

PROFESSOR GREENAWALT'S UNFASHIONABLE IDEA

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To understand why Kent Greenawalt is a legal scholar of the first order, we need to grasp just how completely indifferent he has been to the intellectual fashions of the day. The man is a closet radical. Beneath a personal congeniality and a generous courtesy to the work of others that are all too unusual in the contemporary legal academy, Professor Greenawalt has shown no respect for assumptions that most of us, in the academy and elsewhere, accept at so deep a level that we seldom need to state or to discuss them. Scholarly contumacy is what I call it, and it is high time Greenawalt is unmasked for the revolutionary he truly is. In order to do so effectively, however, we need first to review what we all know but seldom talk about.

I.

Ever since the Enlightenment, for many intellectuals, religion has seemed peculiarly resistant to thought. It makes factual assertions that are ungrounded, moral demands that are nonnegotiable, social claims that are at one and the same time impossibly parochial and terrifyingly imperialistic. From this perspective, religion is a, or even *the*, great antagonist of the cool, dispassionate, universal Reason that is and was the great Enlightenment ideal. The perception that eighteenth-century rationalism was at war with fundamentally irrational religious commitments was itself already a common idea in the era of the philosophes. In August 1739, the distinguished English philosopher Joseph Butler rebuked the famous evangelist John Wesley: "Sir, the pretending to extraordinary revelations and gifts of the Holy Ghost is a horrid thing, a very horrid thing."¹ To be sure, Butler was himself a devout Christian (in fact, a bishop of the Church of England), and his objection to Wesley's preaching stemmed, in part, from intramural Anglican disagreements over church order.² But as Butler's overheated language suggested, underneath Butler's starchy concern for episcopal authority lay his horrified fear that Wesley and those like him were simply providing evidence for

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1. Immense, Unfathomed, Unconfined 258 (Sean Winter ed., 2013). Butler did important work in ethics and the philosophy of mind and identity; his *Analogy of Religion, Natural and Revealed* was an influential defense of the rationality of orthodox Christianity. On Butler's continuing relevance in moral philosophy, see, e.g., Tom Regan, Moore's Use of Butler's Maxim, 16 J. Value Inquiry 153, 159 (1982) (discussing Butler's influence in twentieth century moral philosophy).

2. Wesley was not the antirational religious zealot Butler feared, and Butler was not the vaguely Deistic ecclesiastical politician eighteenth-century English bishops are sometimes thought to have been.

the assertion that religion is, in the end, an irrational phenomenon: One can make sense of religion (in terms of history or politics or superstition or what we now would call anthropology or psychology), but one cannot make sense with or in religion. Religious claims, on this view, simply can't be fit into rational discourse.

In a strangely parallel fashion, for many intellectuals—at least in American law schools—the law itself has come to seem similarly resistant to thought in the wake of what I suppose we must call postmodernism. This is a highly significant (if vastly understudied) development in recent American intellectual history. In early modernity, common lawyers understood the art and science of which they were masters to be a species of rational inquiry so clearly intertwined that law and reason could hardly be distinguished: As Lord Coke famously claimed, “[r]eason is the life of the law; nay, the common law itselfe is nothing else but reason.”³ In many types of social controversy, to put the matter a little less exuberantly, legal analysis and argument are the tools of choice, on Coke's view, if we wish to resolve a controversy through reason rather than brute force. Coke's law, unlike the irrational religiosity Bishop Butler feared, is the ally and servant of reason.

Lord Coke is dead, alas, and his successors, many of them, have quietly disavowed their inheritance. Why they have done so is not always clear. It has long been obvious that there are dangers inherent in Coke's equation of law and reason. As Justice Holmes and many others have pointed out, the “reason” of the law can ossify into a self-contained conceptual system of abstractions and generalizations that lose touch with reality and in particular with the social goods that the legal system exists to serve.⁴ “We must think things not words,” as Holmes put it, “or at least we must constantly translate our words into the facts for which they stand, if we are to keep to the real and the true.”⁵ Legal concepts should be means to the end of understanding the realities of the social world and addressing its problems, not mystifications or blinders.⁶

Holmes's intent was to criticize and thus correct a maldevelopment in legal reasoning, not to jettison the ideal of law as reason altogether.⁷

3. Edward Coke, *The First Part of the Institutes of the Laws of England* *97b (1628).

4. See, e.g., Oliver Wendell Holmes, Jr., *Law in Science and Science in Law*, 12 Harv. L. Rev. 443, 460 (1899) (distinguishing teaching legal “dogma” from inquiry into “the real justification of a rule of law [which] is that it helps to bring about a social end which we desire”).

