

## ARTICLES

### PUTTING FAITH IN EUROPE: SHOULD THE U.S. SUPREME COURT LEARN FROM THE EUROPEAN COURT OF HUMAN RIGHTS?

*Antony Barone Kolenc\**

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\* Antony Barone Kolenc (J.D., University of Florida College of Law) is an Associate Professor of Law at Florida Coastal School of Law, where he teaches Constitutional Law. He served as a Lieutenant Colonel in the Air Force Judge Advocate General’s Corps before retiring in 2012. The views expressed in this Article are those of the author alone and do not reflect the official policy of Florida Coastal School of Law. He would like to thank his research assistants, Kent A. Eadler and Cassandra J. Klusmeyer, for their efforts supporting this paper. He is also grateful to the scholars at the *11th Circuit Legal Scholarship Forum* at Stetson University College of Law for their helpful comments on this Article, especially Professors Michael Finch and Ronald Krotoszynski.

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## I. INTRODUCTION

Do the United States of America and its Supreme Court have anything to learn from modern Europe regarding the freedom of religion? Should Europe look to U.S. jurisprudence for guidance on interpreting its own religious freedom protections?

In the twenty-first century, the European Court of Human Rights (European Court) has been making controversial headlines in its religion jurisprudence. It has ruled that Italy may hang crucifixes in government-run schools,<sup>1</sup> but also that Switzerland can prevent Muslim teachers from wearing the hijab in its public schools.<sup>2</sup> The European Court has allowed France to ban the Islamic burqa in public places,<sup>3</sup> but it also has required the United Kingdom to allow a flight attendant to wear a Christian necklace at work.<sup>4</sup> These and other important decisions have caught the attention of constitutional scholars, who often draw comparisons between these cases and the religion jurisprudence of the U.S. Supreme Court.<sup>5</sup> But are such comparisons valid? This Article will explore that query in a systematic fashion.

One may question—and indeed, Justice Antonin Scalia repeatedly did so<sup>6</sup>—why the Supreme Court ever would consult “foreign precedent,”<sup>7</sup> particularly when the Court is interpreting the U.S. Constitution on a purely domestic issue, such as the freedom of religion. Allowing foreign judges to influence modern interpretations of domestic U.S. law seems to ignore the

<sup>1</sup> See *Lautsi v. Italy*, 2011-III Eur. Ct. H.R. 61 (Mar. 18, 2011).

<sup>2</sup> See *Dahlab v. Switzerland*, 2001-V Eur. Ct. H.R. 447 (Feb. 15, 2001).

<sup>3</sup> See *S.A.S. v. France*, App. no. 43835/111, Eur. Ct. H.R. (July 1, 2014).

<sup>4</sup> See *Eweida v. United Kingdom*, 2013-I Eur. Ct. H.R. 215 (Jan. 15, 2013).

<sup>5</sup> See Frederick Mark Gedicks & Pasquale Annicchino, *Cross, Crucifix, Culture: An Approach to the Constitutional Meaning of Confessional Symbols*, 13 *FIRST AMEND. L. REV.* 71 (2014); William P. Marshall, *The Lautsi Decision and the American Establishment Clause Experience: A Response to Professor Weiler*, 65 *ME. L. REV.* 769 (2013); John Witte, Jr. & Nina-Louisa Arold, *Lift High the Cross?: Contrasting the New European and American Cases on Religious Symbols on Government Property*, 25 *EMORY INT'L L. REV.* 5 (2011); Andrea Pin, *(European) Stars or (American) Stripes: Are the European Court of Human Rights' Neutrality and the Supreme Court's Wall of Separation One and the Same?*, 85 *ST. JOHN'S L. REV.* 627 (2011).

<sup>6</sup> See, e.g., *Roper v. Simmons*, 543 U.S. 551, 624 (2005) (Scalia, J., dissenting) (“[T]he basic premise . . . that American law should conform to the laws of the rest of the world . . . ought to be rejected out of hand.”).

<sup>7</sup> “Foreign precedent” refers to “decisions of foreign courts interpreting their domestic laws [or] . . . issues of international law, decisions of supranational tribunals interpreting domestic issues of a particular country, and decisions of a supranational tribunal interpreting a supranational constitution or bill of rights.” Osmar J. Benvenuto, Note, *Reevaluating the Debate Surrounding the Supreme Court's Use of Foreign Precedent*, 74 *FORDHAM L. REV.* 2695, 2701 (2006). The term does not refer to English common law, the backbone of U.S. law. *Id.* at 2702–03.

notion that the American colonies broke their ties with European ideas and practices in a fiery revolution. Indeed, many in the United States today still promote the concept of American exceptionalism that Alexis de Tocqueville noted early in the nation's history.<sup>8</sup> Having thrown off the shackles of Europe, should the Supreme Court now embrace those same old ideas and repatriate them to American soil?

While many scholars today compare religion cases in the United States and Europe, no one has yet addressed in detail why that practice is legitimate. This Article tackles that issue by defending the practice of consulting foreign precedent, within reasonable limits. It breaks down the problem into three parts, looking first at policy-based objections to the practice. It then explores whether differences between the U.S. and European systems invalidate these comparisons. Finally, it considers whether the subject-matter of religion—as protected by the U.S. Constitution and the European Convention on Human Rights—makes such comparisons futile. The Article concludes there is value in consulting foreign precedent on religion. Indeed, Europe and the United States may have a few lessons to teach one another about the value of religion in modern, pluralistic democracies.

## II. POLICY-BASED LIMITS ON COMPARING THE U.S. AND EUROPEAN MODELS

Regarding the reliance on foreign precedent in modern Supreme Court decisions, Justice Scalia passionately argued:

[I]rrelevant are the practices of the “world community,” whose notions of justice are (thankfully) not always those of our people. . . .” Where there is not first a settled consensus among our own people, the views of other nations, however enlightened the Justices of this Court may think them to be, cannot be imposed upon Americans through the Constitution.”<sup>9</sup>

Surely he is correct that foreign precedent cannot be *imposed* upon the Supreme Court, but does that mean foreign jurisprudence must have no role at all, even as a reference point?

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<sup>8</sup> See, e.g., ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 32 (Harvey C. Mansfield & Debra Winthrop eds. & trans., 2000) (“The civilization of New England has been like those fires lit in the hills that, after having spread heat around them, still tinge the furthest reaches of the horizon with their light.”).

<sup>9</sup> *Atkins v. Virginia*, 536 U.S. 304, 347–48 (2002) (Scalia, J., dissenting) (citing *Thompson v. Oklahoma*, 487 U.S. 815, 868–69, n.4 (1988) (Scalia, J., dissenting)).

A policy debate is raging about the propriety of drawing lessons for the U.S. Supreme Court from foreign sources, such as the European Court. In recent years, some politicians have bemoaned official references to foreign precedent in U.S. jurisprudence.<sup>10</sup> The issue has garnered so much attention that Republicans in Congress (unsuccessfully) introduced legislation in 2004 and 2005 that would have prohibited federal courts from using “foreign authorities except in special circumstances where the foreign law ‘informs an understanding of the original meaning of the laws of the United States.’”<sup>11</sup> Some worry that uniquely American ideas will be tarnished if exposed to the brushstrokes of a European system that never understood American values. Indeed, all this controversy about foreign precedent in domestic legal interpretation has generated serious scholarship on both sides of the argument,<sup>12</sup> yet no one has systematically tackled the issue in the specific context of the courts’ jurisprudence on religion.

