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Transatlantic perspectives on proportionality in religious liberty cases: The United States and the European Court of Human Rights

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Perspectives transatlantiques sur le principe de proportionnalité en matière de liberté religieuse : Les États Unis et la Cour Européenne des droits de l'homme

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***CREON**:*

And yet you dared defy the law.

ANTIGONE:

I dared.

It was not God's proclamation. That final Justice

That rules the world below makes no such laws.

Your edict, King, was strong,

But all your strength is weakness itself against

The immortal unrecorded laws of God.

They are not merely now: they were, and shall be,

Operative forever, beyond man utterly.[1]

[1] Sophocles, *Antigone*, trans. Dudley Fitts and Robert Fitzgerald, (Caedmon, 1995), lines 356–363.

ABSTRACT

The question of how to maximize religious freedom without undermining state authority or unduly burdening other citizens is an ancient one, yet it continues to challenge judges across legal systems. When facing rights conflicts courts are often obliged to balance incommensurate values. The object of this study is to better understand how courts make these hard choices by comparing the cases involving religious freedom in the workplace in two distinct legal environments: the federal appeals courts of the United States and the European Court of Human Rights (the "ECtHR").

The US approach to religious free exercise can be characterized as a diverse array of different principles to be applied according to the context of the case. In some categories of case there is very little right to religious accommodation in the workplace or indeed anywhere else. In others, courts apply a strict scrutiny standard that requires the government to justify any limitation as being the least restrictive means of achieving a compelling state interest. In parallel to this two-track system of review there are other statutory requirements in many situations, creating a fractured system implicating multiple standards of review. The ECtHR, on the other hand, has developed its own unitary balancing system based on German proportionality analysis and structured by the language of the limitations clauses of the European Convention on Human Rights.

This thesis compares the workplace cases in the two courts firstly categorized by the context and subject matter of the cases, and then explores the same body of cases by breaking down the methodologies used into a series of common inquiries. The purpose of this form of analysis is to contrast the two approaches in order to shed light on the role that balancing methods play in delivering outcomes. While the cases do not differ vastly when compared in terms of the subject matter of the dispute, the nature of the employer has been somewhat more decisive as a difference between the two jurisdictions. The most important difference to be found is in the treatment of religious organizations. Thus differences in outcomes are significant, but only in specific contexts.

This thesis then compares the cases through the lens of how the courts evaluate (i) the burden imposed on the religious claimant, (ii) the legitimacy and importance of the state interest leading to the rights limitation, (iii) the suitability of the means/ends relationship, and (iv) the relationship between all of the above. It emerges that methodological differences have a significant impact on how religious freedom is evaluated in the US and ECtHR. Firstly, the US system of tiered review and its accompanying categorical approach to reasoning at each step of the process is fundamental to understanding outcomes. The choice of tier of review is usually decisive because each step acts as a potentially decisive threshold. US courts studiously avoid a holistic balancing of interests even when they use balancing rhetoric. In contrast, the ECtHR assembles the outcomes of the inquiries listed above into a holistic balancing of interests. While the result is that religious interests do not win as often in the ECtHR, proportionality allows the Court the flexibility to take greater care of competing rights and interests. The comparison suggests that it is the courts' respective attitudes towards balancing that are the most explanatory in understanding the differences in religious freedom protections. Methodology, in short, trumps ideology.

Keywords : constitutional law, comparative law, human rights, freedom of religion, secularism

RÉSUMÉ

Comment garantir la liberté de religion sans porter atteinte à l'autorité de l'État ou faire peser une charge excessive sur les autres citoyens est une question ancienne qui continue à poser des problèmes aux juges au sein de l'ensemble des systèmes judiciaires. Lorsque les tribunaux sont confrontés à de tels conflits de droits, ils se trouvent contraints d'opérer une mise en balance des droits fondamentaux et de choisir entre eux. L'objet de cette étude est de mieux comprendre comment les tribunaux opèrent ces choix difficiles. Pour ce faire, il s'agira de comparer des cas impliquant la liberté de religion sur le lieu de travail au sein de deux systèmes juridiques distincts : les Cours fédérales d'appel américaines et la Cour européenne des droits de l'homme (la "CEDH").

L'approche états-unienne de la liberté de religion se caractérise par une constellation de différents principes dont l'application dépend du contexte de l'affaire. Dans certaines catégories de cas, le droit à l'exception religieuse est très limité. Dans d'autres, les tribunaux appliquent une norme de contrôle stricte qui impose à l'état de limiter les atteintes à la liberté religieuse en les réservant aux seules atteintes justifiées par un motif impérieux d'intérêt général. Le résultat est un système fragmenté qui connaît une prolifération des normes de contrôle. La CEDH, quant à elle, a développé son propre système fondé sur le modèle allemand du contrôle de proportionnalité et structuré par le langage des clauses de limitation de la Convention.

Cette thèse entend comparer le traitement par ces deux systèmes des cas de conflits religieux sur le lieu de travail, d'abord en les classant selon le contexte et l'objet des affaires, puis en explorant ce même corpus en analysant les méthodologies utilisées. L'objectif de cette analyse est de mettre en contraste différentes approches afin de dévoiler les méthodes distinctes de mise en balance des intérêts. Ainsi, si l'identité de l'employeur semble le facteur le plus déterminant pour chaque juridiction, la différence la plus significative réside dans le traitement réservé par les deux systèmes aux organisations religieuses. Ces différences de résultats sont significatives, mais uniquement dans des contextes spécifiques.

Cette thèse compare également les affaires à travers les prismes suivants : la manière dont les tribunaux évaluent (i) la charge imposée à la personne religieuse, (ii) la légitimité et l'importance de l'intérêt de l'État conduisant à la limitation des droits, (iii) la pertinence des moyens et des objectifs de l'ingérence dans le droit religieux, et (iv) les liens entre tous les éléments ci-dessus. Il apparaît que les différences méthodologiques ont un impact significatif sur les évaluations des conflits impliquant la religion. Tout d'abord, pour comprendre les jugements, il est primordial de comprendre le système d'examen par paliers utilisé aux États-Unis et l'approche catégorielle du raisonnement qui l'accompagne à chaque étape du processus. Si le choix du niveau de contrôle est généralement décisif, c'est parce que chaque étape agit comme un seuil potentiellement déterminant. Les tribunaux états-uniens évitent soigneusement une « mise en équilibre » holistique des intérêts, même lorsqu'ils utilisent la rhétorique de la mise en balance. En revanche, la CEDH rassemble les résultats des enquêtes énumérées ci-dessus et procède ensuite à une mise en balance holistique des intérêts. S'il en résulte qu'auprès de la CEDH, les intérêts religieux ne l'emportent pas souvent, la proportionnalité offre à la Cour la souplesse nécessaire pour prendre en compte les droits et intérêts concurrents. La comparaison suggère enfin que les approches centrées sur les conflits de droits sont =déterminantes pour comprendre les différences dans la protection de la liberté religieuse. En bref, la méthodologie l'emporte sur l'idéologie.

Mots-Clés: droit constitutionnel, droit comparé, droits de l'homme, liberté de religion, laïcité

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ABBREVIATIONS AND ACRONYMS

ACA	Affordable Care Act
ADAPT	Douglas County Council Alcohol and Drug Abuse Prevention and Treatment
BA	British Airways
COE	Council of Europe
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EEOC	Equal Employment Opportunity Commission
PA	Proportionality Analysis
RFRA	Religious Freedom Restoration Act

RÉSUMÉ SUBSTANTIEL

Problématique

Comment maximiser la liberté de religion sans saper l'autorité de l'État ou faire peser une charge excessive sur les autres citoyens est une question ancienne. Au XXIe siècle, elle semble plus urgente que jamais, et pourtant les Cours ont eu du mal à trouver des moyens satisfaisants pour mettre en œuvre cette liberté, face à un pluralisme religieux croissant, face à l'approfondissement de la notion de sécularité et face à des normes sociales qui évoluent rapidement. La plupart des systèmes juridiques, lorsqu'ils abordent les conflits entre droits fondamentaux, appliquent une certaine forme de principe de mise en balance, pour tenter d'optimiser leur solution en "équilibrant" les intérêts des parties dans le contexte spécifique du conflit. La métaphore de la mise en balance est toutefois gênante, surtout lorsqu'il s'agit de la liberté religieuse. Le poids est une valeur commune par laquelle les objets physiques peuvent être comparés, mais par quelle valeur commune peut-on comparer la liberté d'expression et le droit à des soins de santé adéquats ? Le choix dans la manière de faire la comparaison façonnera inévitablement les contours de la liberté religieuse et des droits constitutionnels en général.

