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Discrimination Between Religions: Some Thoughts on Reading Greenawalt's Religion and the Constitution: Establishment and Fairness

John Finnis

DISCRIMINATION BETWEEN RELIGIONS: SOME THOUGHTS ON READING GREENAWALT'S *RELIGION AND THE CONSTITUTION: ESTABLISHMENT AND FAIRNESS*

*John Finnis**

Suppose the core teachings of a religion with a significant number of followers inside and outside the United States entail that significant parts of the United States Constitution, including the free exercise and establishment clauses of the First Amendment, ought to be replaced either by peaceful processes such as voting or, if need be, by threats and use of force, and that governance of the United States, or of such regions, big or small, as can be brought under the religion's sway, ought to be entrusted to its followers. Would it be constitutional for Congress to forbid the entry to the United States of members of that religion unwilling to make a public declaration renouncing that teaching?[1] Should it be? I raise these questions as a kind of test of the thesis prominent in Kent Greenawalt's fine book, that both of the religion clauses "forbid discrimination *among* religions" (p. 13) (emphasis in original), and that "[o]ne of the most powerful principles of the religion clauses is that the government may not favor some religions at the expense of others" (p. 212).

You may say: *Please*, let's just stay in the real world. And spare us the embarrassment of trolling through other people's

* Biolchini Family Professor of Law, University of Notre Dame and Professor of Law and Legal Philosophy, University of Oxford.

1. A low-key version of this might be section 2 of the bill for a Jihad Prevention Act, introduced on September 18, 2008, by Rep. Tom Tancredo as H. R. 6975, which provides, in the relevant part, that "[a]ny alien who fails to attest, in accordance with procedures specified by the Secretary of Homeland Security, that the alien will not advocate installing a Sharia law system in the United States is inadmissible." Jihad Prevention Act, H.R. 6975, 110th Cong. § 2 (2008), *available at* http://thomas.loc.gov/cgi-bin/query/z?c110:H.R.6975. This is "low-key" because of the stringently narrow meaning ascribed to "advocate" in Yates v. United States, 354 U.S. 298, 324–25 (1957), *overruled on other grounds by* Burks v. United States, 437 U.S. 1 (1978).

faith, especially when this faith's adherents are so typically decent, loyal Americans, and stand with us against secularist degradations of human life and family. Haven't you heard of *bigotry*? And I grant that the United States is so big and so unlikely to be threatened, as a whole, by any set of persons who would have to immigrate by ships and planes that it seems plausible to dismiss the hypothesis, or treat it as an occasion for renewed satisfaction that the Constitution compels us to live with the healthy risks of freedom, non-establishment, etc. Not every community, however, is so fortunately placed. You should regard these reflections as an attempt to transpose to the American context, so meticulously explored by Greenawalt, a contemporary problem that elsewhere is very real, transcends bigotry, and calls on responsible people to set aside their feelings of embarrassment. And it is, in any case, worth *testing* the intuition enshrined in Greenawalt's title, that non-establishment and fairness go hand in hand, the former required by the latter.

To establish the realism of at least part of the hypothesis—the part which postulates the existence of a religion of the outlined kind—and to disestablish the imputations of embarrassing bigotry, I will take a short-cut. Since nowadays, I'm told, only rank conservatives object to citation of foreign cases in constitutional matters, I call in aid the recent unanimous judgment of seventeen judges of the European Court of Human Rights in *Refah Partisi v. Turkey*:

> [T]he Court considers that sharia, *which faithfully reflects the dogmas and divine rules laid down by religion, is stable and invariable*. Principles such as pluralism in the political sphere or the constant evolution of public freedoms have no place in it.... [A] regime based on sharia ... clearly diverges from Convention values, particularly with regard to its criminal law and criminal procedure, its rules on the legal status of women and the way it intervenes in all spheres of private and public life in accordance with religious precepts.... [A] political party whose actions seem to be aimed at introducing sharia ... can hardly be regarded as an association complying with the democratic ideal that underlies the whole of the Convention.[2]

On that basis it upheld the Turkish Supreme Court's dissolution of Turkey's elected Government and of the country's main

2. Refah Partisi v. Turkey, 37 Eur. H.R. Rep. 1, § 123 (2003) (emphasis added) (upholding and adopting the language of the Third Section of the European Court of Human Rights in Refah Partisi v. Turkey, 35 Eur. H.R. Rep. 3, § 72 (2002).

party, on the grounds that the Government in which that party was dominant was preparing—or might well be preparing, and there is no obligation to wait until the last moment to be sure of such intentions—to introduce sharia either as law applicable to all or as part of a scheme in which all citizens would be subjected to the law of their respective religion.