From a historical perspective, the Framers considered foreign law when designing the U.S. Constitution; however, judges in that founding generation generally did not find it appropriate to consult foreign sources when interpreting the Constitution.<sup>13</sup> It is no surprise, then, that in the first 150 years of Supreme Court decisions, the Justices almost never referenced foreign precedent to resolve a domestic issue.<sup>14</sup> Although Chief Justice John Marshall made an oblique reference to foreign law in *McCulloch v. Maryland*, the most notable pre-modern use occurred as late as 1905, when the Court—interpreting the Equal Protection Clause—referred to Roman,

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<sup>10</sup> See Austen L. Parrish, *Storm in a Teacup: The U.S. Supreme Court’s Use of Foreign Law*, 2007 U. ILL. L. REV. 637; Harlan Grant Cohen, *Supremacy and Diplomacy: The International Law of the U.S. Supreme Court*, 24 BERKELEY J. INT’L L. 273, 273 (2006) (recounting several political attacks on the practice, including one by Tom C. Feeney (R-FL), who argued that “[t]he Supreme Court has insulted the Constitution by overturning its own precedent to appease contemporary foreign laws, social trends, and attitudes” (citing *Supreme Court Ruling Reiterates Importance of Reaffirmation of American Independence Resolution*, U.S. FED NEWS (Mar. 2, 2005))).

<sup>11</sup> Parrish, *supra* note 10, at 645.

<sup>12</sup> See *id.* (discussing the propriety of using foreign precedent); Cohen, *supra* note 10, at 274 (noting the controversy and its “assumption that, for better or for worse, the Court . . . was increasingly willing to apply foreign and international law in reaching its decisions,” but arguing “that the assumption might not be true”); Benvenuto, *supra* note 7; see also Harold Hongju Koh, *International Law as Part of Our Law*, 98 AM. J. INT’L L. 43 (2004) (arguing in favor of the use of international law); Roger P. Alford, *Misusing International Sources to Interpret the Constitution*, 98 AM. J. INT’L L. 57 (2004) (arguing against the use of foreign precedent).

<sup>13</sup> Benvenuto, *supra* note 7, at 2704–05.

<sup>14</sup> *Id.*; see also Sarah K. Harding, *Comparative Reasoning and Judicial Review*, 28 YALE J. INT’L L. 409, 420 (2003). But see Koh, *supra* note 12 (citing early Supreme Court references to the “law of nations” in relation to congressional statutes as a potential contrary example).

Napoleonic, and Germanic law to help determine the world's historical recognition of "the power to deal with the estate of an absentee."<sup>15</sup>

After World War II, the modern controversy over foreign precedent began to percolate. Starting in the 1940s, Justice Felix Frankfurter led a trend to cite foreign law in Supreme Court opinions, though not as the actual rationale for the Court's decision-making.<sup>16</sup> Then, members of the Court began referencing foreign precedent when interpreting the Eighth Amendment's prohibition on "cruel or unusual punishment," with a majority of the Court eventually citing "laws of other countries" as "instructive for [the Amendment's] interpretation," while at the same time insisting that the "opinion of the world community" was "not controlling" on the outcome of capital cases.<sup>17</sup> Still, the dispute over foreign precedent did not blossom in earnest until the 1990s, driven largely by the advocacy of five Supreme Court Justices from across the political spectrum—Stevens, O'Connor, Kennedy, Ginsburg, and Breyer.<sup>18</sup> This high-level promotion eventually led to this practice outgrowing its Eighth Amendment roots, with some Justices using foreign law when interpreting such varied domestic concepts as federalism<sup>19</sup> and even affirmative action.<sup>20</sup>

Perhaps the most controversial use of foreign precedent involved an interpretation of the Fourteenth Amendment's Due Process and Equal Protection Clauses. In *Lawrence v. Texas*, Justice Kennedy's majority opinion cited a conflicting decision from the European Court to support the Supreme Court's conclusion that it had wrongly decided the controversial *Bowers v. Hardwick* case, which had found no right to homosexual

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<sup>15</sup> Benvenuto, *supra* note 7, at 2704–05 (citing *Cunnius v. Reading Sch. Dist.*, 198 U.S. 458, 570–71 (1905)); *see also* *McCulloch v. Maryland*, 17 U.S. 316 (1819).

<sup>16</sup> Benvenuto, *supra* note 7, at 2706–08.

<sup>17</sup> *Roper v. Simmons*, 543 U.S. 551, 575, 578 (2005); *see also* *Trop v. Dulles*, 356 U.S. 86, 102 (1958) (Warren, C.J., plurality opinion) ("The civilized nations of the world are in virtual unanimity that statelessness is not to be imposed as punishment for crime."); *Coker v. Georgia*, 433 U.S. 584, 592 n.4 (1977) (White, J., plurality opinion) (referencing "legislative decisions" from around the world); *Thompson v. Oklahoma*, 487 U.S. 815, 830 (1988) (Stevens, J., plurality opinion) (singling out Europe as a guidepost of "civilized standards of decency").

<sup>18</sup> Benvenuto, *supra* note 7, at 2711. Justice Souter, while sometimes citing foreign precedent, was not an active advocate of the practice. *Id.* at 2711, n.111.

<sup>19</sup> *See* *Printz v. United States*, 521 U.S. 898, 976 (1997) (Breyer, J., dissenting) (noting that the U.S. federal divide is not unique, and arguing that other countries use the opposite approach from that adopted by the majority).

<sup>20</sup> *See* *Grutter v. Bollinger*, 539 U.S. 306, 344 (2003) (Ginsburg, J., concurring) (comparing the Court's view "with the international understanding of the office of affirmative action," and quoting from an international convention to endorse her point that affirmative action is a temporary measure).

sodomy.<sup>21</sup> This was the first time the European Court had ever been cited in the text of a Supreme Court majority opinion.<sup>22</sup> Kennedy went on to note, “The right the petitioners seek in this case has been accepted as an integral part of human freedom in many other countries. There has been no showing that in this country the governmental interest in circumscribing personal choice is somehow more legitimate or urgent.”<sup>23</sup> In dissent, Justice Scalia railed against this “[d]angerous dicta” by the majority, pointing out that “[c]onstitutional entitlements” do not spring “into existence, as the Court seems to believe, because foreign nations decriminalize conduct.”<sup>24</sup> At bottom, Scalia worried that carefully drawn standards based on deeply rooted American constitutional-law concepts would be abandoned in order to follow the crowd of other countries (especially those in Europe), to the detriment of cherished and hard-won rights in the unique experience of the United States.<sup>25</sup>

Of all the Supreme Court advocates in favor of citing foreign precedent in domestic decisions, Justice Breyer has been particularly outspoken about its benefits. He has conceded that “there may be relevant political and structural differences between [foreign] systems and our own,” yet he continues to believe that the experience of other countries “may nonetheless cast an empirical light on the consequences of different solutions to a common legal problem . . . .”<sup>26</sup> This is true even in the context of the Establishment Clause. For instance, Justice Breyer has admitted that foreign precedent has caused him to be “uncertain” about the validity of his dissent in *Zelman v. Simmons-Harris*.<sup>27</sup> In a 2005 debate with Justice Scalia, Breyer stated, “[O]ne of the things I had to face from my point of view . . . [was] the fact in France they subsidize a religious school and it isn’t the end of the earth. And the same thing is true in Britain, other countries.”<sup>28</sup> In other words, by looking at how established religions operated in modern European democracies, Breyer began to question his stated concern in *Zelman* that allowing government-

<sup>21</sup> *Lawrence v. Texas*, 539 U.S. 558, 572–73 (2003) (“[A]most five years before *Bowers* was decided the European Court of Human Rights considered a case with parallels to *Bowers*. . . .”); see also *Bowers v. Hardwick*, 478 U.S. 186, 192–95 (1986).