La manifestation religieuse sur le lieu de travail

L'objet de cette étude est de mieux comprendre comment les Cours s'y prennent dans leur mise en équilibre des droits, en comparant les expériences de deux systèmes juridiques différents qui ont adopté des approches quelque peu différentes : le système fédéral états-uniens et la Cour européenne des droits de l'homme (la "CEDH"). Afin de conserver les avantages d'une étude à petite échelle, en particulier pour permettre une comparaison détaillée au cas par cas, cette thèse se concentrera sur les cas de conflit découlant de la manifestation religieuse sur le lieu de travail. Ce domaine du droit est de plus en plus pertinent et sous-théorisé en tant que catégorie. De plus, le lieu de travail est essentiellement un espace social hautement litigieux et semi-volontaire, où la participation par choix existe mais est incertaine, où le coût humain d'une mise à l'écart sont élevés, et dans lequel des

personnes de traditions diverses doivent coopérer et s'entendre. L'adhésion à une communauté de travail n'est ni totalement libre (auquel cas les conflits de droits peuvent être facilement résolus en partant), ni totalement obligatoire (auquel cas les règles pourraient simplement être imposées sans compromis).

Le contexte du lieu de travail génère des conflits et encourage le compromis, il constitue donc un creuset idéal pour explorer les méthodes juridiques de conciliation des conflits de droits.

Première partie : évolution comparée des jurisprudences

La première partie de cette thèse explique l'évolution de la jurisprudence en matière de liberté religieuse devant les Cours fédérales américaines jusqu'à la Cour Suprême et devant la Cour européenne des droits de l'homme. Elle explore la pratique actuelle dans toutes les affaires impliquant la religion sur le lieu de travail. La Cour Suprême et la Cour européenne des droits de l'homme constituent des contextes juridiques très différents pour le règlement des litiges en matière de droits, nous l'avons dit, et chacune d'elles a élaboré son propre ensemble de principes en s'appuyant sur différents corpus de jurisprudence.

Approche américaine

L'approche américaine peut être caractérisée comme un ensemble diversifié de principes différents, à appliquer en fonction du contexte de l'affaire, ensemble qui a évolué historiquement. Dans les premiers cas, le droit à l'accommodement religieux sur le lieu de travail ou ailleurs était très limité. À partir des années 1960, cependant, une série d'affaires a considérablement renforcé les protections de la liberté de religion en exigeant des tribunaux qu'ils appliquent le strict test de Sherbert aux limitations du libre-exercice. Cette approche a été inversée dans l'affaire *Employment Division v. Smith* (1990), puis rétablie par la loi plusieurs années plus tard. La protection statutaire a alors été jugée inconstitutionnelle dans son application à la loi de l'État, créant ainsi un système de révision à deux voies et, en fin de compte, une variété de normes qui peuvent être appliquées selon la catégorie de l'affaire. Ce paysage fragmenté de l'examen des droits religieux existe dans le contexte d'une Cour suprême nationale où les réponses à des questions fondamentales et souvent politiquement chargées auront des effets immédiats et à long terme sur les citoyens.

Contexte de la CEDH

La Cour européenne des droits de l'homme, quant à elle, existe sous les auspices du Conseil de l'Europe et, en tant qu'organe de traité, elle opère dans un environnement juridique fondamentalement différent de celui de la Cour suprême des États-Unis. La nature supranationale de la Cour soulève des inquiétudes quant à sa responsabilité démocratique. Ces préoccupations sont atténuées par la doctrine de la subsidiarité, qui affirme que le rôle de la Cour dans l'application de la Convention doit rester subsidiaire par rapport à celui de l'État. Compte-tenu de ce cadre ainsi que de la diversité et de la sensibilité des normes juridiques et culturelles relatives à la manifestation religieuse dans les différents pays, la Cour européenne s'est montrée quelque peu réticente à intervenir dans les conflits entre les droits religieux et les autres obligations de l'État. Dans ce contexte, et contrairement à la Cour fédérale américaine, la Cour européenne des droits de l'homme a élaboré un cadre unique et convenu pour évaluer les affaires de liberté religieuse. Cela a permis une évolution lente mais régulière de la doctrine juridique sur la liberté de religion ; bien que la norme ait souvent été critiquée comme étant relativement peu protectrice des droits, et qu'elle ait parfois été appliquée de manière incohérente, la Cour a réussi à fournir un environnement relativement stable et prévisible dans lequel les conflits liés à la liberté de religion peuvent être examinés.

Une forte similitude des modes de raisonnement

Après avoir développé ces environnements juridiques contrastés, cette étude reprendra l'ensemble des affaires relatives au lieu de travail de chaque juridiction et comparera les modes de raisonnement des Cours et les résultats des affaires, à travers deux schémas différents de catégorisation liés aux schémas de faits donnant lieu aux litiges : 1) par l'objet du litige et 2) par le type de lieu de travail dans lequel le litige s'est produit. La comparaison côte à côte des affaires selon ces critères donne lieu à un ensemble incohérent de similitudes et de différences entre les deux Cours, qui confirme en partie mais aussi infirme les affirmations traditionnelles selon lesquelles la Cour européenne des droits de l'homme protège moins la religion que les Cours fédérales américaines. Les affaires concernant les symboles religieux et le prosélytisme sur le lieu de travail ne sont, dans l'ensemble, pas traitées très différemment. Si les États-Unis se sont montrés plus enclins à exiger des

aménagements, ils l'ont fait dans le cadre des lois anti-discrimination plutôt que comme une question de liberté religieuse en soi. Ce domaine du droit semble être fortement déterminé par le contexte dans les deux Cours. Les deux Cours ont exprimé leur préoccupation quant aux effets prosélytes possibles des ornements religieux dans les écoles ou sur le lieu de travail public. Les deux Cours ont pris en considération la nature des symboles religieux, mais la Cour européenne des droits de l'homme est allée plus loin en réfléchissant à la fonction des symboles. Les États-Unis, en revanche, ont été plus stricts, en exigeant que l'employeur fournisse des preuves justifiant le refus d'accorder des aménagements.

Cas de complicité : une particularité américaine

Une différence essentielle réside dans l'acceptation par les Cours américaines de ce que l'on appelle les "cas de complicité", c'est-à-dire les cas dans lesquels le demandeur exige un aménagement afin d'éviter d'être complice des péchés d'autrui. Ces affaires n'ont pas eu beaucoup de succès auprès de la Cour européenne des droits de l'homme, mais elles constituent une part importante de la charge de travail des tribunaux américains, où la Cour suprême, en particulier, s'est montrée très réceptive à ces arguments. Si ces affaires semblent refléter une plus grande priorité accordée à la religion aux États-Unis qu'au sein de la Cour européenne des droits de l'homme, la comparaison est délicate car ces affaires ont été soulevées dans des contextes qui n'ont pas d'équivalent clair en Europe, notamment le contexte du système de soins de santé - public dans l'obligation mais privé dans la prestation - prévu par la loi américaine sur les soins abordables (US Affordable Care Act ou Obamacare) et les particularités du Titre VII anti-discrimination du Civil Rights Act de 1964.

L'exception ministérielle : une autre particularité

Si les affaires ne diffèrent pas énormément lorsqu'on les compare en termes d'objet du litige, la nature de l'employeur a été un peu plus déterminante comme différence entre les deux juridictions. Cela suggère que la véritable différence entre les deux Cours ne réside pas dans la façon dont ils considèrent la religion, mais plutôt dans la façon dont ils considèrent les relations entre les différents groupes d'acteurs de la société, en particulier les organisations religieuses et le gouvernement, dans leur double rôle d'employeurs et de fournisseurs de services. La CEDH s'accommode d'un large éventail de systèmes juridiques et de traditions

en matière de relations entre l'Église et l'État, et a donc été disposée à autoriser des limites très strictes aux manifestations religieuses des fonctionnaires (en particulier des enseignants) dans les États parties à la Convention où il existe une forte tradition de laïcité de l'État. L'approche américaine est légèrement plus accommodante pour les employés du gouvernement, tant qu'il n'y a pas de risque de violation de la clause d'établissement, mais elle donne à la police et à l'armée plus de latitude pour décider de limiter les symboles religieux. La principale différence, toutefois, réside dans la manière dont les deux systèmes traitent les organisations religieuses. Les États-Unis appliquent ce que l'on appelle "l'exception ministérielle" dans les litiges en matière d'emploi au sein des organisations religieuses ; cette approche fait preuve d'une extrême déférence à l'égard des droits de l'organisation religieuse, au point que tant que l'employé est considéré comme ayant un lien quelconque avec la fonction religieuse de l'organisation, le droit du travail ne s'applique pratiquement plus. La CEDH en revanche, accorde aux droits du travail de l'employé autant de valeur qu'au droit collectif à la liberté de religion de l'organisation.

