Stanford – Vienna
Transatlantic Technology Law Forum

A joint initiative of
Stanford Law School and the University of Vienna School of Law

European Union Law Working Papers

No. 21

Freedom of Religion in Pluralistic Societies: A Comparative Examination of Religious Liberty in the United States and Europe

Matt A. Getz

2017

European Union Law Working Papers

edited by Siegfried Fina and Roland Vogl

About the European Union Law Working Papers

The European Union Law Working Paper Series presents research on the law and policy of the European Union. The objective of the European Union Law Working Paper Series is to share "work in progress". The authors of the papers are solely responsible for the content of their contributions and may use the citation standards of their home country. The working papers can be found at http://ttlf.stanford.edu.

The European Union Law Working Paper Series is a joint initiative of Stanford Law School and the University of Vienna School of Law's LLM Program in European and International Business Law.

If you should have any questions regarding the European Union Law Working Paper Series, please contact Professor Dr. Siegfried Fina, Jean Monnet Professor of European Union Law, or Dr. Roland Vogl, Executive Director of the Stanford Program in Law, Science and Technology, at the

Stanford-Vienna Transatlantic Technology Law Forum
http://ttlf.stanford.edu

Stanford Law School
Crown Quadrangle
559 Nathan Abbott Way
Stanford, CA 94305-8610

University of Vienna School of Law
Department of Business Law
Schottenbastei 10-16
1010 Vienna, Austria

About the Author

Matt A. Getz is a J.D. candidate at Stanford Law School and expects to graduate in June 2018. He received a B.A. in Political Science from Columbia University in 2012. His interests include U.S. constitutional law, comparative law, and international law.

General Note about the Content

Suggested Citation

This European Union Law Working Paper should be cited as:
Matt A. Getz, Freedom of Religion in Pluralistic Societies: A Comparative Examination of Religious Liberty in the United States and Europe, Stanford-Vienna European Union Law Working Paper No. 21, http://ttlf.stanford.edu.

Copyright

Abstract

Despite their common goals and historical connections, European and U.S. fundamental rights jurisprudence are often two ships passing in the night. This Working Paper addresses a key element of that jurisprudence—freedom of religion—and asks what the two bodies of law could learn from one another. It first outlines the contours of religious freedom law under the U.S. Supreme Court, the European Court of Human Rights, and the Court of Justice of the European Union. It then contrasts the U.S. and European approaches and identifies key conceptual differences. These material differences include (i) whether a religious adherent is "exercising" or "manifesting" religion at all; (ii) whether, and to what extent, courts may balance the rights of religious adherents against the rights of others in society; and (iii) whether, and to what extent, claims sounding in religious liberty should be assessed in light of other fundamental rights. This Working Paper concludes that understanding these differences could enrich and improve U.S. constitutional law on freedom of religion.

TABLE OF CONTENTS

I. INTRODUCTION AND SCOPE OF THE PAPER

Freedom of religion is an indispensable component of the basic liberties essential to human dignity. It is, in the words of the European Court of Human Rights (ECtHR), "one of the most vital elements that go to make up the identity of believers and their conception of life."[1] Its protections extend to adherents and nonadherents alike,[2] and it covers the full range of human behavior from "deeply held and private conviction[s]"[3] to communal expressions of faith.[4]

Yet while religious freedom (in some form) is nearly universally recognized,[5] the nature and extent of such freedoms—and their relationship with other societal and governmental values—vary substantially from country to country. Among the Member States of the European Union (EU) and other non-EU European nations, constitutional and historical traditions of religious liberty often diverge.[6] As the ECtHR declared, "[i]t is not possible to discern throughout Europe a uniform conception of the significance of religion in society . . . and the meaning or impact of the public expression of a religious belief will differ according to time and context."[7] Likewise, the original

---

[1] Kokkinakis v. Greece, App. No. 14307/88, ¶ 31, May 25, 1993, http://hudoc.echr.coe.int/eng?i=001-57827; *see also* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2785 (2014) (Kennedy, J., concurring) ("In our constitutional tradition, freedom means that all persons have the right to believe or strive to believe in a divine creator and a divine law. For those who choose this course, free exercise is essential in preserving their own dignity and in striving for a self-definition shaped by their religious precepts.").

[2] *Kokkinakis*, *supra* note 1, ¶ 31 ("[I]t is also a precious asset for atheists, agnostics, sceptics and the unconcerned. The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it."); *accord* Metro. Church of Bessarabia v. Moldova, App. No. 45701/99, ¶ 14, 2001-XII Eur. Ct. H.R. 81, 112 (using similar language).

[3] Işik v. Turkey, App. No. 21924/05, ¶ 51, 2010-I Eur. Ct. H.R. 341.

[4] *See* Françoise Tulkens, *Freedom of Religion Under the European Convention on Human Rights: A Precious Asset*, 2014 BYU L. REV. 509, 517-19 (discussing the "collective aspect" of religious freedom and the interplay between freedom of religion and freedom of association).

[5] The Comparative Constitutions Project allows users to compare constitutions from 194 countries worldwide. Over 180 contain some provision geared toward protecting religious freedom. CONSTITUTE PROJECT, https://www.constituteproject.org/search?lang=en&key=freerel (last visited Mar. 6, 2017).

[6] *See* Pär Hallström, *Balance or Clash of Legal Orders—Some Notes on* Margin of Appreciation, *in* 6 HUMAN RIGHTS IN CONTEMPORARY EUROPEAN LAW: SWEDISH STUDIES IN EUROPEAN LAW 59, 62 (Joakim Nergelius & Eleonor Kristoffersson eds., 2015).

[7] *See* Şahin v. Turkey, App. No. 44774/98, ¶ 109, 2005-XI Eur. Ct. H.R. 173. For a comparative study on religion law at the national level throughout Europe, see generally NORMAN DOE, LAW AND RELIGION IN EUROPE: A COMPARATIVE INTRODUCTION (2011). Doe endeavors to discover common ground in European

American colonies—much like the states that today comprise the United States—had drastically different experiences with religious liberty.[8]

Faced with a right that is vital and yet subject to such vigorous disagreement about its contours, courts have been charged with discerning the essential outlines of what religious freedom demands—and, just as importantly, what it leaves to the purview of government and society. This working paper addresses three such courts: (1) the U.S. Supreme Court, tasked with authoritatively interpreting the U.S. Constitution;[9] (2) the ECtHR, established by and responsible for interpreting and applying the European Convention on Human Rights (ECHR or the Convention);[10] and (3) the Court of Justice of the European Union (CJEU),[11] which protects "fundamental human rights enshrined in the general principles of [EU] law"[12] and—since its entry into force in 2009—interprets the EU's Charter of Fundamental Rights (CFR or the Charter).[13] These three courts—motivated by different legal norms and institutional interests—have approached this delicate interpretive task in a variety of ways.

---

national traditions but also reveals that factors like historical experience, political mobilization, and socioethnic composition weigh heavily in each country's law on religion.

[8] *See generally* STEVEN WALDMAN, FOUNDING FAITH: PROVIDENCE, POLITICS, AND THE BIRTH OF RELIGIOUS FREEDOM IN AMERICA (2008) (presenting conflicting views on religious freedom during the time of the Founding). In particular, the Virginia colony's experience with conflict between Anglican and other religions led to the 1786 Virginia Act for Establishing Religious Freedom, an important precursor to the U.S. Constitution, *see Religious Freedom in Colonial Virginia*, FACING HIST. & OURSELVES, https://www.facinghistory.org/nobigotry/readings/religious-freedom-colonial-virginia (last visited Mar. 24, 2017), and Pennsylvania's first constitution enshrined the principle of religious tolerance, *see Religion in Colonial America: Trends, Regulations, and Beliefs*, FACING HIST. & OURSELVES, https://www.facinghistory.org/nobigotry/religion-colonial-america-trends-regulations-and-beliefs (last visited Mar. 24, 2017).

[9] *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is."). The theory of judicial supremacy in U.S. law holds that the federal courts, of which the Supreme Court is the highest and supervisor, act as the final interpreter of the Constitution. *See generally* KEITH E. WHITTINGTON, POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY: THE PRESIDENCY, THE SUPREME COURT, AND CONSTITUTIONAL LEADERSHIP IN U.S. HISTORY 1-3 (2007).

[10] Convention for the Protection of Human Rights and Fundamental Freedoms, arts. 19, 32, *opened for signature* Nov. 4, 1950, 213 U.N.T.S. 221 (entered into force Sept. 3, 1953) [hereinafter ECHR].

[11] This paper uniformly refers to the "CJEU" rather than distinguishing between the court's past names. *See* KAREN DAVIES, UNDERSTANDING EUROPEAN UNION LAW 41 (6th ed. 2016).

[12] *See* Case 29/69, Stauder v. City of Ulm, 1969 E.C.R. 419, 425.

[13] Charter of Fundamental Rights of the European Union, Dec. 7, 2000, 2012 O.J. (C 326) 391 [hereinafter CFR].

This working paper proceeds from the assumption that U.S. and European law have much to learn from one another. More specifically, it undertakes a comparative study seeking to identify key discrepancies and similarities between the approaches taken by the U.S. Supreme Court and the ECtHR (and, to some extent, the CJEU[14]) through the lens of the most persistent problems in U.S. constitutional law on freedom of religion. It concludes that the U.S. Supreme Court could look to Europe when confronted with vexing questions on religious freedom—particularly when such freedom is in tension with other societal interests or associated rights like privacy, dignity, expression, or association. European law on balancing conflicting interests in pluralistic societies, as well as its appreciation for intertwined and interrelated substantive rights, could inform and improve U.S. constitutional law.

II. FREEDOM OF RELIGIOUS BELIEF AND EXERCISE: AN OVERVIEW OF CASE LAW AND DOCTRINE FROM EUROPE AND THE UNITED STATES

This Part presents a (necessarily brief) survey of general interpretive principles in the United States and Europe as to claims involving religious freedom.

A. Freedom of Religion Under the U.S. Constitution

The Religion Clauses of the First Amendment to the U.S. Constitution, like many of the fonts of fundamental rights in U.S. law, are stated simply and without qualification: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."[15] From these sixteen words, the U.S. Supreme Court has spun an intricate doctrinal web imposing restrictions and affirmative obligations on governmental actors.

---

[14] *See infra* Part II.B.2 (explaining why CJEU case law on freedom of religion—particularly case law interpreting religious-protective provisions of the Charter—is, for the time being, rather limited).

[15] U.S. CONST. amend. I. Traditionally, the first portion is termed the "Establishment Clause"; the second, the "Free Exercise Clause." *See generally First Amendment and Religion*, U.S. CTS., https://shar.es/1UuVm1 (last visited Mar. 7, 2017). The two clauses may point in conflicting directions: The government may have a duty to protect free exercise of religion, but in doing so it cannot go so far as to "establish[]" a religion. While a certain degree of "tension inevitably exists between the Free Exercise and the Establishment Clauses," *see* Comm. for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 788 (1973), the U.S. Supreme Court has recognized "play in the joints" between them—areas in which the government may accommodate free exercise without offending the Establishment Clause. *See* Locke v. Davey, 540 U.S. 712, 713 (2004) (quoting Walz v. Tax Comm'n, 397 U.S. 664, 669 (1970)).

