KENT GREENAWALT AND THE DIFFICULTY (IMPOSSIBILITY?)OF RELIGION CLAUSE THEORY

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When I see a book or article about the establishment clause, there are several things I want to know in order to assess it. First, what kind of approach does it take toward its subject matter? Does it purport to tell us how the framers and ratifiers understood the clause, what their intended meaning was? Or is it an exploration and development of Supreme Court doctrines regardless of those doctrines' relation to the originally intended meaning? Or is it a work of political philosophy, an account of the most justified relationship between government and religion?

Kent's book is difficult to pigeonhole. It contains a brief discussion of original meaning. It contains lots of references to Supreme Court doctrine. But if forced to characterize it in terms of my classifications, I would call it a work of political philosophy—though not one that is heavily theorized—whose normative conclusions turn out to be consistent with some case law and possibly with Kent's view of the Constitution's original meaning, assuming that matters to him, which appears not to be the case. (He spends time attempting to rebut the narrow jurisdictional interpretation of the religion clauses but offers no affirmative account of the original meaning.)

A second thing I want to know about a work on the establishment clause is how the author distinguishes religion from nonreligion. Is Marxism a religion? Transcendental meditation? What are the necessary and sufficient conditions for something's being a religion, and how do those conditions relate to the clause's original meaning and to doctrine?

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Kent has written before on the definition of religion in an article in the *California Law Review*.[1] There, if I recall correctly, he argued that the best we could do would be to identify family resemblances between the creed or sect in question and paradigmatic exemplars of religion (e.g., Christianity, Judaism, Islam). That's a somewhat skeptical conclusion because it denies that any verdict on this issue will be demonstrable. Moreover, I cannot see how answers can even be backed up by normative considerations. Whatever normative considerations support a principle against establishment will not cut neatly along the family resemblance divide.

Kent recognizes that there is no "view from nowhere," no neutral position above the fray of competing metaphysical and normative views—or rather, that neutrality is always relative to some viewpoint, and that there is no Archimedean, interpersonal point of view to which our bare noumenal selves can repair. And at times he demonstrates awareness that our views do not come neatly separated into "religious" and "nonreligious" categories—especially since he himself has rejected the possibility of defining religion.

Kent does seem to believe that "public reasons" can be distinguished from religious ones (though not neatly). He argues that, for officials at least, there should be a distinction drawn between the ultimate grounds for their judgments—which might well be religious grounds—and the arguments they present publicly to justify those judgments. But because there is no neat theoretical line between what is and is not a "public reason," we are left with something like "if we are well acculturated with respect to the kinds of reasons officials might offer and that will be taken as acceptable by most people, then we will probably know 'public reasons' when we see them." On this view, the injunction that officials stick to "public reasons" in justifying their actions to the public seems like good practical advice for someone seeking to be effective as an official and remain in office, but not a matter of high principle.

How do these issues bear on the meaning of the religion clauses? Kent has a chapter (22) on justifications for the norms that the clauses express, though I found the chapter difficult for the following reason: We either know the content of those norms or we do not. If we know the content, then the question of the

1. Kent Greenawalt, *Religion as a Concept in Constitutional Law*, 72 CAL. L. REV. 753 (1984).

norms' justification might be interesting and quite relevant to whether to retain the norms or instead amend the Constitution to eliminate or change them, but it will not affect how we apply the norms. By hypothesis we already know the norms' content. On the other hand, if we do *not* know the norms' content, then what exactly are we doing in our search for their justification? Put differently, how can one "justify" a norm the content of which is not yet established?

The best sense I can make out of this is that we know the core of the norms but not their full reach, and that the justifications assist us in determining the latter. Of course, to some extent, we cannot really know a norm's core unless it has some canonical formulation. On the other hand, perhaps all we need is what Jed Rubenfeld calls a "paradigm case" or two to get the process of inference-to-best-justification-to-full-range-of-norm going.[2] (Of course, it is also the case that there are many norms that do not extend to the full range of applications their justifications would entail, for there are often competing norms that operate to truncate them. A justification for religion clause norms might be limited in its effect by a norm of federalism, for example.)