<sup>22</sup> See Koh, *supra* note 12, at 50.

<sup>23</sup> *Lawrence*, 539 U.S. at 577.

<sup>24</sup> *Id.* at 598 (Scalia, J., dissenting) (criticizing the majority for bringing foreign law into the mix, arguing that “this Court . . . should not impose foreign moods, fads, or fashions on Americans” (quoting *Foster v. Florida*, 537 U.S. 990, n., (2002) (Thomas, J., concurring in denial of certiorari))).

<sup>25</sup> *Id.*

<sup>26</sup> *Printz v. United States*, 521 U.S. 898, 977 (1997) (Breyer, J., dissenting).

<sup>27</sup> See generally *Zelman v. Simmons-Harris*, 536 U.S. 639, 717–29 (2002) (Breyer, J., dissenting).

<sup>28</sup> Federal News Service, Full Written Transcript of Scalia-Breyer Debate on Foreign Law (Jan. 13, 2005), <http://www.freerepublic.com/focus/news/1352357/posts>.

funded vouchers in religious schools would cause political dissension in society.<sup>29</sup>

Despite resistance to foreign precedent, even those who oppose the practice acknowledge its validity to some degree. For example, in his debate with Justice Breyer, Justice Scalia agreed,

[Y]ou can cite foreign law to show, as Justice Breyer gave an example, to show that if the Court adopts this particular view, the sky will not fall. You know, if we got much more latitudinarian about our approach to the Establishment Clause, things won't be so bad . . . . It's useful for that.<sup>30</sup>

And, indeed, Scalia made the occasional useful reference to foreign law as a benchmark in some of his dissenting opinions.<sup>31</sup> Similarly, Justice Alito (joined by Thomas) has referred to foreign precedent to establish the existence of Western legal traditions: “Nor is the right to same-sex marriage deeply rooted in the traditions of other nations. No country allowed same-sex couples to marry until the Netherlands did so in 2000.”<sup>32</sup> And more recently, Chief Justice Roberts (joined by Scalia and Thomas) noted that, “[h]ere and abroad, people are in the midst of a serious and thoughtful public debate on the issue of same-sex marriage . . . . They see countries overseas democratically accepting profound social change, or declining to do so.”<sup>33</sup>

What does all this mean, then? Some Justices believe that foreign law should be liberally used to help shed light on the interpretation of the Constitution and to provide invaluable insight into the various potential approaches to government and constitutional theory. For others, it is appropriate to use foreign precedent as a window to the past to help understand which rights are “deeply rooted” in Western tradition or “implicit in the concept of ordered liberty.”<sup>34</sup> And even those Justices who oppose the

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<sup>29</sup> *Zelman*, 536 U.S. at 719–29.

<sup>30</sup> Federal News Service, *supra* note 28.

<sup>31</sup> See *McIntyre v. Ohio Election Comm'n*, 514 U.S. 334, 381–82 (1995) (Scalia, J., dissenting) (arguing in favor of bans on “anonymous campaigning” by referencing state and federal government parallels, as well as “the legislatures of foreign democracies: Australia, Canada, and England, for example, all have prohibitions upon anonymous campaigning . . . . How is it, one must wonder, that all of these elected legislators, from around the country and around the world, could not see what six Justices of this Court see so clearly . . . ?”); see also *Koh*, *supra* note 12 (arguing in favor of using international law and pointing out consistencies in Scalia’s position on this issue).

<sup>32</sup> *United States v. Windsor*, 133 S. Ct. 2675, 2715 (2014) (Alito, J., dissenting).

<sup>33</sup> *Obergefell v. Hodges*, 135 S. Ct. 2584, 2624–25 (2015) (Roberts, C.J., dissenting).

<sup>34</sup> *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997) (recounting the legal test to determine whether unenumerated human rights should be constitutionally protected as part of substantive due process).

use of foreign law must concede that it can serve a limited purpose as a policy matter—perhaps merely as an object lesson to see how some policies succeed or fail.

Under all these approaches, therefore—despite the protests of some Justices—there is universal recognition of *some* legitimate purpose to consult what the European Court (and other courts) have to say on matters that impact domestic constitutional interpretation. Though there may be limits to such comparisons based on the policies and philosophies of the Justices, there is value in exploring lessons from the European Court on issues such as the freedom of religion.

### III. SYSTEM-BASED LIMITS ON COMPARING THE U.S. AND EUROPEAN MODELS

The prior section concluded that policy-based considerations do not rule out the validity of comparing the jurisprudence of the U.S. Supreme Court and the European Court. One might wonder, however, whether *systemic differences* between the courts are so profound as to make comparison futile. In fact, the opposite is true. While notable structural differences do exist, they do not invalidate the benefit of comparing how the two courts handle religion-based claims.

When assessing judicial approaches to the freedom of religion, one can choose among several European courts, such as the International Court of Justice (ICJ)<sup>35</sup> or the Court of Justice of the European Union (CJEU).<sup>36</sup> No other tribunal, however, compares with the European Court—a permanent judicial body located in Strasbourg, France, which, since 1950, has become the arbiter of Europe's fundamental rights under the ground-breaking European Convention on Human Rights and Fundamental Freedoms

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<sup>35</sup> The ICJ is the principal judicial organ of the United Nations (UN) and a direct successor to the Permanent Court of International Justice (PCIJ), which began in 1922. It has been in existence since 1946 as a key component of the UN Charter. RUTH MACKENZIE, CESARE ROMANO, PHILIPPE SANDS & YUVAL SHANY, *THE MANUAL ON INTERNATIONAL COURTS AND TRIBUNALS* 4–5 (Oxford Univ. Press 2d ed. 2010). To individuals with concerns about religion, however, this court is of little help, because only states may bring an action. *See id.* at 12.

<sup>36</sup> Known as the European Court of Justice (ECJ) prior to 2009 and the Treaty of Lisbon, the CJEU is located in Luxembourg as the principal judicial organ of the European Community (EC). *See id.* at 253. It is responsible for cases that involve the EU Charter of Fundamental Rights, which includes in Article 10 a provision protecting freedom of thought, conscience, and religion. *See* Charter of Fundamental Rights of the European Union art. 10, Dec. 18, 2000, 2012/C 326/02. (EUCFR) The CJEU rarely will deliver a judgment on the topic of freedom of religion. *But see* Cases of Y(C-71/11) and Z(C-99/11), ECLI:EU:C:2012:518.

(ECHR).<sup>37</sup> The European Court decides comparatively few religion cases in its vast case load.<sup>38</sup>

Admittedly, there are important systemic distinctions between the Supreme Court and the European Court. As discussed below, however, key similarities between the courts leave ample room for drawing legitimate parallels in their jurisprudence.

#### A. *Differences in Structure Between the Two Courts*

Four noteworthy structural distinctions separate the Supreme Court and the European Court, relating to the foundational documents from which each court originated, the scope of each court's judicial review, the composition of each court, and the enforcement of each court's judgments. The first difference involves the foundational documents from which each court originated. Unlike the Supreme Court—which is authorized by a domestic federal constitution mostly concerned with the separation of government powers—the European Court was created by an international human rights convention for the purpose of monitoring the Council of Europe and its member-states.<sup>39</sup> This distinction, however, is not overly significant in the context of interpreting individual rights, such as the freedom of religion. Indeed, both courts protect fundamental rights on a case-by-case basis. For instance, in the context of cases raised by couples denied the right to marry within their states, the Supreme Court recognized a nationwide constitutional right to same-sex marriage.<sup>40</sup> Similarly, in the context of an individual complaint from Northern Ireland, the European Court recognized that the

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<sup>37</sup> Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), Nov. 4, 1950, E.T.S. No. 5 (1950), *as amended by* Protocol No. 11, May 11, 1994, E.T.S. No. 155 (1994).

