

The Catholic University of America, Columbus School of Law

CUA Law Scholarship Repository

Scholarly Articles and Other Contributions

Faculty Scholarship

1986

A Comment on Religious Convictions and Lawmaking

John H. Garvey

The Catholic University of America, Columbus School of Law

Follow this and additional works at: <https://scholarship.law.edu/scholar>



Part of the [Constitutional Law Commons](#), and the [Religion Law Commons](#)

Recommended Citation

John H. Garvey, A Comment on Religious Convictions and Lawmaking, 84 MICH. L. REV. 1288 (1986).

This Article is brought to you for free and open access by the Faculty Scholarship at CUA Law Scholarship Repository. It has been accepted for inclusion in Scholarly Articles and Other Contributions by an authorized administrator of CUA Law Scholarship Repository. For more information, please contact edinger@law.edu.

CORRESPONDENCE

A Comment on *Religious Convictions and Lawmaking*

John H. Garvey*

Professor Kent Greenawalt's Cooley Lectures on *Religious Convictions and Lawmaking*¹ are fresh, honest, and thoughtful. They offer some troubling questions for liberal democratic theorists (Greenawalt names Bruce Ackerman and John Rawls as representatives of the class) who argue that good citizens and officials should set their religious convictions aside when they deal with political questions. Greenawalt contends that religious liberal democrats are not committed to such a program of self-denial — that sometimes (though not always) political judgments can rest on religious convictions. I think he is right but too modest about the implications of his thesis.

The chief argument against political use of religious convictions is that it's unfair to one's fellow citizens. To appeal to principles and arguments not accessible to all "is to deny the essential spirit of democracy."² Political discussion should be secular and above all rational (p. 358), the argument goes, so that all citizens can understand and appraise it.

The principal difficulty with this argument, Greenawalt says, is that some political questions *can't* be decided on rational grounds (pp. 368, 370, 371, 373). Nonrational convictions must then play a part. And "[o]nly a society that was actually hostile to religion or riven by religious strife could think it preferable for people to rely on nonreligious, nonrational judgments rather than upon religious convictions."³

* Wendell Cherry Professor of Law, University of Kentucky. A.B. 1970, Notre Dame University; J.D. 1974, Harvard University. — Ed.

1. 84 MICH. L. REV. 352 (1985). All page citations are to Professor Greenawalt's article.

2. D. LYONS, ETHICS AND THE RULE OF LAW 191 (1984).

3. P. 379. A secondary but intractable difficulty is that it may be impossible for religious citizens to do what the secular rationalist demands:

Most religious believers will be hard put to evaluate the status of the fetus or animals in purely secular terms. The matter is not one of weighing evidence pro and con, but of adopting one of a number of debatable perspectives about how to look at a problem. If one believes he already has a clear answer or an overarching perspective on the relevant question of value that is derived from his religion, he may find it impossible to decide what perspective he would otherwise adopt.

P. 379.

Greenawalt suggests three classes of questions that can't be settled on rational grounds. One is questions of status. Theories of justice like Ackerman's and Rawls' explain how to deal with conflicts among persons. They don't decide who *is* a person (the problem of abortion) (pp. 377-78), or what we owe to *non*persons (the problems of animal rights and environmental protection) (pp. 368-69).

A second class, which does apply to interpersonal conflicts, is complex factual questions (pp. 381-82). Suppose you and I agree that the government should play a role in distributing social resources, and that it must treat everyone equally in handing them out. We may still disagree about whether the proper measure of equality is Marxist, or utilitarian, or Rawlsian. The choice depends in part on hard factual judgments about human nature: Will a utilitarian or Rawlsian scheme cause resentment? Will people in a Marxist society be willing to sacrifice for others? Such judgments are so complex that we must in the end rely on personal experience and "nonrational commitments of value" (p. 382) in making them. And in that case one who rejects Marxism because he thinks people are just selfish is not obviously a better citizen than one who does so because he believes what the Bible teaches about original sin.

