

6-1-1996

Religious Expression in the Public Square—The Building Blocks for an Intermediate Position

Kent Greenawalt

Recommended Citation

Kent Greenawalt, *Religious Expression in the Public Square—The Building Blocks for an Intermediate Position*, 29 Loy. L.A. L. Rev. 1411 (1996).

Available at: <https://digitalcommons.lmu.edu/llr/vol29/iss4/15>

This Symposium is brought to you for free and open access by the Law Reviews at Digital Commons @ Loyola Marymount University and Loyola Law School. It has been accepted for inclusion in Loyola of Los Angeles Law Review by an authorized administrator of Digital Commons@Loyola Marymount University and Loyola Law School. For more information, please contact digitalcommons@lmu.edu.

RELIGIOUS EXPRESSION IN THE PUBLIC SQUARE—THE BUILDING BLOCKS FOR AN INTERMEDIATE POSITION†

*Kent Greenawalt**

I. INTRODUCTION

The problem of religious expression in the public square is not primarily legal in a narrow sense. We are not talking about whether people are *allowed* to voice certain kinds of opinions or to vote on certain kinds of grounds.¹ The problem is about how citizens and officials in liberal democracies should act. My own position on this problem is an intermediate one, in a sense I shall shortly explain. Its plausibility depends on some sense of the strengths and weaknesses of positions at each end of the spectrum. I shall begin with a thumbnail sketch of these.

II. INCLUSIVE AND EXCLUSIVE POSITIONS

What we may call the inclusive position is as follows. People have all sorts of grounds for making personal and political judgments. Perhaps none of these are favored in liberal democracies; in any event religious convictions and practices are certainly not *disfavored*. People cannot easily distinguish their personal lives from their political lives, their cultural participation from their political participation. For most religious persons, these are interwoven together. No one supposes that religion is off limits as a basis for personal choice or as a strand of cultural understanding and criticism. If this is

† This Essay summarizes ideas developed by Professor Greenawalt in his most recent book, KENT GREENAWALT, *PRIVATE CONSCIENCES AND PUBLIC REASONS* (1995). Readers who are interested in a more thorough analysis and in citations to proponents of various views will find them in this book.

* University Professor, Columbia University School of Law; A.B., Swarthmore College, 1958; B. Phil., Oxford University, 1960; LL.B., Columbia, 1963. This Essay is a written draft of remarks given by Professor Greenawalt at the Association of American Law Schools Annual Meeting, San Antonio, Texas, January 1996.

1. Although the problem is not primarily legal, an answer to it might bear on whether some motivations render laws unconstitutional.

granted, religion is not off limits as a foundation for political participation. The inclusive position resonates with the values of the free exercise of religion.

The most basic premises of postmodern, critical perspectives lend support to this position. They, of course, do not endorse any view that some religious understandings are genuinely timeless and transcendent; but they do bolster a view that no favored, neutral, discourse exists. If all discourses reflect human power and time-bound aspirations, why should religious convictions be treated differently from any other?

The exclusive position starts with ideas of fairness and social harmony in liberal democracies. In societies in which citizens are equal and largely free to pursue their own ideals and desires, coercing one citizen because of the religious views of other citizens is unfair, and will breed resentment and conflict. Religion is fine for personal life and cultural understanding, but religious beliefs are unacceptable grounds for governmental coercion. The appropriate grounds are basic premises of liberal democracy, such as the equality of citizens, and shared methods of understanding, such as ordinary scientific techniques. People respect each other's equality and liberty by adopting coercive measures only when they rest on grounds that the people coerced should reasonably accept as valid. This does not mean the people coerced should reasonably accept that, on balance, coercion is warranted, but they should realize that the bases for coercion have some force for them.

Exactly what views are excluded, or self-excluded, by the exclusive position varies. Three major possibilities are (1) all religious views; (2) all comprehensive views;² and (3) all views that are not publicly—or rationally—accessible to citizens in general.³ With some oversimplification, we can say that religious views are likely to be excluded under any of these approaches, and that what mainly varies is what else is excluded. The exclusive position bears some resemblance to the Establishment Clause, with its idea that religion and government should not mix.

If you are like me, you will find something strongly attractive in each of the two basic positions. The attractions of one are an obstacle to wholesale acceptance of the other. Once we begin to

2. This treats nonreligious overarching views of life like religious views.

3. Public accessibility concerns the force of grounds, not just the percentage of citizens who happen to accept them.

examine matters more closely, we begin to doubt that one answer is right for all liberal democracies. We also see that the strength of the arguments for the two basic positions varies with different sorts of people and different aspects of participation in political life. From these insights come the seeds of a nuanced, defensible, not wholly satisfactory intermediate position for the United States at the end of the twentieth century.