Deuxième partie : L'analyse de la proportionnalité

La deuxième partie de cette étude aborde le même groupe d'affaires sous un angle plus procédural ; les éléments de l'analyse de la proportionnalité et les différents tests américains sont explorés en détail, puis décomposés en plusieurs enquêtes, communes aux pratiques de la Cour Suprême et de la CEDH. Les affaires sont ensuite comparées à travers le prisme de la manière dont les Cours évaluent (1) la charge imposée au demandeur religieux, (2) la légitimité et l'importance de l'intérêt de l'État conduisant à la limitation des droits, (3) la pertinence de la relation moyens/finalités et (4) la relation entre tous les éléments ci-dessus. Une analyse de ces étapes dans le contexte des affaires relatives au lieu de travail révèle que même lorsque les deux Cours semblent partager des préoccupations similaires, et même lorsqu'elles convergent sur certaines questions, les affaires relatives à la liberté de religion à la Cour Suprême et à la CEDH sont régies par des cadres analytiques très distincts. En particulier, la différence dans la manière dont ces deux tribunaux assemblent les différentes composantes de leurs analyses s'avère être un facteur clé pour expliquer les divergences entre l'approche des deux Cours en matière de protection de la liberté religieuse.

La question du fardeau de la loi pesant sur le croyant/la croyance

La phase du fardeau est similaire dans les deux formes d'analyse et, si la CEDH est plus disposée à examiner le contenu des croyances religieuses, les deux Cours se gardent bien de porter ouvertement un jugement sur les croyances et font généralement preuve de retenue face aux affirmations selon lesquelles une mesure légale interfère avec la pratique de la foi d'un individu ou d'un groupe. Aucune des deux Cours ne s'est empressée de trancher des affaires en niant que la mesure légale en question constituait un fardeau, et lorsqu'ils l'ont fait, c'était le plus souvent sous la forme d'un argument selon lequel l'obligation religieuse pouvait être remplie de manière suffisante dans d'autres contextes en dehors du lieu de travail. Dans l'un ou l'autre système, les fardeaux sur la religion n'ont pas besoin d'être extrêmement lourds pour mériter un certain examen par les Cours des raisons et des méthodes du gouvernement pour interférer avec la liberté de religion.

Peser les objectifs de l'Etat

Il existe un chevauchement important dans la manière dont les tribunaux traitent leur évaluation des objectifs de l'État. Les deux Cours sont prêtes à remettre en question la légitimité des objectifs du gouvernement lorsqu'ils sont ouvertement discriminatoires ou objectivement inutiles, mais dans la pratique, ils approuvent la plupart des objectifs qui servent l'intérêt public et ne sont pas discriminatoires. Les Cours ont également une vision relativement large du rôle de l'État sur le lieu de travail lorsqu'il s'agit de lutter contre la discrimination ou de maintenir la neutralité et l'efficacité de l'État dans la plupart des cas. Dans leur évaluation de la relation moyens/fins, les deux Cours insistent au minimum sur le fait que les mesures doivent avoir une relation rationnelle avec les objectifs et, dans la plupart des cas, elles reconnaissent qu'il doit y avoir au moins quelques preuves que les moyens servent les fins. Dans certains contextes, mais pas dans tous, elles examinent jusqu'à quel point la mesure est adaptée aux objectifs. En outre, les deux Cours conviennent que lorsqu'il s'agit de l'exercice de la religion dans sa dimension collective, il faut veiller davantage à éviter l'ingérence de l'État dans le fonctionnement interne des institutions religieuses.

La question des buts légitimes

Les différences d'analyse qui apparaissent dans ces affaires sont toutefois importantes à plusieurs égards et varient en fonction de la catégorie de contrôle exercé par les Cours

fédérales américaines qui est en cause. La Cour européenne des droits de l'homme est généralement plus à l'aise avec l'imposition de fardeaux accessoires qui interfèrent involontairement avec la pratique religieuse sur le lieu de travail que ne le sont les Cours américaines. Alors que, d'un point de vue strictement textuel, les États parties à la Convention ne peuvent interférer avec les droits de l'article 9 que dans la poursuite d'une courte liste de buts légitimes contenus dans la clause limitative, les Cours américaines ne disposent d'aucune liste prédéfinie de buts légitimes et doivent déterminer la légitimité des objectifs gouvernementaux au cas par cas. Dans la pratique, la légitimité dans le contexte américain signifie "non illicite" ; Pour la CEDH, même le plus noble des objectifs n'est pas légitime s'il ne peut être défini comme l'un des objectifs de la clause limitative, bien que dans la pratique, la Cour interprète ces objectifs de manière assez large. Dans tous les niveaux de contrôle, les Cours américaines sont souples dans leur conception de la légitimité, mais dans les affaires de libre-exercice, la neutralité et l'applicabilité générale des mesures gouvernementales font l'objet d'un examen minutieux, et ce de manière beaucoup plus explicite que ne le fait la CEDH

Le contrôle par tests de recevabilité

La CEDH est moins rigoureuse dans l'évaluation de l'objectif du gouvernement que certaines Cours américaines, et si on la place sur un spectre, la norme de la CEDH se situe quelque part entre le contrôle de la base rationnelle et le contrôle intermédiaire. Cependant, une telle comparaison est trompeuse, car dans la pratique, la CEDH utilise une variété de tests pour interpréter le langage "nécessaire dans une société démocratique" de la Convention, contrairement à l'éventail plus clair et plus structuré de niveaux de contrôle imposé par les Cours américaines. Dans ces tests, les objectifs de l'État ont tendance à être discutés à un niveau d'abstraction assez élevé, comme dans les niveaux inférieurs du contrôle américain. Le contrôle strict, avec son exigence d'atteinte à la personne, impose aux Etats-Unis un niveau de spécificité beaucoup plus élevé dans la définition des objectifs de l'État, que celui que la CEDH tend à utiliser dans la plupart des cas. Et en général, il est juste de dire que les tribunaux américains sont plus détaillés dans leur analyse des objectifs de l'État que la CEDH. L'exception notable à cette règle est l'ensemble des affaires d'exception ministérielle aux États-Unis, dans lesquelles les Cours ne considèrent même pas l'importance

des objectifs du gouvernement. La CEDH accorde une grande priorité à l'autonomie religieuse, mais ne soumet pas ces affaires à une méthodologie distincte.

La relation moyens/fins dans l'application des mesures

Dans l'évaluation de la relation moyens/fins, les deux systèmes accordent un poids et une attention très différents à l'adaptation étroite des mesures afin d'atteindre les objectifs de l'État, mais là encore, les différents niveaux de contrôle compliquent considérablement la comparaison des traditions analytiques respectives des États-Unis et de la CEDH. Le degré d'examen par la CEDH de l'adéquation entre les moyens et les fins dans ces affaires est similaire à celui utilisé dans l'approche américaine de la base rationnelle, mais l'analyse semble très différente car elle s'étend sur la phase de nécessité et la phase de mise en balance. L'analyse de la CEDH est loin d'être aussi rigoureuse que le test des moyens les moins restrictifs utilisé dans les affaires américaines de contrôle strict. Elle semble cependant parfois comparable, en termes de rigueur, sinon de méthode, à l'exigence d'adaptation étroite du contrôle intermédiaire.

Conclusion : une différence méthodologique plus qu'idéologique ?

En fin de compte, si les facteurs historiques et culturels jouent un rôle dans le traitement de la liberté religieuse, les contrastes qui existent entre les Cours dans les affaires relatives au lieu de travail sont mieux compris comme résultant des différences dans les méthodes utilisées par les Cours pour équilibrer les droits. Deux différences méthodologiques semblent avoir un impact significatif sur la manière dont la liberté religieuse sur le lieu de travail est évaluée aux États-Unis et à la Cour européenne des droits de l'homme.

