
BOOK REVIEW

DISCOURSE IN THE DUSK:
THE TWILIGHT OF RELIGIOUS FREEDOM?

RELIGION AND THE CONSTITUTION — VOLUME 2: ESTABLISHMENT AND FAIRNESS. By Kent Greenawalt. Princeton and Oxford: Princeton University Press. 2008. Pp. x, 543. \$45.00.

*Reviewed by Steven D. Smith**

Snow had settled on the castle at Canossa — and on the royal feet of the (at least cosmetically) contrite supplicant, King Henry IV. For three days Henry had waited outside the castle, barefoot and threadbare, imploring pardon “with many tears” from the pope, Gregory VII.¹ The king’s plight was the pope’s predicament: while Henry suffered freezing feet, Gregory faced a choice fraught with pastoral and political peril. To forgive, or not to forgive?

The extraordinary encounter in the winter of 1077 had come about in this way. In the face of Gregory’s insistence on the independence of the Church, Henry had truculently defended the traditional authority of secular rulers to have a hand in selecting bishops and investing them with the symbols of their authority.² Dialogue deteriorated: the pope accused the king of conduct that was not “becoming,”³ and the king responded by calling Gregory a “false monk” and a usurper who should relinquish the papacy in favor of someone worthy of the office.⁴ Gregory declined Henry’s proposal: instead he excommunicated the king, both spiritually and politically, “releas[ing] all Christian men from the allegiance which they have sworn or may swear to him, and . . . forbid[ding] anyone to serve him as king.”⁵

* Warren Distinguished Professor of Law, University of San Diego. I thank Larry Alexander, Chris Eberle, Paul Horwitz, Andy Koppelman, Michael Perry, George Wright, and Fred Zacharias for helpful comments on an earlier draft. I also benefited from discussion of the book at a roundtable conference at Notre Dame organized by Rick Garnett.

¹ Letter from Pope Gregory VII to the German princes (Jan. 1077), as reprinted in BRIAN TIERNEY, *THE CRISIS OF CHURCH & STATE 1050–1300*, at 62, 63 (1964). For the basis of my description of the conflict, see TIERNEY, *supra*, at 53–73.

² TIERNEY, *supra* note 1, at 53.

³ Letter from Pope Gregory VII to King Henry IV (Dec. 8, 1075), as reprinted in TIERNEY, *supra* note 1, at 57, 58.

⁴ Letter from King Henry IV to Pope Gregory VII (1076), reprinted in TIERNEY, *supra* note 1, at 59, 59–60.

⁵ Excommunication of King Henry IV by Pope Gregory VII (Feb. 1076), reprinted in TIERNEY, *supra* note 1, at 60, 61.

This measure was no mere headline-grabbing flourish, as it might be if, say, a preacher today pronounced a similar doom on the President. On the contrary: many of the excommunicated king's nobles responded, opportunistically perhaps, by refusing to support him and giving their allegiance instead to Henry's rival, Rudolf of Swabia. As imperial fortunes faltered, a conference between pope and king was arranged. But Henry decided to preempt the conference with an act of anticipatory penitence. So he surprised the pope by appearing outside the Canossa castle, in abject condition, as Gregory was traveling to the scheduled meeting.⁶

The strategy worked: "moved by pity and compassion," but to the consternation of Henry's rebellious nobles (who were left in the lurch), the pope ultimately concluded that his priestly obligations required him to absolve the penitent sinner and to "receive[] him into the grace of Holy Mother Church."⁷ Thus restored, Henry returned to Germany and consolidated his power. Three years later, he led an army that drove the pope from Rome, where Henry installed a new pope more to his liking.⁸

As a military and political matter, Henry prevailed. But who was actually in the right? And why?

The contest between Gregory VII and Henry IV was among the most dramatic in a series of medieval conflicts that set scholars, churchmen, lawyers, and kings with their counselors all over Europe to thinking, arguing, and writing in a sustained way about the proper relations between secular government and the church. This outpouring of intellectual energy initiated a distinctively Western tradition of discourse about church-state relations and, more broadly, religious freedom that has persisted for a millennium. But there are signs of the times suggesting that the tradition may now be nearing its end. Both the tradition's ambitions and its current senescence are reflected in the latest distinguished contribution to that tradition — Professor Kent Greenawalt's magisterial *Religion and the Constitution: Establishment and Fairness*.

Greenawalt's volume is the second in what amounts to a comprehensive summa of American law and practice under the First Amendment's religion clauses.⁹ Together the volumes provide close to a thousand pages of intensive, methodical analysis of virtually every

⁶ See TIERNEY, *supra* note 1, at 54.

⁷ Letter from Pope Gregory VII to the German princes, *supra* note 1, at 63.

⁸ See TIERNEY, *supra* note 1, at 54–55.

⁹ The first volume was 1 KENT GREENAWALT, *RELIGION AND THE CONSTITUTION: FREE EXERCISE AND FAIRNESS* (2006). As the titles suggest, the first volume is mostly concerned with free exercise questions and the second with establishment questions, but as the distinction is uncertain and disputed, both sorts of issues appear in both books.

contemporary issue that arises under those clauses. Rather than offer any comprehensive theory of religious freedom, Greenawalt pursues a “bottom up” (p. 1)¹⁰ strategy that “work[s] toward sensible approaches by addressing many discrete issues”¹¹ and by thinking “not in the abstract but by focusing on concrete issues in context” (p. 543). Thus, in the course of the book Greenawalt reflects on all of the perennial Establishment Clause issues: aid to religious schools, prayer in public schools, tax exemptions for churches, and the like. But he also devotes careful attention to some more exotic controversies: state experiments in certifying foods as “kosher,” for example, or laws that seek to correct gender inequalities that result from the Jewish religious rules of marriage and divorce.¹²

The comprehensiveness of Greenawalt’s treatment makes for a book that, though more than a conventional treatise, should be valuable for use in the way treatises are employed. This is not the sort of book that many readers will want to sit down and read cover-to-cover. But for a careful, fair-minded analysis of the cases and arguments with respect to virtually any establishment controversy that a judge or scholar may be investigating, one could hardly do better than to consult Greenawalt’s treatment. And his relevant chapters ought to be mandatory reading for any student who wants to write a seminar paper or law review comment on a religion clause topic.

Although Greenawalt only occasionally glances backward beyond the American experience, his opus amounts to a worthy addition to the venerable tradition of discourse on religious freedom. Worthy and also, potentially, timely. That is because, as it happens, the tradition seems to be ailing. Probably the most common adjective used in descriptions of the contemporary jurisprudence of religious freedom is “incoherent.”¹³ Polemic, invective, and sophistry abound.¹⁴ What the tradition desperately needs, it seems, is just what Greenawalt attempts to supply — namely, a careful, systematic demonstration that controversies over religious freedom can actually be resolved through “reasoned analysis, as distinguished from rhetoric” (p. 440).

¹⁰ Internal quotation marks have been omitted.

¹¹ GREENAWALT, *supra* note 9, at 1.

¹² Greenawalt does not rigorously limit himself to the local and the particular, however. An early chapter discusses the original meaning of the Establishment Clause. And the last several chapters move to a more abstract level in discussing the possibilities of theory, the appropriateness of citizens and officials relying on religious grounds in political decisionmaking, and the regulation of religion-based morality.

¹³ Steven G. Gey, *Vestiges of the Establishment Clause*, 5 FIRST AMENDMENT L. REV. 1, 4 (2006) (“One of the few things constitutional scholars of every stripe seem to agree about is the proposition that the Court’s Establishment Clause jurisprudence is an incoherent mess.”).

¹⁴ Prudence forbids specific citations in a mere footnote, but readers experienced in the field will be able to fill in their own preferred references.

So, does his project succeed? Yes and no. Greenawalt's book is, on one level, a model of the application of fair-minded reason to religion clause controversies. At a deeper level, though, the book displays a disconcerting complacency — almost a disdain — with respect to the requirements of reason. More specifically, beyond cursory invocations of some familiar but highly contested rationales, Greenawalt makes virtually no effort to *justify* either his general precepts or his array of particular conclusions.

Given Greenawalt's almost palpable commitment to reason, this default is puzzling. It can best be explained, I think, in terms of the decadence of the tradition of discourse within which Greenawalt is working.¹⁵ In Part I ("The Discursive Tradition"), we will look briefly at the tradition of discourse about religious freedom in which Greenawalt participates and will notice the daunting challenge that threatens that tradition. More specifically, we will see how widely accepted constraints of modern secular discourse — constraints thought by many (including Greenawalt (pp. 449, 492–94)) to be entailed by religious freedom itself — impede efforts to justify the venerable commitments to church-state separation and religious freedom, thus cutting the tradition off from the roots that have nourished it. In Part II ("Greenawalt in the Twilight?"), we will look closely at Greenawalt's recent book, and will see how its conspicuous shortcoming — its curious, disconcerting default on the level of basic justification — reflects a sort of good faith paralysis in the face of this challenge.

¹⁵ What does it mean for a tradition to exhibit "decadence," or "exhaustion"? In this context, the terms are obviously metaphorical. But the metaphors are illuminated by Professor Alasdair MacIntyre's description of what he calls an "epistemological crisis" within a tradition:

At any point it may happen to any tradition-constituted enquiry that by its own standards of progress it ceases to make progress. Its hitherto trusted methods of enquiry have become sterile. Conflicts over rival answers to key questions can no longer be settled rationally. Moreover, it may indeed happen that the use of the methods of enquiry and of the forms of argument, by means of which rational progress had been achieved so far, begins to have the effect of increasingly disclosing new inadequacies, hitherto unrecognized incoherences, and new problems for the solution of which there seem to be insufficient or no resources within the established fabric of belief.

ALASDAIR MACINTYRE, *WHOSE JUSTICE? WHICH RATIONALITY?* 361–62 (1988). Such crises are sometimes overcome through "[i]maginative conceptual innovation." *Id.* at 362. But "not all epistemological crises are resolved so successfully. Some indeed are not resolved, and their lack of resolution itself defeats the tradition which has issued in such crises . . ." *Id.* at 365.

In a similar vein, the eminent historian Jacques Barzun perceives an advancing decadence in Western culture generally. See JACQUES BARZUN, *FROM DAWN TO DECADENCE: 500 YEARS OF WESTERN CULTURAL LIFE*, at xiii–xvii (2000). Barzun contends that the culture is "old and unraveling," *id.* at xiii, and that its condition is reflected in "the deadlocks of our time," *id.* at xv. "The forms of art as of life seem exhausted, the stages of development have been run through. Institutions function painfully. Repetition and frustration are the intolerable result." *Id.* at xvi.

I. THE DISCURSIVE TRADITION

Greenawalt's opus, as noted, is the latest distinguished contribution to a centuries-old tradition of discourse about the proper relation between the spiritual and temporal in the political sphere. But in recent decades, the character and terms of that discourse have undergone an almost complete reversal.

Any review of a millennium-old tradition of discourse in an essay like this will necessarily be summary.¹⁶ Nonetheless, a look backwards can help us understand, I think, the current plight to which Greenawalt's book is an impressive, if ultimately unsuccessful, response. Accordingly, this Part will briefly sketch the development of this tradition of discourse from the Middle Ages through America's founding, and will observe the ways in which in recent decades the character of that discourse has undergone a substantial reversal. More specifically, the problem of church and state is no longer conceived of in terms of separate (and divinely ordained) jurisdictions; instead, religion and religious institutions are understood to be subject to the encompassing (and secular) jurisdiction of the state. Within the contemporary framework, however, it is hard to explain *why* religion ought to be treated as a special legal category at all and, consequently, *how* it should be treated specially. As we will see in Part II, this difficulty is starkly displayed in Greenawalt's book.

A. *The Religious Origins of Religious Freedom*

1. *The Two Realms.* — The Western tradition of church-state separation and religious freedom is often, and properly, traced back to the dualistic teaching of the New Testament, succinctly expressed in Jesus's admonition to "[r]ender . . . unto Caesar the things which be Caesar's, and unto God the things which be God's."¹⁷ The admonition poses a problem when the demands emanating from Caesar and God (or God's presumed representatives) conflict. Consequently, episodic skirmishes between bishops and princes occurred throughout the centuries as the declining Roman Empire entered the Middle Ages.¹⁸ But more systematic theorizing about the relation between church and state began in earnest with the so-called Investiture Controversy of the eleventh and twelfth centuries, of which the conflict between Gregory VII and Henry IV was one especially portentous episode.

¹⁶ For a much longer (though still, truth be told, highly summary) presentation, see STEVEN D. SMITH, *THE DISENCHANTMENT OF SECULAR DISCOURSE* (forthcoming 2010) (manuscript at ch. 4, on file with the Harvard Law School Library).

¹⁷ *Luke* 20:25 (King James); e.g., TIERNEY, *supra* note 1, at 7–8.

¹⁸ See, e.g., PETER BROWN, *THE RISE OF WESTERN CHRISTENDOM* 80–81 (1996).

These conflicts generated a huge range of arguments and positions.¹⁹ Despite this diversity, the medieval discussions proceeded within a common framework in which advocates on all sides of the disputes worked from a set of common assumptions. In this view, all authority (like everything else in the created world) ultimately derived, directly or indirectly, from God. But God had in fact created a world with two dimensions or realms — the spiritual and the temporal — and each realm was subject to its appropriate subauthorities. The spiritual realm was subject to the church. The temporal or secular realm was subject to God, ultimately, but more immediately to kings and princes.