If it is hard for *contemporary* American constitutionalists to take this sort of "militant democracy"—pre-emptive defense of democracy—at all seriously, it is even harder to get them to do so when it involves steadily focusing on the possibility that a particular religion—the private faith of fellow citizens or of hard-up immigrants—might be different from all other religions in its core beliefs about the Constitution, and about the legitimacy of long-term deception[3] and intimidation in the cause of overthrowing it or, much more immediately, in the cause of rendering certain constitutional guarantees inapplicable within the religion's zone of dominance. And, Greenawalt's new book's commentary on these matters is rather oblique. In persuasively defending the pre-*Smith* balancing test for religious claims to exemption from generally applicable prohibitions, against Eisgruber and Sager's thesis that claims of religious exercise should enjoy constitutional protection if and only if non-exemption (failure to accommodate) would manifest a discriminatory legislative "failure of equal regard," Greenawalt takes a critical look at their suggestion (as he paraphrases it) that "[i]f legislatures or administrators fairly considered the imposition on members of minority religions of a uniform dress code, they would have made exceptions." (p. 475).[4] He comments that this overlooks a significant complexity: "It might be that the reason *not* to make a particular exception—say for girls in school wearing head scarves—is that usage reflects and conveys (for some people) a prescribed role

3. It was part of Turkey's case before the European Court of Human Rights that (in the Court's past-tense paraphrase) "[i]n order to attain its ultimate goal of replacing the existing legal order with sharia, political Islam used the method known as *takiyye*, which consisted in hiding its beliefs until it had attained that goal." *Refah Partisi*, 35 Eur. H.R. Rep. 3, § 59. The Court did not make any finding about Islamic *takiyye* (a practice which had not been denied by the applicant members of the dissolved government and party), but observed more broadly that political parties and movements may conceal their aims and profess their adherence to democracy and the rule of law until it is too late to prevent them overthrowing both. *Refah Partisi*, 35 Eur. H.R. Rep. 3, §§ 48, 80; *Refah Partisi*, 37 Eur. H.R. Rep. 1, § 101.

4. Eisgruber and Sager might protest that this absolutizes their claim, quoted by Greenawalt in the preceding sentence, that equal liberty "will call for exemptions in *most* dress code cases" (p. 475) (emphasis added).

for women that does not correspond to liberal democratic values." (p. 475) (emphasis in original).

Greenawalt's point is a fair one. But his dialectic with Eisgruber and Sager does not require or even allow him to reach the issues I am considering: (1) What if the prohibition were aimed precisely at a practice demanded or encouraged by a particular religion, *because* it is demanded or encouraged by that religion *as part of a unitary package of tenets of that religion which as a package is opposed to the Constitution*? Or again: (2) What if the prohibition were aimed precisely at a practice demanded or encouraged by a particular religion, *because* it is often imposed on members of that religion by (a) unlawful intimidation, or (b) unjustified pressure, otherwise impossible to combat effectively?

Or again, to get a bit closer to the immigration issue: (3) What if the prohibition were in the context of state aid, e.g. vouchers available for schools including religious schools, provided that they undertake neither to advocate nor to teach the desirability of introducing sharia law into the United States? Greenawalt's discussions of the conditions that states may impose on the ideas that schools receiving aid may teach are, doubtless necessarily, somewhat inconclusive. "[C]ertain [legislative] judgments about good and bad values would be constitutionally foreclosed as criteria for a state providing aid," but "[c]ourts will permit states to set some conditions . . . as Ohio required that schools receiving voucher money in Cleveland [in *Zelman v Simmons-Harris*[5]] not teach hatred of groups classified by race, religion, or ethnic background." (p. 459). On the other hand, he notes that "Justice Souter amply demonstrates that the rule against teaching hatred of groups is fuzzy enough at the edges, so that it might be understood to cover teaching of various ideas that are embraced by many religious groups" (p. 418).[6] Still, Greenawalt does not seem to draw Souter's definite conclusion that any state aid to religious schools threatens religious liberty and equality amongst religions (or entangles the state in discrimination between religions). The book's treatment, at this point, lacks the absolutism foreshadowed by its early (p. 13) acceptance of the sponsorship of Justice Brennan in *Larson v.*

5. Zelman v. Simmons-Harris, 536 U.S. 639 (2002).

6. Citing *Zelman*, 536 U.S. at 713–14; see also p. 416, where Greenawalt suggests a list of other religious (Catholic and Protestant—conspicuously not Islamic) beliefs that might be regarded as hatred of others.

