amount of legislation enforcing morality violates the Establishment Clause, but not in a way a court can declare" (p. 498). In his chapter on "legal enforcement of religion-based morality," he concedes that, given all the givens, his approach "will rarely, if ever, lead a court to invalidate a law" (p. 536). And so one might wonder why the conclusion of, or "take-away" from, Greenawalt's context-sensitive approach to church-and-state and religion-and-public life questions isn't something like this: "These questions are hard, answering them requires balancing and trade-offs, there are many values at stake, and sometimes in tension, and so the best way to answer these questions—with a few exceptions—is through politics." To say this is not, of course, to pretend that there is not a lot at stake, or that the right answers do not matter (just because they are hard to find). It is simply to confess that, in this area, "judicially manageable standards" are hard to come by, that the arena of politics is one where "complex, often conflicting values" are often balanced, and so, perhaps, we should admit a possible, "permissible disparity between constitutional ideals and [judicially enforceable] implementing doctrine."[10]

But couldn't we—after taking to heart Greenawalt's appreciation for conflicting values and his sensitivity to context—just as well opt for "overenforcement" as "underenforcement" of the establishment clause?[11] Not, I think, just as well.

Three years ago, Jeremy Waldron set out the "core of the case against judicial review."[12] In his essay, he suggested that "rights-based judicial review is inappropriate for reasonably democratic societies whose main problem is not that their legislative institutions are dysfunctional but that their members dis-

10. Fallon, *supra* note 5, at 1332.

11. Professor Fallon compares, for example, Henry Monaghan's identification of overenforcing rules with Lawrence Sager's focus on judicial tests that underenforce constitutional norms. *Id.* at 1297–1306.

12. Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346 (2006).

agree about rights."[13] This is because (to oversimplify) there is no reason to believe that courts (or renowned and context-sensitive law professors) are more likely to better protect rights than are democratic legislatures and, in addition, judicial review is undemocratic. I am sympathetic to Waldron's suggestion, though it goes farther than I mean or need to go here. Here, the suggestion is simply that the journey with Kent Greenawalt through two volumes and a thousand pages of careful, charitable balancing might lead us to think that the better course is to find (somehow) some bright-line, on-off "rules" and "tests", constructed to identify and forbid the most obvious violations of the Religion Clauses' core—*Murder in the Cathedral*[14]-type violations—and give up on (or, perhaps, "underenforce") the rest.

13. *Id.* at 1406.
14. T.S. ELIOT, MURDER IN THE CATHEDRAL (1935).