RELIGIOUS ESTABLISHMENT AND AUTONOMY

*Andrew Koppelman**

In Volume I of *Religion and the Constitution*, Kent Greenawalt explains the rationale for non-establishment of religion, in part, by claiming that "personal autonomy is most fully recognized and the flourishing of religion itself is best served if the government does not sponsor religious understandings and practices."[1] This sentence ends with a parenthetical promising that this subject will be addressed in Volume II. In that volume, he defines autonomy as "unfettered freedom to choose among various options, whether or not an absence of freedom restricts one's exercise of his convictions" (p. 9). He then writes: "In this sense, even if every citizen is free to practice religion as she chooses, including the freedom to practice no religion, full autonomy of choice is limited if the government 'stacks the deck' in favor of one religion or all religions" (p. 9).

Just how is the freedom to choose among options fettered by the government supporting one or another religion? Greenawalt's explanation of this point is fragmentary and inconclusive. That such a superb scholar falters on such a fundamental point suggests to me that autonomy is a mask for other concerns that Greenawalt is reluctant, for respectable but ultimately unpersuasive reasons, to spell out.

The most obvious objection to an autonomy-based argument against "deck-stacking" is that it makes no sense to denounce the deliberate creation of choice-influencing circumstances. People's preferences and choices are inevitably shaped in non-rational ways by their environment. George Sher asks, "exactly what is disrespectful about taking (benign) advantage of

* John Paul Stevens Professor of Law and Professor of Political Science, Northwestern University. Thanks to Kent Greenawalt and Steven D. Smith for helpful comments.

1. KENT GREENAWALT, RELIGION AND THE CONSTITUTION: FREE EXERCISE AND FAIRNESS 3–4 (2006) [hereinafter GREENAWALT, FREE EXERCISE AND FAIRNESS].

a causal process that would occur anyway?"[2] More specifically, establishment, unless it involves tangible disabilities for members of minority religions, does not impair individual autonomy at all. This is why establishment is not taken by international human rights instruments and tribunals to impair religious liberty.[3]

Greenawalt acknowledges that "government promotes all sorts of points of view over others" (p. 9), but notes that religion may be special, because:

> when a person's sense of her relationship to God (or gods) or to ultimate reality is concerned, the government should particularly refrain from attempted influence. This stance is based both on the essential nature of the questions religions address [meaning, it shortly becomes clear, the way in which establishment can corrupt both religion and government] and on the government's incompetence to deal with them (p. 9).

In the pages that follow, he elaborates on these considerations.[4] These may be sound arguments. I happen to think they are.[5] But what have corruption and incompetence to do with autonomy?

The basic problem is that the idea of autonomy is too abstract to be a basis for religious liberty. One problem is that which, Greenawalt acknowledges, John Garvey has raised: "any principle of maximizing autonomy would cover many areas of

---

2. GEORGE SHER, BEYOND NEUTRALITY: PERFECTIONISM AND POLITICS 73 (1997).

3. *See* REX AHDAR & IAN LEIGH, RELIGIOUS FREEDOM IN THE LIBERAL STATE 127–54 (2005).

4. The concept of autonomy makes one more appearance late in the book: "If a person genuinely believes that happiness or free choice (in the sense of unconstrained choice) is really the most valuable aspect of human life, the highest good, her perspective opposes most religious conceptions, yet she might well be led to a conclusion that choices about religion should not be constrained by government" (p. 483–84, footnote omitted). Why would she reach that conclusion? She would have to think that government's taking sides somehow compromises autonomy. But Greenawalt has not yet offered an argument for thinking so.

5. *See e.g.*, Andrew Koppelman, *Akhil Amar and the Establishment Clause*, 33 U. RICH. L. REV. 393 (1999); Andrew Koppelman, *Corruption of Religion and the Establishment Clause*, 50 WM. & MARY L. REV. 1831 (2009); Andrew Koppelman, *Is It Fair to Give Religion Special Treatment?*, 2006 U. ILL. L. REV. 571; Andrew Koppelman, *No Expressly Religious Orthodoxy: A Response to Steven D. Smith*, 78 CHI-KENT L. REV. 729 (2003); Andrew Koppelman, *On the Moral Foundations of Legal Expressivism*, 60 MD. L. REV. 777 (2001); Andrew Koppelman, *Phony Originalism and the Establishment Clause*, 103 NW. U. L. REV. (forthcoming 2009); Andrew Koppelman, *Secular Purpose*, 88 VA. L. REV. 87 (2002); Andrew Koppelman, *The Troublesome Religious Roots of Religious Neutrality*, 84 NOTRE DAME L. REV. 865 (2009); Shari Seidman Diamond & Andrew Koppelman, *Measured Endorsement*, 60 MD. L. REV. 713 (2001).

choice that do not receive similar constitutional protection" (p. 486).[6] Greenawalt responds that autonomy is only one of the concerns of the religion clauses: a clause can fit multiple justifications even though it does not fit any one of them perfectly.

But if the law is barred from manipulating people in religious directions (and thus violating their autonomy), while it remains free to manipulate them in nonreligious directions (and thus violate their autonomy in exactly the same way), it is hard to see how autonomy as such is what is being protected.