Consider the characteristic explanation of a prominent twelfth-century thinker, Hugh of St. Victor:

There are two lives, one earthly, the other heavenly, one corporeal, the other spiritual. . . . Each has its own good by which it is invigorated and nourished. . . . Therefore, in each . . . life, powers were established. . . . The one power is therefore called secular, the other spiritual. . . . The earthly power has as its head the king. The spiritual power has the supreme pontiff. All things that are earthly and made for the earthly life belong to the power of the king. All things that are spiritual and attributed to the spiritual life belong to the power of the supreme pontiff.²⁰

This two-realm world view created a distinctive²¹ and daunting challenge — namely, sorting out how God had allocated authority as

¹⁹ The more forceful popes such as Gregory VII, Innocent III, and Boniface VIII maintained that secular authority, though in some sense separate, was received through the church; it followed, they thought, that popes could establish, judge, and depose secular rulers. See Papal Bull, Pope Boniface VIII, *Unam Sanctam* (Nov. 1302), reprinted in TIERNEY, *supra* note 1, at 188, 188–89; *Dictatus Papae* (1075), reprinted in TIERNEY, *supra* note 1, at 49, 49–50; Letter from Pope Gregory VII to Bishop Hermann (Mar. 15, 1081), as reprinted in TIERNEY, *supra* note 1, at 66, 67–69; Letter from Pope Gregory VII to King Solomon (Oct. 28, 1074), as reprinted in TIERNEY, *supra* note 1, at 50, 50–51; Letter of Pope Innocent III to King John (Apr. 1214), as reprinted in TIERNEY, *supra* note 1, at 135, 135–36. Emperors such as Henry IV, Frederick Barbarossa, and Frederick II insisted that their power, though from God, was not bestowed through and hence was not subject to the church. See TIERNEY, *supra* note 1, at 139; Letters from Emperor Frederick Barbarossa to the German bishops (Feb. 1158 & Oct. 1158), as reprinted in TIERNEY, *supra* note 1, at 107, 108; Letter from King Henry IV to Pope Gregory VII, *supra* note 4, at 59–60.

²⁰ HUGH OF SAINT VICTOR, *DE SACRAMENTIS CHRISTIANAE FIDEI* (circa 1134), as reprinted in TIERNEY, *supra* note 1, at 94, 94–95 (fifth omission in original).

²¹ Professor Bernard Lewis explains, for example, that “[c]lassical Islam recognized a distinction between things of this world and things of the next, between pious and worldly considerations.” BERNARD LEWIS, *THE CRISIS OF ISLAM: HOLY WAR AND UNHOLY TERROR* 20 (2003). But “[t]he dichotomy of *regnum* and *sacerdotium*, so crucial in the history of Western Christendom, had no equivalent in Islam”:

In pagan Rome, Caesar was God. For Christians, there is a choice between God and Caesar, and endless generations of Christians have been ensnared in that choice. In Islam there was no such painful choice. In the universal Islamic polity as conceived by Muslims, there is no Caesar but only God, who is the sole sovereign and the sole source of law.

Id. at 6–7.

between the church and the secular rulers. Christian writers over the centuries debated this issue under the headings of the two “cities,”²² the two “swords,”²³ and the two “kingdoms.”²⁴ Not surprisingly, different thinkers, different political and ecclesiastical actors, and different eras developed this commitment to a division of spiritual and secular authority in different ways. Theorists during the High Middle Ages gave much thought to how church and state should be separated, but their conclusions differed drastically among themselves, with some thinkers giving more and others less scope to the church’s jurisdiction vis-à-vis the state’s.²⁵ Naturally, proponents of church or state, being human, sometimes sought to expand their own jurisdiction at the expense of the other.²⁶

Two crucial features of this long and sprawling debate need to be noted. First, as already noted, the central question was one of *jurisdiction*.²⁷ What were the church’s and the prince’s proper jurisdictions? In this respect, the medieval debate resembles modern debates about the proper division of jurisdiction as between nations, or states, or the national and state governments and their respective judiciaries.

Second, the debate was at its heart a *religious* dispute. Arguments were typically based on scripture, the writings of Church fathers, canon law, or analogies comparing spiritual and temporal authority to the soul and the body,²⁸ or occasionally on a sort of natural theology (in which, for example, relations between pope and king were under-

²² See, e.g., ST. AUGUSTINE, *THE CITY OF GOD* (Henry Bettenson trans., Penguin Books 1984) (413–426).

²³ See TIERNEY, *supra* note 1, at 8.

²⁴ See, e.g., JOHN WITTE, JR., *LAW AND PROTESTANTISM: THE LEGAL TEACHINGS OF THE LUTHERAN REFORMATION* 87–117 (2002); David Vandrunen, *The Context of Natural Law: John Calvin’s Doctrine of the Two Kingdoms*, 46 *J. CHURCH & ST.* 503 (2004).

²⁵ See generally TIERNEY, *supra* note 1. For a helpful survey that attempts to distill the various positions into four main “models,” see JOHN WITTE JR., *GOD’S JOUST, GOD’S JUSTICE: LAW AND RELIGION IN THE WESTERN TRADITION* 210–24 (2006).

²⁶ See *supra* note 19.

²⁷ See, e.g., HAROLD J. BERMAN, *LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION* 255–69 (1983). Professor John Witte explains that during the twelfth and thirteenth centuries:

[T]he Church came to claim a vast new jurisdiction — literally the power “to speak the law” (*jus dicere*). The Church claimed personal jurisdiction over clerics, pilgrims, students, the poor, heretics, Jews, and Muslims. It claimed subject matter jurisdiction over doctrine and liturgy; ecclesiastical property, polity, and patronage; sex, marriage, and family life; education, charity, and inheritance; oral promises, oaths, and various contracts; and all manner of moral, ideological, and sexual crimes. The Church also claimed temporal jurisdiction over subjects and persons that also fell within the concurrent jurisdiction of one or more civil authorities.

WITTE, *supra* note 25, at 12 (footnote omitted).

²⁸ See GILES OF ROME, *DE ECCLESIASTICA POTESTATE* (1301), as reprinted in TIERNEY, *supra* note 1, at 199, 199; HUGH OF SAINT VICTOR, *supra* note 20, at 95; TIERNEY, *supra* note 1, at 87.

stood based on a supposed parallel to the relation between the sun and the moon).²⁹ Even after the systematic introduction of Aristotle into the discourse in the thirteenth century³⁰ made more secular arguments available, the debates retained a predominantly religious character.

This religious orientation persisted into modernity. Indeed, though the sections we typically read may not disclose the fact, even a later theorist of the secular state such as Thomas Hobbes — recently lauded as the seminal rejecter of “political theology” and advocate of the “Great Separation”³¹ — devoted as many pages in his *Leviathan* to supporting his political views through painstaking scriptural exegesis and theological exposition as to the more secular social contract reasoning we focus on today.³² And, as we will notice shortly, the most basic justifications for religious freedom given during the American founding remained at bottom religious in character.

2. *Freedom of Conscience.* — Before we reach the founding period, though, we need to notice one vitally important phase of the evolving tradition — the development of a commitment to freedom of conscience. Although the sanctity of conscience was recognized in medie-

²⁹ The thirteenth-century canon lawyer and cardinal Hostiensis argued that:

[J]ust as the moon receives its light from the sun and not the sun from the moon, so too the royal power receives authority from the priestly and not *vice versa*. Again, just as the sun illuminates the world by means of the moon when it cannot do so by itself, that is at night, so too the priestly dignity enlightens the world by means of the royal when it cannot do so by itself, that is when it is a question of inflicting a blood penalty.

HENRICUS DE SEGUSIO (HOSTIENSIS), *SUMMA DOMINI HENRICI CARDINALIS HOSTIENSIS* (1537), as reprinted in TIERNEY, *supra* note 1, at 156, 156. On this reasoning, and on Ptolemaic calculations, Hostiensis concluded that “the sacerdotal dignity is seven thousand, six hundred and forty-four and a half times greater than the royal . . .” *Id.*

³⁰ Before the thirteenth century only a few of Aristotle’s works were available in Latin to Western thinkers. The more complete introduction of Aristotle “had an impact reminiscent of those science fiction stories in which the world suddenly encounters a civilization far in advance of its own.” WILLIAM C. PLACHER, *A HISTORY OF CHRISTIAN THEOLOGY* 150 (1983).

³¹ MARK LILLA, *THE STILLBORN GOD: RELIGION, POLITICS, AND THE MODERN WEST* 74–75 (2007).

³² In the original, the primarily theological and scriptural section of the book begins on page 195 and continues for approximately 200 pages to the end of the book. See THOMAS HOBBS, *LEVIATHAN* 78–79 (C.B. MacPherson ed., Penguin Books 1968) (1651). Criticizing the common depiction of Hobbes as a purely secular thinker, Professor Joshua Mitchell explains:

The central feature of Hobbes’s system of political order is the *unity* of sovereignty, political and religious, from which derives, among other things, the Leviathan’s right to command obedience . . . ; while reason can conclude for the unity of *political* sovereignty, it cannot conclude for the unity of political and religious sovereignty. Of religious sovereignty, as Hobbes insists again and again, reason must be silent; consequently, the unity of political and religious sovereignty must be established on the basis of Scripture . . .

Joshua Mitchell, *Luther and Hobbes on the Question: Who Was Moses, Who Was Christ?*, 53 J. POL. 676, 677 (1991); see also Jeremy Waldron, *Hobbes on Public Worship*, in *TOLERATION AND ITS LIMITS* 31, 33–34 (Melissa S. Williams & Jeremy Waldron eds., 2008).

val Catholic teaching and canon law,³³ the Protestant Reformation altered the significance of conscience in a way that profoundly affected, and to some extent redirected, historical commitments to the separation of church and state. The alteration can be understood as the product of two changes associated with the Reformation.

First, the fragmentation of Christendom resulting from the Reformation, combined with the tendency of both Protestants and Catholics to invoke the aid and protection of secular princes in the ensuing struggles, had the effect of bringing churches under state control. Such arrangements came to be described as “Erastian.”³⁴ Professor José Casanova observes that following the Reformation, “[t]he churches attempted to reproduce the model of Christendom at the national level, but all the territorial national churches, Anglican as well as Lutheran, Catholic as well as Orthodox, fell under the caesaropapist control of the absolutist state.”³⁵

Second, in Protestant thinking the conception of the church itself changed. In simple terms, the change was this: whereas Catholic teaching had emphasized the necessity of the church as an intermediary between God and humans, Protestants sought to cut out (or at least downsize) the middle man, so to speak, and to encourage a more direct relation between the individual and God. In the “priesthood of all believers,” anyone could read the Bible for himself or herself and could commune with God directly without the intercession of priests, saints, or sacraments.³⁶ In this spirit, Martin Luther passionately and defiantly set his own understanding of scripture against the decrees and practices of the church — “Here I stand, I can do no other”³⁷ — and thereby, as his biographer observes, “liberated the Christian conscience.”³⁸ Close to three centuries later, Thomas Paine, a radical

³³ See Brian Tierney, *Religious Rights: A Historical Perspective*, in RELIGIOUS LIBERTY IN WESTERN THOUGHT 29, 36–37 (Noel B. Reynolds & W. Cole Durham, Jr. eds., 1996).

³⁴ Professor Richard Garnett explains that “Erastus was a sixteenth-century Swiss theologian ‘who taught that the church had no proper coercive jurisdiction independent of the civil magistrate.’ His name is usually attached to the view that the state is or should be supreme over, and should control, the church.” Richard W. Garnett, *Pluralism, Dialogue, and Freedom: Professor Robert Rodes and the Church-State Nexus*, 22 J.L. & RELIGION 503, 513 (2006–2007) (footnote omitted) (quoting ROBERT E. RODES, JR., PILGRIM LAW 141 (1998)).

³⁵ JOSÉ CASANOVA, PUBLIC RELIGIONS IN THE MODERN WORLD 22 (1994).

³⁶ WITTE, *supra* note 25, at 55. In Protestant thinking, John Witte explains, “Each individual stands directly before God, seeks God’s gracious forgiveness of sin, and conducts life in accordance with the Bible and Christian conscience.” *Id.* at 16.

³⁷ HEIKO A. OBERMAN, LUTHER: MAN BETWEEN GOD AND THE DEVIL 204 (Eileen Walliser-Schwarzbart trans., 1989). For a brief account of the incident (which may not have involved the exact famous words passed down in the legend), see MARTIN MARTY, MARTIN LUTHER 66–70 (2004).