<sup>38</sup> “From 1959 to 2009, the European Court . . . found a total of thirty [religion] violations . . . . By comparison, during that same forty-year period, the Court found some 4008 violations . . . concerning the fairness and length of proceedings . . . .” Witte & Arold, *supra* note 5, at 14–15; *see also* MACKENZIE, ROMANO, SANDS & SHANY, *supra* note 35, at 335.

<sup>39</sup> Created by the ECHR, the Council includes forty-seven member-states: Albania, Andorra, Armenia, Austria, Azerbaijan, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Macedonia, Malta, Moldova, Monaco, Montenegro, Netherlands, Norway, Poland, Portugal, Romania, Russia, San Marino, Serbia, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, Turkey, Ukraine, and the United Kingdom. *See Our Member States*, COUNCIL OF EUROPE (2017), <http://www.coe.int/en/web/about-us/our-member-states>.

<sup>40</sup> *See Obergefell v. Hodges*, 135 S. Ct. 2584 (2015). This action by the Court, however, was heavily criticized by the dissenting justices as an inappropriate act of judicial legislating, instead of constitutional interpretation.

ECHR provided all consenting European adults the right to engage in homosexual activity without criminal sanction.<sup>41</sup>

This focus on individual cases creates an additional similarity between the courts. Due to its limited federal jurisdiction under Article III of the U.S. Constitution, the Supreme Court must wait for properly raised individual cases before it can define fundamental rights.<sup>42</sup> In the same way, before the European Court can enforce human rights under the ECHR, it must await applications from member-states, non-governmental organizations, or individuals alleging that a member-state has violated rights secured by the Convention and its protocols.<sup>43</sup> In other words, neither court can affirmatively seek out cases or target government policies to overturn.

The second structural difference involves the scope of each court's judicial review. Outside of a handful of cases falling within its original jurisdiction, the Supreme Court operates as a pure appellate court, with little competency in the first instance to find facts and assign damages.<sup>44</sup> In contrast, although mostly resembling an appellate tribunal, the European Court regularly exercises fact-finding powers associated with trial courts, including the ability to conduct an examination, complete with witnesses and documentary evidence.<sup>45</sup> Further, if the domestic law of a member-state cannot provide full satisfaction for an injury, the European Court may fashion a remedy of "just satisfaction," with both pecuniary and non-pecuniary damages.<sup>46</sup> Undeniably, these are significant judicial powers; however, these distinctions do not foreclose a comparison of the two courts. Even though the European Court has distinct fact-finding and remedial powers, it shares with the Supreme Court the key interpretive authority to determine the scope of fundamental rights—the critical point of comparison in religion cases.

The third structural difference involves the composition of the courts. The Supreme Court consists of nine independent Justices with lifetime terms, who decide all cases together and have extensive control over their own

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<sup>41</sup> See *Dudgeon v. United Kingdom*, 45 Eur. Ct. H.R. (ser. A) (1981). Unlike the Supreme Court, the European Court has not yet found a European consensus to recognize a fundamental right to same-sex marriage.

<sup>42</sup> Jeffery S. Gutman, *2.1 Courts of Limited Jurisdiction*, FEDERAL PRACTICE MANUAL FOR LEGAL AID ATTORNEYS (2013), <http://federalpracticemanual.org/chapter2/section1>.

<sup>43</sup> EUROPEAN COURT OF HUMAN RIGHTS THE LIFE OF AN APPLICATION, [http://www.echr.coe.int/Documents/Case\\_processing\\_ENG.pdf](http://www.echr.coe.int/Documents/Case_processing_ENG.pdf) (last visited Feb. 14, 2017).

<sup>44</sup> See *Pullman-Standard v. Swint*, 456 U.S. 273, 291–92 (1982) (stating that "factfinding is the basic responsibility of [lower] courts, rather than appellate courts" (citing *DeMarco v. United States*, 415 U.S. 449, 450 (1974))).

<sup>45</sup> ECHR, art. 38.

<sup>46</sup> *Id.* art. 41; MACKENZIE, ROMANO, SANDS & SHANY, *supra* note 35, at 353–54.

docket.<sup>47</sup> In contrast, the European Court consists of forty-seven judges (one from each member-state) appointed to nine-year, non-renewable terms.<sup>48</sup> They decide cases in a single-judge formation, three-judge committees, seven-judge Chambers, or a seventeen-judge Grand Chamber,<sup>49</sup> and they have little control over their docket, except in those cases accepted for final review by the Grand Chamber.<sup>50</sup> While these distinctions are notable, they bear little on the key reason to compare the courts' jurisprudence—assessing the strengths or weaknesses of each court's interpretation of individual rights.

The final structural difference involves the enforcement of each court's judgments. Although the Supreme Court must rely on the federal political branches to ensure the efficacy of its judgments, the Court has enjoyed notable success even when ushering in major societal changes, such as declaring an end to segregated schools or mandating rights to abortion and same-sex marriage. In contrast, the European Court is not capable of enforcing its own decisions. The judgments, though binding, are executed under the supervision of the Committee of Ministers of the Council of Europe—a sometimes time-consuming and ineffective process.<sup>51</sup> Worse, as illustrated by the United Kingdom's resistance to the European Court's prisoner voting cases,<sup>52</sup> if a member-state ignores a judgment of the Court,

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<sup>47</sup> U.S. CONST., art. III, sec. 1 (providing that the Justices “shall hold their Offices during good Behaviour”); 28 U.S.C. § 1 (LexisNexis current through PL 114-327) (setting number of Justices); 28 U.S.C. §§ 1254, 1257 (LexisNexis current through PL 114-327) (providing for review by *writ of certiorari*).

<sup>48</sup> ECHR, arts. 20, 23(1). Member-states nominate three candidates, and the Parliamentary Assembly of the Council of Europe further elects one judge. See ECHR art. 22; MACKENZIE, ROMANO, SANDS & SHANY, *supra* note 35, at 337–38.

<sup>49</sup> ECHR, *supra* note 37, art. 26.

<sup>50</sup> *Id.* arts. 26–27; European Court of Human Rights, Rules of Court, rr. 24–30 (Nov. 14, 2016), [http://www.echr.coe.int/Documents/Rules\\_Court\\_ENG.pdf](http://www.echr.coe.int/Documents/Rules_Court_ENG.pdf). In the Grand Chamber, a panel of five judges decide whether the case raises a “serious issue of general importance.” *Id.* at r.73; see also ECHR, *supra* note 37, art. 43; Rules of Court, *supra* note 50, at r. 73.

<sup>51</sup> ECHR, *supra* note 37, art. 46(2).

