of the eucharistic doctrine of Cranmer, Jewel and Hooker, at a formative stage in the history of the Church of England, and his persuasive exposition of the view that the Eucharist makes the Church in the sense that the Eucharist may properly be regarded as a means of grace whereby members of different communions may grow into full ecclesial union.

This glance at some of the themes in Dr Avis' book may indicate why it should be on the reading list of those responsible for the shape and ordering of Anglican life in the years ahead. We belong to a family of self-governing churches, which constitute a fellowship or communion, conciliar not pyramidical in shape, with a heritage both catholic and reformed, mindful of our continuity with the past and aware of our need to draw on this heritage as we face the future.

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Religion and the Constitution: Establishment and Fairness

Kent Greenawalt
Princeton University Press, Princeton, NJ and Oxford, 2008, x + 555 pp (hardback £32.50) ISBN: 978-0-691-12583-1; (paperback £16 95) ISBN: 978-0-691-14114-5

Establishment and Fairness is the second volume in a two-volume work by Ken Greenawalt, *Religion and the Constitution*; the first was subtitled *Free Exercise and Fairness*.[9] It is principally addressed to lawyers in the United States and contains a comprehensive analysis of each set of factual circumstances that may raise questions under the First Amendment's prohibition of establishment.[10] Why might it be important for lawyers or scholars of law and religion outside the United States? Because it is not just about positive law. General chapters ask why US law says what it does and how that law may continue to develop into a workable set of principles that promote a central virtue – fairness (certainly a British virtue, as well[11]).

Greenawalt effectively rebuts the argument that the non-establishment provision of the First Amendment was intended to protect state religious

9 K Greenawalt, *Religion and the Constitution: Free Exercise and Fairness* (Princeton, NJ, 2006).
10 These range from 'religious words and symbols in public places' to 'tax exemptions and deductions'.
11 J Tilley and A Heath, 'The decline of British national pride', (2007) 58 *British Journal of Sociology* 672 ('fair and equal treatment of all groups in society').

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establishments,[12] showing that the amendment also applied to areas such as non-state territories under exclusive federal jurisdiction. Given the difficulty that Congress had in deciding on territorial policies regarding slavery (which ultimately led to the Civil War), one can only imagine the outcome had it been up to the national government to determine whether Kansas' establishment was protestant, roman catholic or something else. State establishments had been abolished by the time of the Civil War, and the Fourteenth Amendment, adopted to protect citizens from state governments, can reasonably be understood to incorporate non-establishment, as the Supreme Court has consistently done. Non-establishment may be bad policy, but its application to the states is not illegitimate.

Greenawalt's project is not to develop a unified field theory of religion and the state; yet he engages in a principled analysis and avoids constitutional ad hocery. Core concepts include the principle that the government should never assert that a particular religion's beliefs (much less those of a denomination) are true, and that fairness requires that groups not be symbolically excluded by government endorsement of religion, so that a non-adherent 'feels excluded, like an outsider' (pp 12 and 108). Nevertheless, he is sympathetic to Justices Stephen Breyer's and Arthur Goldberg's position, cautioning against 'untutored devotion to the concept of neutrality', which may partake 'of a brooding and pervasive devotion to the secular and a passive, or even active, hostility to the religious' (p 86).[13] The United States is not, according to Greenawalt, France.

The work also includes political science and philosophy. Greenawalt points out that United States Supreme Court rulings depend upon five justices (a majority), which may in turn depend upon a tiny minority. If four justices think laws A and B are similar and valid, and four justices think that laws A and B are similar and invalid, and one justice thinks that A and B are dissimilar in a way that makes A valid and B invalid, the outcomes depend upon a distinction that only one justice discerns.[14] In *Van Orden v Perry*[15] and *McCreary County v American Civil Liberties Union of Kentucky*,[16] Justice Breyer was the 'pivot' (pp 84–87). On the philosophical front, Greenawalt lines up with the critics of John Rawls who claim that Rawlsian public reasons – to which policy debates are supposed to be restricted – besides being difficult to define, are too thin to address many important political questions. Nevertheless,

12 See AR Amar, *The Bill of Rights: creation and reconstruction* (New Haven, CT and London, 1998).

13 *Van Orden v Perry*, (2005) 545 US 677, 699 (permitting a monument with the Ten Commandments on the grounds of the Texas state capitol), quoting *School Dist. of Abington Township v Schempp*, (1963) 374 US 203, 306.

14 Greenawalt does not use the term 'pivot', but compare I McLean, *Public Choice: an introduction* (Oxford, 1987), p 109 (defining a 'pivot' that turns a winning coalition into a losing one.

15 See note 13.

16 (2005) 545 US 844 (holding that the State of Kentucky could not display the Ten Commandments on courtroom walls).

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Greenawalt argues that judges should self-censor and eschew reasoning in the following form: 'Given a true religious proposition, these conclusions about social good follow' (p 506). He would not preclude the use of religious propositions in judicial opinions to show that moral values were widely held, nor would he bar the use of familiar religious stories to illustrate a point. The responsibility of judges to self-censor arises from their obligation to articulate arguments that have force for *all* judges. In the case of legislators, he argues that their *decisions* should give greater weight to public than to non-public reasons, but that their *arguments* and public justifications may properly include religious premises along with others. For Greenawalt, citizens generally should not be constrained from relying on religious reasons in political debates or in forming political judgments, and religion is not excluded from the public square.

Lawyers and scholars from outside the United States may become impatient with the level of detail that Greenawalt includes in his analysis of specific subjects, although they include such topical issues as the potential conflict between civil and religious law. However, in addition to being a general treatise on religious establishment, his work demonstrates how American lawyers reason through these kinds of problems, a process that bears only a family resemblance to British legal reasoning. The detail reflects the need to show which facts are relevant and which ones are not, as well as how the judges decide (and even how they decide how they decide).[17] Overall, the book is an important one, and its arguments should be considered in any serious discussion of the parameters of establishment, in the United States or elsewhere.

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17 Justice Sandra Day O'Connor believes that case-by-case adjudication under flexible standards is acceptable, so that standards can be relatively vague. Justice Antonin Scalia thinks that all judicial decisions should accord with clear criteria developed in advance (p 51).

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