Contrôle rationnel et par étape américain

Tout d'abord, il y a le système d'examen par paliers utilisé dans le système américain et l'approche catégorielle du raisonnement qui l'accompagne à chaque étape du processus. Dans les cas de base rationnelle et de contrôle strict, chaque phase d'examen agit comme un seuil potentiellement décisif qui détermine l'issue de l'affaire ou ouvre la porte à la phase d'analyse suivante. Dans les affaires de la Cour européenne des droits de l'homme, les différentes phases d'analyse sont importantes mais, individuellement, elles sont rarement considérées

comme décisives pour l'affaire. Au contraire, les résultats de ces diverses enquêtes sont ensuite réassemblés et reconsidérés dans la phase de mise en balance holistique. C'est dans cette phase que le véritable travail d'analyse semble être effectué dans les affaires de la CEDH, où les différentes composantes de la proportionnalité sont pesées et évaluées sur la toile de fond de la doctrine de la marge d'appréciation. Cette approche globale de la mise en balance qui constitue la discussion finale et décisive des affaires de la CEDH peut présenter quelques similitudes superficielles avec la pratique américaine, mais elle n'a pas de véritable équivalent dans la base rationnelle ou le contrôle strict des Cours américaines.

Mise en balance finale européenne

En fait, la conclusion la plus surprenante de cette étude est peut-être l'effort que les Cours américaines déploient pour éviter la mise en balance réelle de tous les éléments. Dans les affaires relatives au lieu de travail, les Cours américaines ne procèdent en fait à aucune mise en balance, sauf à un degré limité dans les affaires de contrôle intermédiaire, où il existe une certaine place pour une approche plus holistique. En revanche, la phase de mise en balance finale de la CEDH offre une grande souplesse à la Cour pour déterminer ce qui semble être, d'un point de vue global, la mise en balance la plus juste des intérêts et, en fin de compte, la plus appropriée, à la lumière de ses obligations de respecter son rôle subsidiaire par rapport aux tribunaux nationaux. Cependant, si cette approche est plus holistique et consensuelle, elle aboutit également à des décisions beaucoup plus opaques que leurs équivalents devant les Cours américaines.

En outre, ces affaires suggèrent que, lorsqu'il s'agit de manifestation religieuse sur le lieu de travail, l'équilibrage ne peut être évité que dans une certaine mesure, et seulement à un certain prix. Il est certain que la tradition américaine est globalement plus vigilante sur son attente que les employeurs doivent accorder des aménagements aux employés religieux lorsque cela est possible. Toutefois, cette protection se fait au détriment d'autres droits et libertés individuels, y compris les libertés religieuses individuelles. Cela peut sembler être un différend idéologique, mais les résultats de cette étude suggèrent le contraire. C'est l'attitude à l'égard de l'équilibre, plutôt que l'attitude à l'égard de la religion, qui est la plus explicative pour comprendre les différences dans les protections de la liberté religieuse. La méthodologie est importante. Cela permet d'espérer qu'à une époque de conflits sectaires, de

montée du nationalisme et de craintes d'une réaction populiste au multiculturalisme, la méthodologie peut fournir un terrain neutre commun sur lequel nous pouvons continuer à affiner et à améliorer les moyens de garantir le type de justice, fondée sur des principes, dont dépendent les démocraties libérales.

ZUSAMMENFASSUNG DER WESENTLICHEN UNTERSUCHUNGSERGEBNISSE

Die Frage, wie die Religionsfreiheit sich bestmöglich entfalten kann, ohne die staatliche Autorität zu untergraben oder andere Bürger unangemessen zu belasten, ist uralt. Im 21. Jahrhundert bleibt sie so dringlich wie eh und je, doch die Gerichte haben zunehmend Schwierigkeiten, diese Freiheit angesichts des zunehmenden religiösen Pluralismus, einer rasch fortschreitenden Säkularisierung und ebenso rasch wandelbarer sozialer Normen angemessen umzusetzen. Die meisten Rechtssysteme wenden bei Konflikten zwischen Grundrechten eine Art Abwägungsprinzip an und versuchen, das Ergebnis zu optimieren, indem sie die Interessen der Parteien im spezifischen Kontext des Konflikts balancierend ausgleichen, das heißt „abwägen". Die Metapher des Abwägens ist jedoch nicht unproblematisch, insbesondere wenn es um die Religionsfreiheit geht. Das Bild evoziert von seinen sprachlichen Wurzeln her die Vorstellung echten „Abwiegens" physischer Objekte mit einem eindeutig messbaren, spezifischen Gewicht. Aber auf welche gemeinsame Maßeinheit sollen sich so unterschiedliche Rechte wie etwa die Meinungsfreiheit auf der einen, das Recht auf eine angemessen Gesundheitsvorsorge auf der anderen Seite herunterbrechen lassen. Durch die Entscheidung über das „Wie" der Abwägung werden zugleich auch die Konturen der abzuwägenden Freiheiten – hier der Religionsfreiheit und entgegenstehender anderer Freiheiten – mitbestimmt.

Vorliegende Studie verfolgt einen rechtsvergleichenden Ansatz, um besser zu verstehen, wie sich die Gerichte dieser Abwägungsaufgabe stellen. Sie nimmt dazu zwei Rechtssysteme in den Blick, die durchaus unterschiedlichen (dogmatischen) Ansätzen folgen: die Vereinigten Staaten und den Europarat mit der Europäischen Menschenrechtskonvention (EMRK) und dem Europäischen Gerichtshof für Menschenrechte (EGMR). Um sinnvolle Vergleichskategorien zu entwickeln und auf deren Grundlage Fallstudien zu erarbeiten, beschränkt sich die Untersuchung auf Fälle religiöser Äußerungen und religiös motivierten Auftretens am Arbeitsplatz. Sie sind von hoher (praktischer) Relevanz und (theoretisch) noch längst nicht hinreichend aufbereitet. Die Arbeitswelt eröffnet streitanfällige soziale Räume; der Arbeitsumwelt kann sich der/die Einzelne nur schwer entziehen, er/sie braucht sie zur Sicherung seiner/ihrer materiellen Lebensgrundlagen. Am Arbeitsplatz müssen Menschen

ganz unterschiedlicher kultureller Prägung, ganz unterschiedlicher Wertorientierung und mit ganz unterschiedlichen sozialen Präferenzen miteinander auskommen. Zur Lösung von Rechtkonflikten existiert einerseits keine einfache „Exit"-Option, da vor einem Arbeitsplatzwechsel hohe Hürden stehen. Andererseits bleibt der Arbeitsplatzwechsel doch eine Option, niemand ist zum Bleiben gezwungen und muss sich schlicht Regeln fügen, die sie/er für unerträglich hält. Die Arbeitswelt ist sowohl konfliktträchtig als auch kompromissfördernd und bildet daher eine ideales Referenzfeld, um Ausgleichsmechanismen durch Schlichtung rechtlicher Konflikte zu untersuchen.

Teil I erläutert die Entwicklung der Rechtsprechung zur Religionsfreiheit vor den US-Bundesgerichten und dem EGMR und untersucht die derzeitige Praxis in Fällen, die Fragen religiöser Freiheit am Arbeitsplatz betreffen. Die US-Gerichte und der EGMR agieren in sehr unterschiedlichen rechtliche Kontexten, in denen Rechtsstreitigkeiten ausgetragen werden. Beide Seiten haben ihre je unterschiedliche Herangehensweise und ihre je unterschiedlichen Prinzipien zum Umgang mit den Fällen entwickelt. Die US-amerikanischen Gerichte nutzen eine Fülle ganz unterschiedlicher Prinzipien, die sie kontext- und fallspezifisch zur Anwendung bringen. Die frühe Rechtsprechung forderte kaum Vorkehrungen zum Gebrauch der Religionsfreiheit ein – weder am Arbeitsplatz noch sonst wo. Seit den 1960er Jahren stärkte eine Reihe von höchstrichterlichen Entscheidungen denSchutz der Religionsfreiheit allerdings erheblich, indem die Gerichte verpflichtet wurden, den strengen Sherbert-Test auf Einschränkungen der freien Religionsausübung anzuwenden. Dieser Ansatz wurde in der Rechtssache Employment Division v. Smith (1990) zunächst wieder verworfen und dann einige Jahre später per Gesetz neuerlich in Kraft gesetzt. „Satuatory protection" sei dann als verfassungswidrig einzustufen, wenn auf (glied-)staatliches Recht angewendet. Dadurch entstand letztlich ein zweigleisiges Überprüfungssystem mit einer Vielzahl ganz unterschiedlicher Standards, die jeweils abhängig von der Kategorie des Falles angewendet werden. So entstand mit Blick auf die Überprüfung religiöser Rechte eine höchst zerklüftete Landschaft – und das im Kontext eine nationalen Obersten Gerichtshofs, der auf politisch aufgeladene, höchst umstritten Fragen Antworten mit langfristige Auswirkungen für die Bürgerinnen und Bürger respektive den innergesellschaftlichen Zusammenhalt gibt.