<sup>52</sup> In a series of cases beginning in 2005, the European Court found multiple violations by the United Kingdom regarding its failure to permit prisoners to vote in U.K. elections, in violation of Article 3 of Protocol No. 1 of the ECHR. See *Hirst v. United Kingdom*, 2005-IX Eur. Ct. H.R. 187 (Oct. 6, 2005); *Greens v. United Kingdom*, 2010-VI Eur. Ct. H.R. 57 (Nov. 23, 2010); *Firth v. United Kingdom*, App. no. 47784/09, Eur. Ct. H.R. (Dec. 12, 2014); *McHugh v. United Kingdom*, App. no. 51987/08, Eur. Ct. H.R. (Feb. 10, 2015). The Court has noted the United Kingdom's failure to follow the *Hirst* decision, which was met with an enormous backlash in the United Kingdom, with some leaders even threatening to withdraw the United Kingdom from the ECHR. The Council of Ministers has twice called upon the United Kingdom to follow the *Hirst* decision; however, the United Kingdom still has not complied. Although in 2013 a U.K. Parliamentary committee reviewed a draft bill, the U.K. is unlikely to comply, and the government intends to write a full response to this report sometime in 2016. See Jack Simpson Caird, *Prisoner's Voting Rights: Developments Since*

compliance can be achieved only through a delicate and sometimes ineffective process of diplomacy.

As can be seen, none of these four structural differences poses an insurmountable obstacle to comparing the jurisprudence of the two courts on individual rights such as the freedom of religion. Moreover, the two courts share other similarities in their procedures. For instance, both courts permit third parties (such as non-governmental organizations (NGOs) and other states with an interest) to intervene as *amicus curiae*.<sup>53</sup> This allows for full development of the issues and for the expression of varied positions about individual rights. Also, if there is “imminent risk of irreparable damage,” such as loss of life or torture, both courts have the ability to preserve rights while a case is being considered.<sup>54</sup> Additionally, both courts use oral argument to assist in deciding cases, although the Supreme Court hears argument in far more cases and employs a much more active method of questioning the advocates during those arguments.<sup>55</sup>

In sum, while structural dissimilarities may impact how the judges operate, these differences do not nullify the legitimacy of comparing the two courts’ jurisprudence. Indeed, as discussed below, a core “similarity of focus” between the courts favors a comparison of their cases involving individual rights, such as the freedom of religion.

#### *B. Similarity of Focus: Federalism, Subsidiarity, and the Margin of Appreciation*

Despite the structural differences noted above, when dealing with matters of individual rights, the focus of the Supreme Court Justices and the European judges is often similar. Indeed, the two courts operate in somewhat parallel systems because the entities subject to their rulings are sovereign states. In this way, the U.S. system of “federalism” dovetails with the European Court’s experience as a supra-national body governed by the principle of “subsidiarity.”

The Supreme Court has affirmed that the U.S. Constitution operates within the bounds of federalism—a doctrine that recognizes the federal

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May 2015, U.K. PARLIAMENT (Feb. 15, 2016), <http://researchbriefings.parliament.uk/Research/Briefing/Summary/CBP-7461>.

<sup>53</sup> See ECHR, *supra* note 37, art. 36; Rules of Court, *supra* note 50, at r. 44; see also MACKENZIE, ROMANO, SANDS & SHANY, *supra* note 35, at 351.

<sup>54</sup> For instance, the European Court may have the parties adopt “interim measures” while the case is decided. MACKENZIE, ROMANO, SANDS & SHANY, *supra* note 35, at 346 (citing *Mamatkulov v. Turkey*, 2005-I Eur. Ct. H.R. 293, para. 104 (Feb. 4, 2005)).

<sup>55</sup> See ECHR, *supra* note 37, art. 40; Rules of Court, *supra* note 50, at r. 58–59, 63; see also MACKENZIE, ROMANO, SANDS & SHANY, *supra* note 35, at 351.

government as one of delegated powers. James Madison summed up the concept this way:

The powers delegated by the proposed constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite . . . . The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State.<sup>56</sup>

Partly due to federalism principles, the Supreme Court polices its own jurisdiction with constitutional and prudential doctrines, such as standing, and by enforcing common law and statutory requirements to exhaust remedies at the state level.<sup>57</sup> By limiting the number and types of cases available for federal judicial review, the Court better preserves the power of the sovereign states to act within their own spheres of authority. This, in turn, maintains an important constitutional balance set in place to limit the power of the national government and to divide power in order to avoid tyranny.

Likewise, at the European Court, the principle of subsidiarity—stemming from the ECHR—provides that “the task of ensuring respect for the rights enshrined in the Convention lies first and foremost with the authorities in the Contracting States rather than with the [European] Court. The Court can and should intervene only where the domestic authorities fail in that task.”<sup>58</sup> Due to this principle, the European Court strictly enforces the ECHR’s requirement that cases be submitted within six months from the date of a final domestic decision, and that the petitioner exhausts all ordinary, reasonably available legal remedies through courts and channels in the member-state.<sup>59</sup> In addition, the European Court scrutinizes alleged human rights violations with a strict eye to weed out cases that are unnecessary to decide, in deference to the sovereign states living under the ECHR—much like U.S. federal courts.

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<sup>56</sup> THE FEDERALIST NO. 45 (James Madison).

<sup>57</sup> For instance, in *habeas corpus* cases, a tradition of common and statutory law has affirmed the requirement that prisoners exhaust state remedies. See *Duckworth v. Serrano*, 454 U.S. 1, 3 (1981) (“The exhaustion requirement . . . serves to minimize friction between our federal and state systems of justice by allowing the State an initial opportunity to pass upon and correct alleged violations of prisoners’ federal rights.”).

<sup>58</sup> *Interlaken Follow-Up (Note by the Jurisconsult)*, EUROPEAN COURT OF HUMAN RIGHTS, ¶ 2 (Aug. 7, 2010), [http://www.echr.coe.int/Documents/2010\\_Interlaken\\_Follow-up\\_ENG.pdf](http://www.echr.coe.int/Documents/2010_Interlaken_Follow-up_ENG.pdf).

<sup>59</sup> See MACKENZIE, ROMANO, SANDS & SHANY, *supra* note 35, at 342–43.

The similarity of this practice to the U.S. Supreme Court can be seen most clearly in two European doctrines: “admissibility” and the “margin of appreciation.”

### *1. Admissibility Doctrine*

The European Court’s doctrine of admissibility leads to the dismissal of most filed petitions,<sup>60</sup> including those alleging violations of the freedom of religion—a convenience that approximates the Supreme Court’s ability to control its docket by dismissing most petitions for a writ of certiorari without explanation. Additionally, this European doctrine often promotes the same policies that undergird the Supreme Court’s Article III and prudential justiciability doctrines of standing, ripeness, and mootness.

The first prong of the Supreme Court’s standing doctrine<sup>61</sup> focuses on whether a party was sufficiently injured to bring a federal case. In the same way, a European Court petition may be inadmissible because it fails to provide sufficient information about an injury, or fails to show that the applicant “suffered a significant disadvantage.”<sup>62</sup> As an example, in *Avilkina v. Russia*, the European Court dismissed a petition by a Jehovah’s Witness member who claimed she was injured because of her religious status when Russia disclosed her medical files, in violation of the non-discrimination provisions of the ECHR.<sup>63</sup> The facts of record, however, did not back up that alleged injury: no actual files had been disclosed for that particular applicant.<sup>64</sup>

Another injury-related reason to dismiss a case as inadmissible involves applicants who file “manifestly ill-founded” petitions. For instance, in *Mann Singh v. France*, a Sikh complained under the ECHR when France denied him a driver’s license because his passport photo was not “bareheaded,” as

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<sup>60</sup> Since 1998, a major case load increase at the European Court, but for example, over 90% were inadmissible in 2013. See European Council, *Practical Guide on Admissibility Criteria*, EUROPEAN COURT OF HUMANS (2014), [http://www.echr.coe.int/Documents/Admissibility\\_guide\\_ENG.pdf](http://www.echr.coe.int/Documents/Admissibility_guide_ENG.pdf).