5. *Id.*

6. Holmes's great line about the life of the law opposes “experience” (engagement with social reality) to “logic” (disengaged conceptualism of the sort he equated with Dean Langdell), not to the “reason” that the common lawyers at their best aspired to follow.

7. See, e.g., the peroration at the close of Holmes's *Path of the Law*, with its invocation of “the command of ideas” as the greatest ambition in the law: “It is through them that you not only become a great master in your calling, but connect your subject with the universe and catch an echo of the infinite, a glimpse of its unfathomable process, a hint of the universal law.” Oliver W. Holmes, *The Path of the Law*, 10 Harv. L. Rev. 457, 478

But just such a retreat from Coke's equation underlies much that has happened in the legal academy and, what is equally to the point, in the jurisprudence of the United States Supreme Court, over the past few decades. Many academics have come to think of traditional legal reasoning much the same way that an Enlightenment Deist thought of traditional religion, an anti-intellectual fraud to be seen through, not thought with. Law, traditional legal thought, isn't reason—it's obfuscation. The Justices, who don't have an academic's luxury of turning to other and more fashionable intellectual pursuits, increasingly show signs that they are giving up on many of the traditional tools of legal thought and decision—precedent, analogy, normative argument—and turning to other means of executing their duty to reach reasonable decisions.⁸

Nowhere have the effects been clearer from the slow erosion of implicit confidence in the traditional tools of their own trade than in the Justices' decisions involving the Establishment and Free Exercise Clauses of the First Amendment. This is hardly surprising. In the post-Enlightenment world of Supreme Court jurisprudence, the Enlightenment difficulty with fitting the claims of religion into any rational framework was always going to make decisions under the religion clauses difficult. For example, a quarter century ago, Michael Sandel described the Court's religion clause jurisprudence as an attempt to assimilate the idea of religious liberty into an ostensibly rational framework in which liberty is understood as protected by governmental neutrality toward individual preferences. As Sandel persuasively argued, religion is precisely *not* a matter of choice for (many) religious people, and treating it as such "confuses the pursuit of preferences with the exercise of duties" when dealing with "persons bound by [religious] duties they have not chosen."⁹ If Sandel's overall analysis was correct, the Court's modern religion clause case law got off on the wrong foot and needed a significant course correction if it was to fulfill the constitutional premise of religious freedom. Traditional legal reasoning allows for the possibility of such missteps and provides avenues for correction, but in an age where professors and Justices alike have lost confidence in the reason of the law, one might suspect that the Court would find it well-nigh impossible to find the path of reason in dealing with religion.

And so it has proved. The law of the religion clauses, almost everyone agrees, is a mess. For almost forty years the Supreme Court ostensibly enforced the Free Exercise Clause by applying the compelling interest test—and a form of judicial scrutiny that in other contexts nearly always proves fatal to the action under scrutiny proved (inexplicably) less strin-

(1897). Now is not the occasion to debate anyone inclined to dismiss Holmes's language as a mere rhetorical flourish.

8. As yet the members of the Court haven't turned up any compelling alternatives, in my judgment, but that too is a debate for another day.

9. Michael J. Sandel, *Freedom of Conscience or Freedom of Choice?*, in *Articles of Faith, Articles of Peace* 91, 92 (1990).

gent when religious free exercise was at stake. In 1990, the Court executed an abrupt, if rhetorical, about-face and reduced free exercise analysis to a form of discrete-and-insular minority review with very little practical significance.¹⁰ The *Smith* decision achieved doctrinal coherence (the Court's rhetoric now matches the predictable results) at the expense of draining the principle of free exercise of any independent significance;¹¹ in its inability even to comprehend "the special concern of religious liberty with the claims of conscientiously encumbered selves,"¹² the *Smith* majority betrayed its underlying assumption that religious commitments are inherently arational.¹³