Der EGMR hingegen agiert im Rahmen des Europarats und ist als dessen Vertragsorgan in einem ganz anderen rechtlichen Umfeld tätig als der Oberste Gerichtshof der USA bzw.

die US-Bundegerichte. Er ist kein staatlicher, sondern ein überstaatlicher Gerichtshof, was Fragen seiner demokratischen Legitimation und seiner demokratischen Rechenschaftspflichten aufwirft. Bedenken dieser Art werden, jedenfalls ein Stück weit, durch das Subsidiaritätsprinzip entkräftet. Es besagt, dass die Rolle des Gerichtshofs bei der Gewährleistung der in der Konvention verbürgten Rechte gegenüber der der Mitgliedstaaten subsidiär bleiben muss. Schon in Anbetracht dessen, aber auch aufgrund der Vielfalt und Sensibilität der rechtlichen und kulturellen Normen, die in den Mitgliedstaaten des Europarats mit religiösen Äußerungen verbunden sind, hat der Gerichtshof bei Konflikten zwischen religiösen Rechten und anderen (grundrechtlichen) Verpflichtungen des Staates eher zurückhaltend interveniert. Er hat, anders als die US-Gerichte, Schritt für Schritt einen weitgehend einheitlichen dogmatischen Rahmen zur Beurteilung von Einschränkungen der Religionsfreiheit entwickelt. Gewiss, die Genese der dogmatischen Grundlagen hat längere Zeit gebraucht und dem Gerichtshof manche Kritik eingetragen (die Schutzstandards seien zu schwach und würden noch dazu uneinheitlich angewendet), und doch ist es ihm alles in allem gelungen, relative Stabilität und Vorhersehbarkeit in der Judikatur zur Religionsfreiheit zu schaffen.

Nach der Konturierung dieser gegensätzlichen rechtlichen Rahmenbedingungen wendet sich die Untersuchung ihren Fallstudien (Religionsfreiheit am Arbeitsplatz) zu. Diese orientiert sie an zwei verschiedenen Kategorisierungsschemata, um die divergierenden Argumentationslinien und Entscheidungsergebnisse in der US-amerikanischen und europäischen Rechtsprechung analytisch aufzubereiten: den i) Gegenstand der Streitigkeit und ii) die spezifischen Charakteristika des Arbeitsplatzes, an dem die Streitigkeit entstanden ist. Der Vergleich liefert keine einheitlichen Ergebnisse: Neben ähnlichen Herangehensweisen stehen recht unterschiedliche Ansätze, die die seit langem gängige These, der EGMR schütze die Religionsfreiheit weniger intensiv als die US-Gerichte teils bestätigen, teils widerlegen. Fälle, in denen es um religiöse Symbole und Glaubenswerbung am Arbeitsplatz geht, werden insgesamt recht ähnlich behandelt. Während die US-Gerichte der Religionsausübung etwas größeren sichtbaren Raum geben wollen, geschieht das regelmäßig nicht auf Grundlage der Religionsfreiheit, sondern von Antidiskriminierungsregelungen. In Europa wie in den USA sind die Entscheidungen in hohem Maße kontextabhängig. Der US-Supreme Court und der EGMR begegnen religiösen

Symbolen und aktiver Glaubenswerbung an Schulen und im öffentlichen Dienst mit großer Skepsis. Für beide Gerichte hat die Art der Symbole eine große Bedeutung, der EGMR befasst sich überdies noch eingehender mit der Funktion der Symbole. Die US-Gerichte sind dahingehend strenger, dass sie klare Nachweise darüber fordern, warum die Verweigerung religiöser Betätigung respektive religiöser Sichtbarkeit am Arbeitsplatz gerechtfertigt ist.

Ein wesentlicher Unterschied besteht im Umgang mit den sog. „complicity"-Fällen. Hier verlangen die Kläger die Gewährleistung religiöser Freiräume, wenn und weil sie andernfalls mitschuldig an den „Sünden Dritter" würden. Der EGMR hat solchen Konstellationen keine große Aufmerksamkeit geschenkt. In den USA machen sie indes einen beträchtlichen Teil der Fälle zur Religionsfreiheit aus und der Supreme Court ist entsprechenden Argumenten gegenüber sehr aufgeschlossen. Der Schluss, dass diese Fälle für einen höheren Stellenwert der Religionsfreiheit in den USA stünden, wäre freilich trügerisch. Die US-amerikanischen Fälle sind nämlich in Kontexten entstanden, für die es in Europa kein exaktes Pendant gibt (insbesondere das öffentlich vorgeschriebene, aber privat bereitgestellte Gesundheitssystem nach dem „US Affordable Care Act" und die Besonderheiten aus Titel VII der Antidiskriminierungsgesetze).

Während sich die Fälle in Bezug auf den Streitgegenstand nicht wesentlich unterscheiden, ist die Art des Arbeitgebers ein entscheidenderer Unterschied zwischen den beiden Gerichtsbarkeiten. Dies deutet darauf hin, dass der eigentliche Unterschied zwischen den beiden Jurisdiktionen nicht darin besteht, wie sie die Religion generell betrachten, sondern vielmehr darin, wie sie die Beziehungen zwischen verschiedenen Gruppen von Akteuren in der Gesellschaft sehen, insbesondere zwischen religiösen Organisationen und der Regierung in ihrer doppelten Rolle als Arbeitgeber und Dienstleistungserbringer. Der EGMR berücksichtigt ein breites Spektrum von Rechtssystemen und Traditionen der Beziehungen zwischen Kirche und Staat und war daher bereit, sehr strenge Beschränkungen für religiöse Äußerungen von Beamten (insbesondere Lehrern) in Vertragsstaaten der Konvention zuzulassen, in denen es eine starke Tradition des staatlichen Säkularismus gibt. Der Ansatz der USA war etwas großzügiger und entgegenkommender gegenüber Regierungsangestellten, solange kein Risiko eines Verstoßes gegen die „Establishment Clause" aus dem First Amendment besteht, hat aber der Polizei und dem Militär mehr Spielraum bei der Entscheidung über die Beschränkung religiöser Symbole gegeben. Der

Hauptunterschied besteht jedoch darin, wie die beiden Systeme religiöse Organisationen behandeln. Die USA wenden bei Beschäftigungskonflikten innerhalb religiöser Organisationen die so genannte "ministerial exception" an; dieser Ansatz geht äußerst respektvoll mit den Rechten der religiösen Organisation um, was so weit geht, dass die Arbeitsgesetze im Grunde nicht mehr gelten, solange der Arbeitnehmer als mit der religiösen Funktion der Organisation verbunden angesehen wird. Der EGMR hingegen misst den individuellen Rechten des Arbeitnehmers ebenso viel Wert bei wie dem kollektiven Recht auf Religionsfreiheit der Organisation.

Teil II dieser Studie nähert sich der gleichen Gruppe von Fällen aus einem eher verfahrenstechnischen Blickwinkel; die Elemente der Verhältnismäßigkeitsanalyse und die verschiedenen US-Tests werden im Einzelnen untersucht und dann in mehrere gesonderte Einzeluntersuchungen unterteilt, die sowohl der Praxis der USA als auch des EGMR gemeinsam sind. Die Fälle werden dann unter dem Gesichtspunkt verglichen, wie die Gerichte (i) die dem religiösen Kläger auferlegte Belastung, (ii) die Legitimität und Bedeutung des staatlichen Interesses, das zur Einschränkung der Rechte führt, (iii) die Angemessenheit des Verhältnisses zwischen Mittel und Zweck und (iv) das Verhältnis zwischen all diesen Punkten bewerten. Eine Analyse dieser Schritte im Zusammenhang mit den Fällen am Arbeitsplatz zeigt, dass selbst dort, wo die beiden Gerichte ähnliche Anliegen zu haben scheinen, und selbst dort, wo sie in bestimmten Fragen übereinstimmen, die Fälle von Religionsfreiheit in den USA und dem EGMR von ganz unterschiedlichen analytischen Rahmen bestimmt werden. Insbesondere der Unterschied in der Art und Weise, wie die US-amerikanischen Gerichte, insbes. der Supreme Court und der EGM die verschiedenen Komponenten ihrer Analysen zusammenstellen und Stufen der Verhältnismäßigkeitsprüfung entwickeln, erweist sich als Schlüsselfaktor für die Erklärung der konzeptionellen und dogmatischen Divergenzen.

