ESTABLISHMENT AND JUDICIAL ADMINISTRABILITY

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In *Establishment and Fairness*, Kent Greenawalt provides a rich account of the establishment clause, eschewing reliance on a single categorical test or overarching value. His method is "to develop a sensible, nuanced approach to the religion clauses, one that involves a number of debatable choices and does not reduce to any simple formula." (p. 433). He identifies basic principles of nonestablishment and proceeds to analyze specific establishment clause problems in light of those principles. The analyses are context-specific, value-inclusive, and carefully measured.

Even under Greenawalt's "totality of the circumstances" approach, however, categorical rules emerge prohibiting government action as establishing religion. As such rules emerge, certain government defenses to nonestablishment claims come to fail not because they lack merit relative to the nonestablishment values that the categorical rule is meant to serve, but because they are judicially "unworkable" or "inadministrable." An important question thus arises from Greenawalt's analysis of the establishment clause and fairness: In a totality-of-the-circumstances approach to establishment clause claims, are government defenses systematically less judicially workable or administrable than establishment clause claims?

Categorical Rules in a Totality-of-the-Circumstances Test. Totality-of-the-circumstances approaches to constitutional problems are subject to familiar critiques: In the name of "fairness," such tests (1) do not adequately serve interests in legal certainty; (2) allow too much judicial discretion in ascribing relative weights to the values that the analysis comprises; (3) provide judges with cover for effectuating values that the analysis does not properly comprise—through subconscious bias or conscious

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subterfuge; and (4) require judges to make empirical determinations that judges are not well suited to make. "Categorical" approaches are subject to the opposite critique: In the name of certainty, limiting judicial discretion, etc., they preclude account of values that, in fairness, a court should consider. Judges and scholars have debated whether in given cases courts better fulfill their role by accounting for the totality of facts and values a case implicates, or by invoking more categorical rules that are certain in application and limit judicial discretion.[1]

Even under a totality-of-the-circumstances approach, judges recognize the need for certainty and workability in some measure. Thus, categorical rules that preclude consideration of salient factors predictably emerge from totality-of-the-circumstances inquiries. This dynamic is evident in Greenawalt's analysis. At the outset, he identifies certain nonestablishment values that bear on problems that arise under the establishment clause. These values include protecting religious conscience, promoting autonomy, avoiding corruption and intermingling of government and religion, promoting equal dignity among citizens, and preserving equality (pp. 6–13). Certain of these values implicate interests of both believers and non-believers, religion and nonreligion, in a given context. For instance, to allow teaching about religion in public schools may offend the dignity of nonbelievers, but to forbid it may offend the dignity of believers. Likewise, to provide government funds to religious schools may be unequal treatment relative to religions that lack schools, or equal treatment relative to other schools that receive government funds. Having identified nonestablishment values, Greenawalt develops specific nonestablishment principles (rules, if you will) to guide judicial analysis of nonestablishment problems: "Governments cannot aid particular religions as such or promulgate particular religious doctrines. . . . Governments also may not aid religion in general as such or support religious ideas that unite a high percentage of religious believers." (p. 15).

Unworkability and Government Defenses. As Greenawalt applies these principles, certain government defenses to establishment claims prove judicially unworkable (at least anecdotally)—either because they would make a rule more difficult to

1. *See, e.g.*, Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989); Cass R. Sunstein, *Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4, 42–43 (1996).

administer or because they are based on values that themselves do not easily translate into a judicially administrable standard.

First, in Greenawalt's analysis, certain government defenses to establishment claims fail because allowing them would make it more difficult for judges to administer the rule supporting the claim. For example, Greenawalt explores public education and religion, including the place of religion in history courses. Greenawalt raises a judicial workability concern in this context that may lead to overenforcement of nonestablishment values. As a general rule, Greenawalt argues, "religion should be accorded its fair place in history courses," but "teaching about the place of religion in history should not inculcate any particular religious view" (p. 125). He proceeds to consider whether it violates nonestablishment for teachers to "identify their own religious outlooks, encourage free discussion of competing views, and argue for their own views" (p. 125). Normally, he argues, it would be a forbidden establishment for a Lutheran high school teacher to say, "I am going to tell you what I think and why, presenting my position as forcefully as I can; but you should understand that this is not the school's official position and you are free to form your own opinions." (p. 129). Students, Greenawalt surmises, would not be "in a position to respond critically to the teacher's forceful presentation" (p. 129). That said, he observes, "such teaching might be appropriate for a small class of superbly educated and sophisticated high school seniors" (p. 129). But he would not allow such teaching to proceed in this circumstance—though it would not violate a nonestablishment principle—because of workability concerns. He explains that "constitutional principles need to be administrable by educators and judges. The legal inquiry that an exception along these lines would require would be too refined and too uncertain in outcome to be practical . . . ." (p. 129). Thus, a categorical rule emerges that teachers may never identify and defend their own religious views, even if in context their conduct undermines no salient nonestablishment value.

In practice, then, as context-specific as Greenawalt's analysis is, there comes a "stopping point" at which judges may not consider further refinements of context, though those refinements may prove dispositive of the constitutional question. For the sake of administrability, courts would hold a government act that in fact comported with nonestablishment values *to be* a violation of the establishment clause. In this way, administrability problems result in the overenforcement of nonestablishment values.

Second, certain government defenses to establishment claims fail in Greenawalt's analysis because they are premised on values that do not easily translate into judicially workable standards. For example, Greenawalt considers whether government may provide general grants to all private nonprofit organizations, including religious ones, on a per member basis, as a means of fostering good citizenship through civic participation (pp. 391–92). Greenawalt argues that courts should hold such a program unlawful under the establishment clause insofar as religious organizations could use the funds for "core religious activities" (p. 392). Such use would violate his categorical principle of "No Aid to Religious Organizations for Religious Activities" (p. 53). Any countervailing value, such as the "secular benefit" of fostering "good citizenship" would be too "amorphous" to factor in judicial analysis, because "the state cannot measure benefits to citizenship of participation in individual churches" (p. 392). Greenawalt does not deny the value of good citizenship, but relative to a formal principle of "no aid for religious activities," he finds it too amorphous to factor in judicial decision-making.

A Question Worth Considering. It is worth considering, under Greenawalt's analysis, whether government defenses to nonestablishment claims will systematically confront workability problems, resulting in overenforcement of nonestablishment principles. The answer depends in part on whether Greenawalt has defined his nonestablishment principles in such a way that legitimate nonestablishment values are more judicially workable than legitimate countervailing values. Perhaps by definition, any functional establishment clause inquiry will state more clearly (and thus workably) principles that limit government action than principles that enable government action notwithstanding such limiting principles. (For instance, the Supreme Court has provided greater clarity on whether the First Amendment presumptively protects certain forms of speech than on what constitutes a "compelling state interest" sufficient to justify a governmental limitation on it.[2]) Nonetheless, if governing principles aspire to account case by case for *all* relevant values, the unworkability of certain government defenses may call into question the formulation of the governing principles themselves. It also may reflect the limits of judicial process in this context. If certain government defenses, reflecting real values, are inherently not judicially

2. *See, e.g.*, Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1321–25 (2007) (describing how the Supreme Court has not adopted a clear approach to identifying compelling governmental interests).

administrable, it is worth considering whether the judiciary, relative to other governmental institutions, is competent in all cases to weigh the competing values that the establishment clause implicates. An enduring value of Greenawalt's book is that it brings into focus questions such as these—and embraces by its very approach their ongoing consideration.