Valente[7] for a near-absolutist rule of non-discrimination amongst religions. Against Noah Feldman's argument that a decisive reason for avoiding or outlawing state aid is that the constitutional rule of neutrality, applied to such aid, would entail permitting the beneficiaries to (both take the money and) teach e.g. "anti-Americanism, or sexism," Greenawalt objects (pp. 459, 469): "Although a state cannot discriminate on the basis of theological propositions of a religion, it may be able to require that a school's ethical and political teachings be not wholly at odds with premises of our liberal democracy." (p. 470).[8]

Here a central underlying issue comes into view. What if the "theological propositions of a religion" **include** *political* teachings "wholly at odds with premises of our liberal democracy" or, to speak like the European Court of Human Rights, "with the democratic ideal that underlies the whole of the [Constitution]" or, to speak I think more suitably, with the Constitution and other principles that we have taken as foundational for our law?

The matter is, I guess, not settled by cases declaring that "The Bill of Rights is a futile authority for the alien seeking admission for the first time to these shores."[9] Such sweeping declarations are qualified even by those who, like the majority in *United States v. Verdugo-Urquidez*,[10] recite them in the context of a rights-articulating provision such as the Fourth Amendment. The declarations, like the result in *Verugo-Urquidez*, were rejected by the same Justice Brennan who authored *Larson v. Valente*. It is easy to envisage judges of Brennan's (Greenawalt's?) persuasion jumping off from the absoluteness of the prohibition: "shall make no law respecting an establishment of religion." No need (the argument might run) to predicate a correlative right in aliens abroad; many citizen members of the "dis-established" religion might be deemed to have standing to challenge its discriminatory, "other-religions-establishing" restriction on their opportunity to be joined by co-religionists

7. Larson v. Valente, 456 U.S. 228 (1982).

8. Greenawalt adds, to me somewhat obscurely: "If the only concern is about discrimination, the inquiry should be whether state restrictions on forms of teaching constitute some kind of discrimination. Presumably more would need to be shown than that some religious groups actually do want to engage in the kind of teaching that is disallowed." (p. 470). Then he adds, to me more intelligibly: "[H]owever, the concern here goes beyond discrimination to whether the government impedes religious liberty by setting up standards for instruction about morals and politics with which religious groups wanting state assistance for their schools must comply." (p. 470).

9. Bridges v. Wixson, 326 U.S. 135, 161 (1945) (Murphy, J., concurring). Also quoted in United States v. Verdugo-Urquidez, 494 U.S. 259, 271 (1990).

10. *Verdugo-Urquidez*, 494 U.S. 259.

(family-members, imams, etc.) from abroad. Other absolutist pronouncements of the Court would be called in aid, such as Justice Kennedy's statement in the *Lukumi* case that:

> [A] law targeting religious beliefs as such is never permissible, if the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral, and it is invalid unless it is justified by a compelling interest and is narrowly tailored to advance that interest.[11]

Would ending immigration by Muslims, or by Muslims who will not publicly renounce sharia for America, be "targeting their beliefs as such"? Would it be "to infringe upon or restrict their practices because of their religious motivation"? The categories creak. But one can readily foresee the first part of Justice Kennedy's loosely constructed sentence being pressed into service.

To be sure, Greenawalt nowhere opts for absoluteness, but instead for a non-discrimination demand that is defeasible in principle. It's a matter of strict scrutiny, scrutiny seeking a compelling state interest. Strict scrutiny in religious liberty cases has proved "feeble." But in religious discrimination cases it has hitherto been strict enough to be uniformly fatal,[12] absent historic practices such as legislative prayers (anomalies bitterly repudiated by the Brennan absolutists).

To conclude this provocation: Because numbers—critical masses—matter, times change. A legislature looking forward from now, or fairly soon, might responsibly decide that the only likely medium-term constructive alternative to forbidding immigration by persons unwilling to renounce their religion's core theologico-political and numbers-dependent drive to impose political and legal domination will foreseeably prove to be the *state-promoted* introduction—as is beginning to be ventured in France, Germany and the U.K.—of an emasculated version of Islam, supervised by state instrumentalities responsible for selecting the teachers and preachers of that highly distinctive religion in the hope of watering down its inbuilt focus on domination, violence and submission, its division of the world into the world of Islam and the world of war, its public and private subjection of women, and other features that (so the legislature might judge) make it at best inassimilable and at worst a clear and

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11. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 533 (1993) (citations omitted).

12. Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 860–62 (2006).

mounting danger. If the latter alternative (State-sponsored Islam) is to be judged permanently unavailable here, because a plain "establishment of religion," still the resort to it by centrist European governments might go some way towards (a) showing a compelling state interest in not leaving this religion and its followers to their own devices, and thus (b) surmounting the bar raised by the beguiling but curious doctrine that discrimination against one religion is (as Greenawalt seems implicitly to contend) not only unfair but also an establishment of all the others (and of irreligion?).