In Art der und Herangehensweise an die Beweiserhebung gibt es weitgehende Übereinstimmungen. Während der EGMR noch eher bereit ist, auch den Inhalt religiöser Überzeugungen zu prüfen, hüten sich beide Gerichte sehr bewusst davor, ein explizites Urteil über spezifische religiöse Überzeugungen zu fällen. Sie nehmen im Allgemeinen vielmehr Rücksicht auf Behauptungen, dass eine Maßnahme die Ausübung des Glaubens einer Person oder Gruppe (nach deren Selbstverständnis) beeinträchtigt. Nur selten weisen beide Gerichte

eine Klage/Beschwerde mit der Begründung ab, die in Frage stehende Maßnahme stelle gar keinen Eingriff in die Religionsfreiheit dar. Und wenn Sie es tu, dann mit der Begründung, die religiöse Verpflichtungen könnten in anderen Zusammenhängen außerhalb des Arbeitsplatzes ausreichend erfüllt werden kann. Insgesamt zeigen sich beide Gerichte großzügig in ihrer Bereitschaft, hoheitliche Maßnahme auf ihre Vereinbarkeit mit der Religionsfreiheit hin zu überprüfen.

Es gibt weiterhin erhebliche Überschneidungen in der Art und Weise, wie die Gerichte die staatlichen Regelungsziele bei einem eingreifenden Rechtsakt bewerten. Beide Gerichte sind bereit, die Legitimität der Ziele hoheitlichen Handelns kritisch in Frage zu stellen, wenn es offen diskriminierend oder objektiv nicht erforderlich ist. Umgekehrt haben sie in ihrer Rechtsprechungspraxis die meisten Ziele gebilligt, die das öffentliche Interesse fördern und nicht diskriminierend sind. Auch wenn es darum geht, Diskriminierungen zu bekämpfen oder staatliche Neutralität zu wahren, billigen beide Gerichte den Hoheitsträgern einen relativ weit gefassten Handlungsrahmen zu. Wenn es im Rahmen der Verhältnismäßigkeitsprüfung um die Zweck-Mittel-Relation geht, genügt es beiden Gerichten, wenn die Maßnahme vernünftige Ziele verfolgen. In den meisten Fällen verlangen sie zudem, dass die Förderlichkeit der Mittel beweisbar ist oder wenigstens hinreichend plausibel gemacht werden kann. Beide Gerichte berücksichtigen in einigen, aber nicht in allen Fällen, wie gut die Maßnahme auf die Erreichung ihrer Ziele zugeschnitten sind. Darüber hinaus sind sich beide Jurisdiktionen einig, dass bei der Religionsausübung in ihrer kollektiven Dimension sorgfältiger darauf geachtet werden muss, dass der Staat sich nicht in die internen Abläufe religiöser Einrichtungen einmischt.

Die analytischen Unterschiede, die sich in diesen Fällen zeigen, sind jedoch in mehrfacher Hinsicht wichtig und variieren je nachdem, welche Verhältnismäßigkeitsmaßstäbe die US-Gerichte anlegen. Der EGMR zeigt im Allgemeinen mehr Verständnis für die Auferlegung von Belastungen, die nur als unbeabsichtigte Nebenfolgen die Religionsausübung am Arbeitsplatz beeinträchtigen. Die US-Gerichte legen hier deutlich restriktivere Maßstäbe an. Legt man eine strenge Wortlautauslegung zugrunde, rechtfertigen nur wenige in der Schrankenklausel genannte Ziele einen Eingriff in Art. 9 EMRK. Eine solche Schrankenregelung mit vordefinierten legitimen Zielen kennen US-Gerichte nicht. Sie müssen die Rechtfertigungsstandards fallspezifisch austarieren. Dabei

genügt es, wenn die Ziele nicht illegitim sind. Für den EGMR können auch die ehrenwertesten Ziele nicht hinreichen, wenn sie sich nicht in der Schrankenklausel wiederfinden lassen – die der Gerichtshof freilich recht extensiv auslegt. Auf allen Stufen der Verhältnismäßigkeitsprüfung sind die US-amerikanischen Gerichte somit zwar relativ flexibel in der Konturierung ihrer Rechtfertigungsstandards, aber in allen Fällen der freien Religionsausübung, in denen staatliche Neutralität und die generelle Anwendbarkeit hoheitlicher Maßnahmen in Rede stehen, legen die US-Gerichte sehr viel strengere Maßstäbe an.

Insgesamt ist der EGMR bei der Bewertung der Ziele hoheitlicher Regelungen weniger streng als einige US-Gerichte. Wollte man das auf einem Spektrum ansiedeln, so liegen die EGMR-Standards zwischen dem „rational basis"-Test und der „intermediate scrutiny". Ein solcher Vergleich ist jedoch irreführend, da der EGMR in der Praxis eine Vielzahl von Tests zur Interpretation der Formulierung "notwendig in einer demokratischen Gesellschaft" verwendet. Das Spektrum, in dem US-Gerichte agieren, ist durch die klar formulierten und vorstrukturierten Tests sehr viel enger. Die Tests erfolgen oft auf einem sehr hohen Abstraktionsniveau. Wo aber der strenge „strict scrutiny"-Test Anwendung findet, verlangt dieser mit seinem „to the person"-Erfordernis ein viel höheres Maß an Spezifität bei der Definition staatlicher Ziele als es der EGMR in den meisten Fällen zu tun pflegt. Und im Allgemeinen kann man mit Fug und Recht behaupten, dass die US-Gerichte die hoheitlichen Ziele detaillierter analysieren als der EGMR. Eine bemerkenswerte Ausnahme bilden die „ministerial-exception-Fälle" in den USA, in denen die Gerichte nicht einmal die Bedeutung der Ziele der Regierung berücksichtigen. Der EGMR räumt der religiösen Autonomie zwar einen hohen Stellenwert ein, unterzieht solche Fälle jedoch keiner gesonderten Methodik.

Bei der Bewertung der Zweck-Mittel-Relation messen die beiden Systeme dem engen Zuschnitt der Maßnahmen zur Erreichung der staatlichen Ziele sehr unterschiedliches Gewicht und sehr unterschiedliche Aufmerksamkeit bei. Aber auch hier stellen die unterschiedlichen Stufen der Verhältnismäßigkeitsprüfung eine erhebliche Komplikation beim Vergleich der jeweiligen analytischen Traditionen der USA und des EGMR dar. Die Überprüfung der Zweck-Mittel-Relation durch den EGMR ähnelt in hohem Maße dem US-amerikanischen „rational-basis"-Ansatz. Auf der zweiten (Erforderlichkeit) und dritten Stufe (Verhältnismäßigkeit im engeren Sinne) ergeben sich aber große Unterschiede. Die Analyse

des EGMR ist bei weitem nicht so streng wie der „least restrictive means"-Test. Aber sowohl hinsichtlich des Anforderungsmaßstabs als auch des methodischen Vorgehens gleicht der Ansatz des EGMR oft dem Erfordernis eines restriktiven Zuschnitts im Rahmen der „intermediate scrutiny".

Letztendlich spielen zwar historische und kulturelle Faktoren eine nicht unerhebliche Rolle bei der Behandlung der Religionsfreiheit, aber die Unterschiede zwischen den Gerichten in den Fällen am Arbeitsplatz lassen sich besser als Folge ihrer unterschiedlichen methodischen Ansätze denn der Rechts- und Entscheidungskulturen ansehen. Es sind vor allem zwei methodische Unterschiede, die einen erheblichen Einfluss darauf zu haben scheinen, wie die Religionsfreiheit am Arbeitsplatz in den USA und in der Rechtsprechung des EGMR bewertet wird. Erstens kennen die US-Gerichte ein mehrstufiges Überprüfungsverfahren und damit kategoriale Unterschiede der Überprüfung auf jeder Stufe. Sowohl im Rahmen des „rational basis"- als auch des „strict scrutiny"-Tests stellt jede Phase der Überprüfung eine potenziell entscheidende Schwelle dar, die entweder den Ausgang des Falles bestimmt oder die Tür zur nächsten Stufe öffnet. In den EGMR-Fällen sind die einzelnen Stufen der Analyse zwar wichtig, werden aber nur selten als entscheidend für den Fall und den Fortgang der Überprüfung angesehen. Vielmehr werden die Ergebnisse auf den vorausgehenden Überprüfungsstufen (Geeignetheit, Erforderlichkeit) auf dritter Stufe (Abwägung) im Sinne eines holistischen Ansatzes wieder zusammengefügt und erneut geprüft. Auf dieser dritten Stufe schient der EGMR die eigentliche Analysearbeit zu leisten. Hier führt er die verschiedenen Komponenten, das Für und Wider der Verhältnismäßigkeit zusammen, hier wendet er seine „margin of appreciation"-Doktrin an, hier erfolgt die Abwägung im engeren Sinne.