³⁸ OBERMAN, *supra* note 37, at 204. Oberman qualifies the usual assessment, however: “Appealing to conscience was common medieval practice; appealing to a ‘free’ conscience that had

protestant in temperament and outlook if not in substantive doctrine, put the idea in characteristically pithy form: “My own mind is my own church.”³⁹

This change can be overstated.⁴⁰ For Protestants the church remained important as a community of believers and as a vehicle through which the word of God was preached. Moreover, the sacraments of baptism and communion were typically retained. But the spiritual center of gravity had shifted, as the position and functions formerly controlled by the church came to be transferred to the individual and his or her conscience: God spoke to people most compellingly, it came to be thought, not so much through the church as through the conscience.⁴¹

As a consequence of these developments, the medieval commitment to separation of church and state, and hence to keeping the *church* independent of secular jurisdiction, was partially rerouted into a commitment to keeping the *conscience* free from secular control. “The old claim that the church ought not to be controlled by secular rulers,” Professor Brian Tierney explains, “was now taken to mean that the civil magistrate had no right to interfere with any person’s choice of religion.”⁴² Thus, the medieval slogan proclaiming *libertas ecclesiae* — “freedom of the church”⁴³ — begat the more modern theme of “freedom of conscience.”⁴⁴

The generative connection and the jurisdictional emphasis are manifest in eighteenth-century legislator and Yale rector Elisha Williams’s declaration:

[I]f CHRIST be the *Lord* of the *Conscience*, the sole King in his own Kingdom; then it will follow, that *all such* as in any Manner or Degree *assume* the Power of directing and governing the Consciences of Men, are

liberated itself from all bonds would never have occurred to Luther.” *Id.* Luther’s innovation was to liberate the conscience “from papal decree and canon law.” *Id.*

³⁹ 1 THOMAS PAINE, AGE OF REASON 6 (1794), reprinted in THE THEOLOGICAL WORKS OF THOMAS PAINE (1879).

⁴⁰ In fact, the Reformers differed significantly among themselves in their conceptions of the church, and Luther’s own notions changed over time as he tried to distinguish his views of the church from those of Catholicism on the one side and of more radical Reformers on the other. For a helpful overview, see ALISTER E. MCGRATH, REFORMATION THOUGHT 130–38 (1988). See also CARL E. BRAATEN, PRINCIPLES OF LUTHERAN THEOLOGY 54–57 (2d ed. 2007) (discussing “the tension between the Protestant principle and Catholic substance” in Lutheran ecclesiology).

⁴¹ Cf. ANDREW R. MURPHY, CONSCIENCE AND COMMUNITY 111 (2001) (“According to the orthodox view, conscience represented the voice of God within an individual . . .”).

⁴² Tierney, *supra* note 33, at 51.

⁴³ See *id.* at 35–36.

⁴⁴ For a critical discussion of this development, see JOHN COURTNEY MURRAY, WE HOLD THESE TRUTHS 201–15 (1960).

justly chargeable with *invading* his rightful Dominion; He alone having the Right they claim.⁴⁵

This theme grew to be powerfully influential in Protestant societies and became a central component of the American version of religious freedom.⁴⁶

3. *The American Phase.* — By the time Jefferson and Madison took their places on the historical stage, therefore, the tradition of church-state separation and freedom of conscience was already centuries old. Jefferson and Madison and their fellow citizens in turn accepted that inheritance and developed it in their own distinctive ways. The American Founders' commitment to religious freedom is often viewed as a decisive break from the past.⁴⁷ And in view of the more Erastian intermission that immediately preceded the American founding,⁴⁸ this supposition is understandable. Nonetheless, the strand of continuity in the founding was as important as the fact of discontinuity.⁴⁹ Jefferson and his contemporaries were in reality the heirs to a tradition that was already centuries old, and they still had at least one foot firmly planted in the classical world view.⁵⁰

Thus, unlike most modern commentators, Madison justified religious disestablishment in openly theological terms.⁵¹ For his part, Jefferson officially argued for disestablishment and freedom of conscience on the overtly theological premise that "Almighty God hath created the mind free," and that governmental coercion in matters of religion represented "a departure from the plan of the Holy author of our religion, who being Lord both of body and mind, yet chose not to propagate it

⁴⁵ ELISHA WILLIAMS, *THE ESSENTIAL RIGHTS AND LIBERTIES OF PROTESTANTS* 12 (1744).

⁴⁶ See generally MURPHY, *supra* note 41; Noah Feldman, *The Intellectual Origins of the Establishment Clause*, 77 N.Y.U. L. REV. 346, 354–98 (2002).

⁴⁷ See, e.g., SIDNEY E. MEAD, *THE LIVELY EXPERIMENT* 60 (1963) (describing the American embrace of religious freedom as a "momentous revolution in the thinking and practice of Christendom" and as "one of the 'two most profound revolutions which have occurred in the entire history of the church'" (quoting Winfred E. Garrison, *Characteristics of American Organized Religion*, 256 ANNALS AM. ACAD. POL. & SOC. SCI. 14, 17 (1948))).

⁴⁸ See *supra* p. 1877 and note 34.

⁴⁹ Cf. WITTE, *supra* note 25, at 210 ("Separation of Church and state is often regarded as a distinctly American and relatively modern invention. In reality, separationism is an ancient Western teaching rooted in the Bible.")

⁵⁰ See generally DANIEL J. BOORSTIN, *THE LOST WORLD OF THOMAS JEFFERSON* (3d ed. 1993). For a study emphasizing the continuities between founding-era and medieval and classical thought, see ELLIS SANDOZ, *A GOVERNMENT OF LAWS: POLITICAL THEORY, RELIGION, AND THE AMERICAN FOUNDING* (Univ. of Mo. Press 2001) (1990).

⁵¹ See JOHN T. NOONAN, JR., *THE LUSTRE OF OUR COUNTRY: THE AMERICAN EXPERIENCE OF RELIGIOUS FREEDOM* 86–89 (1998).

by coercions on either, as was in his Almighty power to do.”⁵² And of course, Jefferson deployed the “wall of separation” metaphor in a letter to a group — New England Baptists — who had struggled for separation of church and state on unapologetically religious grounds.⁵³

In addition, founding-era separationist commitments retained the jurisdictional aspect of classical thinking and the Protestant adaptation of this thinking to the domain of individual conscience. The Protestant emphasis on a relation — an *unmediated* relation — between God and the individual was central to the argument in the famous *Memorial and Remonstrance* that James Madison wrote in support of religious freedom in Virginia.⁵⁴ “It is the duty of every man,” Madison contended, “to render to the Creator such homage, and such only, as he believes to be acceptable to him.” And on this assumption “[t]he Religion then of every man must be left to the conviction and conscience of every man.” Madison was thereby led to conceive of religious freedom in strikingly *jurisdictional* terms. “Before any man can be considered as a member of Civil Society,” Madison reasoned, “he must be considered as a subject of the Governor of the Universe.” Consequently, duties to God are “precedent both in order of time and degree of obligation, to the claims of Civil Society,” and entrance into society can only occur “with a saving of . . . allegiance to the Universal Sovereign.” From these premises Madison drew his jurisdictional conclusion: “[I]n matters of Religion, no man’s right is abridged by the institution of Civil Society, and . . . Religion is wholly exempt from its cognizance.”⁵⁵

B. The Tradition Transformed

The medieval discourse of church and state had, as we have seen, two important features: it was concerned with an allocation of *jurisdiction*, and it was predominantly *religious* in character. And these features persisted, though in altered and perhaps diluted form, into the American founding. In these respects, though, the modern discourse is diametrically different.

⁵² Virginia Act for Religious Freedom (1786), *reprinted in* CHURCH AND STATE IN THE MODERN AGE 63, 64 (J.F. Maclear ed., 1995). Jefferson was responsible for drafting the Act. CHURCH AND STATE IN THE MODERN AGE, *supra*, at 63.

⁵³ For descriptions of the incident, see DANIEL L. DREISBACH, THOMAS JEFFERSON AND THE WALL OF SEPARATION BETWEEN CHURCH AND STATE 25–54 (2002); PHILIP HAMBURGER, SEPARATION OF CHURCH AND STATE 155–80 (2002).

⁵⁴ See JAMES MADISON, MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ASSESSMENTS (1785), *reprinted in* CHURCH AND STATE IN THE MODERN AGE, *supra* note 52, at 59, 59–60.

⁵⁵ *Id.* at 60 (emphasis added); *cf.* Vincent Blasi, *School Vouchers and Religious Liberty: Seven Questions from Madison’s Memorial and Remonstrance*, 87 CORNELL L. REV. 783, 789 (2002) (observing that the term “cognizance” as used by Madison could not have meant “knowledge” or “awareness” but must rather be understood to mean “responsibility” or “jurisdiction”).

Start with the second feature. Modern political discourse, including constitutional discourse and in particular the discourse of religious freedom, is thoroughly secular in character.⁵⁶ The historical factors that have worked to bring about the shift to a more secular framework have of course been complex.⁵⁷ Historians and theorists variously emphasize nominalistic philosophical and voluntaristic theological developments of the late Middle Ages and early modern period,⁵⁸ the Protestant Reformation and the political reaction to the ensuing “Wars of Religion,”⁵⁹ the spectacular achievements of science,⁶⁰ and the development of new ethical visions and commitments that departed from more classical and medieval notions.⁶¹ Other scholars call attention to the organized efforts of thinkers and movements of the nineteenth and twentieth centuries.⁶² In addition, it is commonly supposed (by, among many others, Greenawalt⁶³) that a constitutional discourse based on religious assumptions or commitments would violate the constitutional commitments to religious freedom and the separation of church and state.⁶⁴ Perhaps paradoxically, therefore, the very commitment to reli-

⁵⁶ See GRAEME SMITH, *A SHORT HISTORY OF SECULARISM* 5 (2008) (“[O]ur public discussions are secular. They are based on assumptions which confine religious and theological matters to the private sphere . . .”). A more complete account would depict this change not so much as one from a “religious” to a “secular” framework as a transformation in the conception of what “secular” means. For a more detailed discussion, see SMITH, *supra* note 16 (manuscript at ch. 4). For an illuminating account of the change, see Nomi Stolzenberg, *The Profanity of Law, in LAW AND THE SACRED* 29, 35 (Austin Sarat et al. eds., 2007).

⁵⁷ OWEN CHADWICK, *THE SECULARIZATION OF THE EUROPEAN MIND IN THE NINETEENTH CENTURY* (1975) is a masterful exploration of the variety of causes, both social and intellectual, that contributed to modern secularization.

⁵⁸ See generally LOUIS DUPRÉ, *PASSAGE TO MODERNITY* (1993); MICHAEL ALLEN GILLESPIE, *THE THEOLOGICAL ORIGINS OF MODERNITY* (2008).

⁵⁹ See Charles Taylor, *Modes of Secularism, in SECULARISM AND ITS CRITICS* 31, 32 (Rajeev Bhargava ed., 1998) (“The origin point of modern Western secularism was the Wars of Religion; or rather, the search in battle-fatigue and horror for a way out of them.”).

⁶⁰ See CHADWICK, *supra* note 57, at 182–88; LILLA, *supra* note 31, at 58–65. Professor Graeme Smith argues that “[t]he important role that religion played in ancient and medieval society was technological.” But “[s]cience has replaced religion as the technology of Western society.” SMITH, *supra* note 56, at 38.

⁶¹ The recent, almost epic exploration of this dimension of the development of secularism is CHARLES TAYLOR, *A SECULAR AGE* (2007). Graeme Smith argues, in contrast, that modern liberal morality is essentially a form of Christianity in which ethics have been cut loose from theology. SMITH, *supra* note 56, at 183–205.

⁶² See, e.g., Christian Smith, *Introduction: Rethinking the Secularization of American Public Life* to *THE SECULAR REVOLUTION* 1, 1 (Christian Smith ed., 2003). Professor Christian Smith stresses the collaborative efforts of “waves of networks of activists who were largely skeptical, freethinking, agnostic, atheist, or theologically liberal; who were well educated and socially located mainly in knowledge-production occupations; and who generally espoused materialism, naturalism, positivism, and the privatization or extinction of religion.” *Id.*

⁶³ See *infra* pp. 1891–92.

⁶⁴ For a detailed and engaging account of how a more secularized understanding of constitutional religious freedom developed in American history, see generally HAMBURGER, *supra* note 53.

gious freedom has worked to render inadmissible the rationales that historically generated and supported that commitment.⁶⁵ Whatever the root causes, however, there can be no doubt that modern discourse — especially legal and academic discourse — adopts an almost exclusively secular viewpoint.

The confinement of discourse to the secular rules out, among other things, the fundamental and essentially jurisdictional premise that gave rise to the whole debate and tradition in the first place — the belief that God has divided life into spiritual and temporal domains and has assigned different authorities to each domain. For this reason among others, debates about religious freedom no longer have the *jurisdictional* character they once had. Instead, we now have a problem of *justice*, broadly conceived, or of “fairness,”⁶⁶ which is, aptly, the common normative term in the titles of Greenawalt’s volumes.

To be sure, the older perspective may still occasionally manifest itself in language that refers to jurisdiction in an attenuated or metaphorical sense.⁶⁷ But the bottom line is that actual legal and political jurisdiction now belongs to the state, period.⁶⁸ The United States Constitution may be construed to insulate a church against some state regulation⁶⁹ just as it may insulate other associations.⁷⁰ Even so, the church will ultimately enjoy as much freedom or immunity, and only as much, as the state and its (secular) constitution see fit to grant. And when disagreements arise, it is the state that will decide them: a religious leader today who, following the example of Gregory VII, pur-

⁶⁵ This paradoxical and potentially self-cancelling character of religious freedom is discussed at length in Steven D. Smith, *The Rise and Fall of Religious Freedom in Constitutional Discourse*, 140 U. PA. L. REV. 149 (1991).