The tale of modern Establishment Clause doctrine is more complicated but, in the end, no less depressing. In 1971, the Supreme Court announced in *Lemon v. Kurtzman* a three-party inquiry as a means of analyzing Establishment Clause cases.¹⁴ *Lemon* reflected the penchant of its era for multifactor "tests" that promised more analytical clarity than they could deliver, but subsequent decisions substituted palpable anarchy for illusory precision. Without ever overruling or doing much in the way of modifying the "*Lemon* test," the Court has vacillated—often without even acknowledging the fact—among *Lemon*, variations based on the different prongs of *Lemon*, and entirely distinct approaches to Establishment Clause analysis, some of which are quite inconsistent with *Lemon*.¹⁵ In 1993, Justice Scalia observed that a majority of the then-

10. Compare *Sherbert v. Verner*, 374 U.S. 398, 406–07 (1963) (applying "compelling state interest" test in First Amendment analysis), with *Emp't Div., Dept. of Human Res. of Or. v. Smith*, 494 U.S. 872, 883–90 (1990) (deeming "compelling interest" inapplicable to prohibition at issue and questioning its validity generally). The political branches reacted to this judicial deletion of a constitutional provision by enacting a statute intended to restore the compelling interest test, but a Court badly divided over *Smith* found common ground in the proposition that Congress can't overrule the Court. See *City of Boerne v. Flores*, 521 U.S. 507 (1997) (invalidating Religious Freedom Restoration Act as applied to states). For a demonstration that the Act did no such thing in the constitutionally objectionable sense, see *Sasnett v. Sullivan*, 91 F.3d 1018, 1020–21 (7th Cir. 1996) (Posner, C.J.), vacated, 521 U.S. 1114 (1997).

11. Professor Greenawalt has written that "despite its protestations that it is faithful to prior principles and will have little practical effect, [*Smith*] performs radical surgery on the scope of free exercise claims." 1 Kent Greenawalt, *Religion and the Constitution: Free Exercise and Fairness* 442 (2006) [hereinafter Greenawalt, *Free Exercise and Fairness*].

12. Sandel, *supra* note 9, at 91.

13. This assumption, particularly when it remains at the level of unquestioned assumption, is perfectly compatible with religious commitments on the part of those who hold it. Not all religious people agree with Bishop Butler that reason and true religion are and must be ultimately compatible.

14. *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971) ("Three such tests may be gleaned from our cases. First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive government entanglement with religion.'" (internal citations omitted))

15. For a recent, and admirably sardonic, summary of the incoherence of the Court's case law, along with its confusing effects on the lower courts, see *Utah Highway Patrol*

sitting Justices had rejected *Lemon's* authority, but nevertheless, "[l]ike some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, *Lemon* stalks our Establishment Clause jurisprudence."¹⁶ A quarter-century later, a majority of the Court—perhaps by now amounting to a consensus of the Justices—continues to agree that *Lemon* is inadequate, but the Court continues to invoke it as controlling—sometimes.¹⁷ Opinions that invoke *Lemon* under these circumstances inevitably have the feel of verbal compromises intended to paper over conflicting and inconsistent views on how the Court should address Establishment Clause issues.¹⁸ One might try to excuse these inconsistencies by pointing to the fact that the decisions of a multimember Court will inevitably reflect the differing jurisprudential views of its members, but this explanation rests on the assumption (a correct one, I think) that the Justices have lost faith in the power of traditional legal reason to resolve difficult issues.¹⁹ Judges in the law-is-reason tradition of Lord Coke—and Justice Holmes—would have recognized an obligation to serve “the integrative and rationalizing

Assoc. v. Am. Atheists, Inc., 132 S. Ct. 12, 14–20 (2011) (Thomas, J., dissenting from denial of cert.) (“Our jurisprudence provides no principled basis by which a lower court could discern whether *Lemon*/endorsement, or some other test, should apply in Establishment Clause cases . . . lower courts have understandably expressed confusion.”).

16. *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 398 (1993) (Scalia, J., concurring in the judgment).