<sup>61</sup> The doctrine of standing “serves to prevent the judicial process from being used to usurp the powers of the political branches . . . . To establish Article III standing, an injury must be ‘concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling.’” *Clapper v. Amnesty Int’l USA*, 133 S. Ct. 1138 nn.46–47 (2013) (quoting *Monsanto Co. v. Geertson Seed Farms*, 130 S. Ct. 2743, 2752 (2010)) (or 561 U.S. 139, 149).

<sup>62</sup> MACKENZIE, ROMANO, SANDS & SHANY, *supra* note 35, at 348–50; ECHR, *supra* note 37, art. 35; Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Amending the Control System of the Convention, May. 13, 2004 arts. 7, 8, CETS 194.

<sup>63</sup> *Avilkina v. Russia*, App. no. 1585/09, Eur. Ct. H.R. (Oct. 7, 2013).

<sup>64</sup> *Id.*

required by the rules—instead, he wore a turban to comply with his religious mandate to wear the headpiece at all times.<sup>65</sup> The European Court found the application manifestly ill-founded because the rule—while clearly interfering with the Sikh's religious observances—was “justified in principle and proportionate to the objective” of “public safety and protection of public order” and necessary “due to the increased risk of fraud and forgery of driving licenses.”<sup>66</sup> This aspect of admissibility—seemingly judging the merits of claims without entertaining a complete examination—grants even greater deference to sovereign states than the U.S. Supreme Court's standing doctrine. Of course, the Supreme Court engages in a similar practice when it regularly denies certiorari on cases that are not deemed important enough to be heard by the Justices.

Other aspects of the admissibility doctrine resemble the second and third prongs of the Supreme Court's standing inquiry—lack of causation and lack of redressability.<sup>67</sup> Notably, the European Court will not entertain petitions that bring a claim against an entity that is not a party to the Convention, or that seek to redress a right that is not secured by the ECHR.<sup>68</sup> In *Stephens v. Cyprus*, a woman alleged under the ECHR that the United Nations had denied her access to her home without compensation while Turkish and Greek-Cypriot forces were fighting in the area in 1974.<sup>69</sup> The European Court found the complaint to be inadmissible because the United Nations “has a legal personality separate from that of its member states and is not a Contracting Party to the Convention . . . .”<sup>70</sup> In other words, her claim of injury was not within the Court's jurisdiction.

A petition may also fail if the injury has not yet come to full fruition—the ripeness doctrine.<sup>71</sup> In *Ligue des Musulmans de Suisse v. Suisse*, the European Court considered a challenge to a Swiss constitutional amendment that banned the building of Muslim minarets.<sup>72</sup> The Court ruled the case inadmissible because it was brought by those who did not allege that they intended to erect such buildings in the future, and who were not direct

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<sup>65</sup> *Mann Singh v. France*, App. no. 4479/07, Eur. Ct. H.R. (Nov. 13, 2008).

<sup>66</sup> *Id.*

<sup>67</sup> *See Clapper*, 133 S. Ct. at 1147.

<sup>68</sup> *See ECHR*, *supra* note 37, art. 35; Protocol 14, *supra* note 62, arts. 7–8; MACKENZIE, ROMANO, SANDS & SHANY, *supra* note 35, at 348–50.

<sup>69</sup> *Stephens v. Cyprus*, App. no. 45267/06, Eur. Ct. H.R. (Feb. 28, 2007).

<sup>70</sup> *Id.*

<sup>71</sup> The ripeness doctrine helps “to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties.” *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148–49 (1967).

<sup>72</sup> *Ligue des Musulmans de Suisse v. Suisse*, App. no. 66274/09 (June 28, 2011).

victims of the alleged Convention violation.<sup>73</sup> Although most scholars, including the Swiss government itself, opined that the ban would be a violation of the freedom of religion under the ECHR, the Court did not even reach the question because the challenge lacked a ripe injury.

Finally, sometimes an inadmissible petition raises previously resolved issues that no longer justify review—mootness.<sup>74</sup> For example, in *Oleksy v. Poland*, the applicant—a former Prime Minister of the nation—complained of several deprivations of his rights as a defendant in a criminal trial, in violation of the ECHR.<sup>75</sup> The Supreme Court of Poland previously overturned his conviction and required that the proceedings against the applicant be discontinued. In light of this action at the state level, the European Court ruled the case inadmissible because “any defects which may have existed at the time of the applicant’s trial . . . must be considered to have been rectified.”<sup>76</sup> In turn “the applicant can no longer claim to be the victim of the alleged violations of the Convention, as required by Article 34.”<sup>77</sup>

In essence, the European Court’s admissibility doctrine ensures that the judges do not needlessly interfere with the workings of member-states. This parallel to the Supreme Court’s practices increases the validity of comparisons made between the jurisprudence of the two courts.

## 2. *The “Margin of Appreciation” Doctrine*

The European Court’s application of the “margin of appreciation” doctrine also bears similarity to regular practices of the Supreme Court. The U.S. system of federalism requires “federal courts to defer to the practices and policies of individual states, unless there are clear violations of federal constitutional rights . . . .”<sup>78</sup> In the same way, the European “margin of appreciation” doctrine was created “to address the pluralism of member states’ legislation” and to give European nations “adequate space” to legislate “according to their different legal traditions, social circumstances, and cultural specificities.”<sup>79</sup> This principle of deference “recognizes that

<sup>73</sup> *Id.* (“pas plus qu’elles n’allèguent avoir l’intention d’ériger de tels bâtiments à l’avenir. Elles ne sont donc pas directement victimes de la violation alléguée de la Convention.”).

<sup>74</sup> “A case becomes moot—and therefore no longer a ‘Case’ or ‘Controversy’ for purposes of Article III—‘when the issues presented are no longer ‘live’ or the parties lack a legally cognizable interest in the outcome.’ ” *Already, LLC, v. Nike, Inc.*, 133 S. Ct. 721, 727 (2013) (quoting *Murphy v. Hunt*, 455 U.S. 478, 481 (1982) (per curiam)).

<sup>75</sup> *Oleksy v. Poland*, App. no. 1379/06, Eur. Ct. H.R. (June 16, 2009).

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> Witte & Arold, *supra* note 5, at 53–54.

<sup>79</sup> Pin, *supra* note 5, at 641.

national judges are often better placed than international judges to assess these culturally sensitive questions” regarding human rights within the context of a particular nation’s situation.<sup>80</sup>

In the context of religion, the European Court has liberally applied the “margin of appreciation” to a wide variety of practices. For instance, in *Cha’are Shalom Ve Tsedek v. France*, the European Court rejected a challenge by an ultra-orthodox Jewish organization that was denied the ability to ritually slaughter its own meat to ensure compliance with the group’s rigid “glatt” religious prescriptions.<sup>81</sup> The French government denied the group’s license under its animal cruelty laws, because another Jewish organization had been granted the license and could provide the meat to the applicant group.<sup>82</sup> Displaying great deference, a Grand Chamber of the European Court found that there had been no interference with the applicant’s religious beliefs and that France’s rules fell within the wide “margin of appreciation” due to member-states.<sup>83</sup> In a very different context, in *Eweida v. United Kingdom*, the two applicants were Christian employees who opposed same-sex partnerships on religious grounds, and whose consciences prevented them from performing job duties that furthered such relationships.<sup>84</sup> The European Court upheld their dismissals from employment in the United Kingdom, in a display of its usual wide “margin of appreciation,” noting that there was no consensus in Europe on the proper balance between conscience and accommodations on this sensitive issue.<sup>85</sup>

This generous application of the margin of appreciation doctrine provides significant deference to the practices of European nations where no clear consensus has been established throughout Europe. In that sense, it is similar to the deference the Supreme Court sometimes gives to states under federalism principles, especially in certain areas (e.g., education, criminal law) traditionally regulated by the states using their general police power, in contrast to the limited and delegated powers of the national government under the U.S. Constitution.<sup>86</sup>

In sum, because both courts are deferential to sovereign states when crafting their judicial opinions, legitimate comparisons can be made between the U.S. and European systems despite their differences. This is shown by

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<sup>80</sup> Witte & Arold, *supra* note 5, at 16.