1. Impermissible entanglement between Church and State

Contrary to popular belief, the U.S. Constitution erects no insurmountable wall between Church and State. The Court has long recognized that "total separation is not possible" and "[s]ome relationship between government and religious organizations is inevitable."[16] Rather than total separation, the government must "pursue a course of 'neutrality' toward religion, . . . favoring neither one religion over others nor religious adherents collectively over nonadherents."[17] Thus, the "clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another."[18]

However, short of "sponsorship, financial support, [or] active involvement of the sovereign in religious activity,"[19] government actions that affect but do not expressly favor religions are more difficult to assess for purposes of the Establishment Clause. Over time, the Supreme Court developed and refined a three-part test. Government actions that affect religious institutions are permissible if they (1) "have a secular legislative purpose," (2) have a "principal or primary effect . . . that neither advances nor inhibits religion," and (3) do not "foster 'an excessive government entanglement with religion.'"[20] At bottom, then, the Establishment Clause prevents both outright *endorsement* of religions as well as subtle *entanglement* with religious institutions.[21]

---

[16] Lemon v. Kurtzman, 403 U.S. 602, 614 (1971). For example, the same eighteenth-century Congress that submitted the First Amendment for ratification also began each legislative session with a prayer conducted by official chaplains. *See* Town of Greece v. Galloway, 134 S. Ct. 1811, 1818-19 (2014).

[17] Bd. of Educ. v. Grumet, 512 U.S. 687, 696 (1994) (quoting *Nyquist*, 413 U.S. at 793).

[18] Larson v. Valente, 456 U.S. 228, 244 (1982). Most Establishment Clause cases involve executive or legislative action, but it also imposes a limitation on the judiciary: "Judges are not to take sides in disagreements about interpretation of religious doctrine; the judicial role in such contexts is limited to neutral application of secular legal principles." WILLIAM J. RICH, 1 MODERN CONSTITUTIONAL LAW § 10:11 (3d ed. 2016).

[19] *Walz*, 397 U.S. at 668.

[20] *Lemon*, 403 U.S. at 612-13 (quoting *Walz*, 397 U.S. at 674). The *Lemon* test has been subject to revisions and criticisms beyond the scope of this paper. For treatment on the subject, see W. COLE DURHAM & ROBERT SMITH, 1 RELIGIOUS ORGANIZATIONS AND THE LAW § 2:10 (2013).

[21] *See* Lynch v. Donnelly, 465 U.S. 668, 687-88 (1984) (O'Connor, J., concurring) (attempting to distill Establishment Clause jurisprudence into those two categories).

2. Impermissible burdens on free religious exercise

If the Establishment Clause prevents government endorsement of or entanglement with religion, the Free Exercise Clause serves as a shield protecting persons in their personal or communal expressions of faith.

i. Compulsion, punishment, or discrimination

"At a minimum, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons."[22] Noncontroversial examples include that the government may not compel officeholders to declare their belief in God,[23] disqualify religious leaders from holding public office,[24] or discriminate against certain religious groups in the use of a public park.[25]

On occasion, the Court has also inferred antireligious purpose in facially nondiscriminatory governmental actions. In *Church of the Lukumi Babalu Aye*, for example, a community adopted severe penalties for animal slaughter after a Santeria church leased local land.[26] Although the law on its face did not target the Santeria church, the Court determined that "suppression of the central element of the Santeria worship service was the object of the ordinances."[27] It held that legislators "may not devise mechanisms, overt or disguised, designed to persecute or oppress a religion or its practices."[28]

ii. Hybrid claims involving other freedoms

The "hybrid rights" doctrine holds that governmental action affecting the "Free Exercise Clause in conjunction with other constitutional protections" is subject to heightened scrutiny and will

---

[22] Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 532 (1993).

[23] Torcaso v. Watkins, 367 U.S. 488, 496 (1961).

[24] McDaniel v. Paty, 435 U.S. 618, 627-28 (1978).

[25] Fowler v. Rhode Island, 345 U.S. 67, 69-70 (1953). Because using a public park involves expressive conduct also protected by other First Amendment clauses, U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people peaceably to assemble . . . ."), *Fowler* could potentially be recast under the "hybrid" rights claims discussed in Part II.A.2.ii below.

[26] 508 U.S. at 525-28.

[27] *Id.* at 534.

[28] *Id.* at 547.

be struck down unless supported by a compelling governmental interest.[29] Thus, a discretionary licensing system allowing government officials to deny a license to any cause they deem "nonreligious" was declared unconstitutional[30]—but it likely would have been unconstitutional under the Free Speech Clause[31] whether or not it involved a question of faith.[32] Likewise, a compulsory school attendance law challenged by members of an Amish community for interference with their parental rights to oversee the education and spiritual development of their children was ruled unconstitutional under a hybrid-style theory that did not depend on the religious nature of the claim.[33]

Yet it bears emphasizing that the hybrid rights doctrine has received minimal attention in recent years.[34] When it has, it has been treated with skepticism.[35] Much of the objection stems from the perception that, in relegating cases to "hybrid" status, the Supreme Court was not so much distilling as "effectuat[ing] a wholesale overturning of settled law" on free exercise.[36] It also is arguably inconsistent with much of U.S. constitutional law, which typically applies discrete analytical structures depending on the right being asserted.[37] Thus, it is one thing to recognize that religious liberties

---

[29] *See* Emp't Div. v. Smith, 494 U.S. 872, 881 (1990). The hybrid rights doctrine developed from an effort by Justice Scalia to reconcile inconsistent case law on generally applicable laws discussed in Part II.A.2.iii below. *See also* DURHAM & SMITH, *supra* note 20, § 2:59; *infra* notes 38-41 and accompanying text.

[30] Cantwell v. Connecticut, 310 U.S. 296, 303 (1940).

[31] U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech . . . .").

[32] *See Smith*, 494 U.S. at 881 (construing *Cantwell* as a "hybrid" case).

[33] Wisconsin v. Yoder, 406 U.S. 205, 207-09, 215-19 (1972); *see* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 633-40 (1943) (holding unconstitutional a statute requiring children in public school to salute the U.S. flag under broad principles of liberty and expression even though the claim was brought by Jehovah's Witnesses on religious grounds); *see also* Pierce v. Soc'y of Sisters, 268 U.S. 510, 534-35 (1925) (recognizing "the liberty of parents and guardians to direct the upbringing and education of children under their control").

[34] *See* William L. Esser IV, *Religious Hybrids in the Lower Courts: Free Exercise Plus or Constitutional Smoke Screen?*, 74 NOTRE DAME L. REV. 211, 242-43 (1998) (surveying lower courts' treatment of hybrid rights claims and concluding that "these cases are being decided based solely upon the strength or weakness of the 'other' constitutional provision without reference to the Free Exercise Clause").

[35] *See, e.g.*, Axson-Flynn v. Johnson, 356 F.3d 1277, 1295-96 (10th Cir. 2004) (stating the court's desire to avoid "open[ing] the floodgates for hybrid-rights claims, as nearly every plaintiff with a free exercise claim would be able to assert an additional non-frivolous constitutional claim"); *see also* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 567 (1993) (Souter, J., concurring in part and concurring in the judgment) (labeling as "ultimately untenable" the distinction between pure Free Exercise claims and "hybrid" claims).

[36] *See Smith*, 494 U.S. at 908 (Blackmun, J., dissenting); *see also infra* notes 41-42 and accompanying text.

[37] *But see infra* Part III.C (discussing other U.S. constitutional doctrines that employ hybrid-type analysis).

implicate other freedoms—it is quite another to assess *how* such implications should affect the legal analysis or framework.

iii. Generally applicable laws

Perhaps the most elusive question has been whether and to what extent people can bring free exercise claims against generally applicable governmental action. For many years, U.S. case law was internally divided, with fact-specific and often hard-to-reconcile differences between cases.[38] Generally applicable laws that nonetheless burdened free exercise were subjected to heightened scrutiny but were upheld if the state demonstrated that the burden was "essential to accomplish an overriding governmental interest."[39] Ultimately, however, it proved difficult for courts to distinguish permissible from impermissible burdens on religious exercise. This in turn "open[ed] the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind."[40] In *Smith*, the Court reversed course, holding that incidental burdens on religious exercise resulting from generally applicable laws were not subject to challenge under the Free Exercise clause.[41]

Smith attempted to resolve the issue; instead, it set off a firestorm. Congress responded by attempting to legislatively overrule the decision.[42] The Court responded, holding RFRA

---

[38] *Compare, e.g.*, Braunfeld v. Brown, 366 U.S. 599, 600-01, 606 (1961) (upholding a law requiring businesses to close on Sundays because it "impose[d] only an indirect burden on the exercise of religion" of merchants who also closed shop on Saturday for religious reasons), *with, e.g.*, Murdock v. Pennsylvania, 319 U.S. 105, 106-07, 110-12 (1943) (holding that a generally applicable flat tax imposed on door-to-door canvassing selling "merchandise of any kind" was unconstitutional as applied to Jehovah's Witnesses because it impermissibly burdened the exercise of their faith).

[39] United States v. Lee, 455 U.S. 252, 257 (1982); *see id.* at 257-60 (upholding social security taxes against a free exercise challenge "[b]ecause the broad public interest in maintaining a sound tax system is of such a high order" that "religious belief in conflict with the payment of taxes affords no basis for resisting the tax"); *see also* Sherbert v. Verner, 374 U.S. 398, 399-409 (1963) (holding that no compelling state interest justified the state commission's decision that a Seventh-Day Adventist was not entitled to unemployment benefits because she had refused to work on Saturdays in accordance with her religious beliefs).

[40] *Smith*, 494 U.S. at 888.

[41] *Id.* at 876-82. *Smith* involved a generally applicable state criminal statute that prohibited possession of controlled substances including peyote, which is ingested for sacramental purposes during Native American Church ceremonies. *Id.* at 874.

[42] *See* Religious Freedom Restoration Act (RFRA) of 1993, Pub. L. No. 103-141, § 3, 107 Stat. 1488, 1488-89 (codified as amended at 42 U.S.C. § 2000bb-1). RFRA declares: "Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability . . . . [unless that burden] (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of

unconstitutional as applied to the states,[43] though not to the federal government.[44] In a basic sense, then, free exercise law in the United States is fractured: generally applicable actions of the federal government are subject to RFRA's balancing test, whereas those of state governments are governed by *Smith*'s rule.

3. Open questions in U.S. religious liberty law

Surveying U.S. constitutional law on freedom of religion reveals two open questions likely to occupy the Supreme Court in the near future.

First, what qualifies as a *burden* on *exercise* of religion is presently undertheorized. Early cases sought to distinguish exercise according to an opinion–action distinction[45] or by asking whether the governmental action implicated religious activities.[46] More recently, the Court has been loath to assess the religious questions lurking behind Free Exercise claims.[47] In 2014, it held that a regulation burdens corporations' religious exercise if it incentivizes them to "engage in conduct that seriously violates their religious beliefs"[48]—without asking what it means for corporations to "exercise" religion at all.[49]

---

furthering that compelling governmental interest." *Id.* In attempting to restore the rule set out in cases like Wisconsin v. Yoder, 406 U.S. 205, 215 (1972) ("[O]nly those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion."), Congress sought to provide additional statutory protections above the constitutional floor set by *Smith*. Congress is typically free to enact greater protections than those required by the Constitution, but in this case, the Act may threaten to collide with the Establishment Clause. *See* City of Boerne v. Flores, 521 U.S. 507, 536 (Stevens, J., concurring) ("In my opinion, [RFRA] is a 'law respecting an establishment of religion' that violates the First Amendment . . . ."); *see also supra* note 15.