17. See *McCreary Cnty. v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844, 859–66 (2005) (applying *Lemon's* three-part test for determining secular purpose). On the same day, and in a case involving the same basic question (does a governmental display of the Ten Commandments violate the Establishment Clause?), the lead opinion concluded that “[w]hatever may be the fate of the *Lemon* test in the larger scheme of Establishment Clause jurisprudence, we think it not useful in dealing with the sort of passive monument.” *Van Orden v. Perry*, 545 U.S. 677, 686 (2005) (Rehnquist, C.J.) (plurality opinion).

18. In *Van Orden*, Chief Justice Rehnquist noted that “[m]any of our recent cases simply have not applied the *Lemon* test [while] [o]thers have applied it only after concluding that the challenged practice was invalid under a different Establishment Clause test.” 545 U.S. at 686.

19. It is striking that the most methodologically self-conscious of the current Justices endorse approaches to the Establishment Clause that eschew traditional legal reasoning altogether. Justice Thomas, for example, rejects any application-by-analogy of the Establishment Clause to issues not within the original meaning of “establishment” as he perceives that meaning, i.e., “coercion of religious orthodoxy and of financial support by force of law and threat of penalty.” *Id.* at 693 (Thomas, J., concurring) (citation omitted); see also *Utah Highway Patrol Assoc.*, 132 S. Ct. at 16 (Thomas, J., dissenting from denial of cert.) (criticizing “superficiality and irrationality of a jurisprudence meant to assess whether government has made a law ‘respecting an establishment of religion’”). Justice Breyer is similarly critical of “any set of formulaic tests” for resolving difficult Establishment Clause cases, but for Thomas’s positivist originalism, Breyer proposes to substitute a fact-and-consequences-driven judgment based on his “consideration of the basic purposes of the . . . Religion Clauses” as he perceives those purposes. *Van Orden*, 545 U.S. at 702–04 (Breyer, J., concurring in the judgment); see also *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1839–41 (2014) (Breyer, J., dissenting) (discussing five “factors that I believe underlie the conclusion that, on the particular facts of this case . . . [h]aving applied my legal judgment to the relevant facts”).

functions of doctrinal analysis” rather than permitting Establishment Clause doctrine to descend into chaos.²⁰ For postmodern judges who have seen through the forms of the law, there is no such obligation, and *our* postmodern Justices have accordingly gone on to other modes of decision.

A subject for decision, religion, that is intrinsically beyond reason. An empty language of decision, law, that ultimately masks reasoning based on other considerations—history, empirical sociology, economics, etc., as the decisionmaker finds most persuasive. Who would be so intellectually obstreperous as to suggest that we tackle conflicts involving religion by thinking about them within the internal rationality of the law? The idea is positively medieval and quite contrary to the spirit of our age. It would take a remarkably bold (not to mention rebellious) individual to undertake such a project. Enter Professor Greenawalt, who has been pursuing, with marvelous success, exactly that project for many years.²¹

II.

Kent Greenawalt has always taken a broad view of what legal scholarship can and often should involve. Even in his early work, the overlap between legal and moral concerns was an important theme. Early articles addressed substantive themes such as civil disobedience, moral obligation and the law, and specific issues such as the legal and ethical significance of silence, while other pieces displayed his ability to write in jurisprudence and analytical philosophy.²² Eventually the big books in this vein followed—legal and moral conflict, the idea of objectivity in law, and the value for law of interpretive theory²³—while other work applied Greenawalt’s philosophical and legal expertise to the difficult questions raised by the Constitution’s guaranty of freedom of expression.²⁴ Ordinary mortals would have viewed these endeavors as enough to fill a couple of CVs,²⁵ but if Greenawalt had stopped here, he might not have

20. Charles Fried, Foreword: Revolutions?, 109 Harv. L. Rev. 13, 70 (1995).

21. As I acknowledge just below, religion and law is not the only subject in Professor Greenawalt’s extensive oeuvre.

22. E.g., Kent Greenawalt, A Contextual Approach to Disobedience, 70 Colum. L. Rev. 48 (1970); Kent Greenawalt, The Enduring Significance of Neutral Principles, 78 Colum. L. Rev. 982 (1978); Kent Greenawalt, How Empty Is the Idea of Equality?, 83 Colum. L. Rev. 1167 (1983); Kent Greenawalt, Silence as a Moral and Constitutional Right, 23 Wm. & Mary L. Rev. 15, 19 (1981).