⁶⁶ In a recent, much-discussed book, for example, Professors Christopher Eisgruber and Lawrence Sager describe the central problem as that of “finding fair terms of cooperation for a religiously diverse people.” CHRISTOPHER L. EISGRUBER & LAWRENCE G. SAGER, *RELIGIOUS FREEDOM AND THE CONSTITUTION* 4 (2007). Their formulation closely tracks John Rawls’s question: “How is it possible that there may exist over time a stable and just society of free and equal citizens profoundly divided by reasonable religious, philosophical, and moral doctrines?” — a question that, as Rawls notes, presents “a problem of political justice.” JOHN RAWLS, *POLITICAL LIBERALISM*, at xxvii (paperback ed. 1996).

⁶⁷ See, e.g., Ira C. Lupu & Robert W. Tuttle, *Sexual Misconduct and Ecclesiastical Immunity*, 2004 BYU L. REV. 1789, 1805–07.

⁶⁸ See BERMAN, *supra* note 27, at 269 (“When the church eventually became, in the secular mind, an association within the state, as contrasted with an association beyond and against the state, then the plural jurisdictions in each country of the West were swallowed up by the one national jurisdiction, and the plural legal systems were absorbed more and more by the one national legal system.”).

⁶⁹ See, e.g., *Combs v. Cent. Tex. Annual Conference of the United Methodist Church*, 173 F.3d 343 (5th Cir. 1999).

⁷⁰ See, e.g., *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000).

ported to depose a secular ruler would be seen as more amusing than serious.⁷¹

If the state is or aspires to be liberal and just, it will naturally be committed to respecting citizens' rights, to treating them as equals, and to promoting the public interest. The church will be one of many associations within the state's legal and political jurisdiction that the state will seek to treat as liberal justice requires.

Once the discourse of religious freedom is transformed in this way, however, a new and troubling question arises: why should "religion" (whatever it is⁷²) be entitled, or subjected, to special legal treatment at all? If religious believers and religious institutions are simply one class among the numerous actors and interests that government must treat as liberal justice demands, why single out religion for distinctive benefits (such as exemption from laws that obligate comparable nonreligious actors and institutions) or distinctive burdens (such as ineligibility for public support that other interests and institutions may receive)?

C. *The Contemporary Dilemma*

In sum, the commitment to special legal treatment for religion derives from a two-realm world view in which religion — meaning the church, and later the conscience — was understood to inhabit a separate jurisdiction that was in some respects outside the governance of the state. The church and later the individual conscience were to the state in a sense like Mexico is to the United States: independently sovereign. Secular government should not exercise its sovereign power over church or conscience because, whatever prudence or fairness might otherwise dictate, secular government simply had no jurisdiction in this domain. Such matters were, in Madison's words, "wholly exempt from [the state's] cognizance."⁷³ But once that world view with its "separate jurisdictions" component is abandoned or forgotten, what sense does it make to continue treating religion as a special legal category?⁷⁴

⁷¹ See TAYLOR, *supra* note 61, at 427 ("And of course, no Pope or bishop could bring a ruler to beg penance on his knees, as happened to Henry II of England and Henry IV of the Empire.")

⁷² The challenge of saying what "religion" even is has vexed judges and scholars. For one perspicuous treatment, see Kent Greenawalt, *Religion as a Concept in Constitutional Law*, 72 CAL. L. REV. 753 (1984).

⁷³ MADISON, *supra* note 54, at 60.

⁷⁴ In this vein, Gerard Bradley asserts a "necessary relation between a Christian cultural matrix and 'separation of church and state.'" Gerard V. Bradley, *Church Autonomy in the Constitutional Order: The End of Church and State?*, 49 LA. L. REV. 1057, 1086 (1989). Operating outside such a matrix, "we constitutionalists are not constructively engaging the church-state issue and have practically obliterated it." *Id.* at 1075.

That question, often only dimly perceived, provokes a prodigious array of conscious and unconscious responses from contemporary judges and scholars. But the cleanest responses, it seems, would lie in two main directions.

One pure response would resist the constraints of secular discourse, and would attempt to defend separation of church and state and freedom of conscience in some contemporary version of the traditional theological terms that in various forms were used from the time of Gregory VII and Hugh of St. Victor to the time of Madison and Jefferson. The other and opposite pure response would embrace the constraints of modern secular discourse in full awareness of the consequences, and would accordingly concede — or perhaps insist — that on current assumptions, there simply is no good justification for treating religion as a special legal category. Religious speech, practice, and association might still enjoy substantial protection under other constitutional provisions and principles — free speech, perhaps, or equal protection — but religion qua religion would not be singled out for *distinctive* legal privileges or burdens.

In part because the dilemma is not widely appreciated, few judges or scholars adopt either of these responses in its pure form. Nonetheless, jurists and theorists show signs of moving in one or the other of these directions. In recent years, theorists have tried to address the question of whether there is any good justification, or at least any good *secular* justification, for treating religion as a special category — and have concluded, often, that there is not.⁷⁵ From that conclusion, theorists may gravitate toward the purer positions noted above.

Thus, a number of theorists and judges have resisted the contention that public decisions cannot be based on religious rationales.⁷⁶ And a few have ventured to suggest that religious freedom itself might be — or perhaps *must* be — justified and interpreted in religious terms. Perhaps the leading example is Professor John Garvey, who after surveying the inadequacies of familiar rationales candidly concludes that special constitutional protection for religious exercise probably cannot

⁷⁵ For a recent critical discussion concluding that there is no satisfying reason for giving religion special legal treatment, see Anthony Ellis, *What Is Special About Religion?*, 25 *LAW & PHIL.* 219 (2006). In a similar vein, see James W. Nickel, *Who Needs Freedom of Religion?*, 76 *U. COLO. L. REV.* 941, 943 (2005); and Andrew Koppelman, *Conscience, Volitional Necessity, and Religious Exemptions* (bepress Legal Series, Working Paper No. 1761, 2006), available at <http://law.bepress.com/expresso/eps/1761>. For an analysis of the common secular rationales for treating religion as special, and an argument that they are unpersuasive, see STEVEN D. SMITH, *FOREORDAINED FAILURE: THE QUEST FOR A CONSTITUTIONAL PRINCIPLE OF RELIGIOUS FREEDOM* 77–117 (1995).

⁷⁶ For a careful review of the various arguments and a defense of this position, see CHRISTOPHER J. EBERLE, *RELIGIOUS CONVICTION IN LIBERAL POLITICS* (2002).

be justified on secular grounds, so that the only plausible justification is a religious rationale.⁷⁷

In addition, a few scholars have recently made efforts to resuscitate the more jurisdictional sense of religious freedom. Professor Richard Garnett attempts to revive the commitment to “freedom of the church.”⁷⁸ Professor Paul Horwitz notes a smattering of interest in the neo-Calvinist notion of “sphere sovereignty,” and he seeks to elaborate that notion into an approach to religious freedom that would give greater protection to institutional religious autonomy.⁷⁹ Some years ago I argued (albeit mostly on “original meaning” grounds that I no longer find wholly persuasive) that “institutional separation” should be the central commitment of Establishment Clause jurisprudence.⁸⁰

These efforts, however, swim against the stream. More commonly, theorists and judges plunge into the prevailing secular current, and are swept along toward abandoning the commitment to treating religion as a special legal category. Often this conclusion is veiled (even, perhaps, from those who draw it) because theorists or judges attempt to translate entrenched commitments to religious freedom into other more contemporary idioms — often into the language of equality or neutrality. Such translations may preserve a constitutional commitment to religious freedom *in name*, and they may also help to maintain constitutional space for the practice of religion. But the substantive commitment to special treatment of *religion* is quietly compromised.⁸¹ In this vein, Alan Brownstein observes that “the growing acceptance of formal neutrality as a framework for protecting the free exercise of religion” represents “part of the evolving replacement for Separatism,”⁸² and he criticizes this development as a regrettable departure from longstanding constitutional commitments.⁸³

Perhaps the most explicit rejection of the commitment to special legal treatment of religion occurs in a recent, widely discussed book by Professors Christopher Eisgruber and Lawrence Sager. Eisgruber and Sager find the idea of a distinctive constitutional commitment to

⁷⁷ JOHN H. GARVEY, *WHAT ARE FREEDOMS FOR?* 42–57 (1996). Garvey’s religious rationale has in turn been criticized by other scholars. *See, e.g.*, Larry Alexander, *Good God, Garvey! The Inevitability and Impossibility of a Religious Justification of Free Exercise Exemptions*, 47 *DRAKE L. REV.* 35 (1998).

⁷⁸ Richard W. Garnett, *The Freedom of the Church*, 4 *J. CATH. SOC. THOUGHT* 59 (2007).

⁷⁹ *See generally* Paul Horwitz, *Churches As First Amendment Institutions: Of Sovereignty and Spheres*, 44 *HARV. C.R.-C.L. L. REV.* 79 (2009).

⁸⁰ Steven D. Smith, *Separation and the “Secular”: Reconstructing the Disestablishment Decision*, 67 *TEX. L. REV.* 955 (1989).

⁸¹ For a more detailed discussion of this development, see SMITH, *supra* note 16 (manuscript at ch. 4).

⁸² Alan Brownstein, *Protecting Religious Liberty: The False Messiahs of Free Speech Doctrine and Formal Neutrality*, 18 *J.L. & POL.* 119, 120 (2002).

⁸³ *See id.* at 186–213.

“separation of church and state” indefensible, and indeed almost incomprehensible.⁸⁴ In addition to causing confusion, Eisgruber and Sager argue, church-state separationism is substantively unjust.⁸⁵

The separation-inspired approach to Establishment Clause questions is the mirror image of the separation-inspired approach to the Free Exercise Clause questions about special exemptions for religiously motivated conduct. They form an odd couple. Both insist that religion is an anomaly, requiring exotic constitutional treatment different from anything else. Yet in free exercise cases, the idea of special immunities demands that religious believers be given an extraordinary benefit enjoyed by no one else; in Establishment Clause cases, the idea of separation insists that religion and religion alone be starved of public benefits available to everyone else. . . . The result is a curious position that requires government both to grant religion special privileges and to impose upon it special restrictions. . . .⁸⁶

From the traditional perspective, what Eisgruber and Sager view with puzzled disdain as a “strange, two-faced constitutional response”⁸⁷ and an “injustice”⁸⁸ seems utterly unremarkable. If church and state are viewed as independent jurisdictions, then it is no more odd — no more anomalous or unjust — that governmental noninterference will sometimes relieve churches and their disciples of both the benefits and the burdens of the state’s law than that citizens of Mexico are neither subsidized nor restricted under many laws and programs of the United States. Conversely, once the two-realm, jurisdictional perspective is discarded or forgotten, Eisgruber and Sager’s criticism seems apt: there is no longer any very compelling excuse for what now looks like a sort of schizophrenic, constitutional love-hate complex extending to religion both special immunities and special disabilities.

In place of separation, Eisgruber and Sager propose a principle of “Equal Liberty.” The core idea is that “minority religious practices, needs, and interests must be as well and as favorably accommodated by government as are more familiar and mainstream interests.”⁸⁹ Their proposal makes explicit the shift from viewing religion as a matter requiring distinctive legal treatment to understanding religious citizens and institutions as just another category of actors to be treated according to general principles of justice.⁹⁰

⁸⁴ EISGRUBER & SAGER, *supra* note 66, at 6 (commenting on “how odd and puzzling the idea of separation is”).

⁸⁵ *See id.* at 17–18, 22–50, 55, 283–84.

⁸⁶ *Id.* at 17–18.

⁸⁷ *Id.* at 24.

⁸⁸ *Id.* at 283.

⁸⁹ *Id.* at 13.

⁹⁰ Critics have wondered, however, whether Eisgruber and Sager fully grasp and embrace their secular assumptions. At times they seem influenced by a lingering commitment to classical separation, or at least to its residue. *See, e.g.,* Thomas C. Berg, *Can Religious Liberty Be Pro-*

In sum, the commitment to church-state separation and the derivative commitment to freedom of conscience arose in — and acquired their sense and their urgency from — a classical, Christian world view in which the spiritual and temporal were viewed as separate domains within God’s overarching order. In the prevailing modern framework, by contrast, the jurisdictional and religious problem has receded, and has been replaced by a problem of justice: the question is simply how a secular liberal state should treat those subject to its governance. But in that secular framework, the inherited commitments to church-state separation and to free exercise of religion lose their grounding, and their sense; indeed, there seems to be no very powerful reason to regard religion as a special legal category at all. Eisgruber and Sager’s attempt to break away from separationism and from the privileging of conscience is merely a conspicuous manifestation of the conclusion to which modern secular assumptions naturally lead us.

II. GREENAWALT IN THE TWILIGHT?

The preceding discussion suggests that the alternatives emerging in more searching contemporary religion clause discourse are basically these: We might try to maintain traditional commitments to church-state separation and free exercise of religion while defying the powerful constraints of the prevailing secular discourse. Or we might accept those constraints and accordingly reject or relax the traditional commitment to treating religion as a special legal category. But this can be a painful choice — one that many would prefer not to acknowledge. It is in this inauspicious context, and in the face of this potentially numbing dilemma, that Kent Greenawalt sets out to show that religious freedom controversies can be resolved through “reasoned analysis, as distinguished from rhetoric” (p. 440). So, how does he deal with this daunting challenge?