What *are* the anti-establishment norms that Greenawalt finds in the establishment clause? The central norm seems to be one forbidding government acts that are premised on theological views, with subsidiary (or corollary) norms against government's preferring one religion over another and against government's "endorsing" religion or specific religions. There are a number of questions I could raise about these norms and that I am sure others *will* raise. But I want to focus on the central norm.

My basic difficulty with this norm—a difficulty that I would have whether the norm's provenance is the intended meaning of the Constitution's authors or is instead Kent's political philosophy—is that I believe what it requires is an impossibility. Our views about what actions are right and wrong, good and bad, social progress or social retrogression, ultimately rest on the entire web of our beliefs to the extent our beliefs cohere.[3] These beliefs will frequently if not always include beliefs about ultimate grounds—metaphysical, metaethical, and theological. We might

2. JED RUBENFELD, FREEDOM AND TIME: A THEORY OF CONSTITUTIONAL SELF-GOVERNMENT 178 (2001).

3. *See* Larry Alexander, *Liberalism, Religion, and the Unity of Epistemology*, 30 SAN DIEGO L. REV. 763, 767–70 (1993).

dissemble in reporting those grounds, or we might never be asked about them. Nonetheless, they will be present in our normative (and empirical) judgments.

If that is true, then our convictions about government's proper relation to religion, like our views more generally, will be a product of our fundamental views, which I believe is what religious views are. Christianity is a religious view, but so too is Marxism or utilitarianism. The latter are non-theistic, but many "religions" one finds in representative lists of "religions" are also non-theistic. Our fundamental—religious—views will often include views about government's proper role, including its role vis-à-vis fundamental—religious—views that are, by its lights, incorrect. It may prescribe toleration of those views. It may prescribe government steering as clear as possible of certain matters (for example, forms of worship). Still, it will only issue such prescriptions from its own fundamental (religious) vantage point.[4] What else could it do? (Note the echo of Stanley Fish's Dennis Martinez.[5])

Consider Michael Perry's recent views on human rights.[6] They are informed, argues Perry, by a view of human worth, a view which makes sense, he believes, only if one believes in a God who admonishes us to love each other as He loves us.

Now suppose Perry is a government official. May he support human rights, or would that support rest on a theological view? Could he regard as other than nonsensical an injunction that he bracket those views in deciding whether or not to enact legal measures implementing human rights? For him, there are human rights that should be legally protected, and they stem from a religious truth—which truth is on a par with all other truths. He may realize that some or many people will find his arguments unpersuasive, which may or may not lead him to dissemble in his advocacy, which will in turn depend on other religious views he holds about how lying and consequentialist success should be weighed.

This is the root problem of the religion clauses, both their applications and their justifications. It is the problem Steve

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4. *See* Lawrence A. Alexander, *Is There Logical Space on the Moral Map for Toleration? A Brief Comment on Smith, Morgan, and Forst*, *in* TOLERATION AND ITS LIMITS 300 (Melissa S. Williams & Jeremy Waldron eds., 2008).

5. Stanley Fish, *Dennis Martinez and the Uses of Theory*, 96 YALE L.J. 1773, 1773 (1987).

6. Michael J. Perry, *Morality and Normativity*, 13 LEGAL THEORY 211 (2007).

Smith[7] and Stanley Fish[8] address in the works Kent responds to in chapter 20. I don't believe he has answered it. But I also don't believe it *can* be answered. We are stuck with our religious views, and they will exert their influence over us, constitutional provisions or no. In this area, the Constitution really is and can be no more than a mere parchment barrier.

7. STEVEN D. SMITH, FOREORDAINED FAILURE (1995).

8. Stanley Fish, *Mission Impossible: Settling the Just Bounds Between Church and State*, 97 COLUM. L. REV. 2255 (1997); *see also* Alexander, *supra* note 3; Alexander, *supra* note 4.