<sup>81</sup> *Cha’are Shalom Ve Tsedek v. France*, 2000-vII231 Eur. Ct. H.R. (May 31, 2000).

<sup>82</sup> *Id.* (concluding that the group could also easily import “glatt” meat from Belgium).

<sup>83</sup> *Id.*

<sup>84</sup> *Eweida v. United Kingdom*, 2013-I Eur. Ct. H.R. 215 (Jan. 15, 2013).

<sup>85</sup> *Id.*

<sup>86</sup> *See, e.g.*, *United States v. Lopez*, 514 U.S. 549 (1995) (striking down a federal law that encroached on an area of traditional state regulation); *see also* Antony B. Kolenc, *Commerce Clause Challenges After United States v. Lopez*, 50 FLA. L. REV. 867 (1998) (discussing commerce challenges in other areas of traditional state regulation).

the European Court's strict application of its admissibility doctrine, reminiscent of the Supreme Court's justiciability doctrines. It also reveals itself in the wide margin of deference the European Court provides to legislation and adjudications made at the member-state level, recognizing that judges at the state level are better situated to vindicate individual rights, such as the freedom of religion, in the unique cultural settings of their own nations—a policy with parallels to U.S. notions of federalism.

#### IV. SUBJECT-MATTER-BASED LIMITS ON COMPARING THE U.S. AND EUROPEAN MODELS

In the two prior sections, this Article established that policy considerations from all points of the political spectrum would allow for some comparison between the jurisprudence of the U.S. Supreme Court and the European Court. In addition, the systemic structure and similar focus of the two courts may lend themselves to a legitimate comparison of their respective precedents. Even if one accepts these two propositions, however, one might still object that—at least in religion cases—the substance of the subject matter differs too greatly between the two systems. In other words, one could argue that the U.S. Constitution and the ECHR are too dissimilar regarding religion to offer any useful data. This line of attack would provide the strongest reason to be skeptical of the comparison between the two courts. Still, as discussed below, even this consideration does not foreclose the validity of comparing the U.S. and European jurisprudence in this area.

##### A. *The First Amendment and Article 9*

The First Amendment to the U.S. Constitution states, in part, that “Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof.”<sup>87</sup> This single sentence contains two Religion Clauses. The first part of the sentence—known as the Establishment Clause—prevents government from taking steps toward setting up a state church; while the second part—the Free Exercise Clause—protects against government hindrances to religious faith and practice. Yet this dearth of words has left many unanswered questions for the Supreme Court to decide.

The Religion Clauses provide no guidance on how to adjudicate establishment claims or assess free exercise violations. They lay out no jurisprudential tests for the Supreme Court to apply, and they do not define key terms, such as “respecting” or “establishment.” Indeed, the term

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<sup>87</sup> U.S. CONST. amend. I.

“religion” appears to leave non-religious conscience rights unprotected by the First Amendment.<sup>88</sup> All this ambiguity has left the Supreme Court with free reign to interpret terms and define the scope of the Religion Clauses with few textual limitations. Unfortunately, the Supreme Court has struggled over the years to define workable tests to measure these areas, leading to the development of the oft-maligned Establishment Clause test articulated in *Lemon v. Kurtzman*,<sup>89</sup> and the notorious rational basis view adopted in Free Exercise Clause cases in *Employment Division v. Smith*.<sup>90</sup>

In contrast, Article 9 of the ECHR provides explicit guidance for the European Court to apply when deciding freedom of religion questions. Article 9 states:

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.<sup>91</sup>

The first paragraph of Article 9 defines the substantive right in detail, protecting both private and public aspects of religion, as well as individual and community manifestations of faith. Unlike the First Amendment, this first paragraph expressly includes rights of conscience and non-religion under its protective ambit.

The second paragraph of Article 9 sets forth a jurisprudential ends-means balancing test that allows member-states flexibility in structuring their laws to achieve proper ends (e.g., safety, health) through appropriate means (necessary democratic legal limitations). In essence, this paragraph requires

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<sup>88</sup> See Eduardo Peñalver, *The Concept of Religion*, 107 YALE L.J. 791, 802–04 (1997); Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1481 (1990) (concluding that the Framers excluded conscience rights protection in the Religion Clauses, expressly rejecting an earlier version of the First Amendment).

<sup>89</sup> See *Lemon v. Kurtzman*, 403 U.S. 602 (1971); see also Antony B. Kolenc, “*Mr. Scalia’s Neighborhood*”: A Home for Minority Religions?, 81 ST. JOHN’S L. REV. 819, 831–35 (2007) (discussing the criticism of *Lemon* and evaluating potential replacement tests).

<sup>90</sup> See *Employment Division v. Smith*, 494 U.S. 872, 886 (1990); see also Kolenc, *supra* note 89, at 840–42 (discussing the details of *Smith*).

<sup>91</sup> ECHR, *supra* note 26, art. 9.

the European Court to determine whether a member-state has interfered with a religious right, and whether a legal basis existed for that interference. Article 9 then mandates a balancing test to weigh whether the interference was “necessary in a democratic society”—that is, whether it “corresponds to a pressing social need, is proportionate to the aim pursued, and is justified by relevant and sufficient reasons.”<sup>92</sup> In practice, this test has proven to be similar to the rational basis test used by the U.S. Supreme Court in its free-exercise jurisprudence.

So just how different is the subject matter of Article 9 from the U.S. Constitution’s First Amendment? This question is best considered by dividing the comparison between the two Religion Clauses.

#### *B. Article 9 and the Free Exercise Clause*

The differences between the First Amendment and Article 9 are not as great as they appear when considering the Free Exercise Clause jurisprudence after *Smith*. In a post-*Smith* world, the Supreme Court applies strict judicial scrutiny only when the government targets religion with laws that are either not neutral or not generally applicable.<sup>93</sup> Otherwise, the Supreme Court’s ends-means analysis in free exercise cases approximates the second paragraph of Article 9 of the ECHR by merely requiring that governments possess a rational basis to regulate neutral activity that impacts religion.

For instance, in the controversial *Smith* case itself, the Supreme Court affirmed a state government’s generally applicable law that neutrally regulated harmful controlled substances, such as the drug peyote, even though that regulation substantially interfered with the rights of some Native Americans who sincerely practiced a religion that considered peyote use to be sacramental.<sup>94</sup> The Court found that the state had neutrally sought to protect ends that were legitimate (i.e., public health and safety) by generally applicable means that were rationally related to those ends (i.e., prohibiting ingestion). Thus, the fact that the law interfered with individual religious practice was essentially a non-issue.