A. *Greenawalt As Gratian?*

As noted, Greenawalt’s strategy is not to offer any general theory but rather to “work toward sensible approaches by addressing many discrete issues.”⁹¹ Both in its comprehensiveness and in its issue-by-issue approach, Greenawalt’s opus resembles the first great legal treatise⁹² addressing church-state relations (among various other mat-

tected As Equality?, 85 TEX. L. REV. 1185 (2007) (reviewing EISGRUBER & SAGER, *supra* note 66).

⁹¹ GREENAWALT, *supra* note 9, at 1.

⁹² Professor Harold Berman describes Gratian’s *Decretum* as “the first comprehensive and systematic legal treatise in the history of the West, and perhaps in the history of mankind.” BERMAN, *supra* note 27, at 143.

ters⁹³), written during the dawn of the Western tradition of law and religious freedom — Gratian's twelfth-century *Concord of Discordant Canons* or, as it is usually called, the *Decretum*.⁹⁴ Brian Tierney explains that Gratian employed a “dialectical” strategy:

That is to say, [Gratian] would first state a disputed canonical problem, then adduce all the texts that could be quoted in favor of one solution, then those that favored an opposing solution, and finally he would try to show how the two sets of texts could be reconciled with one another or why one solution was to be preferred to the other.⁹⁵

Greenawalt proceeds in much the same relentlessly methodical fashion (albeit with an important qualification that we will consider shortly). Typically, a chapter begins by announcing what the central issue of the chapter will be and then breaking down this issue into a series of subissues, often presented as a numbered list. Greenawalt proceeds to describe the various arguments, judicial decisions, and other authorities on each side of the various issues, making every effort to present the competing views in a fair and accurate way. Distinctions proliferate as Greenawalt ponders the different senses of the questions (and often gently chastises judges or other scholars for failing to appreciate these subtleties). The analysis eventually culminates in a conclusion or prescription, and Greenawalt then moves on to a new chapter and a new set of issues, arguments, and fine-grained distinctions.

As an example, consider the chapter on free exercise exemptions.⁹⁶ Greenawalt begins the chapter by stating that “the central question about exemptions is whether they are warranted at all” (p. 298). He immediately goes on to enumerate no fewer than fourteen lesser included questions that will need attention (pp. 298–99), and then in leisurely and methodical fashion proceeds to consider these questions one by one. In the course of his consideration, Greenawalt introduces numerous further distinctions: between exemptions that present the danger underlying the contested regulation and those that do not (p. 301), between exemptions that operate as “privileges” and others that serve

⁹³ With respect to the *Decretum*'s comprehensiveness, Professor Richard Southern observes that it “stretch[es] out to embrace all aspects of life.” 1 R.W. SOUTHERN, SCHOLASTIC HUMANISM AND THE UNIFICATION OF EUROPE 310 (1995).

⁹⁴ For a discussion of the *Decretum* and its influence on thinking about the relation between church and state, see TIERNEY, *supra* note 1, at 116–26. Southern asserts that the *Decretum* “had a more immediate and lasting influence on the future of European government than any other work of the [twelfth] century.” SOUTHERN, *supra* note 93, at 307.

⁹⁵ TIERNEY, *supra* note 1, at 116.

⁹⁶ Though free exercise is the central concern of Greenawalt's first volume, the issue of exemptions receives considerable discussion in his second volume as well, in part because such exemptions, by giving a benefit to religion, have sometimes been thought to be in conflict with the Establishment Clause.

as “protection” against unfair treatment (p. 302), between exemptions based on “activity” and exemptions based on “belief or status” (p. 304), and so forth. Subquestions beget sub-subquestions,⁹⁷ and Greenawalt patiently sorts out and speaks to these increasingly rarefied considerations. After working his way through these intricacies, and after presenting the competing considerations and authorities, Greenawalt concludes by endorsing a generous program of exemptions to accommodate religious conscience, subject to various qualifications and conditions, and with an important caveat: accommodation should normally be extended to any comparable nonreligious instances of conscience (pp. 331–33).⁹⁸

So, what substantive conclusions does this exercise in careful reasoning lead to? In a sense, Greenawalt’s concrete conclusions are less important than his method: as in a well-played sports event, the performance is of more interest than the score. Moreover, as we will see, the conclusions are in any case largely detachable from the analysis that accompanies them. Still, prospective readers will naturally be curious to know: how does Kent Greenawalt come down on the contentious issues of the day?

B. *Greenawalt’s Moderately Radical Prescriptions*

It is harder to give a brief answer to that question for Greenawalt than it would be for many scholars. As noted, Greenawalt addresses a host of specific controversies, and his various prescriptions do not align nicely with any established school of thought or any simple slogan (such as “no aid” or “substantive neutrality”). For present purposes, though, it may be enough to refer to Greenawalt’s own distillation in his concluding chapter.

There he reiterates his view that governmental endorsement of religion or religious ideas is impermissible, qualifying this prohibition only to allow some “mild endorsements” that are deeply embedded in American tradition and that “ideally, over time, . . . will get weaker and weaker and will eventually disappear” (p. 540). Greenawalt

⁹⁷ For example, Greenawalt notes at one point, “In addressing the question whether exemptions may be required by justice [as opposed to prudence], we need initially to clarify six points” (p. 311).

⁹⁸ On what metric or by what criteria do we judge whether a nonreligious objection is comparable to a religious objection? This question has plagued the “equal liberty” approach of Eisgruber and Sager, *see, e.g.*, Michael W. McConnell, *The Problem of Singling Out Religion*, 50 DEPAUL L. REV. 1, 32–38 (2000), and it should be a central question for Greenawalt as well. However, Greenawalt’s treatment of this question remains vague. For example, he notes that “[i]n some circumstances, nonreligious conscientious claims will seem about as pressing as religious ones” and that nonreligious objectors to public schooling may “feel as strongly as the Amish” (p. 322). He also states that the question is whether belief “has roughly the same significance for [nonreligious objectors]” (p. 327).

would allow tax exemptions for churches so long as these are part of “a broad category of charitable and educational activities within which religious activities fall” (p. 542), and he is inclined to permit “faith-based” social service providers to be included in publicly funded programs on neutral, secular terms so long as secular providers are also available (p. 540). Education, though, presents a different problem, Greenawalt says, and he finds “regrettable” the recent shift toward allowing greater aid to private religious schools through voucher programs and the like (p. 541).

Greenawalt’s views are roughly congruent with the Supreme Court’s modern Establishment Clause jurisprudence, and he defends the Court and its doctrines against its more severe critics.⁹⁹ For example, he argues (cogently, I think) that the familiar disparagement of the Supreme Court for splitting hairs in the school aid cases decided in the 1970s and 1980s — cases that allowed states to supply private religious schools with books but not maps, and so forth — was unfair. For any doctrinal line the Court might draw there will be borderline cases, he points out, and only the most difficult cases will reach the Supreme Court, so it is to be expected that the decisions will turn on fine-grained distinctions (pp. 404–05).

But Greenawalt is far from being a mere apologist for the Court. Sometimes he rejects the results of particular decisions: for example, he criticizes the outcomes in *Rosenberger v. Rector & Visitors of University of Virginia*,¹⁰⁰ which ruled that a Christian newspaper should not be excluded from a university program subsidizing student publications, and in *Zorach v. Clauson*,¹⁰¹ which upheld an off-premises “release time” program of religious instruction for public school students (pp. 203–04, 67–68). And he occasionally rejects whole decisional movements. As noted, for instance, Greenawalt opposes the trend toward allowing greater financial aid to religious schools (pp. 400–24).

In issuing his various prescriptions, Greenawalt self-consciously strives to be moderate and centrist.¹⁰² I am not sure that he succeeds. Relative to the “culture wars” described by observers like Professor James Davison Hunter,¹⁰³ Greenawalt regularly comes down on the

⁹⁹ Greenawalt devotes several pages, for instance, to criticizing the deconstructive work of Professor Frederick Gedicks (pp. 434–36). For Gedicks’s response, see Frederick Mark Gedicks, *Indeterminacy and the Establishment Clause*, 26 CONST. COMMENT. (forthcoming 2009).

¹⁰⁰ 515 U.S. 819 (1995).

¹⁰¹ 343 U.S. 306 (1952).

¹⁰² This can be seen in several places throughout Greenawalt’s book (pp. 17, 91–94).

¹⁰³ JAMES DAVISON HUNTER, *CULTURE WARS* (1991). Professor James Hunter finds that across a wide variety of seemingly independent political and social issues, American citizens tend to coalesce into two broad camps, which he calls “progressive” and “orthodox.” “This is a conflict over how we are to order our lives together,” he observes. “[T]he contemporary culture war is ultimately a struggle over national identity — over the meaning of America, who we have been in

“progressive” side and against the “orthodox” or traditional side. For example, his prescriptions would have the effect of repudiating or at least rendering suspect the longstanding American tradition — one honored over the years by all branches of government (executive, legislative, judicial) and all levels of government (federal, state, local) — of including religious language in enactments, displays, and official proclamations of various sorts.¹⁰⁴ Nearly every state constitution expresses deference to a being denominated “God,” “Almighty God,” “the Supreme Ruler of the Universe,” or “the Sovereign Ruler of the Universe”:¹⁰⁵ Greenawalt says that all of these expressions, unless conceived of as having mainly historical significance, are probably unconstitutional (p. 65 n.27).¹⁰⁶ And every President (including, most recently, President Obama) has included religious language in an inaugural address:¹⁰⁷ this practice would also seem to transgress Greenawalt’s constitutional principles.¹⁰⁸ Thus, it seems that on Greenawalt’s view, Lincoln’s much revered Second Inaugural Address (“with

the past, who we are now, and perhaps most important, who we, as a nation, will aspire to become in the new millennium.” *Id.* at 50. The struggle expresses itself, among other ways, in competing interpretations of the Constitution, the American founding, and the American political tradition. Orthodox interpreters “link[] the nation’s birth to divine will To them, America is, in a word, the embodiment of Providential wisdom.” *Id.* at 109. By contrast, “[t]hose on the progressive side of the cultural divide rarely, if ever, attribute America’s origins to the actions of a Supreme Being.” *Id.* at 113. For an update and debate, see JAMES DAVISON HUNTER & ALAN WOLFE, *IS THERE A CULTURE WAR?* (2006).

¹⁰⁴ For a collection of such expressions, see JOHN T. NOONAN, JR. & EDWARD MCGLYNN GAFFNEY, JR., *RELIGIOUS FREEDOM* 201–08, 210–12, 308–13 (2001).

¹⁰⁵ For a compilation, see WILLIAM J. FEDERER, *THE TEN COMMANDMENTS & THEIR INFLUENCE ON AMERICAN LAW* 52–55 (2003). The United States Constitution is importantly different in this respect. For consideration of the significance of the national Constitution’s agnosticism, see Steven D. Smith, *Our Agnostic Constitution*, 83 N.Y.U. L. REV. 120 (2008).

¹⁰⁶ In this respect, of course, Greenawalt’s conclusions are hardly distinctive; they track the dominant view that the Constitution forbids government to do or say anything that endorses religion. Greenawalt does not push that view as far as do many, such as Professor Douglas Laycock, who suggests that at least in principle the names of cities such as Corpus Christi and Los Angeles are unconstitutional. See Douglas Laycock, *Equal Access and Moments of Silence: The Equal Status of Religious Speech by Private Speakers*, 81 NW. U. L. REV. 1, 8 (1986). For critical discussion of this position, see Steven D. Smith, Lecture, *Nonestablishment “Under God”? The Nonsectarian Principle*, 50 VILL. L. REV. 1, 9–17 (2005).

¹⁰⁷ FEDERER, *supra* note 105, at 49–51. Consider Jefferson’s Second Inaugural Address:

I shall need . . . the favor of that Being in whose hands we are, who led our fathers, as Israel of old, from their native land and planted them in a country flowing with all the necessaries and comforts of life; who has covered our infancy with His providence and our riper years with His wisdom and power, and to whose goodness I ask you to join in supplications with me

President Thomas Jefferson, Second Inaugural Address (Mar. 4, 1805), *as reprinted in* NOONAN & GAFFNEY, *supra* note 104, at 206, 206.

¹⁰⁸ Greenawalt allows that government officials should be free to express religious opinions when not speaking “for the government” (p. 62) (internal quotation marks omitted). In their inauguration ceremonies, however, our chief executives surely understand themselves — and are understood — to be speaking as Presidents, and their addresses are presented as such.

malice toward none, with charity for all”) should be sandblasted off the wall of the Lincoln Memorial: after all, the speech was, as one historian observed, a “theological classic,” containing “fourteen references to God, many scriptural allusions, and four direct quotations from the Bible.”¹⁰⁹

Greenawalt declares that a statute with an explicitly religious preamble would be unconstitutional, and that this infirmity could not be cured by invalidating the preamble, because people would remember the original religious rationale (pp. 166–67, 506). Greenawalt writes as if he is contemplating a hypothetical statute, but his stricture would almost surely condemn Jefferson’s celebrated and seminal Virginia Statute for Religious Freedom,¹¹⁰ which as noted began with the declaration that “Almighty God hath created the mind free,” and proceeded to assert that governmental coercion in matters of religion represented “a departure from the plan of the Holy author of our religion, who being Lord both of body and mind, yet chose not to propagate it by coercions on either, as was in his Almighty power to do.”¹¹¹

A position that condemns what was arguably the legal foundation of religious freedom in America¹¹² as a *violation* of religious freedom would seem to carry a heavy burden of justification. So, how does Greenawalt attempt to justify his prescriptions?