III. IMPOSITIONS, DEGREES OF SELF-EXCLUSION, RELIGIOUS UNDERSTANDINGS

Before I turn to that position, I need to clarify some preliminary matters.

A. Impositions

First, I want to narrow the focus of discussion. Some political outcomes are themselves at odds with values of liberal democracy, or of our liberal democracy. Let us assume, although this remains controversial, that devotional bible reading led by teachers in ordinary public school classes involves an unacceptable imposition of religion. An atheist *could* support such bible reading on nonreligious grounds—say that it helps quiet students at the beginning of the day, or has the paradoxical consequence of showing them how ridiculous traditional Christianity and Judaism are. But virtually all supporters of devotional bible reading are moved by religious reasons. This illustration is not helpful for considering the use of religious reasons in politics, because it mixes up concerns about the nature of underlying grounds with concerns about the narrower effects of the practice. If promoting religion in public schools is itself unacceptable, the example is a poor test of whether, in general, underlying religious grounds belong in political discourse.

Consider legislation to regulate laboratory use of animals—to assure humane conditions and to provide that experiments in which animals will predictably die are not performed unless they serve a substantial human need. If such legislation would modestly increase the cost of laboratory experimentation and would preclude lethal testing for marginal purposes, the law would not impose religion on anyone, at least it would not impose religion in any ordinary sense. Yet, citizens and officials might formulate positions based on their religious understandings of what animals deserve. *This* is the kind of

use of religious grounds that is genuinely disputed; it is the kind of use on which I am focussing.

B. Degrees of Exclusion

Self-exclusion of religious grounds in politics might be total or partial along three different dimensions. First, all or only some people might have a responsibility to exclude. Along this dimension, the basic division is between officials and ordinary citizens; but among officials, judges might be different from legislators, and among citizens, ordinary citizens might be different from religious leaders or from presidents of major universities. The second dimension is between bases on which one actually decides and one's stated reasons for a position. Total exclusion would require that someone both decide on nonreligious reasons and discuss and defend her decisions in those terms. Partial exclusion would permit either decision or articulation in religious terms, but not both. The third dimension is a bit harder to explain. One might think it is all right for people to rely on deep fundamental religious assumptions, such as that God loves all human beings equally, but not to rely on narrower, more specific religious grounds, such as the Pope's explanation of how natural law precludes artificial contraception and abortion. In what follows, I will disregard this third dimension, partly because it is so difficult to come up with any satisfactory division and, more fundamentally, because I am skeptical that such a division is appropriate in our society.

C. Originating Standpoints for Political Philosophy

My third preliminary matter is of fundamental importance. I often face this challenge:

What is the point of talking about the responsibilities of citizens in a liberal democracy floating free of people's distinctive religious views? Religion encompasses all of life. No seriously religious person faces any issue without regard to his religious understanding. *Conceivably*, someone might conclude that a religious belief important for personal life should not be employed for political coercion; but he would reach that conclusion only by reference to his overarching religious position. Why develop principles of political philosophy that do not depend on a religious or other

comprehensive view? The *only* significant evaluation must take place within a comprehensive view.⁴

This is a complex problem. There is a form of political philosophy, practiced notably by John Rawls and Bruce Ackerman, that draws from premises of liberal democracy and characteristics of human beings to develop social principles, without resolving overarching questions about the meaning of human life. Another form of political philosophy begins with some overarching view and works downward to political institutions and social justice. Thomas Aquinas and Jeremy Bentham were practitioners of this approach. Some people, as Rawls points out, accept political principles without any clear sense of their relation to an overarching position; but if an approach to political philosophy is to affect many people, it must connect to the religious and other comprehensive positions people hold. Is this a realistic expectation for any philosophy that does not itself start from a comprehensive position?

Let us return first to how our problem of religion and politics might be viewed from a comprehensive position. A person's religion might lead her to believe in human liberty and equality. She might determine that if these are to be respected, people should be coerced only on grounds accessible to them, and further, that her own faith-based religious understanding is not accessible in the right way to nonbelievers. She might then be open, from the standpoint of her own religious understanding, to the proposal that religious grounds should not play a direct role in choices to adopt coercive laws. I say "she might be open," because she would then face a troubling question. Should she engage in self-exclusion regardless of the behavior of others, *or* should self-exclusion be a matter of reciprocity? We believe that the wanton infliction of harm is wrong, no matter how others act, but we think waiting in line makes sense only if most other people observe the same restraint. Our believer might conclude that she should refrain from relying directly on her religious premises only if most others are doing the same.⁵ I shall not explore this issue further here, except to say that I believe reciprocity *is* a substantial component of a sound principle of exclusion.