[43] *City of Boerne*, 521 U.S. at 529-36. The Court's opinion rested on its holding that Congress had exceeded its powers under Section 5 of the Fourteenth Amendment, *see id.*, an issue beyond the scope of this paper.

[44] *See* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2761 (2014).

[45] *E.g.*, Reynolds v. United States, 98 U.S. 145, 164 (1878) (concluding that the Free Exercise Clause left Congress "free to reach actions" but powerless to reach "mere opinion").

[46] *E.g.*, Bowen v. Roy, 476 U.S. 693, 695, 700-01 (1986) (rejecting Native American parents' objection to the government's use of a social security number for their daughter because the Court failed to see how using an identification number implicated or impaired the parents' "freedom to believe, express, and exercise" religion); *see id.* at 700 ("[The father] may no more prevail on his religious objection to the Government's use of a Social Security number for his daughter than he could on a sincere religious objection to the size or color of the Government's filing cabinets.").

[47] *Cf.* Thomas v. Review Bd., 450 U.S. 707, 716 (1981) ("Courts are not arbiters of scriptural interpretation.").

[48] *Hobby Lobby*, 134 S. Ct. at 2775.

[49] *See id.* at 2793-97 (Ginsburg, J., dissenting).

Unless the Court answers this question,[50] it will continue to struggle with RFRA claims for exemption from general laws, claims that could potentially touch upon an increasingly wider swath of regulation.[51]

Second, for state laws beyond RFRA's reach,[52] it remains to be seen whether the "hybrid claims" doctrine will blunt *Smith*'s edge.[53] Many have called for the Court to reinvigorate the doctrine,[54] but it is an open question whether the Court will assess complex claims touching on a diversity of rights and governmental regulatory interests[55] with a more open balancing approach.

---

[50] At the time of writing, Justice Neil Gorsuch has filled the seat on the Court formerly occupied by Justice Scalia but has not yet weighed in on a case involving the religion clauses. Justice Gorsuch brings to the Court a well-developed view on free exercise jurisprudence, one that tends to favor the individual rights of religious adherents. *See* Sean R. Janda, Essay, *Judge Gorsuch and Free Exercise*, 69 STAN. L. REV. ONLINE 118, 120 (2017) (reviewing decisions from the U.S. Court of Appeals for the Tenth Circuit and finding that then-Judge Gorsuch gave "broad latitude to religious claimants to define the scope of their religious beliefs and determine what acts (or omissions) infringe those beliefs" and believed that the Free Exercise Clause "repudiates liberal neutrality and enshrines religion as a favored good in the United States").

[51] *See, e.g.*, Michael A. Helfand, *Identifying Substantial Burdens*, 2016 U. ILL. L. REV. 1771, 1773 ("The question of substantial burden under RFRA has also emerged as one of the key issues in controversies over the refusal of some religiously-motivated 'public accommodations' to provide their services at same-sex weddings or commitment ceremonies. In three recent, separate, and highly publicized cases, a baker, a florist, and a photographer were each found liable for impermissibly discriminating on the basis of sexual orientation—in one case, over and above the defendant's attempt to assert RFRA as a defense." (footnotes omitted)). As discussed below, the open question of when religious adherents are entitled to exemptions or accommodations from general laws is currently being debated in the European context as well. *See* Frédérique Ast, *Reflections on the Recognition of a Right to Reasonable Accommodation in EU Law*, *in* BELIEF, LAW AND POLITICS: WHAT FUTURE FOR A SECULAR EUROPE? 131 (Marie-Claire Foblets et al. eds., 2014) (noting that accepting many forms of reasonable religious accommodation "may be hard to square" with law and tradition from secularist European countries); Stephanos Stavros, *Freedom of Thought, Conscience and Religion: A Policy Priority for the Council of Europe*, *in* BELIEF, LAW AND POLITICS, *supra*, at 117, 118 ("[R]easonable accommodation will probably become the focus of freedom-of-religion claims."); Alice Donald & Erica Howard, The Right to Freedom of Religion or Belief and Its Intersection with Other Rights 11-12 (2015), http://www.ilga-europe.org/sites/default/files/Attachments/the_right_to_freedom_of_religion_or_belief_and_its_intersection_with_other_rights__0.pdf (noting the increase in conscientious objection-type claims brought by pharmacists, midwives, marriage registrars, wedding- or fertility-related services, hotel accommodations, and the like); *see also infra* Part III.B.

[52] *See supra* notes 43-44 and accompanying text.

[53] Here, too, one wonders if Justice Gorsuch would vote to overrule *Smith* and restore pre-*Smith* religious liberty as a constitutional matter. *See* Hugh Hewitt & Ronald A. Klain, *How Will Neil Gorsuch Change the Supreme Court?*, WASH. POST (Feb. 1, 2017), http://wapo.st/2ksuSuP?tid=ss_tw ("[I]n fact Judge Gorsuch may be more inclined to protect religious liberty than Justice Scalia was in [*Smith*]."); *see also supra* note 50.

[54] *E.g.*, Ryan S. Rummage, Comment, *In Combination: Using Hybrid Rights to Expand Religious Liberty*, 64 EMORY L.J. 1175, 1181-82 (2015) (arguing that "hybrid rights cases provide stronger protections for religious liberty" than pure free exercise claims and allow for better "balanc[ing of] the relevant factors between the government and the claimant").

[55] *See Hobby Lobby*, 134 S. Ct. at 2785 (Kennedy, J., concurring) ("[I]n a complex society and an era of pervasive governmental regulation, defining the proper realm for free exercise can be difficult.").

B. Freedom of Religion in Europe

European laws on freedom of religion diverge substantially "by virtue of divergent historical, political and social factors."[56] Yet there are "profound" similarities between national approaches, possibly "suggest[ing] a homogeneous European approach"[57]—one made even more uniform by supranational legal instruments that purport to apply baseline fundamental rights principles to all members or signatories. Two such instruments, the ECHR and the CFR, are discussed below.

1. Case law and standards from the ECtHR

The ECHR provides several protections for freedom of religion. Most notable (and directly applicable) among them is Article 9:

> 1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.
>
> 2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.[58]

At the heart of Article 9 is its distinction between the "internal" aspect of the right—the right of belief and identity in each person's *forum internum*, which is "absolute" and which admits of "no limitation, no restriction, no interference or control by the State"[59]—and the "external" aspect, dealing with "manifestation," which is subject to limitation if justified under the terms of Article 9(2).[60]

---

[56] DOE, *supra* note 7, at 2.

[57] *Id.*

[58] ECHR, *supra* note 10, art. 9.

[59] Tulkens, *supra* note 4, at 513.

[60] *Id.* at 516. Scholars have recognized that distinguishing between belief and manifestation—i.e., between internal and external aspects—can be quite difficult. *See, e.g.*, *id.* This distinction between core and peripheral aspects of a fundamental right is present in some U.S. constitutional law doctrines—*see, e.g.*, United States v. Marzzarella, 614 F.3d 85, 96-98 (3d Cir. 2010) (noting that for both First Amendment Free Speech Clause cases and Second Amendment (right to keep and bear arms) cases, courts distinguish between the "core" elements of the right (any invasions of which are subject to strict scrutiny by courts) and non-core elements (intermediate scrutiny))—but does not exist as such for religious law claims under the First Amendment.

The Convention also recognizes "the right to respect for . . . private and family life";[61] "the right to freedom of peaceful assembly and . . . association with others";[62] and "the right to education" and "the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions."[63] Moreover, each of these rights must "be secured without discrimination on any ground such as . . . religion."[64]

This paper identifies three notable elements of ECtHR case law: (i) its tightrope walking between encouraging pluralism and allowing states ample margins of appreciation; (ii) its tendency to interpret rights "in light of" one another rather than in a vacuum; and (iii) its distinction between acts that *manifest* religious belief and acts that are merely *motivated by* religious belief. Each is discussed below, along with a recent case that may call the ECtHR's jurisprudential tendencies into question.

i. Emphasizing pluralism and state margins of appreciation

Central to the ECtHR's analyses on what types of governmental measures are "necessary in a democratic society"[65] is the Court's focus on pluralism as independent good.[66] As the Court wrote in a case involving freedom of association of a national minority:

> [A]ssociations formed for . . . purposes [such as] protecting cultural or spiritual heritage, pursuing various socio-economic aims, *proclaiming or teaching religion*, seeking an ethnic identity or asserting a minority consciousness, are also important to the proper functioning of democracy. For *pluralism is also built on the genuine recognition of, and respect for, diversity* and the dynamics of cultural traditions, ethnic and cultural identities, [and] *religious beliefs* . . . . The harmonious interaction of persons and groups with varied identities is essential for achieving social cohesion.[67]

---

[61] *Id.* art. 8(1).

[62] *Id.* art. 11(1).

[63] *Id.* protocol, art. 2.

[64] ECHR, *supra* note 10, art. 14.

[65] For an example of the ECtHR's analysis on whether restrictions are necessary in a democratic society, see the discussion of the *Eweida* case in note 94 below.

[66] *See, e.g.*, *Metro. Church of Bessarabia*, *supra* note 2, ¶ 115 ("[I]n a democratic society, in which several religious coexist within one and the same population, it may be necessary to place restrictions on this freedom in order to reconcile the interests of the various groups and ensure that everyone's beliefs are respected . . . .").

[67] Gorzelik v. Poland, App. No. 44158/98, ¶ 92, 2004-I Eur. Ct. H.R. 219, 261-62 (emphasis added).

Pluralism involves two key elements: (1) respect for minorities and the concomitant requirement that majority "[b]elievers must 'accept the legitimacy of there being a divergence of views on matters of fundamental significance to them within the broader society of which they form a part'";[68] and (2) a social cohesion- rather than individual-oriented view of religious liberty. These elements can be in significant tension. If, for example, an unpopular minority religion faces discrimination because it is viewed as undemocratic, amoral, or otherwise against the grain of society, it might be difficult to simultaneously grant the religious its space to breathe while also respecting the majority in its quest for cohesion. The ECtHR tends to operate as the scales of justice, balancing these two contrary ideas on a case-by-case basis.[69]

A separate but related (if at times contradictory) aspect of ECtHR case law is the longstanding recognition that national and local governments enjoy a "margin of appreciation" in their determinations about what is necessary for democratic and pluralistic society.[70] The margin of appreciation essentially operates as a doctrine of deference[71]—particularly when the European polities

---

[68] Donald & Howard, *supra* note 51, at 18 (quoting MALCOLM D. EVANS, MANUAL ON THE WEARING OF RELIGIOUS SYMBOLS IN PUBLIC AREAS 50 (2009)). One commentator called the ECtHR "a potential motor for the civic inclusion of religious minorities" for this reason. Matthias Koenig, *The Right to Religious Freedom: A Modern Pattern of Differentiation and Its Development*, *in* BELIEF, LAW, AND POLITICS, *supra* note 51, at 71, 78.