Diesem ganzheitlichen Vorgehen des EGMR gilt der abschließende Teil der EGMR-Fallstudien. Es mag gewiss einige oberflächliche Ähnlichkeiten mit der US-Praxis aufweisen, findet aber keine wirkliche Entsprechung in den „rational basis"- oder „strict scrutiny"-Tests der US-Gerichte. Das vielleicht überraschendste Ergebnis dieser Studie ist, wie sehr sich die US-Gerichte bemühen, eine tatsächliche Abwägung aller Komponenten zu vermeiden. In den Fällen, in denen es um den Arbeitsplatz geht, nehmen die US-Gerichte überhaupt keine Abwägung vor, außer in begrenztem Maße in Fällen von „intermediate scrutiny", in denen ein gewisser Spielraum für einen dem EGMR vergleichbaren

ganzheitlicheren Ansatz besteht. Im Gegensatz dazu bietet die abschließende Abwägungsphase des EGMR dem Gerichtshof einen großen Spielraum, um zu bestimmen, was ihm – gerade in Anbetracht seiner Verpflichtung, seine subsidiäre Rolle gegenüber den nationalen Gerichten zu respektieren – als die insgesamt gerechteste und letztlich angemessenste Abwägung der Interessen erscheint. Dieser Ansatz ist zwar umfassender konzipiert und konsensorientierter, aber er führt auch zu Entscheidungen, die weitaus intransparenter sind als die entsprechenden Entscheidungen der US-Gerichte.

Darüber hinaus deuten diese Fälle darauf hin, dass bei der Behandlung religiöser Äußerungen am Arbeitsplatz eine Abwägung nur bis zu einem gewissen Grad und nur zu einem gewissen Preis vermieden werden kann. Es ist sicherlich richtig, dass die US-Tradition insgesamt wachsamer ist, wenn es darum geht, dass Arbeitgeber religiösen Arbeitnehmern nach Möglichkeit entgegenkommen müssen. Dieser Schutz geht jedoch auf Kosten anderer individueller Rechte und Freiheiten, einschließlich der individuellen religiösen Freiheiten. Es mag den Anschein haben, dass es sich hier um einen ideologischen Streit handelt, aber die Ergebnisse dieser Studie legen das Gegenteil nahe. Es ist die Einstellung zur Art der Verhältnismäßigkeitsprüfung und nicht die Einstellung zur Religion, die zum unterschiedlichen Verständnis der beiden Jurisdiktionen beiträgt und deren unterschiedlichen Schutzstandards in Sachen Religionsfreiheit erklärt. „Methodology matters“ – die Methode zählt. Dies lässt hoffen, dass in einer Zeit tiefgreifender gesellschaftlicher Spaltungen, eines zunehmenden Nationalismus und der Angst vor einer populistischen Gegenreaktion auf den Multikulturalismus die Methodik einen gemeinsamen neutralen Boden bieten kann, auf dem wir jene „Art von Gerechtigkeit“ weiter verfeinern und verbessern können, die auf jenen Prinzipien beruht, ohne die liberale Demokratien nicht überleben können.

TABLE OF CONTENTS

INTRODUCTION

I. GENERAL INTRODUCTION

Even in ancient Athens, religious freedom was a controversial topic. It continues to be so, in part because of the deeply personal nature of faith, and in part because of the frequent intractability of conflicts between religion and the law. Sophocles' depiction of Antigone's pain as she faces the impossible choice between the law of the gods and the law of her own society has become immortal in part because it strikes a chord in all of us; one need not believe in Zeus, or indeed in any god, to understand Antigone's dilemma and to empathize with her suffering. Over 24 centuries later the question of how to maximize religious freedom without undermining state authority or unduly harming others remains as urgent as ever. Modern conceptions of human rights as enshrined in international conventions and in national constitutions across the globe have learned from history that religious freedom is a vital asset to all of society if for no other reason than that its opposite, religious persecution, has proven so destructive. But courts have struggled to find satisfactory ways of implementing this freedom in the face of increasing religious pluralism, enhanced notions of secularism, and rapidly evolving social norms that at times challenge traditional religious conceptions of morality. The question "can't we all get along?" has become commonplace to the point banality.[2] The sentiment, however, remains urgent and widely shared among proponents of liberal democracy, that we should find a way to live and let live. In situations where religious rights conflict with other fundamental rights, the question is how?

When faced with a conflict between two rights, a principled decision as to how to reconcile the conflict can be made either by following rules or by applying principles. A rule-based approach would involve categorizing the conflict and then applying the predetermined solution that is prescribed for that category. For example, one might adopt a rule that says "in conflicts between religious tradition and property rights, property wins." This would be a very crude rule, but the point is that the outcome is predetermined once the conflict has

[2] The phrase was famously used by Rodney King against the backdrop of the Los Angeles riots in 1992. It has since been satirized by sources as diverse as The Simpsons and the New Yorker.

been categorized. Legal reasoning in rights conflicts becomes, under such an approach, a question of taxonomy. The other approach is to establish a set of principles that can guide decisionmakers.[3] Principles, in Robert Alexy's formulation, are "norms requiring that something be realized to the greatest extent possible, given the legal and factual possibilities."[4] They are "optimization requirements." Most legal systems, when approaching the conflict of constitutional rights, apply some form of balancing principle in an attempt to optimize the outcome by "balancing" the interests of the parties in the specific context of the conflict.[5] The metaphor of balancing is an old one – the Greek goddess of Justice, Dike, is portrayed as carrying scales as early as the fifth century B.C.E. in Aeschylus' *The Libation Bearers*.[6] But the metaphor is an awkward one. Weight is a common value by which physical objects can be compared, but by what common value can one compare freedom of speech and the right to adequate health care? The values are in some sense incomparable. As Supreme Court Justice Antonin Scalia once wrote, "the scale analogy is not really appropriate, since the interests on both sides are incommensurate. It is more like judging whether a particular line is longer than a particular rock is heavy."[7]

This is especially true where religion and conscience are involved, since these are both constitutive of personal identity and in many cases fundamental to our ontological and epistemological understanding of the world. Religion (as well as conscience, for many nonbelievers) relies in part on notions of the sacred.[8] As Thomas Jefferson observed in his Letter to the Danbury Baptists, "religion is a matter which lies solely between Man & his God."[9] This raises the stakes of limiting freedom of religion and belief, especially for the many faithful for whom nothing less is at stake than an immortal soul. It also complicates any debate that touches on religion since rights bearers brought into conflict may well have entirely different ontological assumptions. We adhere to different truths, and judges in both

[3] Robert Alexy, "Constitutional Rights, Balancing, and Rationality," *Ratio Juris* 16, no. 2 (June 2003): 131-140.
[4] Alexy, "Constitutional Rights," 135.
[5] T. Alexander Aleinikoff, "Constitutional Law in the Age of Balancing," *Yale Law Journal* 96, no. 5 (1987): 943-944.
[6] Aeschylus, *Libation Bearers*, trans. Herbert Weir Smyth, (Cambridge MA, Harvard University Press, 1926), line 55, consulted at https://www.theoi.com/Text/AeschylusLibation.html.
[7] Bendix Autolite Corp. v. Midwesco Enters., Inc., 486 U.S. 888, 897 (1988) (Scalia, J., dissenting).
[8] Mircea Eliade, *The Sacred and the Profane*, trans. Willard R. Trask (New York: Harcourt, 1987), 9-10.
[9] Thomas Jefferson to Messrs Nehemiah Dodge, Ephraim Robbins and Stephen S. Nelson, Committee of the Danbury Baptist Association, 1 January 1802, Library of Congress.

Europe and the United States are barred from choosing one over another where faith is concerned. It is difficult enough for a judge to compare speech and health care; but it seems nearly impossible to compare one's right to proselytize their faith and another's right to raise her children free from what she perceives as the harmful influences of religion. And yet deciding between such unmeasurable constitutional values is precisely what judges must do in such cases. They can do so as taxonomists applying rules, or they can formulate principles to guide judges and help them determine the "weight" of disparate social values in the fairest way possible. The choice of how to do this will inevitably shape the contours of religious freedom and of constitutional rights more generally.