4. Or, more charitably, the far more significant evaluation must take this form.

5. She would certainly think that, if she accepted exclusion as a kind of appropriate political compromise, preferable to losing out from the use of religious views different from hers.

The place of political philosophy detached from specific comprehensive views is now more readily apparent. It tries to identify grounds that will appeal to people with various overarching views. I do not want to claim that it is more important than theorizing *within* religious and other wide views, only that it is worth doing.

IV. ADVOCACY AND JUDGMENT

When we think about how people make up their minds and how they discuss issues and advocate positions, two related truths quickly emerge. The first is that one can more easily monitor one's discourse than one's grounds of decision. The second is that although other people have the same access as the speaker does to the speaker's discourse, ordinarily they have much less access to the full grounds of decision.⁶ These truths have immense importance for our topic.

Most people would be hard put to *try* to carry out a program of excluding their deepest religious convictions from their political judgments. For many crucial issues, they would be incapable of disentangling what they believe because of underlying religious convictions from what they would believe if they somehow relied only on premises of liberal democracy and shared techniques of understanding.

Speaking without reference to religious convictions is not difficult. At Columbia Law School members of the faculty share an assumption that law school problems are to be resolved in terms of values that are not explicitly connected to particular comprehensive views. In my thirty years there, I have yet to hear a specifically Jewish, Christian, or atheist argument for one faculty decision rather than another. Yet, when decisions involve the point of legal education, I wonder if colleagues try rigorously to remove the threads of their religious understandings about the nature of society and education for a profession. I should imagine that the experience of many readers is similar in this respect, although at law schools with powerful religious connections, discussion of positions in explicitly religious terms may be more common.

People can tell easily whether arguments are being made from explicit religious premises; they will know if their own restraint is

6. However, on occasion, some other people have greater insight into a person's motivations than does the person herself.

matched by parallel behavior from others. If they try to purge their silent deliberations of religious influence, they can rarely be sure that others are similarly motivated and that others are successful. Once a person realizes just how difficult this exercise will be to perform, he will doubt the effort and success of others. This is a poor basis for restraint that should be reciprocal.

V. OFFICIALS AND CITIZENS

Officials have a lot more to do with the law that gets made and applied than do citizens; there are a lot more citizens than officials. Officials are used to making judgments and offering reasons that do not include everything they believe is relevant in their personal lives. Citizens are less used to practicing such restraint. Of course, we can conceive of a highly educated, participating citizenry in which ordinary people learn to draw distinctions between what matters for most aspects of life and what matters for politics. But that is not our citizenry. For officials to practice some restraint impinges much less on a population's religious liberty than for citizens to practice restraint; and official restraint more greatly affects the quality of political life. These basic differences—between advocacy and judgment and between officials and citizens—suggest that if any self-exclusion is justified, it is self-exclusion for officials in their public statements. That indeed is the core of my intermediate position.

VI. POLITICAL PHILOSOPHY RETAIL

I need to supply one final building block. Much of the theorizing about this subject has been cast in terms of liberal democracies in general. Some theorizing has been put as an elaboration of what the Establishment Clause of our Constitution actually requires. I believe *neither* of these approaches answers the most central practical questions.

The Establishment Clause, in its direct force, has modest implications here. It does not make reliance on religious premises unconstitutional, when the resulting law protects interests—such as the lives of animals—that are comprehensible in nonreligious terms, and the law does not impose on other people's religions. When I say that reliance is not unconstitutional, I mean not only that courts should not hold such laws invalid, but also that these laws are not in a class of unconstitutional events that are beyond judicial enforcement.

Theorists of liberal democracy argue persuasively that in a liberal society people will adopt many different comprehensive views. Barring some extraordinary and near irresistible revelation, this condition will not change. The history of western liberal democracies, forged out of religious division, shows that differences in religious views *can* be a source of intense conflict. But, I believe it is much too early to conclude that this must inevitably be the condition of liberal democracies. We can imagine people of various religious views who seek to learn from one another and who trust each other's social judgments. These people might welcome the injection of religious perspectives in political discourse. They might be interested in employing their own perspectives and in understanding the views of others, without being fearful of coercion according to premises they do not accept. On the other hand, one would not recommend explicitly religious politics as the most fruitful approach for a newly constituted Northern Ireland or for the fledgling, fragile union to be formed in Bosnia. Much depends on history, culture, the religious and other comprehensive views that people hold, and their degree of mutual tolerance and respect. If I am right about this, specific principles of self-restraint must be offered for particular political orders, not in gross.