The idea that religious freedom serves autonomy makes sense only if it relies, *sub silentio*, on something like Joseph Raz's view that "[a]utonomy is valuable only if exercised in pursuit of the good" and that "[t]he ideal of autonomy requires only the availability of morally acceptable options."[7] Religion would then be protected because it is an option that is particularly valuable.

Greenawalt is reluctant to say that American law treats religion as such as a good thing.[8] The reason is easy to see. There is an obvious danger in Raz's type of approach. Timothy Macklem, whose work is heavily indebted to Raz, proposes that before courts protect religion in any case, they undertake "a frank examination of the contribution that any doctrine held on the basis of faith, be it traditional or non-traditional, is capable of making to well-being."[9] In a pluralistic society, there are obvious dangers in giving judges the power to assign legal consequences to different religious beliefs based on the judges' own conceptions of well-being. Macklem's own confident withholding of protection from "cults" is not reassuring.[10]

I think that the most promising alternative to Macklem's approach is to treat as valuable, not autonomy, but religion—understood, however, in the somewhat vague way that Greenawalt has proposed.[11] "Religion" in American law,

---

6. *See* John H. Garvey, *An Anti-Liberal Argument for Religious Freedom*, 7 J. CONTEMP. LEGAL ISSUES 275, 278 (1996).

7. JOSEPH RAZ, THE MORALITY OF FREEDOM 378, 381 (1986).

8. Thus, he notes my suggestion that this is the case in American law but is carefully noncommittal about whether he agrees (p. 352 n.2).

9. TIMOTHY MACKLEM, INDEPENDENCE OF MIND 142 (2006).

10. *Id.*

11. GREENAWALT, ESTABLISHMENT AND FAIRNESS, *supra* note 1, at 124–56; *see also* Kent Greenawalt, *Religion as a Concept in Constitutional Law*, 72 CAL. L. REV. 753 (1984). The same idea had been proposed earlier by others; the earliest statement of it that I have been able to find is William P. Alston, *Religion*, *in* 7 ENCYCLOPEDIA OF PHILOSOPHY 142 (Paul Edwards ed. 1967). But Greenawalt has developed the idea as a

Greenawalt has argued, denotes a set of phenomena that are grouped together by nothing more than a kind of family resemblance; there is no set of necessary and sufficient conditions that will make something a "religion."[12]

Macklem objects to Greenawalt's approach, arguing that the question of what "religion" conventionally means is a semantic one, but the question of what beliefs are entitled to special treatment is a moral one, and it requires a moral rather than a semantic answer.[13] Macklem's analytical point is sound. But there are powerful reasons for denying the state the power to judge the objective value of particular religions—reasons that Macklem inadvertently displays. The decision to define religion vaguely, relying on the fuzzy semantic meaning, itself rests on moral grounds: the considerations about corruption and incompetence that Greenawalt tries to shoehorn into the category of autonomy. Non-establishment aims, not at autonomy, but at the substantive good of the citizens, described in an appropriately vague way.[14]

This would also help to explain Greenawalt's qualified support for the argument, advanced in different ways by Michael McConnell and Douglas Laycock, that government try to leave religion to private choices, to the extent that this is possible. Christopher Eisgruber and Lawrence Sager reject that claim as incoherent, because a world in which religion is unaffected by government is unimaginable.[15] Greenawalt responds that the basic idea, which is not at all incoherent, is "that basic functions of government would be taken for granted and that within that context the aspiration would be freedom of choice" (p. 453). He also

---

legal concept with unparalleled thoroughness and care.

12. Although this approach is analytically frustrating, that does not mean that it is unworkable. It is remarkable how few cases have arisen in which courts have had real difficulty in determining whether something is a religion or not. The list of reported cases that have had to determine a definition of "religion" is a remarkably short one. *See Religion*, *in* 36C WORDS AND PHRASES 153–57 (2002). An analogical criterion is also used by that singularly hard-headed entity, the Internal Revenue Service. *See Defining "Religious Organization" and "Church,"* 868 TAX MGMT & PORT. (BNA) (2007).

13. MACKLEM, *supra* note 9, at 120–26.

14. Professor Raz never endorses Macklem's approach to religious liberty, but he is skeptical of the kind of epistemic abstinence adduced here when a philosopher such as John Rawls advocates it, and argues that political philosophy ought to proceed "in the full light of reason and truth." Joseph Raz, *Facing Diversity: The Case of Epistemic Abstinence*, *in* ETHICS IN THE PUBLIC DOMAIN 84 (1995). On the other hand, the epistemic abstinence advocated here is not to be practiced by political philosophers, but by the state, and Raz has not expressed a view about abstinence in that context.

15. CHRISTOPHER L. EISGRUBER & LAWRENCE G. SAGER, RELIGIOUS FREEDOM AND THE CONSTITUTION 27–29 (2007).

thinks that this determination to maximize freedom of religious choice "can only be one side of a balance, telling us whether or not something is being sacrificed in terms of the government's relation to religion, but not whether a law overall is justified" (p. 455). So freedom of religious choice seems to be something of special value—enough value to force us to think about whether something government is doing, which conflicts with religious choice, is an exercise of the "basic functions of government" or is more dispensable. No such balancing is called for, evidently, when the law interferes with nonreligious choice. Again, it is hard to see what sense this makes unless one stipulates what Greenawalt is reluctant to say, that religion as such is being treated as especially valuable in some way.