[69] Much of this tension comes from European law's recognition that, at least in some cases, individual religious freedoms collide with other freedoms. *See* David Pollock, *An Ill-Disguised Defence of Religious Privilege*, *in* BELIEF, LAW, AND POLITICS, *supra* note 51, at 245, 245-46 (arguing that calls for increased religious protection in Europe ignore "the rights of vulnerable minorities oppressed by religion" and that cohesive secularism has a "strong claim to be the best guarantor of freedom of religion or belief"). As other commentators have identified, this produces the odd situation of "liberal objections to a liberal right" in which "freedom of religion or belief has . . . received the somewhat dubious reputation as a human right which allegedly is less human, less liberal, less egalitarian and less secular than other human rights." Heiner Bielefeldt, *Freedom of Religion or Belief: Anachronistic in Europe?*, *in* BELIEF, LAW, AND POLITICS, *supra* note 51, at 55.

[70] *See, e.g.*, Hallström, *supra* note 6, at 60. Hallström writes that margin of appreciation is the means selected by the ECtHR "to balance, via interpretation, the room to monoeuvre of the states and rights of individuals granted by the Convention." *Id.* at 62.

[71] *See* Wingrove v. United Kingdom, App. No. 17419/90, ¶ 58, Nov. 25, 1996, http://hudoc.echr.coe.int/eng?i=001-58080 ("What is likely to cause substantial offence to persons of a particular religious persuasion will vary significantly from time to time and from place to place, especially in an era characterised by an ever growing array of faiths and denominations. By reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements with regard to the rights of others as well as on the 'necessity' of a 'restriction' . . . .").

are split on an issue—allowing local governments to make sensitive and difficult decisions about the cohesion of their own societies.[72] Commentators have note that this deference serves the ECtHR in its unique and difficult position as a quasi-supraconstitutional court.[73] The margin is appreciably wider when it comes to "religion and morals, where national conceptions vary."[74] Yet this deference only applies if a state provides intelligible reasons for its decisions—it does not shelter unreasoned or arbitrary action that cannot be defended by reference to state interests.[75]

The *Eweida* cases[76] provide an example. The third applicant, Ms. Ladele, was a fundamentalist Christian employed as a local registrar who objected to a local policy requiring her to register same-sex partnerships.[77] After she was subject to formal disciplinary proceedings, she complained that she had been discriminated against on account of her religion in violation of Article 14 (taken in

---

[72] *See, e.g.*, İ.A. v. Turkey, App. No. 42571/98, ¶ 25, 2005-VIII Eur. Ct. H.R. 249, 257 ("In examining whether restrictions to the rights of freedoms guaranteed by the Convention can be considered 'necessary in a democratic society', . . . the Contracting States enjoy a certain but not unlimited margin of appreciation . . . . States have a wider margin of appreciation when regulating freedom of expression in connection with matters liable to offend intimate personal convictions within the sphere of morals or religion . . . ."). *İ.A.* involved a book, *Yasak Tümceler* (*The Forbidden Phrases*), for which its author was punished under Turkish blasphemy law. *Id.* ¶¶ 5-16. The parties agreed that the conviction interfered with Article 10 ECHR's freedom of expression, so the case turned on whether the interference was necessary and justified. *Id.* ¶ 22. The Court viewed its task as "weighing up the conflicting interests of the exercise of two fundamental freedoms, namely the right of the applicant to impart to the public his views on religious doctrine . . . and the right of others to respect for their freedom of thought, conscience and religion." *Id.* ¶ 27. The Court recognized the importance of pluralism but held that the book could appreciably be interpreted as "an abusive attack on the Prophet of Islam," and thus it "met a 'pressing social need'" to punish the author. *Id.* ¶¶ 28-32. *İ.A.* thus demonstrates that the margin of appreciation may work for or against notions of pluralism depending on the circumstances.

[73] Hallström, *supra* note 6, at 61.

[74] *Id.* at 62; *see Şahin*, *supra* note 7, at ¶ 109 ("Where questions concerning the relationship between State and religions are at stake, on which opinion in a democratic society may reasonably differ widely, the role of the national decision-making body must be given special importance . . . ."); *see also* Schüth v. Germany, App. No. 1620/03, ¶ 56, 2010-V Eur. Ct. H.R. 397, 423 ("There will also be a wide margin if the State is required to strike a balance between competing private and public interests or different Convention rights . . . .").

[75] *See, e.g.*, *Schüth*, *supra* note 74, at ¶¶ 66, 69 ("[T]he Court cannot but note the brevity of the [state body's] reasoning . . . . [A] more detailed examination was required when weighing the competing rights and interests at stake, particularly as in this case the applicant's right was weighed against a collective right. . . . [A decision] cannot be subjected . . . only to a limited judicial scrutiny . . . ." (citation omitted)).

[76] Eweida v. United Kingdom, App. Nos. 48420/10, 59842/10, 51671/10 & 36516/10, 2013-I Eur. Ct. H.R. 215. *Eweida* was a consolidated decision involving four separate applicants and thus presents a rich variety of issues related to Article 9 ECHR and other provisions.

[77] *Id.* ¶¶ 23-27.

conjunction with Article 9) ECHR.[78] The ECtHR recognized that her claim "fell within the ambit of Article 9 and Article 14" but noted that states "enjoy a wide margin of appreciation" in promoting equal opportunities and requiring state employees not to discriminate.[79] Finding the limitations proportionate, the Court upheld them as within the state's margin of appreciation.[80] Both features of ECtHR case law on freedom of religion are thus visible in *Eweida*: broad, societal views on pluralism, coexistence, and tolerance; and a margin of appreciation afforded to states in search of that goal.

ii. Rights interpreted in light of one another

The ECtHR rarely considers Article 9 ECHR claims in a vacuum. Instead, the Court often looks to other sources of fundamental rights. From the perspective of the religious applicant, this can either be freedom-enhancing (e.g., a church organization's claim under Article 9 ECHR will be bolstered by the right to assembly and association recognized by Article 11(1) ECHR[81]) or freedom-reducing (e.g., a parent's religiously motivated control over her child's healthcare protected by Articles 8-9 ECHR may collide with her child's independent right to life and other privacy interests).

"[I]n a democratic society, hardly any rights are totally absolute."[82] Necessarily, freedom of religion must be set against the rights and freedoms of others, and ECtHR case law reflects this fact. Thus, even when assessing an individual claim, the Court has asked whether government-imposed limitations on religious manifestations "pursu[e] the legitimate aim of protecting the rights of others."[83] *Eweida*, again, provides an example. The third applicant's claim about being disciplined for refusing to

---

[78] *Id.* ¶¶ 26-30, 70-72.

[79] *Id.* ¶¶ 103-05.

[80] *Id.* ¶¶ 105-06.

[81] *See, e.g.*, *Jehovah's Witnesses of Moscow*, *infra* note 102; *see also* Murphy v. Ireland, App. No. 44179/98, 2003-IX Eur. Ct. H.R. 1 (analyzing a pastor's complaint about a legal prohibition against radio broadcasts of religious advertising under Article 10 ECHR's freedom-of-expression rubric with a particular concern for religious liberty); Hoffman v. Austria, App. No. 12875/87, ¶¶ 10-11, 30-36, June 3, 1993 (finding that depriving the applicant of child custody in part because she was a Jehovah's Witness constituted a violation of Article 8 (respect for private life) taken in conjunction with Article 14 (antidiscrimination) ECHR).

[82] Tulkens, *supra* note 4, at 520-21 (collecting cases on this point).

[83] Council of Eur. & ECtHR, Overview of the Court's Case-Law on Freedom of Religion 24-25 (2013), http://www.echr.coe.int/Documents/Research_report_religion_ENG.pdf.

register homosexual marriages[84] sounded in Article 14 in conjunction with Article 9 (that is, she complained that she had been discriminated against on the basis of her religion).[85] The Court took that into account, but it also considered same-sex couples' rights to be free from discrimination and their interest in "legal recognition and protection of their relationship."[86] Likewise, after the fourth applicant, a therapist, refused to provide psychological counseling services to same-sex couples and was thus terminated,[87] the Court recognized the applicant's religious liberty claim but rejected it on grounds that "the employer's action was intended to secure the implementation of its policy of providing a service without discrimination."[88]

Simply put, the ECtHR recognizes that there is often more than one set of rights in the room, and it adopts its jurisprudence to best analyze disputes according to this rubric.

iii. "Manifestation" of religion

While the "core" of religious belief protected by the ECHR is not subject to invasion by the State, freedom to *manifest* that religion—a term that necessarily refers to religious belief and conduct in the public rather than private sphere[89]—is subject to governmental limitation if "prescribed by law and . . . necessary in a democratic society."[90] Because the ECHR provides no protection for acts outside Article 9, the ECtHR is often forced to distinguish between manifestations and mere religiously motivated (but unprotected) acts.

Here, too, *Eweida* provides guidance. Manifestation "may take the form of worship, teaching, practice and observance."[91] Yet, as the ECtHR made clear, "it cannot be said that every act which is

[84] *See supra* notes 77-78 and accompanying text.

[85] *See Eweida*, *supra* note 76, ¶ 70.

[86] *Id.* ¶¶ 103-05.

[87] *Id.* ¶¶ 31-37.

[88] *Id.* ¶¶ 107-09.

[89] One respected dictionary defines "manifest" as "[t]o make . . . evident to the eye" and to "show plainly, disclose, reveal." *Manifest, v.*, OXFORD ENG. DICTIONARY, https://tinyurl.com/ya9t4gsv (last visited Mar. 30, 2017).

[90] ECHR, *supra* note 10, art. 9(2).

[91] *Eweida*, *supra* note 76, ¶ 80. This language comes from the Charter itself. *See* ECHR, *supra* note 10, art. 9(1) ("Everyone has the right to . . . manifest his religion or belief, in worship, teaching, practice and observance.").

in some way inspired, motivated or influenced by [a religious belief] constitutes a 'manifestation' of the belief."[92] The Court determined that the ECHR requires that manifestations "be intimately linked to the religion or belief," with a "close and direct nexus between the act and the underlying belief [to] be determined on the facts of each case."[93] Thus, while the ECtHR tends to apply its manifestation analysis somewhat charitably toward religious applicants,[94] ECHR case law protects against clever applicants seeking to avoid local obligations by cloaking themselves in any religious belief.

The *Pichon* case involved French pharmacists who complained that being punished for refusing to provide contraceptives to women with valid prescriptions violated their religious freedom.[95] Appling the test discussed above, the Court asked whether the activities in the application were "closely linked to these matters such as acts of worship or devotion forming part of the practice of a religion or a belief."[96] However capacious the term *manifest* might be, "the Convention does not always guarantee the right to behave in public in a manner governed by" a religious belief, and *practice* of religion "does not denote each and every act or form of behaviour motivated or inspired by a religion."[97] Thus, the legal requirement to issue contraceptives in accordance with valid prescriptions could not be avoided by a religious objection because the religious claimants could "manifest those beliefs in many ways outside the professional sphere."[98] The ECtHR itself has since interpreted this

---

[92] *Eweida*, *supra* note 76, ¶ 82.