Greenawalt's third class concerns some conflicts of value.⁴ Even liberal democrats who agree that the government should redistribute wealth may disagree about whether overall welfare should always prevail over the moral right to the fruits of one's talents. This choice among "ultimate categories of moral right" (p. 383), though it may be informed by rational secular arguments, cannot be resolved by them. Once again, the atheistic partisan of overall welfare is not obviously a better citizen than one who finds a duty to care for the poor in Christian or Jewish tradition.

In other political disputes, however, Professor Greenawalt says it is wrong to rely on religious convictions. Two examples involve religious judgments in conflict with rationality. If I believe that gray cats are sacred (a value judgment) even though I know there is nothing scientifically special about them, I should not advance a political program based on my view ("Save the gray cats!"). The same is true if scripture tells me that the world will be flooded in three years (a factual judgment), though I have no scientific basis for that belief (pp. 387-88).

A third, and slightly different, instance is the case of sexual acts

4. I say "some" because many conflicts are ruled out by the premises of Greenawalt's argument. The question he is asking, remember, is whether one who *accepts liberal democratic values* can still take account of religious convictions.

between consenting adults. Greenawalt argues (pp. 362-64) that the rational secular arguments against criminalizing such acts⁵ are far stronger than the rational secular arguments for criminalization.⁶ Homosexuality, for example, causes little or no secular harm. If that is so, then sodomy laws passed on religious grounds may be another instance of religious judgment in conflict with rationality. But even if rational and religious judgments pointed in the same direction, Greenawalt argues, "the possible sinfulness of sexual activities [would] not *by itself* [be] a legitimate consideration" (p. 364). The law should not directly implement religious convictions. It cannot dictate worship or belief; neither should it dictate religiously appropriate behavior ("X is a sin"). Religion should instead function only in the background, where it reinforces a commitment to some secular good.⁷

This crude summary hardly does justice to the sophistication of Professor Greenawalt's arguments, but it suffices for the two points I want to make. The first point is about internal consistency: I am troubled by the distinctions Greenawalt draws between cases where religious convictions can be considered and cases where they cannot. This leads, as I will explain, to my second point, which is mostly about the theory of liberal democracy that Greenawalt is attacking.

First, as to internal consistency. Greenawalt distinguishes proper from improper use of religious convictions in roughly this way:

(1) Religion may be considered only when rational secular grounds won't work (the cases of abortion, the environment, complex factual judgments, and categories of moral right).

(2) But religion is out of bounds even then if it is *irrational* (the cases of the gray cats and the flood).

(3) It is also out of bounds whenever it bears directly on lawmaking (the case of homosexual behavior).

Let me begin with (2). My problem with this principle is that I don't think religious value judgments *can* be irrational in the required

5. These include: (i) the idea "that such matters of individual choice are none of the state's business"; (ii) Mill's argument that prohibition will produce suffering and stunt human development; and (iii) the argument that enforcement will be ineffective and capricious. P. 362.

6. These include: (i) paternalism (helping people resist their own temptations); (ii) protecting family life; (iii) protecting children; (iv) health; and (v) maintaining the moral tone of the community. Pp. 362-63. The danger presented by AIDS makes (iv) a troubling argument at the moment. Greenawalt sets that to one side for purposes of his discussion. P. 363.

7. Pp. 370-71, 380. "[E]veryone must make nonrational judgments about entities that deserve protection. Given those judgments, the *nature* of the protection afforded is called for by secular objectives." P. 370. An example might be something like this: God made the fetus a person (religious conviction). Each person has a right to life (secular value). Abortion is wrong because it takes the life of a person (permissible use of religion).

sense.⁸ Greenawalt says a judgment is irrational when it is “contrary to what can be established on rational grounds” (p. 369). But while it may be impossible to prove that gray cats are sacred, it is also impossible to “[establish] on rational grounds” that they are not. Greenawalt seems to acknowledge this in explaining why religious convictions can figure in environmental policymaking: “Attaching inherent value to the preservation of species, and even to maintenance of the physical environment, is not contrary to reason; but such views do require some nonrational commitment or judgment of value” (p. 369). Gray cats are like snail darters. If religion is a relevant reason for saving the latter, it should also be for the former.