C. *Default in Justification*

I have suggested that in its comprehensiveness and method Greenawalt’s book resembles Gratian’s *Decretum*. But at this point we come to what looks like a significant difference. As Brian Tierney explained, after listing the competing arguments and authorities, Gratian typically “would try to show how the two sets of texts could be reconciled with one another or why one solution was to be preferred to the other.”¹¹³ In this respect, Greenawalt’s method is different.

1. *Pronouncing Judgment.* — As noted, after stating an issue Greenawalt carefully presents the pro and con arguments and authorities, but he typically does not purport to reconcile the positions or to show that one set of arguments and authorities is right and the other wrong. Rather, he pronounces his judgment. Although he sometimes criticizes particular arguments or judicial decisions, at the end of his

¹⁰⁹ ELTON TRUEBLOOD, ABRAHAM LINCOLN: THEOLOGIAN OF AMERICAN ANGUISH 135–36 (1973).

¹¹⁰ VA. CODE ANN. § 57-1 (2007).

¹¹¹ Virginia Act for Religious Freedom, *supra* note 52.

¹¹² Modern Establishment Clause jurisprudence began with the (contested) assumption that the Establishment Clause effectively imported the content of Jefferson’s statute into the First Amendment. *See* *Everson v. Bd. of Educ.*, 330 U.S. 1, 13 (1947).

¹¹³ TIERNEY, *supra* note 1, at 116.

examination at least some of the contending arguments on each side of the issue usually are still standing and intact. Greenawalt then declares his (often heavily qualified) support for one side or the other, or for some compromise or middle position.

Sometimes these declarations are — or at least look like — bald pronouncements. After summarizing the competing arguments in cases like *Good News Club v. Milford Central School*¹¹⁴ or *Capitol Square Review & Advisory Board v. Pinette*,¹¹⁵ for example, Greenawalt simply states that a particular position is more convincing than the alternative positions (pp. 205–06, 82–83). In other instances Greenawalt's judgments are accompanied by something that *in form* looks like a proffered justification, but that in substance adds nothing to the bare declaration. For example, Greenawalt sometimes says that government cannot endorse religious doctrines because to do so would be an establishment of religion (p. 57).¹¹⁶ But of course, what should count as an “establishment of religion” is precisely the issue that is being contested.

In the midst of what is in many respects a relentlessly rational presentation, Greenawalt's practice of deciding contentious issues through highly conclusory pronouncements may be disturbing. That impression may be softened, however, by two mitigating observations. First, Greenawalt's apparent proclivity to pronounce is not so much a departure from his course of rigorous reflection as a natural if lamentable product of it. Less conscientious advocates often manage to present their conclusions as rationally compelled only by selectively slighting the requirements of reason. They may simply ignore particular arguments that threaten their own preferred positions. They may resort to deprecating or ad hominem characterizations to discredit their opponents.¹¹⁷ Greenawalt studiously seeks to avoid such measures. In refraining from dismissive rhetorical tactics, however, he often leaves the various competing arguments in a state of apparent impasse, and then there is seemingly nothing left but to declare which side he aligns himself with.

Here is a small example. In discussing the issue of graduation prayer, Greenawalt remarks that other advocates — he mentions Justice Souter and Professor Douglas Laycock — characterize those who

¹¹⁴ 533 U.S. 98 (2001).

¹¹⁵ 515 U.S. 753 (1995).

¹¹⁶ “In a political community that adheres to a principle of no established religion government does not announce that particular religious doctrines are true.”

¹¹⁷ For example, Professor Martha Nussbaum's recent treatment of religious freedom, MARTHA C. NUSSBAUM, LIBERTY OF CONSCIENCE: IN DEFENSE OF AMERICA'S TRADITION OF RELIGIOUS EQUALITY (2008), pervasively resorts to such devices. For supporting discussion, see Steven D. Smith, *The Wages of Advocacy*, FIRST THINGS, Feb. 2008, at 35.

favor prayer as “want[ing] a symbolic affirmation that government endorses their religion” (p. 113 n.40). If the desire for prayer were merely an expression of such a narrowly self-serving demand, then it would be easy enough to conclude that the demand must be rejected. But Greenawalt is too scrupulous to get rid of a competing position by means of tendentious characterization. “I do not think,” he observes, “this fairly captures the reason why many people want prayers at a graduation. Rather, they want, as members of a group participating in any event of deep significance in the lives of graduates and their parents, to acknowledge God and seek God’s blessing” (*id.*). This more charitable description complicates the issue and makes the graduation prayer controversy less susceptible of peremptory resolution. Ironically, Greenawalt’s very reasonableness makes his own eventual prescription — like Justice Souter and Professor Laycock, he would forbid graduation prayer — seem more like a personal preference than a product of reasoning.

The second mitigating observation is that Greenawalt’s prescriptions are not in fact capricious or ad hoc. Readers might be misled by his repeated claim that “[s]ound constitutional approaches to the religion clauses cannot be reduced to a single formula or set of formulas” (p. 1). In fact, as the book proceeds it becomes apparent that Greenawalt himself subscribes to a handful of general precepts and that these precepts largely determine his conclusions or prescriptions on particular issues.

For example, he repeatedly declares that governments must not make or act on the basis of theological judgments or judgments about religious truth (pp. 57, 195, 492–93, 523–24). Another frequent theme is that governments must never prefer or promote one religion over another (pp. 195, 212, 251–52, 284–85, 337). Greenawalt treats these prohibitions as almost categorical. A third precept — that governments must not endorse religion or religious doctrine (p. 190) — is less unbending but still powerful. Mostly as a concession to political necessity, Greenawalt allows for a sort of de minimis exception to the “no endorsement” precept (pp. 92–93). But he does so regretfully and, as noted, with the hope that the exception can be eliminated as the “no endorsement” precept comes to be accepted (p. 540).

In short, Greenawalt’s specific prescriptions derive from more general precepts. So, do these precepts serve to justify what might initially seem to be a series of ad hoc pronouncements?

The question points us to others. Where do Greenawalt’s precepts come from? What justification can *they* claim? In some cultural neighborhoods — in much of the academy, for example — it might seem that no justification is necessary. Greenawalt’s precepts forbidding government to act on or express religious judgments may seem axiomatically right. But in fact the principles are not universally accepted: indeed, as we have already noted, they run strongly counter to

a great deal in the American political tradition and in contemporary American culture. Greenawalt himself is too astute to suppose that these precepts are self-evidently correct, and he does from time to time allude to possible supporting rationales. But although he gestures toward these rationales, he never attempts any genuine defense of them.

2. *Vacancy on the Ground Floor?* — American constitutional discourse has inherited or developed a number of familiar rationales that might be — and that routinely are — recited by the advocates of precepts and prescriptions like Greenawalt's. Thus, advocates seeking to explain why government must not support or endorse religion often assert that governmental involvement with religion is likely to be politically divisive,¹¹⁸ or that it will offend and alienate some citizens,¹¹⁹ or that it will infringe on the consciences of dissenting citizens,¹²⁰ or that it will interfere with a crucial component of the equality or the autonomy that our constitutional order exists to protect.¹²¹ In a more legalistic vein, advocates may bluntly contend that government must avoid such measures simply "because the Constitution says so."¹²² These and related rationales are familiar, as are the objections to such rationales. All of these claims and rebuttals have been the subject of lengthy debates.

In his first chapter, under the heading of "Nonestablishment Values," Greenawalt lists nine of the standard rationales and devotes a paragraph or so to explicating each of them. He refers back to these rationales from time to time throughout the book. But he does not actually join in the debates over the rationales; his treatment of them is distinctly conclusory in character.

Consider, for example, his use of the "divisiveness" rationale. A standard argument in Establishment Clause discourse — one sometimes advanced by Justice Breyer, for instance¹²³ — maintains that government should keep itself separate from religion because any mixing of the two can be politically divisive. The responses to this argument are also familiar. One response asserts that the divisiveness rationale is fatally overinclusive: a great deal that government says or does can be divisive, and religion is not necessarily more divisive than

¹¹⁸ See, e.g., Steven H. Shiffrin, *The Pluralistic Foundations of the Religion Clauses*, 90 CORNELL L. REV. 9, 40–41 (2004).

¹¹⁹ See, e.g., *id.* at 39.

¹²⁰ See, e.g., NOAH FELDMAN, *DIVIDED BY GOD* 33–42, 246–47 (2005).

¹²¹ The equality theme runs through NUSSBAUM, *supra* note 117. On liberty, see, for example, Douglas Laycock, *Religious Liberty As Liberty*, 7 J. CONTEMP. LEGAL ISSUES 313 (1996).

¹²² Cf. Laycock, *supra* note 121, at 314 ("'Because the Constitution says so, and because all our liberties depend on maintaining the authority of the Constitution's guarantees,' should be sufficient reason to vigorously protect religious liberty.").

¹²³ See, e.g., *Van Orden v. Perry*, 545 U.S. 677, 698 (2005) (Breyer, J., concurring in the judgment).

other matters in which government acts.¹²⁴ Another common response asserts that, depending on the particular issue and context, separation of government from religion can in fact be more divisive than involvement or support:¹²⁵ it is evidently more inflammatory, at least at this point in our history, for a court to order the words “under God” stricken from the Pledge of Allegiance than to leave the Pledge as it has been for the last half century.¹²⁶ Thus, after a lengthy examination, Garnett concludes that the political-divisiveness argument “should play no role in the evaluation by judges of First Amendment challenges to state action. What it ‘signals’ — disagreement, pluralism, and the exercise of religious freedom — are, in the end, constitutionally protected facts of life.”¹²⁷

Greenawalt is familiar with these debates, of course, but he stays aloof from them. Thus, he notices that the divisiveness rationale is often employed and also that it is subject to objections like Garnett’s. Without further ado, Greenawalt then simply declares that “potential for political division should be *a* relevant factor in otherwise close cases” (p. 180). This pronouncement, unaccompanied as it is by any examination of the pro and con arguments, leaves the basis for Greenawalt’s own position unexplained.

Or consider Greenawalt’s treatment of what we might call the “taxpayer-conscience” rationale — namely, the claim that government cannot promote religion, financially at least, because to do so would violate the consciences of taxpayers who object to having their tax dollars spent for religious purposes. Again, this argument is familiar — and fragile.¹²⁸ If we do not think a religious taxpayer’s rights of free exercise or conscience are violated when government uses public funds in ways that her *religious* beliefs condemn (to support the war in Iraq, perhaps, or the teaching of contraception in public schools), then why

¹²⁴ See, e.g., Michael W. McConnell, *Political and Religious Disestablishment*, 1986 BYU L. REV. 405, 413 (“Religious differences in this country have never generated the civil discord experienced in political conflicts over issues such as the Vietnam War, racial segregation, the Red Scare, unionization, or slavery.”).

¹²⁵ Professor Michael Sandel argues, for example, that the Supreme Court’s decisions invalidating school prayer provoked more strife than they prevented. Michael J. Sandel, *Freedom of Conscience or Freedom of Choice?*, in ARTICLES OF FAITH, ARTICLES OF PEACE: THE RELIGIOUS LIBERTY CLAUSES AND THE AMERICAN PUBLIC PHILOSOPHY 74, 86–87 (James Davison Hunter & Os Guinness eds., 1990).

¹²⁶ See Richard F. Suhrheinrich & T. Melindah Bush, *The Ohio Motto Survives the Establishment Clause*, 64 OHIO ST. L.J. 585, 612 (2003) (“Not surprisingly, Congress, the President, and the vast majority of Americans of all faiths were quick to condemn the Ninth Circuit’s [Pledge of Allegiance decision] . . .”).

¹²⁷ Richard W. Garnett, *Religion, Division, and the First Amendment*, 94 GEO. L.J. 1667, 1723 (2006).

¹²⁸ I consider and criticize the rationale, on both historical and analytical grounds, in Steven D. Smith, *Taxes, Conscience, and the Constitution*, 23 CONST. COMMENT. 365 (2006).

is the *nonreligious* taxpayer's right of free exercise (of what? of his nonreligion?) or of conscience infringed when government uses money in a way that helps religion?

Greenawalt quotes Jefferson's oft-recited assertion that "[t]o compel a man to furnish contributions for the propagation of opinions which he disbelieves, is sinful and tyrannical" (p. 25). But nothing in Jefferson's sentence — or, more importantly, his logic — would confine the ostensible tyranny to the forced subsidization of *religious* beliefs. So then, is it "sinful and tyrannical" to use public funds to support the propagation in the public schools of, say, theories of evolution, if many citizens "disbelieve" those theories? Wouldn't systematic acceptance of Jefferson's proposition effectively subvert the public school system?

