

IN MEMORIAM

TRIBUTE TO R. KENT GREENAWALT: A COMMON-LAW THINKER IN A TEXT-DRIVEN AGE

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Kent Greenawalt was my colleague and friend for half a century. Over those years, we shared responsibility both for students at the beginning of their legal studies and for candidates for the doctoral degree. The course in Legal Methods, while we each taught it, was an intensive three-week, thirty-nine class hour introduction to legal studies that divided its attention between common law case analysis and statutory interpretation; Kent's nuanced understanding of both profoundly shaped my approach to each. In the doctoral program, he offered a graduate seminar on jurisprudence; my responsibility was for a seminar on legal education. Sharing these few students opened for me a window into his open and balanced approach to a subject easily given to forms of orthodoxy, the affection and deep respect his students had for him, and his extraordinary qualities as a mentor for students who would themselves go on to distinguished positions in legal education.

When, eight years ago, Columbia Law School celebrated Kent Greenawalt's fiftieth extraordinary year on its faculty, the *Columbia Law Review* published six tributes to him—all but one written by Columbia Law School colleagues.¹ Reading them, one finds again and again acknowledgments of the qualities we all treasured in him: the extraordinary intelligence and fidelity to the widest range of the law's sources in his own work; the reasoned care he took to engage with all readers, all potential sources of understanding, and all scholars whose work he addressed; the balance and catholicity in the breadth of his explorations, with disciplined and respectful attention to opposing points of view; and, of particular importance to our intellectual community, his

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1. Barbara Aronstein Black, *Kent Greenawalt: An Appreciation*, 115 *Colum. L. Rev.* 777 (2015); Vincent Blasi, *Three Dimensions of Kent Greenawalt's Excellence*, 115 *Colum. L. Rev.* 780 (2015); Elizabeth F. Emens, "Think Harder, Do More, Study Better": A Tribute to Kent Greenawalt, 115 *Colum. L. Rev.* 786 (2015); H. Jefferson Powell, *Professor Greenawalt's Unfashionable Idea*, 115 *Colum. L. Rev.* 790 (2015); Susan P. Sturm, *Rigorous Reflection Fueled by Love: Kent Greenawalt's Gifts to Future Generations*, 115 *Colum. L. Rev.* 800 (2015); William F. Young, *My Friend, the Philosopher*, 115 *Colum. L. Rev.* 805 (2015).

unwavering engagement with the scholarship of his colleagues, consistently respectful and deep, with questions and suggestions that invariably went to the heart.

The one outsider to comment in that celebratory issue, Professor H. Jefferson Powell of Duke Law School, started by describing his scholarship as “completely indifferent . . . to the intellectual fashions of the day” and Kent as “a closet radical.”² Professor Powell then took ten pages to explain how praiseworthy he found Kent’s commitment to rational discourse within the framework of legal sources and his indifference to the theories and empirical research that by then had become legal scholarship’s fashion.

Only a bold scholar would dare to be so unfashionable 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.” 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.” 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.³

Professor Powell was writing principally about Kent’s profound scholarship on religion and law, and not the work on lawyerly interpretation of secular texts—case law, statutes, and others—with which I am most familiar and which have most profoundly shaped my own thinking. Issues about law and religion graced his scholarship from the beginning, and what may be remarkable is that his personal religious commitments, central to his identity as they were, did not command or unbalance his approach. Among his most recently published books are a two-volume study, *Religion and the Constitution*,⁴ followed in 2016 by *Exemptions: Necessary, Justified, or Misguided?*⁵ Reviewers both characterized Kent as “a giant in the field of law and religion” and described the first of these works as “the most comprehensive treatment available of the law of the religion clauses.”⁶ They found in these works the refusal to insist on

2. Powell, *supra* note 1, at 790.

3. *Id.* at 799 (alterations in original) (footnotes omitted) (quoting Gerald J. Postema, *Classical Common Law Jurisprudence* (Part II), 3 *Oxford U. Commonwealth L.J.* 1, 8 (2003)).

4. 1 Kent Greenawalt, *Religion and the Constitution: Free Exercise and Fairness* (2006); 2 Kent Greenawalt, *Religion and the Constitution: Establishment and Fairness* (2006).

5. Kent Greenawalt, *Exemptions: Necessary, Justified, or Misguided?* (2016).

6. Andrew Koppelman, *Kent Greenawalt, Defender of the Faith*, 95 *Tex. L. Rev.* 821 (2017) (book review).

simple, embrasive answers that has characterized all his work—and in doing so underscored Powell’s praise.

