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JUDICIAL REVIEW AND THE RELIGION CLAUSES:

A RESPONSE TO PROFESSOR GREENAWALT

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At the heart of Professor Greenawalt's understanding of the religion clauses is the idea that individuals and minorities need, and are entitled to, the protection of courts exercising fairly broad discretion to invalidate, or exempt members of minority faiths from, laws enacted by majorities that are hostile or, at least, insensitive to their legitimate interests. This idea is widely shared in the culture and, especially, in the legal academy, where it enjoys the status of something like an orthodoxy. I do not suggest that it is a foolish or dishonorable idea. I have certainly felt its attraction myself.

Indeed, it is easy to think of instances in American history when courts have come to the aid of oppressed or exploited individuals or members of minority groups. It is, however, also easy—all too easy—to recall cases in which courts have come to the aid of their oppressors or exploiters—cases in which the institutions of democratic governance at the state and federal level were effectively disabled by judges from preventing or rectifying injustices. Our nation's experience with judicial review confirms the adage, "the power to do good is the power to do evil." Yes, thankfully, there was a *Brown v. Board of Education*;[1] but there was, alas, also a *Dred Scott v. Sandford*.[2] Yes, there was a *Pierce v. Society of Sisters*[3] and a *West Virginia State Board of Education v. Barnette*;[4] but there was also a *Lochner v. New York*[5] and an *Adkins v. Children's Hospital*.[6]

1. 347 U.S. 483 (1954).
2. 60 U.S. (19 How.) 393 (1856).
3. 268 U.S. 510 (1925).
4. 319 U.S. 624 (1943).
5. 198 U.S. 45 (1905).
6. 261 U.S. 525 (1923).

In short, the historical record is mixed. And then consider the case of *Roe v. Wade*.[7] In striking down laws prohibiting abortion, did the Supreme Court advance the cause of women's freedom? Or did it expose their innocent unborn offspring to virtually unrestricted lethal violence? It would seem entirely to depend on one's moral view of the status of human beings in the embryonic and fetal stages of their development.[8] While judges certainly are entitled to have views on this issue, it is unclear why their views should matter more than those of other conscientious citizens.

The idea of courts exercising more or less free-wheeling judicial review as a check on legislative oppression both overestimates judicial wisdom and virtue and underestimates the capacity of the people and their elected representatives to act on the basis of principle, rather than prejudice or self-interest.[9] No idea in contemporary constitutional theory is more mischievous, in my view, than Ronald Dworkin's juxtaposition of courts, as "forums of principle" concerned with the protection of rights, with legislatures, as forums of policy charged to advance the general welfare—conceived in some utilitarian or other aggregative fashion—subject to the enforcement by judges of rights as trumps against "general utility," "aggregate collective good," or some such concept.[10] This idea teaches judges truly to think of themselves as "princes"—indeed, "philosopher kings"—and teaches the people as a whole that democracy is merely about the clash of interests, rather than deliberation about justice and the common good.[11] It promotes as virtues the very vices to which

7. 410 U.S. 113 (1973).

8. *Compare* Jed Rubenfeld, *On the Legal Status of the Proposition that "Life Begins at Conception,"* 43 STAN. L. REV. 599 (1991), *with* Robert P. George, *Public Reason and Political Conflict: Abortion and Homosexuality*, 106 YALE L. J. 2475, 2486-595 (1997), *and* Robert P. George, *Law, Democracy, and Moral Disagreement*, 110 HARV. L. REV. 1388, 1394-400 (1997).

9. *See* CASS R. SUNSTEIN, LEGAL REASONING AND POLITICAL CONFLICT (1996); JEREMY WALDRON, LAW AND DISAGREEMENT (forthcoming).

10. *See* RONALD DWORKIN, *The Forum of Principle*, *in* A MATTER OF PRINCIPLE 33 (1985); RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 91, 191 (1977). For a sustained critique of Dworkin's argument, *see* ROBERT P. GEORGE, MAKING MEN MORAL: CIVIL LIBERTIES AND PUBLIC MORALITY 83 (1993).

11. On the "deliberative" conception of democracy, *see* AMY GUTMANN & DENNIS THOMPSON, DEMOCRACY AND DISAGREEMENT: WHY MORAL

judicial and legislative officers, respectively, are most prone. Courts are, to be sure, or should be, forums of legal principle; but legislatures are, or should be, forums of moral principle for the making of laws.[12]

To be sure, people often disagree about matters of moral principle. So, the political system must include a procedure for resolving such disputes. It is a mistake, however, to suppose that a procedure which reserves high matters of moral principle to courts is more likely to generate correct decisions.[13]

Moreover, I think it is time to acknowledge candidly that the reservation of such matters to the judiciary effectively vests vast power in the hands of an elite—indeed, an elite very likely to be responsive to elite interests and opinion when they are in conflict with popular opinion, as they often are today. For example, if one polls the faculty of Princeton University on morally-charged political issues such as whether to abolish the death penalty or institute "same-sex marriage," and then polls the first 700 people listed in the Trenton phone directory, one will almost certainly get very different results. If such issues are to be freely resolved by the judiciary in the absence of clear constitutional warrant, can there be any doubt about which side benefits? It is not that judges will come down on the more liberal side every time in what Justice Scalia labeled the "Kulturkampf" in a famous dissent.[14] But it is more than likely that where judges rob one side or the other of a victory at the polls, they will rob the morally more conservative side.

As applied to religion, I think we have to take seriously the cultural clash between religious and secularist world views. The latter, which is plainly dominant in the elite sector of the culture, obtains benefits in presenting itself as a kind of "neutrality," rather than as an ideology or world view that competes with others. If courts are to enforce a doctrine of neutrality, they must, in fairness, avoid treating

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CONFLICT CANNOT BE AVOIDED IN POLITICS, AND WHAT SHOULD BE DONE ABOUT IT (1996).

12. Cass Sunstein puts the point well: "In American government and in all well-functioning constitutional democracies, the real forum of high principle is politics, not the judiciary—and the most fundamental principles are developed democratically, not in courtrooms." SUNSTEIN, *supra* note 9, at 7.

13. *See* WALDRON, *supra* note 9.

14. *See* Romer v. Evans, 517 U.S. 620, 636 (1996) (Scalia, J., dissenting).

secularism as if it were neutral. They must, in other words, enforce neutrality as between secularism and religion. Even if judges understood and were willing to do that, it would be difficult in many cases to know what such neutrality requires, or even whether it is possible. Where it is not possible, society faces a choice between secularist and religious values.

Now, in my decidedly non-fideistic Catholic view of things, such a choice need not be "unreasoned." Whether the issue is human cloning, assisted suicide, parental rights, or whether to remove "under God" from the Pledge of Allegiance, or "in God we trust" from the coins, I am prepared to engage in the argument with my secularist fellow citizens. Let the matter finally be resolved, however, by the institutions of self-government—what Sunstein calls "the real forum of principle"[15] in a democratic republic—not, in the absence of constitutional warrant, by the courts.

15. SUNSTEIN, *supra* note 8, at 60.