[93] *Id.*

[94] In *Eweida*, for instance, the Court held that wearing a visible cross at work and refusing to provide counseling services to homosexual couples qualified as manifestations of religion. *See id.* ¶¶ 97, 108. Of course, that finding is merely a threshold determination that Article 9(2) ECHR applies; the Court went on to find that several of the applicants' restricted manifestations were necessary in a democratic society and thus did not violate the Convention. *Id.* ¶¶ 100, 106, 109-10. Most interestingly, the Court decided two claims brought by employees denied the right to wear visible cross necklaces differently. While it held that the State was justifying in banning the cross for a nurse due to health and safety concerns, no such justification supported banning the cross for an airline employee. *See id.* ¶¶ 94-95, 99-100.

[95] Pichon v. France, App. No. 49853/99, Oct. 2, 2001, http://hudoc.echr.coe.int/eng?i=001-22644. This excerpted decision on admissibility does not have paragraph numbers.

[96] *Id.*

[97] *Id.*

[98] *Id.* It is not clear whether *Pichon* is best characterized as holding that the applicant had not set forth any "manifestation" of religion at all—and had thus failed to make out a case under Article 9 ECHR—or, alternatively, that any minor interference with his religious manifestation was necessary to a democratic society.

case to stand for the proposition that Article 9 ECHR "does not allow general laws to be broken."[99] While this is potentially inconsistent with the more recent *Eweida* decision, which articulated a test requiring a close causal connection to a religious belief or practice but which applied that test loosely,[100] *Pichon* and the idea it represents stand ready to guard against applicants bringing frivolous claims for exemption from generally applicable laws.[101]

iv. Recent turn toward U.S.-style deference to religious adherence?

One commentator addressing post-2010 developments in European religious liberty law identified *Jehovah's Witnesses of Moscow v. Russia*[102] as a landmark case.[103] He noted that the ECtHR's opinion was a full-throated defense of individual liberty and a message that European states must not smuggle value judgments about particular religions into assessing individual claims.[104] ECtHR wrote:

> The Court further reiterates that *the State's duty of neutrality and impartiality prohibits it from assessing the legitimacy of religious beliefs or the ways in which those beliefs are expressed* or manifested . . . . Accordingly, *the State has a narrow margin of appreciation* and must advance serious and compelling reasons for an interference with the choices that people may make in pursuance of the religious standard of behaviour within the sphere of their personal autonomy.[105]

Far from being purely semantic, that difference will implicate which party bears the burden when a claim involving a generally applicable law is made.

[99] Council of Eur. & ECtHR, *supra* note 83, at 8. Modern applicants have been pushing against that rule. *See supra* note 51.

[100] *See supra* notes 91-94 and accompanying text.

[101] For discussion on ECtHR case law treating "manifestation," see Jim Murdoch, Freedom of Thought, Conscience and Religion: A Guide to the Implementation of Article 9 of the European Convention on Human Rights 15-16 (Council of Eur., Human Rights Handbook No. 9, 2007), https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168007ff4f.

[102] Jehovah's Witnesses of Moscow v. Russia, App. No. 302/02, June 10, 2010, http://hudoc.echr.coe.int/eng?i=001-99221.

[103] Eric Roux, *Recent Developments in Relation to the RELIGARE Project Report*, *in* BELIEF, LAW, AND POLITICS, *supra* note 51, at 275, 277.

[104] *Id.* (writing that certain states were using Article 9(2) ECHR to sugarcoat "policies of intolerance towards non-traditional and new religious movements").

[105] *Jehovah's Witnesses of Moscow*, *supra* note 102, ¶ 119 (emphasis added). The Court went on, however, to identify certain types of interference with religious freedom that are effectively per se appropriate under Article 9(2) ECHR, including protections against "polygamous or underage marriage" or "flagrant breach[es] of gender equality." *Id.* Of course, the Court's analysis begs the question how permissible and impermissible judicial evaluations of religious practices are to be distinguished from one another.

The Court's analysis is reminiscsent of the *Hobby Lobby* case[106] and the U.S. Supreme Court's admonition that "[c]ourts are not arbiters of scriptural interpretation."[107] It certainly suggests a similar wariness toward even benevolent analyses of the legitimacy of religious claims. And, though it is too early to tell if the case marks a true departure in the ECtHR's approach, it also seems to restrict the margins-of-appreciation doctrine. While other cases discuss that doctrine as a requirement of reasoned decisionmaking,[108] *Jehovah's Witnesses of Moscow* suggests that deference extends only to state interests—*not* to any assessment of whether behavior in fact amounts to manifestation of religion at all.[109]

2. Note on the CFR and the CJEU

Even before the entry into force of the CFR, the CJEU (and the EU more broadly) had embarked on a "gradual transformation from a treaty regime into a constitutional order."[110] As EU competences have grown, so too has the Court's interaction with fundamental rights norms.[111] And in safeguarding these "fundamental rights [that] are an integral part of the general principles of law," the CJEU consistently held that the ECHR was "of particular significance."[112]

i. Background on the Charter

The Charter, which entered into force with the Treaty of Lisbon in December 2009, was a formal attempt to codify these human rights principles in part because of "the lack of visibility and ambiguous state of citizen's rights in the Union."[113] It was designed to "reaffirm[]" "the constitutional traditions and international obligations common to the Member States . . . and the case law . . . of the

---

[106] *See supra* notes 48-49 and accompanying text; *see also infra* notes 169-171 and accompanying text.

[107] Thomas v. Review Bd., 450 U.S. 707, 716 (1981).

[108] *See supra* note 75 and accompanying text.

[109] *See supra* Part II.B.1.iii; *infra* Part III.A.

[110] SONYA WALKILA, HORIZONTAL EFFECT OF FUNDAMENTAL RIGHTS IN EU LAW 44 (2016).

[111] *See* Janneke Gerards, *Who Decides on Fundamental Rights Issues in Europe?: Towards a Mechanism to Coordinate the Roles of the National Courts, the ECJ and the ECtHR*, *in* THE EU CHARTER OF FUNDAMENTAL RIGHTS AS A BINDING INSTRUMENT: FIVE YEARS OLD AND GROWING 47, 49-50 (Sybe de Vries et al. eds., 2015).

[112] Joined Cases 46/87 & 227/88, Hoechst AG v. Comm'n, ¶ 13, 1989 E.C.R. 2859, 2923.

[113] *See* WALKILA, *supra* note 110, at 84.

European Court of Human Rights."[114] The Charter protects religious freedom in several ways. Most notably, Article 10(1) of the Charter declares (in language taken word-for-word from Article 9 ECHR):

> Everyone has the right to freedom of thought, conscience and religion. This right includes freedom to change religion or belief and freedom, either alone or in community with others and in public or in private, to manifest religion or belief, in worship, teaching, practice and observance.[115]

Unlike the ECHR, the Charter does not contain limitation provisions within each article.[116] Instead, the Charter in Article 52(1) provides:

> Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.[117]

Like the Convention,[118] the Charter recognizes other freedoms implicated in religious liberty contexts: the right to respect for private and family life,[119] assembly,[120] equality and nondiscrimination,[121] and a separate article (with no Convention analog) that the EU must "respect . . . religious . . . diversity."[122]

---

[114] CFR, *supra* note 13, pmbl.

[115] *Id.* art. 10(1). Article 9 CFR also recognizes the "right to conscientious objection . . . in accordance with the national laws governing the exercise of this right." *Id.* art. 10(2).

[116] *Cf., e.g.*, ECHR, *supra* note 10, art. 9(2).

[117] CFR, *supra* note 13, art. 52(1). The choice to include a limitation clause at the treaty level rather than article-by-article is interesting given that the corresponding limitations on ECHR rights have "developed through application of the [ECtHR] through an extensive line of case[law]." Xavier Groussot & Gunnar Thor Petursson, *The EU Charter of Fundamental Rights Five Years on: The Emergency of a New Constitutional Framework?*, *in* THE EU CHARTER OF FUNDAMENTAL RIGHTS AS A BINDING INSTRUMENT: *supra* note 111, at 135, 137. The early stage of CJEU case law interpreting the Charter as a binding document has produced many open questions as to Article 52(1). *See, e.g.*, *id.* at 142-44 (asking whether the "essence test" is coextensive with the proportionality principle); *see also* Clara Rauchegger, *The Interplay Between the Charter and National Constitutions After* Åkerberg Fransson *and* Melloni*: Has the CJEU Embraced the Challenges of Multilevel Fundamental Rights Protection?*, *in* THE EU CHARTER OF FUNDAMENTAL RIGHTS AS A BINDING INSTRUMENT: *supra* note 111, at 93, 100-02 (arguing that the balancing called for in Article 52(1) has "an important role to play" in ensuring "the unity, primacy and effectiveness of EU law"' (quoting Case C-399/11, Melloni v. Ministerio Fiscal, ¶ 60, Feb. 26, 2013, http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62011CJ0399)).

[118] *See supra* notes 61-63 and accompanying text.

[119] CFR, *supra* note 13, art. 7.

[120] *Id.* art. 12(1).

[121] *Id.* arts. 20-21.

[122] *Id.* art. 22.

Three additional aspects of the Charter are worth noting. First, the Charter applies "to the Member States only when they are implementing Union law."[123] Thus, while the Charter does not have independent force, "[t]he applicability of [any other source of] Union law entails applicability of the fundamental rights guaranteed by the Charter."[124] Second, the Charter recognizes that many of its provisions were drawn *in haec verba* from the ECHR, and it provides that "the meaning and scope of those rights shall be the same as those laid down by" the Convention.[125] Careful readers note that the Charter (at least in the operative sections rather than the preamble[126]) refers to the ECHR but conspicuously fails to mention the ECtHR or its case law, suggesting that the CJEU will be informed, but *not* bound, by ECtHR interpretations of similarly worded provisions.[127] Third, the Charter provides that fundamental rights recognized therein that flow from Member States' national constitutional

---

[123] *Id.* art. 51(1). *But see* Ulf Bernitz, *The Scope of the Charter and Its Impact on the Application of the ECHR: The* Åkerberg Fransson *Case on* Ne Bis in Idem *in Perspective*, *in* THE EU CHARTER OF FUNDAMENTAL RIGHTS AS A BINDING INSTRUMENT, *supra* note 111, at 155, 169 ("If a certain legal rule or practice in the law of a Member State is found to be contrary to the protection of fundamental rights under EU law as far as EU law is applicable, it would at least be very difficult for the Member State to defend and continue to apply the same legal rule or practice in purely internal situations. *In reality, EU law has effects in the fundamental rights area which go beyond the scope of EU law.*" (emphasis added)). Bernitz's argument operates in large part due to an assumption that CJEU enjoys institutional respect across the European continent.

[124] Case C-617/10, Åklagaren v. Åkerberg Fransson, ¶ 21, Feb. 26, 2013, http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62010CJ0617; *see* Case C-198/13, Hernández v. Reino de España, ¶ 37, July 10, 2014, http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62013CJ0198 ("[T]o determine whether a national measure involves the implementation of EU law for the purposes of Article 51(1) of the Charter, it is necessary to determine . . . whether that national legislation is intended to implement a provision of EU law [and] the nature of the legislation at issue and whether it pursues objectives other than those covered by EU law . . . ."). Despite the Court's efforts to clarify Article 51(1), there remains "a certain grey area between applicability and non-applicability." Allan Rosas, *Five Years or Charter Case Law: Some Observations*, *in* THE EU CHARTER OF FUNDAMENTAL RIGHTS AS A BINDING INSTRUMENT: *supra* note 111, at 11, 18.

[125] CFR, *supra* note 13, art. 52(3).

[126] *Cf. supra* note 114 and accompanying text.