23. Kent Greenawalt, Conflicts of Law and Morality (1987); Kent Greenawalt, Law and Objectivity (1992); Kent Greenawalt, Legal Interpretation: Perspectives from Other Disciplines and Private Texts (2010).

24. E.g., Kent Greenawalt, Fighting Words (1995); Kent Greenawalt, Speech, Crime and the Uses of Language (1989); Kent Greenawalt, Viewpoints from Olympus, 96 Colum. L. Rev. 697 (1996).

25. I will not try to convict Professor Greenawalt of prolixity by citing any of his excellent work on criminal law topics unrelated to free speech.

been able to show that he was other than tireless and extremely gifted. Adding a long and illustrious series of articles, essays, and books on the legal and political issues raised by religious commitment was not just a natural extension of his other interests.²⁶ Doing so enabled him to bring out into the open his insouciant disregard for the common wisdom of the era: Greenawalt, it seems, did not get the memo that law isn't reason and religion can't be dealt with reasonably. Instead, he went about proving both convictions dead wrong.²⁷

Let us start with Professor Greenawalt's approach to religion. In contrast to the high Court (as both Professor Sandel and I would read its decisions), Greenawalt does not attempt to assimilate religious commitments to the model (ultimately economic) of individual personal preferences of a nonrational character. Greenawalt understands that for many (probably most) people for whom religion is significant, their religious commitments and convictions are not choices that they could have made otherwise, and might decide to change tomorrow: The claims of religion are instead obligations that encumber and define the self and that cannot be set aside without serious injury.²⁸ That is not because he would exclude from constitutional or political consideration those elements of religious commitment or practice that do not meet some external, rationalistic criterion of acceptability: Religion typically involves a mixture of rational and nonrational elements . . . but then such a mixture is characteristic of human thought and action more generally, whether or not a given individual is religious.²⁹ The nonrational aspect of religious

26. As with other topics, I make no effort to list all the work. The articles are early and late. E.g., Kent Greenawalt, *Religion as a Concept in Constitutional Law*, 72 Cal. L. Rev. 753 (1984); Kent Greenawalt, *Religious Toleration and Claims of Conscience*, 21 J. Contemp. Legal Issues 449 (2013). As for the books, see Kent Greenawalt, *Does God Belong in Public Schools?* (2007); Kent Greenawalt, *Private Consciences and Public Reasons* (1995); 2 Kent Greenawalt, *Religion and the Constitution: Establishment and Fairness* (2008) [hereinafter *Greenawalt, Establishment and Fairness*]; Greenawalt, *Free Exercise and Fairness*, supra note 11; Kent Greenawalt, *Religious Consciences and Political Choice* (1991).

27. I shall not attempt to trace developments in Professor Greenawalt's thought about religion or law, not because his thinking has remained static, but because his work for many years has displayed the admirable characteristics I discuss.

28. Greenawalt often acknowledges this important point, both in general and with respect to specific issues. See, e.g., *Greenawalt, Establishment and Fairness*, supra note 26, at 139 (discussing why "[it] is not hard to see" certain Christians' objections to theory of evolution); *Greenawalt, Free Exercise and Fairness*, supra note 11, at 439 (referring to "widespread sense that one's religious obligations are more ultimate than those of the social order"); Kent Greenawalt, *Religion and Public Reasons: Making Laws and Evaluating Candidates*, 27 J.L. & Pol. 387, 405 (2012) ("For many people, their religious convictions and affiliation are an important part of who they are.").

29. See, e.g., Kent Greenawalt, *Religiously Based Judgments and Discourse in Political Life*, 22 St. John's J. Legal Comment. 445, 460, 480 (2007) ("In much of what we believe, rational understanding, however that is conceived, intertwines with other assumptions In making up their minds about [a difficult legal or moral issue] everybody will rely to an extent on nonrational (I do not say irrational) intuitions.").

commitment does not place it beyond the scope of reasoned discussion, in part because everyone draws on such nonrational sources of belief and action.

