2008

Brief Comments on an Intermediate Position

Kent Greenawalt
Columbia Law School, kgreen@law.columbia.edu

BRIEF COMMENTS ON AN INTERMEDIATE POSITION†

*Kent Greenawalt**

I am going to start with some clarifications about how I see this topic. Some of what I say may be a bit repetitive, but I think it can be helpful. I do not see this subject as mainly about the force of the Establishment Clause.[1] With Judge McConnell, I think there is a big difference between promoting a religious position, let's say, which I think teaching creationism is, and deciding some moral or political issue based on a religious judgment, such as whether there should be restrictive abortion law. And I do not think this is a question of whether anyone should be *restricting* advocacy in religious terms. The question is whether people should ideally restrain themselves in some way.

It is not a question of whether religion should be a private matter. Religious perspectives could be used to critique cultural values, urged as a basis for personal lives, even if those perspectives are not used to advocate political positions in the way that is in controversy. It is not a question, as Professor Audi has explained, as to whether one could explain one's religious views as they bear on a topic, like welfare, same-sex marriage, or abortion; and among co-believers this kind of discussion might be the main discussion, even though in advocacy in the public realm there would be an attempt to rely on public reasons. It is not a question of whether religion is going to influence people's judgments and advocacies; of course it is. Nobody could completely divorce themselves from their religious views. It is a question of how people should try to decide things and of how they should advocate. And it is also not a question of whether it is sometimes prudent or strategically helpful to make nonreligious arguments. The answer to that is yes. The issue is whether there is some principle of restraint about making religious arguments—some principle that applies to this public sphere—suggesting that it would always be inappropriate, or at least prima facie inappropriate, to make such arguments.

---

† This Address was presented as part of the Federalist Society for Law & Public Policy Studies 2007 National Lawyers Convention, November 15, 2007. The panelists included: Dr. James W. Skillen, President, The Center for Public Justice; Professor Robert Audi, University of Notre Dame; the Honorable Michael W. McConnell, United States Court of Appeals for the Tenth Circuit; Professor Kent Greenawalt, Columbia Law School; moderated by the Honorable Diane S. Sykes, United States Court of Appeals for the Seventh Circuit.

* University Professor, Columbia University School of Law; B.A., Swarthmore College; B. Phil., Oxford University; LL.B., Columbia University School of Law.

1 U.S. CONST. amend. I.

Now, one could approach this topic from one's own religious perspectives or from what one might call detached political philosophy that does not rely on any particular religious view. Most discussions of the topic are in this latter category. We might think that there are some principles that are applicable to all liberal democracies. I think that is Rawls's view.[2] I think it is Professor Audi's view, as well. Or, one might think that it matters what the historical time and place is. The typical discussions of this topic are either about all liberal democracies or are arguments that bring in the Establishment Clause in a strong way.

The forms of advocacy that people talk about are typically tied to the bases of decision, and the idea is if you should not advocate to other people on a certain ground, if you are a legislator or a voter, you also should not be deciding on that same ground. So, typically the bases for decision are linked to forms of advocacy in the positions that people take. And, typically, it is assumed that the appropriate limits are the same for officials and for citizens who are advocating in the public realm.

It is commonly assumed, and this has not been touched on yet, that if religious grounds should not be the basis for advocacy, then neither should some other grounds—non-rational grounds, controversial ideas of the good, or, most influentially, other comprehensive views. So, according to Rawls, if you cannot rely on a religious argument, you should not rely on Benthamite utilitarianism either.[3] Now, just in passing, the Benthamite utilitarian would need to give up a lot less of what he would be advocating about a particular position than would many religious believers if both of them restrain themselves from relying on their comprehensive views.

Now, it is often said that there is a line between issues that warrant this kind of self-restriction and those that do not. Rawls talks about constitutional essentials and basic issues of justice as being the ones that call for the restraint.[4] And, we have heard Professor Audi talk about coercive measures as being the sort of crucial category.

My own position is an intermediate one. I think there are reasons of fairness and political stability to rely on grounds, to seek grounds that have force or should have force for everyone in the society. But, I also think there are reasons of liberty and fairness to let people rely upon and advocate the reasons that they think are most persuasive. So, I think this is a genuine dilemma with substantial arguments on each side. I do

---

[2] *See* JOHN RAWLS, POLITICAL LIBERALISM 212–54 (1993).

[3] *Id.*; *see also* JOHN RAWLS, A THEORY OF JUSTICE 23–33 (Harvard Univ. Press 2005) (1971) (discussing Benthamite utilitarianism).

[4] *See* RAWLS, *supra* note 2, at 62 ("There is no reason, then, why any citizen, or association of citizens, should have the right to use the state's police power to decide constitutional essentials or basic questions of justice as that person's, or that association's, comprehensive doctrine directs.").

not think either side has a knockdown argument that just sort of destroys the other side.

I doubt if there is one set of principles for all liberal democracies. I think time, place, and cultural heritage are important, so what I am speaking to is here and now in the United States. I think there should be more restraint for officials than for ordinary citizens. There are a lot more citizens than officials, so the liberty interest in freedom is much more substantial when one thinks of citizens. Officials are much more used to saying less than they fully believe when giving reasons that fit political conditions. Asking officials not to publicly advocate political measures in religious terms is, I think, a pretty modest restraint.

The idea that the same restraint should be placed on advocacy and for decisions is also one that I disagree with. What we are talking about here is reciprocal self-restraint. I restrain myself, but in return you do the same thing. Now, it is very hard to know how anybody else is actually reaching a decision, but it is not hard to know what they are saying. Therefore, if we did accept some kind of reciprocal restraint, and for me it is only for officials, on religious discourse, it would be fairly easy to know whether somebody is complying with it or not, and I think it is a solid basis for some kind of reciprocal understanding. Whereas, I see making the decisions as quite different.

I also think there are significant differences among officials. I believe judges are under more restraints than legislators, for instance. And, I am wondering whether Judge McConnell thinks that it would be appropriate for himself as a judge to rely on an explicitly theological argument based on his conception of God to reach a judicial decision now in the society. I think that would be pretty clearly inappropriate, but I see the restraint as being significantly less for legislators.

Now, insofar as religious grounds should not be the basis for advocacy, I think the same should be true about other comprehensive views. But, I am very troubled by how one draws the line between when reliance is on a comprehensive view and when it is not, whether reliance is on religious views or not. And, I think natural law provides a good example of something that is right on the borderline. I could go into that in more detail, but I will not right now.

I am skeptical about the line between coercive laws and other political decisions and between constitutional essentials and basic issues of justice and other issues. The status of the fertilized embryo is crucial for both the issue of abortion and for funding for stem cell research. A restrictive abortion law does involve coercion. Not funding stem cell research does not involve coercion. I think it would be very puzzling to think that the grounds and the advocacy as to one of those issues should be significantly different than the grounds that we think are appropriate for the other of the two issues.

I do not think the government as such should be promoting religion. And, on clear Establishment Clause issues, I tend to be on the disestablishment or separationist side. But, I see reliance on religious grounds where the object is not to promote religion or endorse religion as quite different. So, I do not follow those who advocate this fairly strict reliance on very public reasons, but I arrive at my kind of mixed intermediate position.

Thank you.