[127] *See* Sionaidh Douglas-Scott, *The Relationship Between the EU and the ECHR Five Years on from the Treaty of Lisbon*, *in* THE EU CHARTER OF FUNDAMENTAL RIGHTS AS A BINDING INSTRUMENT: *supra* note 111, at 21, 40-41 ("Indeed, if the ECtHR's case law were to bind the CJEU, this might threaten the autonomy of the CJEU's interpretations of EU law."). *But see* Case C-400/10 PPU, J. McB. v. L.E., ¶ 53, 2010-I E.C.R. 8965, 9012 ("[I]t is clear that the said Article 7 contains rights corresponding to those guaranteed by Article 8(1) of the ECHR. Article 7 of the Charter must therefore be given the same meaning and the same scope as Article 8(1) of the ECHR, as interpreted by the case-law of the European Court of Human Rights."). At the very least, the Convention should set a floor on top of which the CJEU might provide additional protection. *See* CFR, *supra* note 13, art. 53 ("Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised [by the ECHR] . . . .").

traditions "shall be interpreted in harmony with those traditions."[128] While the Charter itself suggests that national constitutional law will provide a minimum quantum of protections,[129] the CJEU has ruled that the primacy principle demands "that national constitutional rights cannot be given priority over secondary EU law which is compliant with the Charter."[130]

ii. The great unknown: Will the CJEU develop its own religious freedom law?

There is no question that the Charter "has become the main point of reference in post-Lisbon [CJEU] case law" on fundamental rights.[131] But so far, the case law has involved privacy, the right to an effective remedy and a fair trial, and equal rights.[132] While the CJEU has demonstrated a willingness to approach fundamental rights differently from the ECtHR and thus enforce the "autonomy and separateness of the EU human rights system from other human rights instruments,"[133] it is not yet clear how Article 10 CFR will be interpreted by the CJEU.[134]

---

128 CFR, *supra* note 13, art. 52(4).

129 *Id.* art. 53 ("Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised . . . by the Member States' constitutions.").

130 Rauchegger, *supra* note 117, at 110-11; *see Melloni*, *supra* note 117, at ¶¶ 56-59 ("It is settled case-law that, by virtue of the principle of primacy of EU law, which is an essential feature of the EU legal order, rules of national law, even of a constitutional order, cannot be allowed to undermine the effectiveness of EU law on the territory of that State . . . ." (citation omitted)). *But cf.* Rauchegger, *supra* note 117, at 125 (explaining that the Charter Explanations suggest that Article 52(4) CFR should be construed so as to offer a "high standard of protection" rather than following a "rigid approach of a 'lowest common denominator'").

131 Rosas, *supra* note 124, at 13. Direct references by the CJEU to the Charter have tripled in recent years. *See* Gerards, *supra* note 111, at 48 n.12. *Contra* Groussot & Petursson, *supra* note 117, at 149 ("[A]fter five years of application by the Court of Justice . . . . reference to fundamental rights standards is not systematic in EU litigation.").

132 *See* Rosas, *supra* note 124, at 13-16. This is unsurprising given that "[t]he EU's main concern has been with market building and regulation." Douglas-Scott, *supra* note 127, at 45.

133 *See, e.g.*, Douglas-Scott, *supra* note 127, at 38-43 (discussing the different approaches taken by the ECtHR and CJEU to the right to silence).

134 One setting in which the CJEU *has* addressed Article 10 post-Lisbon is in considering whether interference with the right of religious freedom in a non-EU country constitutes persecution for purposes of refugee status. *See, e.g.*, Joined Cases C-71/11 & C-99/11, Bundesrepublik Deutschland v. Y., ¶¶ 49-59, Sept. 5, 2012, http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62011CJ0071. The CJEU held that only severe violations of religious freedom may amount to persecution and that the severity of those violations are to be measured by the "sanctions adopted or liable to be adopted against the person." *Id.* ¶¶ 59-66; *see* DOE, *supra* note 7, at 245 (discussing those issues). In determining what amounted to persecution, the CJEU declined to use the ECtHR's case law distinguishing "core areas" of religious liberty from non-core areas. *Compare Bundesrepublik Deutschland v. Y.*, *supra*, ¶ 62 ("For the purpose of determining . . . which acts may be regarded as constituting persecution . . . it is unnecessary to distinguish acts that interfere with the 'core areas' ('forum

Regardless of the similarity between Article 9(1) ECHR and Article 10(1) CFR, the institutions charged with enforcing these instruments have different interests.[135] These differences may inform both courts' decisions as to the scope as well as the substance of fundamental rights protections, particularly because "[o]verlapping levels of protection between interacting legal orders would only add to judicial confusion."[136] Thus, in assessing matters of religious liberty, the principle of subsidiary would suggest that "for the EU the regulation of religion is primarily a matter for Member States at national level."[137] On the other hand, the *effet utile* principle[138] suggests that the CJEU might be more interested in achieving consistency in human rights standards—and correspondingly less likely to grant states wide margins of appreciation—than the ECtHR.

Moreover, while Article 9(1) ECHR and Article 10(1) CFR are practically identical, the two instruments differ substantially in their limitation provisions. The Convention allows for limitations "prescribed by law" that are "necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others."[139] The Charter, on the other hand, requires that limitations be proportional and that they are "necessary and genuinely meet *objectives of general interest recognised by the Union* or the need to protect the rights and freedoms of others."[140] So while the ECtHR must approve only those limitations that

internum') of the basic right to freedom of religion . . . from acts which do not affect those purported 'core areas'."), *with* Murdoch, *supra* note 101, at 13, 60 ("The *forum internum* is largely sacrosanct, but the public sphere much less so . . . .").

135 Gerards, *supra* note 111, at 57-59 (arguing that the raison d'être of both institutions is quite different, with the ECtHR serving to guarantee respect for individual fundamental rights and the CJEU ensuring the effectiveness and primacy of EU law).

136 WALKILA, *supra* note 110, at 111.

137 DOE, *supra* note 7, at 241 (2011) (noting the "well-known" examples of the "non-intervention of the EU in national religious affairs" according to the principle of subsidiarity and the related concept of state margin of appreciation).

138 *See generally* Urška Šadl, *The Role of* Effet Utile *in Preserving the Continuity and Authority of European Union Law: Evidence from the Citation Web of the Pre-accession Case Law of the Court of Justice of the EU*, 8 EUR. J. LEGAL STUD. 18 (2015).

139 ECHR, *supra* note 10, art. 9(2).

140 CFR, *supra* note 13, art. 52(1) (emphasis added).

comport with pluralistic democratic societies,[141] the CJEU must keep in mind "what is necessary to achieve the objectives of the Treaties"[142] and give primacy to the Union's objectives.[143] Thus, some worry that the key principle motivating the CJEU will be harmonization in terms of promoting the Union rather than promoting individual rights.[144]

It is reasonable to conclude that the CJEU may take a less freedom-protecting view than would the ECtHR. In fact, much of the stir created by the CJEU's decision in the *Melloni* case involved the fear that the interest in EU uniformity would bulldoze national or local interests in fundamental rights protection.[145] Others, reading the tea leaves of the CJEU's opinion on EU accession to the ECHR,[146] found the rejection to be "a clear manifestation of the Court's eagerness to protect the 'autonomy of the Union legal order.'"[147]

---

[141] Council of Eur. & ECtHR, *supra* note 83, at 7 (noting the ECtHR's fundamental drive to "preserv[e] . . . pluralism and the proper functioning of democracy").

[142] *See Proportionality Principle*, EUR-LEX, http://eur-lex.europa.eu/summary/glossary/proportionality.html (last visited Mar. 10, 2017).

[143] This is consistent with the CJEU's longstanding teleological approach to interpretation and its willingness to construe legal provisions in accordance with the *effet utile* principle. *See* WALKILA, *supra* note 110, at 11-12 (citing IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 636 (7th ed. 2008)) (noting that the fundamental idea of "an ever closer union among the peoples of Europe" provides the *telos* toward which the Court's teleological interpretation is oriented (quoting Consolidated Version of the Treaty on the Functioning of the European Union, preamble, May 9, 2008, 2008 O.J. (C 115) 47, 49)).

[144] *See, e.g.*, Rauchegger, *supra* note 117, at 101-02; *see also* WALKILA, *supra* note 110, at 208 ("[T]he work of conceptualising the scope and manner of application of fundamental rights in EU law cannot be done in isolation from the social and political context of European integration."); Hallström, *supra* note 6, at 73 (noting the CJEU's difficult position in implementing a "wider scope of rights" than those enshrined in the ECHR while "necessarily [taking] consideration of wider political and social issues" than the ECtHR).

[145] *See Melloni*, *supra* note 117, at ¶¶ 56-59; Rauchegger, *supra* note 117, at 94-95, 110-11. Of course, *Melloni* involved a *national* right that extended additional protection above the floor of the ECHR and CFR, so the CJEU could hold that the secondary EU law prevailed over the national constitutional norm because the minimum requirements of the Charter were satisfied. *See* Rauchegger, *supra* note 117, at 118. This is to some extent inconsistent with Article 53 CFR, which provides: "Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised . . . by the Member States' constitutions." CFR, *supra* note 13, art. 53. The ECHR is also mentioned in Article 53. *Id.*

[146] *See* Opinion 2/3 of Dec. 13, 2014, http://curia.europa.eu/juris/document/document.jsf?docid=160882&doclang=EN.

[147] WALKILA, *supra* note 110, at 79; *see also* Douglas-Scott, *supra* note 127, at 27 (noting that the opinion "sets out so many objections to accession . . . that one is prompted to think that the Court wished to make accession as difficult as possible"); Steve Peers, *The CJEU and the EU's Accession to the ECHR: A Clear and Present Danger to Human Rights Protection*, EU L. ANALYSIS, Dec. 18, 2014, http://eulawanalysis.blogspot.com/2014/12/the-cjeu-

It is also possible that given their different institutional missions, the CJEU and the ECtHR will continue to preside over overlapping but separate spheres of European law, with the ECHR better suited to national acts infringing individual freedom and the CFR better suited to address unique religious liberty issues arising in conjunction with EU competences.[148] This is even more likely if the Union turns its focus back toward economic integration of the single market rather than full-scale sociopolitical and cultural integration.[149]

It is beyond the scope of this working paper to divine the future of the ECtHR–CJEU relationship in general or the future structure of European religious liberty law in particular. At least in the immediate future, however, it seems probable that (1) both will continue to coexist and (2) the CJEU will be equally or perhaps even less, but not more, freedom-protecting than the ECtHR. Thus, one might reasonably predict that the Convention, rather than the Charter, will remain the principal battleground for religious freedom-related disputes.

III. COMPARING EUROPEAN AND U.S. TREATMENT OF ISSUES RELATING TO FREEDOM OF RELIGION: WHAT CAN BE LEARNED?

This Part highlights three areas in which which the U.S. and European approaches diverge. Yet at the outset, it bears noting that despite the oft-publicized chasm between religious values in Europe and the United States,[150] there are myriad similarities in the two regions' case law. These

and-eus-accession-to-echr.html (criticizing the CJEU for "seeking to protect the basic elements of EU law by disregarding the fundamental values upon which the Union was founded").

148 *See, e.g.*, *supra* note 134 (discussing religious freedom and persecution for purposes of refugee status).