At the same time, Greenawalt refuses to convert “religion” into a synonym for whatever are a person’s deepest moral convictions, an intellectual sleight of hand that makes all positions into “religious” ones and thereby drains the religion clauses of independent significance.³⁰ The result is that we can reason from a clear-headed understanding of the nature of religious commitment to conclusions about its role in a diverse and liberal society.

I think the sense of obligation to an entity beyond oneself that is so important for most religious believers is a powerful enough reason to warrant giving legal protection to some religious claims of conscience that do not involve moral conclusions, while protection is denied for nonreligious, nonmoral claims. No reason comparable to the believer’s sense of obligation to a higher authority applies when a nonbeliever’s sense of what the nonbeliever should do is outside the realm of morality.³¹

In Professor Greenawalt’s world, argument over how far the political community can accommodate the distinctive needs of religious people and about the extent to which it cannot do so does not take us outside the realm of reasoned discussion.

What about reason and the law? The evidence is clear: Professor Greenawalt is an unabashed reactionary, a true disciple of Lord Coke, even if his erudition, his analytical sophistication, and his fair-minded presentation of opposing arguments tend to disguise the fact. A few years ago, Greenawalt conceded that his “own position about constitutional interpretation [was] fairly labeled ‘eclectic.’ I believe a range of considerations are relevant besides original understanding, however that is conceived, and that no neat ordering or precise method of weighing can be assigned.”³² But the adjective is misleading to the extent that it suggests

30. See, for example, Greenawalt’s careful discussion of how far to extend the scope of “religion,” Greenawalt, *Free Exercise and Fairness*, supra note 11, at 129–56, and his conclusion that

refus[ing] to conflate religion and conscience is not only the most sound in terms of constitutional language, it also allows a nuanced evaluation of constitutional claims for equality. Concerns about equality that have led some scholars to a very broad constitutional definition of religion can better be handled by more discrete inquiries about equal treatment.

Id. at 156.

31. Kent Greenawalt, *The Significance of Conscience*, 47 *San Diego L. Rev.* 901, 916 (2010).

32. Kent Greenawalt, *Fundamental Questions About the Religion Clauses: Reflections on Some Critiques*, 47 *San Diego L. Rev.* 1131, 1142 (2010) [hereinafter Greenawalt, *Fundamental Questions*]; see also Kent Greenawalt, *How Does “Equal Liberty” Fare in Relation to Other Approaches to the Religion Clauses?*, 85 *Tex. L. Rev.* 1217, 1218 (2007) (referring to “the more eclectic approach I support” in religion clause analysis). In an early essay, Greenawalt identified a “moderate and eclectic” approach to

that Greenawalt adopts an ad hoc, all-things-considered approach to the analysis of religion clause issues. What Greenawalt means by the modest word “eclectic” is that in addressing a constitutional question he employs the full range of traditional legal tools,³³ seeking the answer that makes the best sense of the positive legal authorities that are relevant in light of what he takes to be the fundamental purposes of the constitutional text.³⁴

Greenawalt, furthermore, has expressed his adherence to Coke’s high vision of law in the most dramatic academic fashion imaginable for someone writing on constitutional issues. We live in an era in which elite law professors tend to think of the doctrinal treatise as either impossible (there is too little agreement to make a treatise intellectually cohesive) or pedestrian (the law being essentially empty).³⁵ But after years of important work on the ethical, political, and social problems raised by religious commitments in a liberal society, much of it more easily treated as moral philosophy or political theory rather than law, Greenawalt’s magnum opus on the subject is a treatise on the constitutional law of the religion clauses. In Greenawalt’s hands, theories (his own as well as those of others) have become the servant of his analysis of specific cases and

legal decisionmaking with Cardozo and the mainstream of American jurisprudential thought. Kent Greenawalt, *Discretion and Judicial Decision: The Elusive Quest for the Fetters that Bind Judges*, 75 Colum. L. Rev. 359, 359 (1975).

33. As Greenawalt recently put it,

[a]mong the relevant considerations beyond the applicable constitutional text [that he considers] are prior legal decisions and the principles they announce, traditions within the country, contemporary values and understandings, the implications of fundamental principles, and the desirability of standards that can give relatively clear guidance to judges and to citizens.