My point is simply that despite its familiarity, the "taxpayer-conscience" rationale raises complicated questions that cry out for critical analysis. But this Greenawalt does not give us. Indeed, although he appears to rely on the rationale (p. 8), Greenawalt also quietly acknowledges its vulnerability (pp. 196, 420). But he makes no effort to determine whether the rationale is ultimately sound or not.

Greenawalt's seeming lack of concern with justifying his prescriptions and precepts is perhaps most palpable in his chapter, late in the book, called "Justifications for the Religion Clauses." The title might lead one to expect that here Greenawalt will undertake a more sustained analysis of the possible rationales for his constitutional precepts. But readers holding such an expectation will be disappointed.

Unlike most of the earlier chapters, this one operates at a very abstract level. Greenawalt begins with some cogent general observations about how different justifications for a constitutional provision may alter its interpretation and applications, nicely illustrating the point with examples from the free speech clause: expression classified as "commercial speech" or "hate speech," he explains, will be entitled to constitutional protection on some rationales for protecting speech but not on others. Greenawalt then abruptly changes direction, however, by claiming that the religion clauses are "substantially atypical" in this respect. Their concrete implications do *not* vary, he says, with the different justifications given for them (p. 482).

Though this claim of atypicality is crucial to Greenawalt's position, he does not immediately offer any argument for it. Instead, he proceeds to distinguish among classes of potential justifications for giving religion special constitutional protection, to provide criteria for assessing such justifications, and to argue for a "principle of nonsponsorship" that prevails regardless of whether religious or secular justifications for religious freedom are adopted (pp. 482–89, 492–96).

There is much to appreciate and much to wonder about in this presentation, but for the moment the important thing is what the chapter does *not* say. More specifically, beyond describing the general *classes* of potential justifications and offering passing allusions to the

standard rationales (p. 493), Greenawalt never enters into any concrete discussion of what the most promising justifications for religious freedom actually are.

The omission seems remarkable. The chapter's central claim is that of the religion clauses' atypicality — the claim that, unlike with other constitutional provisions, the same interpretations and applications of the clauses will follow regardless of what justifications for religious freedom are given. In view of the rampant disagreements over the meaning of religious freedom in American society today, this seems an audacious claim, to put the point gently — one that cries out for corroboration through a close examination of what the actual or potential justifications are. But Greenawalt declines to undertake any such examination. Indeed, the entire chapter on “Justifications for the Religion Clauses” occupies just over half as much space as the chapter on state regulation of kosher foods and Jewish divorce practices.

3. *Greenawalt's Elusive Constitution.* — Perhaps an examination of supporting rationales is unnecessary because the issues have already been settled for us, by the Constitution? And indeed, in the course of his book Greenawalt makes claims — many of them — about what “the Constitution” forbids, permits, and demands. But what conception of “the Constitution,” or of constitutional interpretation, informs these claims? It is easier, I think, to say what Greenawalt's conception is *not* than to say what it *is*.

(a) *Original Meaning.* — It is clear, for example, that Greenawalt is not relying on an originalist conception. He tells us so: original meaning is something to consider, but it is not authoritative.¹²⁹ In this respect, his second chapter, which offers an extended discussion of the original meaning of the Establishment Clause, might mislead an inattentive reader. Greenawalt's purpose in this chapter is defensive: he attempts to say not so much what the original meaning *was*, but what it *was not*.

More specifically, he criticizes at length the interpretation (proposed in various versions by, among others, Justice Thomas, Professor Akhil Amar, and me¹³⁰) which holds that the enactors did not mean to adopt any substantive principle of religious freedom. Instead, they intended simply to confirm in writing what virtually everyone at the time agreed on — namely, that the matter of “establishment of religion” would remain within the jurisdiction of the states, not the national government. If accepted, this interpretation could be embarrassing to the more expansive constitutional jurisprudence favored by many to-

¹²⁹ See, e.g., GREENAWALT, *supra* note 9, at 12.

¹³⁰ See *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 49–50 (2004) (Thomas, J., concurring in the judgment); AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 34 (1998); SMITH, *supra* note 75, at 17–54.

day, including Greenawalt, who accordingly resists the jurisdictional interpretation.

Whether or not his conclusions are correct in this respect,¹³¹ however, nothing in his project hinges on these questions. In his own analyses of Establishment Clause controversies, Greenawalt does not rely on original meaning for support; on the contrary, he candidly concedes that much in modern Establishment Clause jurisprudence and many of his own conclusions are at odds with the understandings and expectations of the framers.¹³² Indeed, Greenawalt's bottom line on original meaning is almost startlingly negative in character:

The modern Supreme Court's treatment of the scope of the religion clauses cannot be justified on originalist grounds, . . . but the latitude with which the Supreme Court has departed from these original understandings is no greater than it has exhibited with other parts of the First Amendment and with other guarantees in the Bill of Rights. Whatever bases one may have to criticize the Supreme Court's religion clause jurisprudence, it is not *distinctly* unfaithful to original understandings (pp. 38–39).¹³³

(b) *Precedent*. — Greenawalt rejects originalism because he thinks courts need to be able to develop constitutional meanings “in light of changing social conditions and evolving moral and political premises” (p. 193). This emphasis on the need for judicially evolved meanings, together with Greenawalt's extensive and careful attention to the Supreme Court's modern case law, might suggest that he adopts the common lawyerly view that “the Constitution” consists of the text *plus* judicial precedent.

But this reading again seems mistaken. In fact, as we have seen, though he is generally sympathetic to the Supreme Court's doctrine and decisions, Greenawalt is also highly critical of some precedents, and indeed of whole lines of precedent.¹³⁴ Some judicially evolved meanings are consistent with “the Constitution,” it seems, and some

¹³¹ For what it is worth, I think Greenawalt's conclusions are plausible but not the most plausible interpretation of the original meaning. For a lengthy defense of the jurisdictional interpretation against the objections of Greenawalt and others, see Steven D. Smith, *The Jurisdictional Establishment Clause: A Reappraisal*, 81 NOTRE DAME L. REV. 1843 (2006).

¹³² Greenawalt acknowledges that “the founders would have accepted various measures that had a religious purpose and a main effect of supporting religion” (p. 76). Greenawalt makes similar acknowledgements in other places as well (pp. 38–39, 65).

¹³³ This sort of defense-by-comparison occurs more than once in Greenawalt's discussion. For example, Greenawalt expresses doubt about whether the enactors of the Fourteenth Amendment actually intended to “incorporate” the Establishment Clause at all but then says that incorporation is no more of a stretch for that clause than for the rest of the Bill of Rights (pp. 35, 38). In another passage, Greenawalt rejects as “simply implausible” the argument that constitutional adjudication not grounded in original meaning will become unprincipled, and as support he asserts that modern gender discrimination law, “which has no support in [the] original understanding [of the Fourteenth Amendment], is neither more nor less principled than aspects of equal protection that can claim more grounding in original understanding” (pp. 120–21).

¹³⁴ See cases cited *supra* notes 100–01 and accompanying text.

are not. Clearly “the Constitution” for Greenawalt somehow subsists independent of precedent.

(c) *Tradition and Culture*. — If the evolving constitutional meanings are not to be supplied by precedent, then perhaps they derive from something more intangible but also more earthy and democratic — something like the “traditions and collective conscience” of the American people? Greenawalt says more than once that constitutional law ought to be congruent with culture and traditions.¹³⁵ And he occasionally defers to traditions that he evidently regards as undesirable in principle, such as the tradition of “mild endorsements” of religion (p. 92).

Nonetheless, Greenawalt never actually attempts to show how his views and prescriptions flow from any deliberate or developed interpretation of the American political tradition. Nor could he, I suspect. That is because, by and large, Greenawalt’s commitments run strongly contrary to well-entrenched American traditions. As we have seen, Greenawalt comes close to being categorical in insisting that government (as opposed to ordinary citizens) cannot make, express, or act on theological judgments or religious beliefs. Far from revealing a tradition in which religious judgments or expression by government are forbidden, however, American history exhibits a pervasive practice of such judgments and expression.¹³⁶

But perhaps Greenawalt is interested not so much in tradition as reflected in *past* expressions and facts but rather in what sort of political community tradition has made us into, *now*. To be sure, past luminaries like Washington, Jefferson, and Lincoln routinely invoked God in their official declarations. But tradition is an evolving matter, and in our more secular and diverse society, we understand that such expressions are divisive and inappropriate.¹³⁷ Don’t we?

Well, actually, no: *we* don’t — not unless the “we” is understood to refer to a smaller and more select fellowship (like, say, devout readers of the *New York Times*?). Thus, a more present-oriented approach to tradition might help Greenawalt a little, but not much. It may be that objections to governmental religious expression are more widespread today than in the past. But such objections do not yet amount to anything like a dominant or consensus position. Presidents and other pub-

¹³⁵ See, e.g., GREENAWALT, *supra* note 9, at 4 (“I will be making claims that rest on the country’s political and legal traditions and on undeniable facts about its present condition . . .”). On the very last page of the second volume, Greenawalt reiterates that “much depends on a country’s history and culture and on the identities and activities of its citizens” (p. 543).

¹³⁶ See *supra* notes 104–111 and accompanying text.

¹³⁷ Greenawalt states, “Although assertions about a beneficent God were prevalent at our country’s founding, are contained in the Declaration of Independence, and remain in many state constitutions, nevertheless government should not now make formal, serious claims about a beneficent God” (p. 65) (footnote omitted).

lic figures still routinely invoke God in their official speeches and declarations. States and local communities still actively assert their right, *as communities*, to maintain religious symbols and expressions of various sorts: the host of cases about Ten Commandments monuments are evidence of this sentiment.¹³⁸ A circuit court that tries to excise the words “under God” from the Pledge of Allegiance still calls forth a torrent of bipartisan outrage.

(*d*) *Theory*. — Another possibility might be that Greenawalt is appealing to some sort of Dworkinian Constitution, in which constitutional meaning is obtained by interpreting the materials in accordance with the best available political-moral theory.¹³⁹ But in fact Greenawalt seems decidedly ambivalent about whether any such theory is even possible. He insists that the religion clauses cannot be understood in terms of “a single formula or set of formulas” (p. 1). And he finds inadequate the leading examples of more theoryish approaches that he considers — the “substantive neutrality” of Douglas Laycock and Judge Michael McConnell, and Christopher Eisgruber and Lawrence Sager’s “equal liberty” approach (pp. 451–56, 462–79).

To be sure, Greenawalt sometimes suggests that a satisfactory theory of religious freedom might be devisable (p. 436), and he devotes a chapter to the refutation of “religion clause skeptics” (more particularly Professor Frederick Gedicks, Professor Stanley Fish, and me) who have doubted the possibility of any such theory (pp. 433–50). Here he confronts the objection which asserts that any such theory would necessarily depend on judgments about more ultimate and contested matters such as the nature and purpose of government, human nature, and, most crucially, the *nature and truth of religion*. Greenawalt concedes the point but suggests that it is in principle possible to investigate such matters and make informed judgments about them (pp. 442, 446).

This suggestion seems plausible;¹⁴⁰ still, this response to theory skepticism seems curious coming from Greenawalt, since his virtually categorical insistence that government must *not* act on the basis of theological judgments would seem to forbid such an investigation, at least for purposes of developing a theory that would govern governmental behavior. Indeed, Greenawalt reiterates in this chapter that he

¹³⁸ See, e.g., *Van Orden v. Perry*, 545 U.S. 677 (2005).

¹³⁹ See generally RONALD DWORKIN, *FREEDOM’S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION* (1996).

¹⁴⁰ It is unlikely that such an investigation will convince everyone, of course, but Greenawalt is surely right to maintain that universal agreement could not possibly be a requirement for a satisfactory theory. He interprets a skeptical objection posed by Stanley Fish and me to the possibility of a satisfactory theory of religious freedom as based on some such (unreasonable) demand for unanimity (pp. 442–43). I cannot speak for Fish, but this has never been my objection.

“agree[s] with Smith that any theory that judges and other officials are directly to employ cannot be based on an assumption that any particular religious view is correct” (p. 449).¹⁴¹ But unless the qualifiers “directly” and “particular” are made to do a good deal of work, this prohibition precludes precisely the determinations about background beliefs that Greenawalt seemed to be recommending as a possible basis for a governing theory.

Or suppose that we somehow managed to show (to the satisfaction of whomever the governing decisionmakers are) that some set of background beliefs, or some comprehensive doctrine — Roman Catholicism, say, or Millian empiricism-utilitarianism — is true, or at least more plausible than its competitors, and then on the basis of this doctrine we justified some domain for religious choice. What we would have, I think, would be a theory of religious *toleration* based on an accepted orthodoxy (namely, whatever comprehensive doctrine was found to be superior) — not a theory of *religious freedom* of the sort that modern theorists have sought. And many people at least seem to think that there is a large difference between these things — and that mere “toleration” is insufficient.¹⁴²

Whether or not a theory of religious freedom is possible in principle, however, it is clear that Greenawalt himself proposes no such theory. His approach is not “theory down” but rather “bottom up,” as he says (p. 1). So it seems that Greenawalt is not employing a Dworkinian Constitution in reaching his various conclusions.