149 *Cf.* EUR. COMM'N, WHITE PAPER ON THE FUTURE OF EUROPE: REFLECTIONS AND SCENARIOS FOR THE EU27 BY 2025, at 18-19 (imagining as one possible future scenario that the EU refocuses entirely on its raison d'être, namely the single market).

150 *See The American-Western European Values Gap*, PEW RES. CTR., http://pewrsr.ch/vIHVsk (last updated Feb. 29, 2012) (detailing statistical differences between American and European respondents as to religious faith, the primacy of religious values, and the relationship between religious and national identity).

similarities are too many to recount in their entirety.[151] In some sense, this should be unsurprising, as there has long been a legal feedback loop between the United States and Europe.[152]

Having recognized the depth and variety of similarities between U.S. and European law on freedom of religion, this working paper now focuses on three differences: (a) divergent ideas about which religiously motivated activities are protected in the public sphere; (b) the degree to which others' rights can and should be taken into account when assessing religious liberty claims; and (c) interactions between religious freedom and other rights.

A. "Exercising" Compared with "Manifesting" Religion

One apparent difference is that while the European instruments protect the "freedom of thought, conscience and religion" and the corresponding right "to *manifest* one's religion or beliefs,"[153] the U.S. instruments protect the "*exercise*" of religion.[154]

Older U.S. case law had suggested it might lean on the term "exercise" to distinguish which types of religiously motivated acts in public were subject to greater protection and which were not.

---

[151] One involves compelling religious faith as a requirement for public office. *Compare* Torcaso v. Watkins, 367 U.S. 488, 496 (1961) (holding that states cannot require a religious test or oath as a precondition to holding office), *with* Buscarini v. San Marino, App. No. 24645/94, ¶¶ 34, 40-41, 1999-I Eur. Ct. H.R. 605, 616-18 (holding that it violates Article 9 ECHR to require individuals "to swear allegiance to a particular religion on pain of forfeiting their parliamentary seats"). Another involves governments' duty of neutrality toward religious groups. *Compare* Presbyterian Church in U.S. v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church, 393 U.S. 440, 449 (1969) ("First Amendment values are plainly jeopardized when church property litigation is made to turn on the resolution by civil courts of controversies over religious doctrine and practice."), *with* Hasan v. Bulgaria, App. No. 30985/96, ¶ 78, 2000-XI Eur. Ct. H.R. 117, 141-42 ("[A] failure by the authorities to remain neutral in the exercise of their powers in this domain must lead to the conclusion that the State interfered with the believers' freedom to manifest their religion within the meaning of Article 9 of the Convention."). And both recognize the fundamental right of parents to raise their children according to religious principles—even if this interferes with the state's pedagogical interests. *Compare supra* note 33 and accompanying text (discussing U.S. Supreme Court case law discovering this right), *with* ECHR, *supra* note 10, protocol, art. 2.

[152] For a discussion of Enlightenment Europe's influence on the formation of the U.S. Constitution, see generally Harold J. Berman, *The Impact of the Enlightenment on American Constitutional Law*, 4 YALE J.L. & HUMAN. 311 (1992). For a discussion of the U.S. Constitution's impact abroad, and particularly on Europe, see generally GEORGE ATHAN BILLIAS, AMERICAN CONSTITUTIONALISM HEARD ROUND THE WORLD, 1776-1989 (2009).

[153] ECHR, *supra* note 10, art. 9 (emphasis added); *accord* CFR, *supra* note 13, art. 10(1).

[154] U.S. CONST. amend. I (emphasis added) ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."); 42 U.S.C. § 2000bb-1 (2015) ("Government shall not substantially burden a person's *exercise* of religion even if the burden results from a rule of general applicability, except [if Government makes a series of necessary showings]." (emphasis added)).

The best example is the *Bowen v. Roy* case,[155] which held that objecting to the government's internal use of a social security number for the plaintiff's daughter no more implicated an "exercise" of religion than would "a sincere religious objection to the size or color of the Government's filing cabinets."[156] This is arguably more in line with broad First Amendment principles applicable to public manifestations that affect others; as classically expressed in the first quarter of the twentieth century, "[y]our right to swing your arms ends just where the other man's nose begins."[157]

Yet in more recent cases, and particularly since the battleground for religious liberty claims has shifted from the First Amendment to RFRA,[158] U.S. courts have been increasingly unwilling to address the threshold question whether plaintiffs had described a protected "exercise" at all, preferring instead to take the plaintiffs at their word and assess whether such "exercise" was permissibly or impermissibly burdened.[159] This blurs the lines between two analytically distinct questions: (1) whether the claimant has a sincerely held *belief*, which the government may only interrogate lightly to ensure the claimant is not "seeking to perpetrate a fraud on the court";[160] and (2) whether the claimant is *manifesting* his belief in such a way as to be entitled to governmental protection above and beyond that which is afforded to every citizen in the public sphere—to be sure, an inquiry that implicates theological questions, but nonetheless not the same thing as questioning someone's belief.

---

155 *See supra* note 46 and accompanying text.

156 476 U.S. 693, 695, 700-01 (1986).

157 Zecheriah Chaffee, *Freedom of Speech in Wartime*, 32 HARV. L. REV. 932 (1919); *see also* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2791 (Ginsburg, J., dissenting) (quoting Chaffee's statement and protesting that the Court had neglected to consider the effect on others of the corporations' "exercise" of religion by refusing to provide contraceptive care in their health plans).

158 *See supra* notes 42-44 and accompanying text.

159 *See, e.g.*, *Hobby Lobby*, 134 S. Ct. at 2771-72, 2775 (majority opinion). An even more attenuated example is the so-called Little Sisters of the Poor litigation, in which religious nonprofit organizations that provide healthcare to their employees complained that merely submitting a form to the government stating their objection to providing contraceptive care—after which the government would grant an exemption from that requirement—itself was an impermissible burden on their religious exercise. *Zubik v. Burwell*, 136 S. Ct. 1557, 1559 (2016) (per curiam). The Supreme Court ducked the issue for the time being, *see id.* at 1560-61 (remanding to allow the parties to come to a practical solution that accommodated both sides' concerns), but the question it raised is likely to return to the Court in a less easily avoidable form. *See* Caroline Mala Corbin, *Punting on Substantial Religious Burden, the Supreme Court Provides No Guidance for Future RFRA Challenges to Anti-Discrimination Laws*, SCOTUSBLOG (May 17, 2016, 12:14 PM), https://shar.es/1QuzOZ.

160 *See* Yellowbear v. Lampert, 741 F.3d 48, 54 (10th Cir. 2014).

Here, the European two-part framework of core, internal *beliefs* and non-core, external *manifestations* could illuminate U.S. law.[161] As discussed above,[162] under the ECHR, manifestations must be "intimately linked to the religion or belief" by a "close and direct nexus."[163] The lesson of *Pichon*—that "manifest" cannot "denote each and every act or form of behaviour motivated or inspired by a religion"[164]—is vital here as well. The U.S. Constitution and RFRA both protect the *exercise* of religion, so courts cannot avoid asking what "exercise" entitles; nor may they rewrite the Constitution or RFRA to protect "every act or activity motivated by a religious belief" or some similar formulation.[165] Whether described in terms of nexus or another term, some basic theological connection between the action at issue and the underlying religious belief must be explained by the claimant, and courts must—with due respect for pluralism—assess whether the claimant has described an exercise or manifestation of religion, or simply an action that implicates a religious belief.[166] Otherwise, essentially any religious adherent will be able to claim exemption from generally applicable laws if she can articulate any religious motivation for doing so. This would not only make governing an increasingly futile proposition, but it would effectively make adherents first-class citizens endowed with a veto power over reasonable governmental regulation.

---

[161] *See supra* notes 59-60 and accompanying text.

[162] *See supra* Part II.B.1.iii.

[163] *Eweida*, *supra* note 76, ¶ 82.

[164] *Pichon*, *supra* note 95.

[165] Nor would they dare to, practically speaking—doing so would grant religious protection to an immensely broad swath of activity, far beyond anything ever granted constitutional protection. Yet that is the practical effect of the U.S. Supreme Court's recent tendency to avoid that question.

[166] The *Hobby Lobby* Court made a great deal of Congress' amendment to RFRA clarifying that "exercise of religion" included any religious exercise "whether or not compelled by, or central to, a system of religious belief." Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2762 (2014) (citing 42 U.S.C. § 2000cc-5). That amendment responded to lower courts that, after RFRA's enactment, imposed a "centrality" requirement, as if Congress intended to protect only those exercises of religion that are central or fundamental to a system of belief. That centrality requirement was misguided, but not because courts may *never* inquire as to whether an action is an "exercise" of religion at all—it simply asked the wrong question, focusing on how important the action was rather than whether it manifested the person's religious belief or faith. Note that European law, unlike the U.S. Congress, has not been as reluctant to speak in terms of centrality. *See* Murdoch, *supra* note 101, at 15 ("[A] distinction must be drawn between an activity *central* to the expression of a religion or belief, and one which is merely *inspired* or even *encouraged* by it." (emphasis in original)).

B. Proportionality and Interest Balancing

At bottom, the European principle of proportionality "means that all interests at stake must be considered and balanced against each other: a fair balance needs to be struck between the rights of the individual and the interests of the state, employer, service provider or the rights of others."[167] Proportionality offers a sensible mode of analysis to address religious freedom claims demanding exemption from generally applicable laws or regulations.[168]

One example is the *Hobby Lobby* litigation.[169] The Court, asking whether a requirement that private employers offering healthcare plans include contraceptive care for female employees "substantially burden[s] a person's exercise of religion" under RFRA,[170] assessed the severity of penalties imposed on corporations with sincerely held religious beliefs. But in the eyes of the dissenters and many commentators, the Court wholly failed to consider the interests on the other side of the ledger.[171]

It was this type of explicit balancing that Justice Breyer of the U.S. Supreme Court advocated in a recent book. Citing the CJEU with approval, he argues that rather than "implicitly balancing harms

---

[167] Donald & Howard, *supra* note 51, at 18.

[168] These exemption claims are the subject of much debate in both the United States and Europe. *See, e.g.*, Douglas Nejaime & Reva B. Siegel, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 YALE L.J. 2516, 2518-22 (2015) (discussing religious objections to regulations and generally applicable nondiscrimination laws and the "material and dignitary harms that accommodation of the claims can inflict on other citizens"); *see also* BELIEF, LAW AND POLITICS, *supra* note 51, at 22, 131-80 (debating the RELIGARE research team's proposal to amend the EU's Employment Equality Directive to grant reasonable accommodations to workers on the basis of religion and belief (citing Council Directive 2000/78/EC of Nov. 27, 2000, Establishing a General Framework for Equal Treatment in Employment and Occupation, 2000 O.J. (L 303) 16); *supra* note 51.

[169] *See supra* notes 48-49 and accompanying text.

[170] *See* 42 U.S.C. § 2000bb-1 (2015); *see also supra* note 42.