In short, (2) doesn’t work because arguments for and against religious value judgments are both nonrational. This has significant consequences for (1). That principle says that religion can play a role only in cases (like abortion) where all choices depend on nonrational commitments (What is the moral worth of a fetus?). But as it turns out, *every* issue of public policy involves such choices once religious values are dragged into the debate. Suppose the issue is whether we should increase personal income tax exemptions to \$2000. We might debate the question in terms like disposable personal income, revenue neutrality, etc. But I might instead say that the current small exemption encourages a moral wrong — the “artificial” limitation of family size. That belief, while idiosyncratic, is not irrational; and unless you take the illiberal approach of simply ignoring me, your decision about the exemption will have to depend on a nonrational conclusion about the morality of family planning.⁹

This doesn’t necessarily mean that religious claims can properly be considered in any public debate in a liberal society. Some such claims might still be disqualified because they conflict with liberal premises *other* than rationality.¹⁰ One such premise, Greenawalt says, is that laws “should seek to promote some good that is comprehensible in secular terms” (p. 361). This is what (3) is about. According to (3), it is illiberal for me to oppose your homosexual activity if my reason for doing so is religious (“Sodomy is a sin.”). My position conflicts with a tenet of liberalism because it would limit your liberty for the sake of a “good that is [in]comprehensible in secular terms” (p. 361). On the

8. Factual judgments (the impending flood) can be true or false, rational or irrational. I agree with Greenawalt that a good liberal democrat should not make religious claims based on irrational factual judgments.

9. Cf. Oppenheim, *Rational Decisions and Intrinsic Valuations*, in NOMOS VII: RATIONAL DECISION 217 (C. Friedrich ed. 1964).

10. See note 4 *supra*.

other hand, Greenawalt implies that it would not be illiberal for me to oppose your experiments in gene-splicing on the basis of an underlying religious conviction ("Nature is sacred."). There too I would limit your liberty. But I could give a secular reason for doing so: your action might upset the ecological balance. My religious conviction functions at a different level, to explain why the current balance has a value.¹¹

That, at least, is the argument. But the difference between the two cases lies only in how they're stated. I might instead say, "Nature is sacred, and homosexuality is a crime against nature." I could then offer a secular reason for opposing homosexuality: it rearranges the ecological balance (men and women being, after all, part of the balance). Or I might say, "Gene-splicing is a sin." I would then oppose gene-splicing for a reason that is incomprehensible in secular terms.¹²

The ease with which my claims can be reformulated is not surprising, since religious convictions underlie both at one level or another. But it suggests that there is no backbone in Greenawalt's requirement that laws "promote some good that is comprehensible in secular terms." If I'm pursuing such a good in the gene-splicing case, I'm also doing so in opposing homosexuality.

The key to this puzzle is that Greenawalt has misstated the premise he's measuring my claims against. What we really believe is this: that laws "should seek to promote some good that is consistent with the goods favored by liberal democracy." That premise allows some religious claims and disqualifies others, not because they are religious *per se* but because of their content. The difference between calling homosexuality a sin and calling gene-splicing a sin is not that the former claim is religious and the latter secular. It is that the former claim collides with a good that liberal democracy values more highly.¹³

This leads me to my second point, which is about the theory of liberal democracy. According to that theory, what I have just said is

11. See note 7 *supra*.

12. There are several objections to this reformulation, none of them persuasive:

(1) One might say that homosexuality doesn't rearrange the ecological balance; it's part of the balance. It's one of the things that people do. But the same goes for gene-splicing; it too is one of the things that people do.

(2) One might say that we're only concerned with *adverse* effects on the ecological balance. Consenting sexual acts by definition have no such effects; gene-splicing, on the other hand, could upset some animal, plant, or atmospheric cycle. This of course assumes that I have no interest in acts that you and Sam consent to. But why can I not attach value to the life cycle of the human species just as I do with other animals? I see no reason why I cannot. The obstacle to lawmaking based on that value is that it collides with a good that liberalism may value more highly. See note 13 *infra* and accompanying text.