Professor Paul Horwitz of the University of Alabama, also a contributor to this collection of tributes, is a former student and friend who found in Kent (as have so many of his students bound for academia) “a consummate mentor.”⁷ Reviewing *Religion and the Constitution* as one participant in a Notre Dame roundtable celebrating the two volumes, he found in them “an extraordinary . . . contribution,” reflecting the “voice of reason,” offering “a fair hearing to the contending viewpoints,” and making the reader “a good deal wiser” about this complex and delicate subject.⁸ But in fairly explicating all views and the complexity of its subject, “it leaves its readers somewhat short of a definitive standard,” suggesting a “careful case-by-case inquiry” but no precise metric—no “viable theory”—by which to “judge just how ‘reasonable’ any given answer is.”⁹

So also Professor Andrew Koppelman of Northwestern Law School, who reviewed *Exemptions: Necessary, Justified, or Misguided?* under the title “Kent Greenawalt, Defender of the Faith.”¹⁰ The book, he wrote, reveals “an easy mastery of this complex area. [Kent] writes beautifully[,] . . . focusing closely on the details of specific types of situations” and resisting the many “general theories of religious accommodation” to be found in the literature. But then, for Koppelman, the book is “deliberately unhelpful” about “general principles . . . legislatures or courts [should] follow if they are going to devise exemptions.”¹¹ Koppelman, like Horwitz, proceeds to offer his own answers to these questions.

The criticisms capture perfectly Kent’s strengths as a teacher and scholar. If he was “deliberately unhelpful,” that flowed from his fundamental skepticism of the idea that one could start from general propositions and use those to deduce right answers to hard questions. The latter idea lives at the heart of the civil law tradition and of “natural law.” Kent’s was the voice of common law reason, of careful, focused analysis moving from the ground up, acknowledging the many methods of interpretation that might be taken and eschewing orthodoxy and simple answers such as others might wish to insist upon. Now, recall that Kent was, himself, deeply religious, firm in his own belief in a loving God and afterlife (while acknowledging the fundamental mysteries that faith involves). Compare with his stance toward other interpreters that of a

7. Paul Horwitz, *The Philosopher’s Brief*, 25 *Const. Comment.* 285, 285 n.* (2008).

8. *Id.* at 285.

9. *Id.* at 285–87; see also Paul Horwitz, *A Tribute to R. Kent Greenawalt: Scholar-Teacher, Teacher-Scholar*, 123 *Colum. L. Rev.* 939 (2023); Paul Horwitz, *Il Miglior Fabbro: RIP Kent Greenawalt*, *Prawfsblawg* (Jan. 28, 2023), <https://prawfsblawg.blogs.com/prawfsblawg/2023/01/il-miglior-fabbro-rip-kent-greenawalt.html> [<https://perma.cc/3MMC-5DGX>].

10. Koppelman, *supra* note 6.

11. *Id.* at 823.

biblical scholar writing about modes of *biblical* interpretation, who concluded his close analysis of them with these words:

In the last analysis Christianity is a very personal matter. Each person must choose how to seek a relationship with God. To a large degree, however, the choice will depend on how each understands the message of the Bible, which in turn will be the outgrowth of the use of a given method of interpretation. The practical importance of what I have discussed, then, is quite evident. Eternal issues are at stake. How each person will fare when standing before God to be judged will be an outgrowth of what hermeneutical approach to the Bible has been most influential in the life of each.¹²

Kent's commitment, as teacher and as scholar, was to leave to each of his students and readers the task of finding their own way in the complex minefields of reason and doctrinal history, of which he was such an acknowledged master.

In his approach to interpretation of legal documents—judicial opinions, wills, statutes, our Constitution, and more—Kent's contributions were the same. When I wrote about that subject, like my colleagues, I received and treasured his close, critical, and supportive comments on my drafts. My teaching materials for Legal Methods long owed their attention to common-law case-reading skills to his exquisite exposition of the complexity of the influences one decision might have on later disputes, and the potential difficulties in understanding the relationships amongst a series of cases already decided. His *Statutory Interpretation: 20 Questions*¹³—predecessor to the four extraordinary books about secular interpretation that he published more recently¹⁴—animated my teaching about statutory interpretation. It was all about how lawyers might appropriately reason with a text—fairly explicating the controversies, taking a balanced view. “Plain meaning” and simplistic textualism, for him as for me, were not commendable paths to take—fashionable as they sometimes appear to be. How one might reason to a better, even best, meaning of a text using a variety of tools, doctrinal as well as textual, is the central issue he addressed.

Finally, recall Kent's collegial commitments, so celebrated in my colleagues' earlier writings. It was not just that he addressed our own work so attentively and thoughtfully, individually and also in the collective workshops that have become the fashion of the day. To return to Professor Powell's admiring characterization of his work as “unfashionable”: Once at Columbia, that is where he stayed for 58 years, save for his brief

12. Robert L. Thomas, *Issues of Biblical Interpretation*, 58 S. Cal. L. Rev. 29, 34 (1985).

13. R. Kent Greenawalt, *Legislation: Statutory Interpretation: 20 Questions* (1999).

14. Kent Greenawalt, *Interpreting the Constitution* (2015); Kent Greenawalt, *Legal Interpretation: Perspectives From Other Disciplines and Private Texts* (2010); Kent Greenawalt, *Realms of Legal Interpretation: Core Elements and Critical Variations* (2018); Kent Greenawalt, *Statutory and Common Law Interpretation* (2013).

intermission for government service. And if his so-warranted honor as a University Professor might have entailed certain entitlements, his modesty left them on the shelf. His was, indeed, an extraordinary life of commitment to scholarship, to his students, and to the Columbia Law School.