Similarly, consider how the European Court applies the jurisprudential test set out in the second paragraph of Article 9. In *S.A.S. v. France*, the Court upheld France’s facially neutral ban on the wear of any item that covered the face in public, despite an acknowledgement by the Court that the

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<sup>92</sup> Witte & Arold, *supra* note 5, at 16.

<sup>93</sup> *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993) (applying strict scrutiny to non-neutral, non-generally applicable city laws that targeted the Santeria religion’s practice of ritual animal slaughter).

<sup>94</sup> *See generally Smith*, 494 U.S. at 872.

ban was primarily aimed at preventing Islamic women from publicly wearing religious garb, such as a burqa.<sup>95</sup> The European Court rejected some of France's proposed ends for the ban (i.e., national security, protection of women), but it accepted France's end of protecting "the rights and freedom of others" to ensure that persons can interact in public by seeing each other's faces.<sup>96</sup> According to the Court, the means of accomplishing this end by "neutrally" banning all facial coverings was "necessary in a democratic society."<sup>97</sup>

This ends-means analysis by the European Court approximates what the Supreme Court would do if it treated the facts of *S.A.S.* under the rational basis test articulated in *Smith*. The Supreme Court could potentially uphold the ban by noting France's legitimate aim to enhance societal interaction, and then it could find that banning face coverings is rationally related to that end. Of course, one might argue that the Supreme Court would instead find France's conduct in *S.A.S.* more akin to a specific discrimination against religion, thereby causing the Justices to strike down the ban under strict scrutiny because France is targeting Islamic garb.<sup>98</sup> Whichever test one uses, however, this academic exercise demonstrates that the subject matter of religion lends itself to a valid comparison between the U.S. and European models—at least when dealing with cases that would fall within the Free Exercise Clause of the U.S. Constitution.

### C. Article 9 and the Establishment Clause

The argument in favor of comparing the jurisprudence of the two courts becomes more challenging when dealing with cases under the Establishment Clause of the First Amendment. For all its detail, Article 9 of the ECHR contains nothing that resembles a ban on the state establishment of religion. In fact, many European nations—the United Kingdom, Denmark, Iceland, Norway, and several others—continue legally to uphold official establishments of religion. Some might argue that this lack of a European Establishment Clause invalidates any attempt to compare religion cases between the two systems. This would overstate the problem, however, and ignore important areas of commonality.

Admittedly, the lack of an Establishment Clause in the ECHR makes it difficult to find many helpful comparisons with certain European cases. For instance, in *Ásatrúarfélagid v. Iceland*, the European Court dismissed the claim of a minority religious group that complained about Iceland's system

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<sup>95</sup> *S.A.S. v. France*, App. no. 43835/11, Eur. Ct. H.R. (July 1, 2014).

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> See generally *Lukumi Babalu Aye*, 508 U.S. at 520.

of “parish charges” collected from income taxes.<sup>99</sup> The European Court found the application to be manifestly ill-founded because Iceland’s explanation about why it needed to pay extra “tithes” to the state-supported national church was “reasonable.”<sup>100</sup> Of course, this kind of tithing system could never occur in the United States., specifically because of the existence of the Establishment Clause. Still, one might find a useful comparison between the cases even in this situation. For instance, the European Court’s analysis of this issue explored whether Iceland’s tithing system neutrally treated all religions comparably, and whether Iceland had a reasonable explanation for extra funds going to the state-established church.

The very existence of a “neutrality principle” in the European system may be due, in part, to the emphasis on neutrality in U.S. Establishment Clause jurisprudence. Indeed, this may be an example of the Supreme Court’s influence on the European Court, persuading that court to use a stricter approach in some cases than the ECHR might otherwise require. For instance, in *Metropolitan Church of Bessarabia v. Moldova*, the European Court found that Moldova had violated Article 9 when it refused to legally recognize a “schismatic” Orthodox Christian sect that refused to reconcile with a larger Orthodox Church that was already recognized by the state.<sup>101</sup> In essence, Moldova had refused to recognize the sect because it had assessed “the legitimacy of religious beliefs” of the group, and had impacted its legal rights. Despite a difficult political environment—Moldova had recently emerged from the Soviet Union and this dispute actually may have been part of a proxy clash between Russia and Romania—the European Court found a violation of “the State’s duty of neutrality and impartiality” in harming the sect’s legal rights under Moldovan law.<sup>102</sup> This case applied the neutrality principle in a way that lines up well with the U.S. Supreme Court’s Establishment Clause ruling in *Presbyterian Church v. Hull Church*, where the Justices nullified a Georgia law that required a jury in a church property dispute to determine which side of the dispute was more faithful to the religion’s tenets.<sup>103</sup> The Court found that “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.”<sup>104</sup>

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<sup>99</sup> *Ásatrúarfélagid v. Iceland*, App. no. 22897/08, Eur. Ct. H.R. (Sept. 18, 2012).

<sup>100</sup> *Id.*

<sup>101</sup> *Metropolitan Church of Bessarabia v. Moldova*, 2001-XII Eur. Ct. H.R. 81 (Dec. 13, 2001).

<sup>102</sup> *Id.*

<sup>103</sup> *Presbyterian Church in U.S. v. Mary Elizabeth Blue Hull Mem’l Presbyterian Church*, 393 U.S. 440, 440 (1969).

<sup>104</sup> *Id.* at 449.

Therefore, if Europeans have found a neutrality principle in Article 9, there may be room to draw parallels with U.S. Establishment Clause jurisprudence, which also hinges on the concept of government neutrality. In essence, even the lack of an Establishment Clause in Article 9 does not destroy all meaningful comparison between the two courts' jurisprudence in this area because there is more overlap than one might think.

#### V. CONCLUSION

The Supreme Court continues to reference foreign precedent in its decisions that interpret the U.S. Constitution, especially taking stock of the jurisprudence of the Western world and the European Court. Scholars in recent years have also taken an increased interest in the European Court, and many of them have examined how the Europeans are resolving difficult questions involving the freedom of religion. Are such comparisons between the courts valid? Absolutely.

Although some Justices have raised policy concerns about the propriety of citing foreign precedent, even the staunchest opponent to the practice succumbs to the temptation from time to time, comparing how other courts around the world have handled problems the Supreme Court may encounter. Yet, even those who most strongly support the consultation of foreign law in domestic issues have recognized that international norms and practices are, at best, guidelines or models for the Supreme Court—not binding precedent to be forced upon the American people.

When it comes to the European Court in particular, several structural differences in the composition of the court, its mission, and its procedures warrant some caution when drawing comparisons with the Supreme Court's jurisprudence. Still, both courts operate in systems that require deference to sovereign states. Indeed, the focus of both courts require a similar judicial temperament when handling alleged human rights violations by member-states. More important, both courts have the final word on interpreting the scope of individual human rights under their respective systems. On balance, then, none of the structural differences destroy the validity of comparing the jurisprudence of the two courts, perhaps even searching for lessons and benchmarks to implement in the other system.

Finally, there are notable differences between the Religion Clauses of the First Amendment and Article 9 of the ECHR. Indeed, the subject matter of each system's religion protections must ultimately limit the extent to which comparisons can be drawn between the jurisprudence of the Supreme Court and the European Court on the topic of religion. In particular, the absence of an Establishment Clause in Europe is the greatest difference, requiring the most caution when comparing this jurisprudence. Yet, accepting those

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caveats, scholars and judges still may find good use in comparing the freedom of religion cases from the European Court with those in the United States.

There may even be some lessons the Americans can learn from Europe when it comes to interpreting the Religion Clauses in the future.