13. The Supreme Court doesn't agree with this, *Bowers v. Hardwick*, 106 S. Ct. 2841 (1986), but we're not talking about constitutional law.

heretical on two counts. In the first place, it is heresy to say that some liberties (like sexual freedom) are more important than others (like entrepreneurial freedom). Ackerman, for example, says that "each citizen [has an] ideal right to use his transactional power as he sees fit so long as he does not engage in any act of censorship or monopolization. The argument for sexual freedom is but a special case of the argument for freedom."¹⁴

In the second place, and more generally, it is heresy to say that liberal democracy favors some good or goods over others. Ackerman maintains that the liberal state must adhere to a principle of neutrality as well as one of rationality: "*Neutrality*. No reason is a good reason if it requires the power holder to assert: (a) that his conception of the good is better than that asserted by any of his fellow citizens"¹⁵ It should come as no surprise that in such a state religious convictions, with their attendant baggage about the good of human life, would have no place in political discourse.

I think that both of these principles (the global conception of freedom and the rule of neutrality) misstate what most card-carrying liberal democrats believe. In our society we are used to thinking that the freedoms of speech and religion are more important than the freedoms to contract, hunt, fish, drink whiskey, shoot pool, and work for Toyota.¹⁶ We may disagree about how much protection some particular liberties ought to get (sexual behavior is a good example), but it's hardly even controversial that there are more and less important ones. I will not attempt to prove this point here, but I must add that it is explicit in the Constitution of our more-or-less liberal democracy.¹⁷ Freedoms of speech and religion are specially mentioned; hunting, fishing, and working for Toyota are just residual liberties that the government can take away by due process of law.

If it *is* true that we consider some liberties more important than others, then the practice, if not the theory, of liberal democracy does incorporate a theory of the good (or goods). What distinguishes the liberties we prize is either that they are good in themselves, or that they are a means of reaching goods that we value. One might argue that voluntary religious activity is good in itself; or that speech is a

14. B. ACKERMAN, *SOCIAL JUSTICE IN THE LIBERAL STATE* 180 (1980).

15. *Id.* at 11.

16. The reason for this is *not* that speech and religion can't cause harm to other people (or maybe animals), while contracting, hunting, fishing, etc., can. See F. SCHAUER, *FREE SPEECH: A PHILOSOPHICAL ENQUIRY* 10-12 (1982).

17. Neither Greenawalt's lectures nor my comments are intended to be essays on constitutional law. I mention this point simply as a datum of social science, relevant in ascertaining whether the "theory of liberal democracy" describes something that many of us believe in.

way of advancing knowledge, which we value. At the same time, we must value less the goods represented by or associated with less-protected liberties — the activities, or the goals, of hunting and fishing, working for Toyota, etc.

In a state organized along these lines (rather than along Ackerman's) it is hard to see why citizens should be disqualified from asserting their own conceptions of the good in political discourse. If the constitution¹⁸ of the society forswears the principle of neutrality, it would be strange to say that individuals are nonetheless bound by it. With this much Greenawalt seems to agree (p. 377). But he argues that talk about the good should be translated into "secular terms" (p. 361) before it is enacted into law.

I mentioned above one difficulty with such a requirement: it may amount to nothing more than word-play. There is a second problem which Greenawalt himself alludes to. If the point of the requirement is to keep political discourse in terms one's fellow citizens can grasp,¹⁹ it may not accomplish its objective. After all, secular no less than religious judgments about the good rest on nonrational convictions: "Neither sort of judgment is fully susceptible to critical appraisal and rational discourse. Only a society that was actually hostile to religion or riven by religious strife could think it preferable for people to rely on nonreligious, nonrational judgments rather than upon religious convictions" (p. 379).

I do not mean to say that we should junk our commitment to liberal democracy and let the religious right (or left) work its will at the polls. Greenawalt's question was whether religious convictions could count *in a liberal democracy*, and that's my concern too. I too would say that they can, and even oftener than Greenawalt would allow. I too would draw a limit. But I would say that the limit is this: a good citizen should not pursue a religious good that conflicts with the goods favored by liberalism. Laws dictating worship or belief are bad for just that reason; they conflict with several freedoms liberals prize highly. Laws forbidding the slaughter of snail darters, sacred cats, or sacred cows are probably OK; liberals do not value those activities. As for calling homosexuality a sin, that's tough precisely because it's unclear whether liberal democracy considers consenting sexual acts a good.

18. I use the word in a generic sense.

19. See text at note 2 *supra*.