The United States is a country of great diversity in culture and religion. Relevantly, the percentage of our people that is neither Christian nor Jewish increases steadily, with immigration policies that no longer discriminate egregiously against Asians. Outright religious conflict is rare in the United States, but religious differences remain a source of distrust and tension. In contrast to some Western European countries, religious convictions are intense and widespread enough to influence politics and to disturb people with their influence.

VII. JUDGES

Among officials, we can divide roughly between those who apply law and those who make law or exercise ordinary discretionary judgment. Among those who apply law, judges and quasi-judicial officials often provide reasoned justifications for their decisions. At this stage of United States history, one does not find explicitly religious grounds in opinions, even when courts reach beyond standard legal sources to comment on the social benefits or harms of a possible ruling. By an explicitly religious ground, I mean reasoning in this form: "Given a true religious proposition, these conclusions about social good follow." Some examination of religious sources

might be acceptable to show the community's attitudes toward a practice or its deep moral assumptions, and judges might employ familiar religious stories to illustrate a point, but none of these is a reliance on religious grounds in the sense that I mean. Although judicial opinions are rarely completely candid about the strength of competing arguments, one expects judges to rely on arguments they believe should have force for all judges. In our culture this excludes arguments based on particular religious premises. Perhaps there are rare cases when judges find that relevant arguments that are broadly accepted are in equipoise; perhaps a judge *may* then properly rely on some religious or personal sense to tip the balance. Even then, we would not expect to find such reasons in an opinion, and this restraint is desirable.

VIII. LEGISLATORS

Conventions about what legislators say and do may vary in different parts of the country. In localities where one religion is overwhelmingly dominant, religious discourse may not be uncommon. I shall concentrate on Congress.

We may start with the proposition that if an explicit religious grounding were placed in the preamble to a statute, that might be viewed as a promotion of religion that would violate the Establishment Clause. Members of Congress typically do not make religious arguments on the floor of Congress or before their constituents. There is, however, no accepted understanding that they should avoid giving any weight to their own religious convictions and those of constituents in the formulation of their positions. I believe legislators should give greater weight to reasons that are generally available than to those they understand are not, but some reliance on religious and similar reasons is appropriate, especially since the generally available reasons are radically indecisive about some crucial social problems. I believe the present conventions about national legislators reflect a sound accommodation of the needs of a religiously diverse citizenry with the inclination of legislators to bring all they believe to bear on political problems.

If I have stated present conventions with any accuracy, they help produce less than fully candid discourse, since legislators may refrain from arguing from premises that matter to them. Two objections to this practice are that discourse is impoverished and voters are left less well-informed than they might be. Realism counsels that much legislative discourse is far from fully candid, so self-restraint about

religious grounds is hardly a *major* contributor to lack of candor. In any event, the value of self-restraint overrides this drawback and whatever reduction in information voters suffer. Let me be clear—I do not say legislators should deny religious bases that motivate them; only that they should not develop public arguments in these terms.

IX. PRIVATE CITIZENS AND RELIGIOUS LEADERS

Because citizens are not used to practicing self-restraint of this kind, and because most citizens have relatively little involvement in the political process, I do not think they should regard themselves as constrained to avoid relying on religious grounds or to avoid stating these grounds. Some citizens, however, such as university and corporation presidents, and individuals consistently engaged in political life, have a much more public role. For them, something like the constraints for legislators is appropriate.

Religious leaders and organizations have a special place. They do properly develop religious grounds as these relate to political problems, and they also properly take part in direct efforts to win support for particular positions. I think it is usually unfortunate when religious leaders endorse parties or candidates and when people who become officials continue to hold themselves out as religious leaders.

X. CONCLUSION

When we examine our political practices, we see that our society has some loose, somewhat controversial, conventions about the place of religion in political life. I think those conventions represent one appropriate approach within a liberal democracy, and one well suited for our society at this time. I regret that within the larger culture there is a kind of sharp division between serious religion, which affects many people and has a considerable influence on political life, and the broad culture, which has become largely nonreligious. I believe it would be healthy were there more dialogue in the broad culture about a religious or spiritual dimension of life. What I do not favor is a substantially increased injection of religious premises into discussions of particular political issues.