(e) *Prudence*. — So then if Greenawalt is not using an originalist conception of the Constitution, or a “text plus precedent” conception, or a tradition-rooted conception, or a Dworkinian theory-oriented conception, then what sort of Constitution *is* Greenawalt invoking as he declares that the Constitution permits some things and forbids other things?

Sometimes Greenawalt almost seems to equate what the Constitution ostensibly demands with “what ought to be done, all things considered.”¹⁴³ At other times, though, Greenawalt explicitly distinguishes

¹⁴¹ My own claim, actually, is not that officials “cannot” act on such assumptions either in the sense that they are incapable of doing so or in the sense that they are somehow constitutionally forbidden to do so. On the contrary, I think that government ultimately cannot avoid making judgments about theological issues. See, e.g., Steven D. Smith, *Barnette’s Big Blunder*, 78 CHI-KENT L. REV. 625, 653–58 (2003). The claim, rather, is that if governments determine the scope for religious choice in accordance with judgments that accept some religious beliefs and reject others, they are not acting in accordance with a “theory of religious freedom” of the sort that modern thinkers have aspired to provide. See STEVEN D. SMITH, *GETTING OVER EQUALITY: A CRITICAL DIAGNOSIS OF RELIGIOUS FREEDOM IN AMERICA* 45–57 (2001).

¹⁴² I elaborate on the difference in Steven D. Smith, *Toleration and Liberal Commitments*, in *TOLERATION AND ITS LIMITS*, *supra* note 32, at 243.

¹⁴³ Thus, after presenting a highly nuanced discussion of how religion should and should not be treated in the public school curriculum (pp. 122–34), Greenawalt asserts that “constitutionally

between constitutional demands and the prescriptions of prudence or fairness.¹⁴⁴ But he offers no clear explanation — none that I could discern, at least — of how this distinction is being drawn.

4. *Reason or Fiat?* — In sum, Greenawalt's book exhibits a puzzling, split-level character. On one level, in discussing discrete controversies like the regulation of kosher foods, faith-based social services, or military chaplains, Greenawalt's approach seems lavishly rational. He presents and ponders the various arguments, pro and con, in leisurely and methodical fashion: there is no argument or subissue so minute as to be unworthy of scrutiny. But with respect to ground-level questions of justification — *Why* is religion being given special treatment? *What justifications* can be given for the precepts that inform Greenawalt's specific conclusions? *How* does "the Constitution" operate to impose binding requirements and constraints on us? — Greenawalt seems almost aggressively complacent. He acknowledges difficulties in the various rationales that occupy the field of discourse and that he himself invokes and relies on. Yet he exhibits virtually no interest in investigating those complexities.

What to make of this disconcerting divide? An innocent reader might be tempted to surmise that the book's author is basically a practical thinker curiously lacking in aptitude for or interest in the deeper or more theoretical dimensions of religious freedom. But as his work in this and other areas overwhelmingly attests, any such surmise would be wholly inapt with respect to Greenawalt. So we must seek some other explanation.

D. In the Grip of the Dilemma

The best explanation, I believe, lies in the present condition of the tradition of discourse about religious freedom. In Part I, I argued that this discourse currently faces a dilemma. The constraints of modern secular discourse preclude reliance on the sorts of premises and rationales from which our commitments to church-state separation and freedom of conscience derive. In response, a few thinkers — John Garvey is a leading example — try to maintain traditional commitments to religious freedom by defying the powerful constraints of secular discourse. More commonly, as vividly manifest in the work of Eisgruber and Sager, thinkers accept those constraints and drift in the direction of rejecting or relaxing the traditional commitment to treating religion as a special legal category.

permissible teaching largely coheres with what I have claimed is appropriate or desirable teaching" (p. 134).

¹⁴⁴ For example, Greenawalt contrasts "constitutionality" with "legislative and judicial wisdom" (p. 240), and he contrasts "policy considerations" with "constitutional principles" (pp. 280, 284).

Greenawalt, by contrast, resists embracing either horn of the dilemma. But he cannot escape its grip.

His inclination, it would seem, is toward the second, secularizing alternative. Thus, as noted, Greenawalt would forbid government to act upon religious rationales or to endorse religious doctrines. This prohibition effectively precludes the possibility of recovering the traditional framework out of which the constitutional commitment to treating religion as a distinctive legal category arose. So then why does Greenawalt not just sign on to, say, the religion-neutral "equal liberty" position of Eisgruber and Sager? In fact, he discusses their position at length, and he finds much to approve in it (pp. 462-79). But after all is said and done, he cannot quite embrace the position, essentially because he perceives, correctly, that in the American constitutional order it has long been supposed that religion is a distinctive concern warranting special legal treatment. And "equal liberty" does not fully honor this commitment to special treatment (pp. 463-64).

In short, Greenawalt finds himself in the awkward position of trying to respect a legal and cultural commitment to special legal treatment of religion, while at the same time forbidding reliance on the premises and rationales that generated that commitment and that might serve to justify it. Indeed, he acknowledges this "paradox," as he calls it (p. 493). His hope is that the special commitment to religious freedom can be grounded in the *fact* that people still believe in special treatment for religion, even if that belief cannot (or can no longer) be supported with any very satisfying *justifications*.

In this respect, Greenawalt may be half right. It may be that inherited, shallowly rooted but widely shared notions *are* the strongest support for religious freedom that contemporary legal culture offers. At least in the long run, however, Greenawalt's seems a frail hope. Indeed, the whole constitutional culture works to challenge and, at least over time, discard positions that cannot be justified on grounds beyond culture and tradition.¹⁴⁵ And this dynamic is vigorously at work in the area of religious freedom. Hotly contested issues force advocates to offer *reasons* for their positions — reasons that go beyond assertions that "the Constitution says so" or that "this is what we've always done." Positions that cannot muster up more satisfying supporting reasons are vulnerable. In short, tradition seems especially embattled in this domain.¹⁴⁶

¹⁴⁵ For an insightful, critical account of this dynamic, see ROBERT F. NAGEL, *CONSTITUTIONAL CULTURES: THE MENTALITY AND CONSEQUENCES OF JUDICIAL REVIEW* (1989).

¹⁴⁶ Ironically, one of tradition's major subverters is Greenawalt himself who, as we have seen, uses the tradition of treating religion as special to challenge central features of our political tradition. See *supra* notes 103-11 and accompanying text.

And indeed, Greenawalt's own commitment to treating religion as a special legal category seems erratic. In many instances he argues that religion should *not* receive special treatment. Thus, Greenawalt favors free exercise exemptions but insists that the exemptions must be extended to parallel nonreligious objectors (if there are any) (pp. 328–33). So it is not really *religion* that would receive special treatment, but something more like deep moral conviction. Greenawalt would allow tax exemptions for churches, but only if these are offered as part of “a broad category of charitable and educational activities within which religious activities fall” (p. 542). Once again, the relevant category seems to be not *religion*, but rather charitable activities.

In other instances, though, Greenawalt argues that religion *should* be treated specially. Thus, government promotes, financially and otherwise, various interests and causes that it deems valuable — science, the arts, education, space exploration, and so forth. But government cannot promote religion, Greenawalt says, even if most citizens want it to. In this respect, religion is special; it is under a special legal disability.

In the public schools, similarly, Greenawalt acknowledges that governments teach all sorts of controversial ideas that many students, parents, or citizens oppose (p. 466). Some of these ideas contradict the religious beliefs of some, or many, students and citizens (p. 60). Nonetheless it is proper to teach such ideas, Greenawalt explains, if they enjoy majority support (p. 154). There is one qualification: the schools must not promote religious ideas, regardless of what parents or students may want. Indeed, the schools may not even refrain from teaching certain ideas or subjects — evolution, contraception — if their purpose is to avoid offense to religious parents or students (pp. 122–56). In this respect as well, religion is distinctively burdened.

But *why* is religion sometimes special and sometimes not? So far as I can discern, Greenawalt offers no general principle or account that would explain why government sometimes *must*, sometimes *may*, and sometimes must *not* give religion special treatment. Perhaps some account might be devised, but it would likely require resort to the sorts of more ultimate beliefs that Greenawalt believes government is forbidden to evaluate or act upon. The upshot is that the constraints of modern secular discourse effectively preclude Greenawalt from offering any justification for his prescriptions beyond unconvincing appeals to supposedly shared axioms or commitments.

As we have seen, however, Greenawalt's default on the level of justification is not so much an individual failure. Rather, it is a reflection of the current condition of the tradition. We have inherited commitments to church-state separation and freedom of conscience. Those commitments are entrenched, in the sense that they are taken as axiomatic in much of our culture. But under the discursive constraints that Greenawalt and many others accept, no very persuasive justifica-

tions for those commitments seem to be available. So it is hardly surprising that upon even moderately close inspection, the various pronouncements of judges and scholars in this domain come to look like a thinly veiled exercise in *ipse dixit*.

III. CONCLUSION

We study works of art, literature, and scholarship for what they individually do or say, but we also sometimes understand them as mirrors or reflections of their times. An artistic or scholarly production can manifest new beginnings or exciting new currents of thought: we often discern such significance in, for instance, the paintings of a Michelangelo or a Leonardo da Vinci. But a work can also be a reflection of decadence or exhaustion.

Thus, in his classic *The Autumn of the Middle Ages*, Professor Johan Huizinga explained how the art and writing of northern Europe in the fifteenth century “reflects the spirit of the late Middle Ages faithfully, a spirit that had run its course”¹⁴⁷ and was now “in its last gasps.”¹⁴⁸ This state of exhaustion was manifest in a sort of split-level quality. At one level, art and writing exhibited a compulsion to “the depiction of everything that could be thought down to the smallest detail.”¹⁴⁹ Such depictions could be so thorough as to produce “an oversaturation of the mind.”¹⁵⁰ But this penchant for obsessively detailed presentation covered a deeper emptiness — an “inner decay of the form of life.”¹⁵¹ The work was “no longer filled with real life.”¹⁵² “Everything had become much too literary, a sickly renaissance, an empty convention.”¹⁵³ Even the justly celebrated work of an undoubted master such as the fifteenth-century artist Jan van Eyck exhibited this combination of exquisitely rendered detail concealing the lack of a cohesive larger vision.¹⁵⁴

In a similar way, I think, Kent Greenawalt’s summa is a faithful and admirable reflection of the current state of discourse about religious freedom. On one level there is in that discourse an impressive and occasionally almost obsessive commitment to rationality. And in this respect, no judge or scholar is more accomplished than Green-

¹⁴⁷ JOHAN HUIZINGA, *THE AUTUMN OF THE MIDDLE AGES* 300 (Rodney J. Payton & Ulrich Mammitzsch trans., Univ. of Chi. Press 1996) (1919). Earlier translations gave the title as *The Waning of the Middle Ages*. *Id.* at x.

¹⁴⁸ *Id.* at 383.

¹⁴⁹ *Id.* at 300.

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 304.

¹⁵² *Id.*

¹⁵³ *Id.* In these particular quotations, Huizinga specifically refers to the elaborate court festivals of the period, but he discerns similar features in the art and literature of the period.

¹⁵⁴ *Id.* at 375.

awalt: he is, so to speak, a Jan van Eyck of legal reasoning. This book in particular evinces a tendency to “the depiction of everything that [can] be thought down to the smallest detail.”

On another level, though, the book discloses an “inner decay” that infects modern theorizing about religious freedom. The assumptions and rationales that gave rise to our distinctive constitutional commitments have been forgotten, or rejected, or ruled inadmissible. And so we carry on an inherited discourse that no longer draws sustenance from the secular premises on which it attempts to operate — a discourse that seems to consist of “empty convention,” and that is “no longer filled with real life.” On this level too, Greenawalt’s work is a faithful exemplar.

I have noted the similarities — similarities in *form* — between Greenawalt’s opus and Gratian’s monumentally influential *Decretum*. Gratian employed his methodically dialectical strategy in the morning of the Western tradition of carefully reasoned discourse about the relations between religion and government. Greenawalt’s book adopts a similar method — but now in the twilight of a tradition that seems to have “run its course.” And so where Gratian could set out to show *by reasoning* “how the two sets of texts could be reconciled with one another or why one solution was to be preferred to the other,” as Brian Tierney explains,¹⁵⁵ Greenawalt neither manifests nor arouses any similar hope. The discourse that he faithfully reflects is rife with reasoning, but this reasoning serves as a mere prelude to and ornament for authoritative pronouncement: “It is so because ‘we’ say it is so.”

Moreover, it is not obvious just what else Greenawalt (or any other normative scholar or judge who honestly faces up to and accepts the difficulties of the prevailing secular premises) *could* do. The discourse of religious freedom will no doubt continue, for a time anyway, but pending some new (or perhaps renewed?) illumination,¹⁵⁶ the discourse will be stumbling along in the dusk.

¹⁵⁵ TIERNEY, *supra* note 1, at 116.

¹⁵⁶ As noted earlier, Alasdair MacIntyre argues that although traditions of thought experience “epistemological crises,” and although such crises can be fatal to the traditions, they are sometimes overcome through “[i]maginative conceptual innovation.” MACINTYRE, *supra* note 15, at 362.