[171] *Compare Hobby Lobby*, 134 S. Ct. at 2775-79 (focusing only on the religious claims of the owners of the corporation), *with id.* at 2787-89, 2789-802 (Ginsburg, J., dissenting) (criticizing the majority for ignoring the rights of women to free and readily accessible contraceptive care, which is instrumental for "women to participate equally in the economic and social life of the Nation" (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 857 (1992) (plurality opinion))). For the backlash to *Hobby Lobby*, see, for example, Leslie C. Griffin, Hobby Lobby*: The Crafty Case That Threatens Women's Rights and Religious Freedom*, 42 HASTINGS CONST. L.Q. 641, 641-42 (2015) ("Missing from the majority's opinion is the core concept that religious freedom is necessary to protect the rights of all Americans, and that a religious belief must not be imposed on citizens through the force of law."); Eliana Dockterman, *5 Things Women Need to Know About the* Hobby Lobby *Ruling*, TIME (June 1, 2014), http://ti.me/V3npCC (calling *Hobby Lobby* a "blow . . . to women's rights").

and objectives," "it is preferable to organize the balancing through a doctrine such as proportionality, thus making the calculus behind an opinion explicit so it can be seen and criticized."[172] Of course, such naked balancing seems foreign to many students of contemporary U.S. constitutional law, in part for the reasons recognized by a former judge and vice president of the ECtHR: rights are necessarily incommensurable, which gives judges "great freedom of judgment" in making subjective determinations between rights.[173]

But the difficulty of the task should not be confused with whether the task is necessary. Cases that reach the U.S. Supreme Court are difficult (otherwise they would have been conclusively resolved below) and high-profile (otherwise the Court would not have granted review). When the Court agrees to hear cases, it does so *because* they are complex, not easily resolved, and implicate key governmental interests. It would be far better for the Court to be forthright in addressing those difficulties and performing the delicate work of deciding the path of the law (and, often, the proper balance between individual rights and the necessary work of government) than to pretend the cases are simple. And while a quantitative comparison of institutional legitimacy is beyond the scope of this working paper, it seems unlikely that the ECtHR and CJEU are less respected simply because they are honest about the nature of their work.

C. Interactions Between Freedom of Religion and Other Substantive Rights

It would likely strike U.S. readers as odd to see the CJEU and ECtHR freely interpret rights "in light of" one another because the typical approach for U.S. courts is to subdivide each substantive right into discrete categories with unique doctrinal structures.[174] But "hybrid" constitutional claims are

[172] STEPHEN BREYER, THE COURT AND THE WORLD: AMERICAN LAW AND THE NEW GLOBAL REALITIES 257 (2015).

[173] Tulkens, *supra* note 4, at 509 n.*, 523.

[174] *See generally supra* Parts II.A.1.-2.

not unique to European law—indeed, there is a noble history of such cases in the U.S. canon. The cases discussed in *Employment Division v. Smith* are examples,[175] and others spring to mind.[176]

A more sophisticated understanding of interactive fundamental rights would not tip the scales of U.S. jurisprudence. Instead, it would exert pressure on *both* sides of the balance. For example, if antidiscrimination law demands that a baker produce wedding cakes for any customer regardless of sexual orientation,[177] the baker's claim that this law violates his sincerely held religious belief that gay marriage is sinful may be bolstered by his claim that his cakes are a form of artistic expression not subject to governmental compulsion.[178] Yet a court would also have to confront the fundamental right held by gay and straight couples alike to full and equal participation in the marketplace.[179] Thus, reference to European law would simply allow judges to remove their blinders and take honest account of the several, often conflicting, interests in the room.

Admittedly, this assumes that judges have something of a policymaking role to play—a proposition that sets juridical conservatives' teeth on edge.[180] But the Constitution devotes only sixteen

---

[175] *See supra* Part II.A.2.iii (addressing hybrid claims in the Free Exercise Clause context).

[176] One recent example is *Obergefell v. Hodges*, in which the U.S. Supreme Court declared that the right to marry is a fundamental right of which same-sex couples may not be deprived. 135 S. Ct. 2584, 2599-605 (2015). Justice Kennedy, writing for the majority, decided the case under *both* the Due Process and Equal Protection Clauses of the Fourteenth Amendment. *See id.*; *see also* U.S. CONST. amend. XIV, § 1 ("No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."). Justice Kennedy argued that the clauses "are connected in a profound way, though they set forth independent principles," and he relied on this "synergy between the two protections" to decide the matter—but not, notably, the well-developed doctrines associated with each clause on its own. *See Obergefell*, 135 S. Ct. at 2602-05. This cross-claim approach reverberated through Supreme Court commentators. *Compare* Brian Beutler, *Anthony Kennedy's Same-Sex Marriage Opinion Was a Logical Disaster*, NEW REPUBLIC (July 1, 2015), https://newrepublic.com/article/122210/anthony-kennedys-same-sex-marriage-opinion-was-logical-disaster (noting that Justice Kennedy "failed 'to provide even a single sentence explaining how the Equal Protection Claus supplies independent weight for its position"(quoting *Obergefell*, 135 S. Ct. at 2623 (Roberts, C.J., dissenting))), *with* Michael C. Dorf, *In Defense of Justice Kennedy's Soaring Language*, SCOTUSBLOG (June 27, 2015, 5:08 PM), http://www.scotusblog.com/2015/06/symposium-in-defense-of-justice-kennedys-soaring-language (defending the "synergy" approach as a useful tool in addressing fundamental rights claims).

[177] *See* Craig v. Masterpiece Cakeshop, Inc., 370 P.3d 272 (Colo. App. 2015), *petition for cert. filed*, No. 16-111 (U.S. July 25, 2016); *see also* Helfand, *supra* note 51, at 1773 (discussing this and other similar cases).

[178] Alternatively, a court might conclude that baking cakes, even if it implicates free expression concerns, does not amount to an "exercise" of religion. *See supra* Part III.A.

[179] *See, e.g.*, *Eweida*, *supra* note 76, ¶¶ 103-05.

[180] *See, e.g.*, Joshua Dunn, The Perils of Judicial Policymaking: The Practical Case for Separation of Powers 2 (The Heritage Found., First Principles Series No. 20, 2008), http://s3.amazonaws.com/thf_media/

words to religious freedom,[181] and while Congress is tasked with making laws, ultimately it is the Court that must uphold those most precious constitutional freedoms—and, necessarily, identify those moments when extending them too far would impinge other, equally crucial, fundamental rights.

IV. CONCLUSION

One might hope that, in grappling with the most complicated constitutional quandaries, the U.S. Supreme Court would gaze freely beyond its jurisdiction for guidance. It certainly has a rich history of doing so.[182] Yet this has been controversial of late. In the 2005 case *Roper v. Simmons*, for example, the Court held it was unconstitutional for states to execute individuals who were under eighteen years of age when they committed their crimes.[183] The Court noted that its holding "finds confirmation" in "the laws of other countries and . . . international authorities," which it found "instructive for its interpretation" of the Constitution.[184] The resulting backlash was fierce, both from *Roper*'s three dissenting justices[185] and thereafter from legal scholarship.[186] These objections to

2008/pdf/fp20.pdf ("[C]ourts are ill-equipped to make public policy, whether judges act tyrannically or have benign intentions.").

[181] U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."). As discussed above, it was the Court's landmark opinion in *Marbury v. Madison* that cemented the principle of judicial supremacy in constitutional interpretation. *See supra* note 9. Chief Justice John Marshall, author of *Marbury*, set forth an equally vital principle in another landmark case: "[W]e must never forget that it is a *constitution* we are expounding." M'Culloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407 (1819); *see also id.* ("A constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, . . . would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind. . . . *Its nature, therefore, requires, that only its great outlines should be marked*, its important objects designated . . . ." (emphasis added)).

[182] *See, e.g.*, Rochin v. California, 342 U.S. 165, 169 (1952) (holding that the Due Process Clause of the Fourteenth Amendment forbids governmental actions that "offend those canons of decency and fairness which express the notions of justice of English-speaking peoples" (quoting Malinski v. New York, 324 U.S. 401, 417 (1945)).

[183] 543 U.S. 551, 560-75 (2005) (citing U.S. CONST. amend. VIII (forbidding "cruel and unusual punishments")).

[184] *Id.* at 575. The Court's reference to foreign law bolstered its conclusion that executing minors was out of line with the "evolving standards of decency that mark the progress of a maturing society" and thus violated the Eighth Amendment. *Id.* at 560-61 (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958)).

[185] *See id.* at 608, 622-28 (Scalia, J., joined by Rehnquist, C.J., and Thomas, J., dissenting) ("[T]he basic premise of the Court's argument—that American law should conform to the laws of the rest of the world—ought to be rejected out of hand.").

[186] *E.g.*, Robert J. Delahunty & John Yoo, *Against Foreign Law*, 29 HARV. J.L. & PUB. POL'Y 291, 297 (2005) (arguing that referring to foreign law "undermines the separation of powers" and "undermines the limited

considering foreign sources of law sound in many theories—sovereignty, separation of powers, untethered judicial discretion, original intent of the Constitution's framers—but are united in their insistence that interpreting U.S. law remain a purely national endeavor.

Others take a less provincial approach. Justice Kennedy, who wrote for the Court in *Roper*, has looked to foreign sources in several landmark decisions.[187] Justice Breyer has written that European law concepts like proportionality can help U.S. judges to "apply the Constitution in conformity with American values."[188] And many in the academy have agreed with Justices Kennedy's and Breyer's references to foreign law.[189]

Leaving for another the day the question whether it is appropriate for U.S. judges to look abroad, this working paper suggests that it could be useful to do so. The analogy is certainly imperfect—in particular, U.S. constitutional law tends to elevate individual rights over communal or societal reactions, mostly to protect people expressing vulnerable or minority viewpoints[190]—but there is much to learn from the European approach. Indeed, it could revitalize U.S. law and preserve, not weaken, the legitimacy of the Court in the twenty-first century by forcing it to take honest account of

---

theory of judicial review"); *see also id.* at 325-28 (arguing that European law in particular is not "the appropriate model for American constitutional interpretation"). *But cf.* Vincent J. Samar, *Justifying the Use of International Human Rights Principles in American Constitutional Law*, 37 COLUM. HUM. RTS. L. REV. 1, 1-7 (2005) (arguing that U.S. judges should look abroad at least "as a means for achieving minimal protections for human dignity").

187 *See* Stephen C. McCaffrey, *There's a Whole World Out There: Justice Kennedy's Use of International Sources*, 44 MCGEORGE L. REV. 201, 203-10 (2013).

188 BREYER, *supra* note 172, at 254.

189 *See, e.g.*, Gerald L. Neuman, *International Law as a Resource in Constitutional Interpretation*, 30 HARV. J.L. & PUB. POL'Y 177, 177 (2006) ("Despite recent polemics, the use of international law in constitutional interpretation, as one factor among others, is highly traditional and eminently proper. . . . [S]ome international law provides useful functional or normative insights on which constitutional adjudication can draw.").

190 *Compare, e.g.*, *İ.A.*, *supra* note 72, ¶¶ 27-32 (concluding than an author's freedom of expression had to yield because of the pressing social need to prevent speech deemed to insult or attack Islam), *with* Texas v. Johnson, 491 U.S. 397, 414 (1989) ("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."), *and* United States v. Schwimmer, 279 U.S. 644, 654-55 (Holmes, J., dissenting) ("[I]f there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought—not free thought for those who agree with us but *freedom for the thought that we hate*." (emphasis added)), *overruled in part by* Girouard v. United States, 328 U.S. 61 (1946).

interactive rights and to subject both governmental programs and individual religious claimants to meaningful judicial scrutiny.