Greenawalt, *Fundamental Questions*, supra note 32, at 1142–43. Unlike contemporary constitutionalists who believe that the “correct” approach to constitutional questions generates incontestably correct answers, Greenawalt recognizes that there is no algorithm for decision. “Whether my conclusions are defensible or not, the basis for them is my conviction that all the factors are relevant.” *Id.*

34. Greenawalt has specifically rejected the criticism that his approach excludes the consideration of normative and purposive considerations. See Greenawalt, *Fundamental Questions*, supra note 32, at 1147 & n.32. See, for example, Professor Greenawalt’s persuasive analysis of the argument that the First Amendment requires a more absolute priest–penitent privilege than may be constitutionally acceptable with respect to other confidential disclosures, *Free Exercise and Fairness*, supra note 11, at 246–60, and his sensitive discussion of the Supreme Court’s decision in *Board of Education of Kiryas Joel v. Grumet*, 512 U.S. 687, 690 (1994) (holding state violated Establishment Clause by creating special school district defined geographically but designed to confer governmental power on a religious community). See Greenawalt, *Establishment and Fairness*, supra 26, at 224–236 (concluding decision was correct). I agree with him on the privilege issue and am not persuaded by his, or the Justices’, arguments about *Kiryas Joel*; one of the great pleasures of reading Greenawalt’s work is that his invariably fair-minded presentation of the issues and arguments actually enables the unpersuaded reader to identify the source of his or her disagreement.

35. On the former rationale, see Professor Tribe’s apologia for abandoning work on the third edition of his treatise, Laurence H. Tribe, *The Treatise Power*, 8 Green Bag 2d 291 (2005). The decline in prestige of the doctrinal treatise generally is a commonplace.

issues that make up the law, and his goal of providing a rationale, in the most persuasive manner possible, of the positive legal authorities.³⁶ This is work in the classical common law tradition: As Coke put it, “[t]he reporting of particular cases or examples . . . is the most perspicuous course of tracing the right rule and reason of the law’ Law is practice, not a theoretical representation of it.”³⁷ Rather than substituting “theory” or “empirical research” for work *within* the law as a practice, as so much “cutting-edge” scholarship seeks to do, Greenawalt has embraced it, confident that legal thought provides an adequate tool for bringing reason to bear on the political and social issues raised by religion.

Only a bold scholar would dare to be so unfashionable, but Professor Greenawalt’s recent work doubles down on the commitment to the law as reason underpinning his treatise on the religion clauses. I do not have time to indicate how that same commitment is at work in his important book on legal reasoning and statutory construction,³⁸ and I have only had the chance to read in manuscript his fascinating, forthcoming general treatment of constitutional decisionmaking. But like many others who have benefited from Greenawalt’s wise counsel, I can testify to another sense in which Greenawalt is unfashionably rooted in legal tradition. The old common lawyers thought of themselves as exercising a form of “reasoning . . . decisively shaped by the fact that it [was] designed to be presented in a public forum in which the reasoning is open to explicit challenge.”³⁹ Rather than relying on a system of authoritarian pronouncements based on incontestable premises, “the practitioner of this art of reasoning [was to] strive for common judgment in the face of dispute and disagreement.”⁴⁰ Legal thought, in other words, was a common, shared activity, and the goal of argument was understanding and, where possible, agreement. No doubt this was an ideal often honored in the breach. But for Kent Greenawalt, practitioner of the arts of charitable interpretation and painstaking attention to the work of others, the ideal is a reality that he embodies, in his work and in his person.

36. See Greenawalt, *Establishment and Fairness*, supra note 26, at 543 (describing “burden” of treatise as one of inquiring into “just how the religion clauses . . . should best be understood” by “[a]sking questions about that understanding, not in the abstract but by focusing on concrete issues in context”).

37. Gerald J. Postema, *Classical Common Law Jurisprudence (Part II)*, 3 *Oxford Univ. Commonwealth L.J.* 1, 6 (2003) (quoting volume 6 of Coke’s Reports).

38. Kent Greenawalt, *Statutory and Common Law Interpretation* (2012).

39. Postema, supra note 37, at 8.

40. *Id.*