The object of this study is to better understand how courts do this by comparing two different legal systems who have taken somewhat different approaches. The United States has a relatively long history of religious freedom jurisprudence, and over the years has developed a complex set of standards that involves both categorical and balancing approaches. The European Court of Human Rights ("ECtHR") is a much more recent court and is an international human rights court rather than a national constitutional court; it has adopted a form of proportionality analysis that attempts to structure balancing in a way that limits arbitrariness and judicial subjectivity. The question is not whether one is better than another. Rather, this study will offer a detailed account of the jurisprudence of both courts in a particular subsection of religious freedom – freedom to manifest one's beliefs in the context of the workplace – and of the mechanics used by each court in balancing the competing rights and interests at stake. Beyond mere concept formation, the goal is to understand the strengths and weaknesses of each approach and to derive lessons from each that may be learned by the other. Arguably there is no perfect approach to protecting fundamental freedoms without shifting the burdens of accommodation onto third parties. But by refining our understanding of the role of methodology in the process of balancing rights, we may be better equipped to improve the ways in which courts solve some of law's most intractable dilemmas.

II. METHODOLOGY AND CASE SELECTION

1. Methodological considerations

The soundness of the methodology of any scientific undertaking, whether in the natural or the social sciences, will weigh heavily on the credibility and the utility of the results. Methodology in comparative constitutional law, however, has not reached quite as refined a state as the scientific method in the natural sciences. Over the course of the twentieth century, comparative constitutional law methodology has evolved from a fairly straightforward exercise in description and classification to a variety of more nuanced methods, some elaborated in contestation with others, some merely designed with regard to the specific goals of the comparison.[10] Whatever one's philosophical leanings are about comparative law methodology, a crucial first step in making a rational choice is to understand the goals of the study in question. One might compare different constitutional systems for a variety of reasons. One might, for example, simply look to have a better understand of a foreign legal system simply out of curiosity or broadening one's knowledge of the differing possibilities of constitutional legal practices. Single country studies are "comparative" only in the sense that they implicitly invite the reader to compare the system being studied with their own system or with another system they are familiar with.[11] Comparative legal studies may also juxtapose two or more jurisdictions with a view to classifying them into various "families" of legal systems, such as civil law systems vs. common law systems, or monist vs. dualist constitutional systems.[12] Here the goal would not be so much understanding one's own legal system as placing it within the context of other traditions in the form of a kind of taxonomy of law.

Another common rationale for undertaking comparative work is to better understand one's own system with a view to find solutions to particular problems or out of a more general

[10] For a general overview of the evolution and variety of comparative methods, see Béatrice Jaluzot, "Méthodologie du droit comparé: bilan et prospective," *Revue internationale de droit comparé* 57, no. 1 (2005): 29-48.
[11] Ran Hirschl, *Comparative Matters: The Renaissance of Comparative Constitutional Law* (Oxford: Oxford University Press, 2014), 232.
[12] Vicki C. Jackson, "Comparative Constitutional Law: Methodologies," in *The Oxford Handbook of Comparative Constitutional Law*, eds. Michel Rosenfeld and András Sajó (Oxford: Oxford University Press, 2012), 55-56.

desire to locate "best practices" in other cultures that might serve well in one's own system.[13] If one finds, for example, that American tort practices seem to be having negative effects on the economy, a good start in finding a solution would be to look systematically at how other jurisdictions deal with tort liability. Do they have a better way? What problems arise in those other jurisdictions, and how do they compare to those of our own jurisdiction. Would their solutions work here? Can the study of another jurisdiction expose any "false necessities"[14] of our own system, that is, practices that we assume are essential to success in achieving some desired goal when in fact other jurisdictions have found different approaches to achieving the same result. When used in this sense, comparative law can act as "a foil for further domestic self-understanding and self-evaluation."[15] Comparative work might also be responding to specific doctrinal questions that are of a comparative nature.[16] ECtHR procedure, for example, requires that in deciding whether to apply the margin of appreciation doctrine with regard to the infringement of a right, the court must look to see if there is a European consensus on the issue, which of necessity would involve a comparative study of other European jurisdictions.

Once the goal of the study is determined, the question shifts to how one can structure the study in order to best achieve those aims. Broadly speaking the various methodologies in use today can be broken down into five categories: descriptive, conceptual, functional, factual and contextual.[17] A thorough review of these different methodologies is beyond the scope of this paper, broadly speaking the choice a researcher faces today is how one focuses the comparison between two jurisdictions such that she is comparing like with like. This is not a small problem; even some of the most basic concepts in law translate badly from one jurisdiction to another. As an example relevant to this study, take the term "secularism." A dictionary (and a surprising number of legal scholars) will be content to translate secularism into French as "laïcité," yet as anyone who has spent time studying these contexts knows, the

[13] Vicki C. Jackson, "Methodological Challenges in Comparative Constitutional Law," *Penn State International Law Review* 28, no. 3 (2009-2010): 320-321.
[14] Mark Tushnet, *Weak Courts, Strong Rights* (Princeton University Press, 2007), 14, quoted in Hirschl, *Comparative Matters*, 235.
[15] Michel Rosenfeld, "Controversy Over Citations to Foreign Authorities in American Constitutional Adjudication and the Conflict of Judicial Philosophies: A Reply to Professor Glendon," *Duquesne Law Review* 52, no. 1 (2013): 25–68, quoted in Hirschl, *Comparative Matters*, 235.
[16] Jackson, "Methodological Challenges," 322.
[17] Jaluzot, "Méthodologie du droit compare," 38-43.

comparison is inexact and can be deeply misleading. The concepts are related, clearly, but not identical. Thus a naïve descriptive comparison of rules and concepts of two jurisdictions risks "comparing apples and oranges," as the expression goes, without any firm starting point of commonality. Such an approach can amount to little more than an act of approximate translation, which can be helpful but is limited in terms of helping legislators or judges learn for the advancement of their own legal systems. This problem his led to various functionalist approaches to methodology, which prefer a focus on how different legal systems have approached similar problems. Rather than simply translating concepts, this method involves comparing the problem-solving techniques of two jurisdictions as related to a specific issue. This can be done practically speaking in a number of ways. As Vicky Jackson explains, "[t]he scholar may identify an institution that exists in multiple constitutional systems and explore its function(s); or the scholar may identify one or more functions performed by constitutions or constitutional institutions or doctrines in some societies, and analyze whether in fact the constitutional institution or doctrine believed to perform a valid function does so, or may analyze whether and how that function is performed elsewhere."[18] Whatever the case, the purpose of such a method is to ensure that there is a clear basis of comparison, and that the researcher can rise above the assumptions of her own legal system and consider the question from the point of view of the social objectives that the institution or doctrine aims to solve.[19]

Functionalist methodology is sometimes contrasted with contextual methodologies. While functionalist approaches do take context into account, so-called contextualist approaches problematize the social, political, historical and cultural particularities to a far greater degree, and generally take those contexts and the focal point of study. While such an approach may help the researcher avoid the particular danger of seeing a legal system in a vacuum devoid of the myriad social factors that might influence its evolution or implementation, it may introduce other problems associated with the notorious difficulties of interdisciplinarity.

[18] Jackson, "Comparative Constitutional Law," 62.
[19] Jaluzot, "Méthodologie du droit compare," 40.

2. Jurisdiction selection

So much for why we compare and how we compare. The next question, perhaps the easiest to make and the hardest to justify, is what we compare. Case selection on this basis in comparative constitutional law must occur on two different levels. Setting out to compare approaches to adjudicating religious freedom conflicts is an enormous task, so naturally the first task involves choosing which jurisdictions to compare? In principle, one might compare almost any two legal systems, and in fact there is an enormous body of comparative scholarship that seeks merely to explore a "foreign" legal (or political, or social, or religious) phenomenon for a "domestic" audience. If, however, a comparison of two objects of study is meant to shed light on some third object of study, it is incumbent upon the researcher to justify why object A and object B offer a fruitful choice of things to compare. To compare the US federal court system with the European Court of Human rights is to claim that there is sufficient similarity – and sufficient difference – in their treatment of religious free exercise cases to make that comparison a useful endeavor. There may be personal reasons motivating a comparison, as indeed there are in this case: language skills, availability of materials, personal acquaintance with the jurisdictions involved, and all the subjectivity involved in making an object of study interesting to the researcher. However, a proper choice of things to compare must be grounded in some kind of commonality; in other words, the objects must be comparable in an objectively meaningful way.

This paper will make what some might consider an unusual comparison between the highest court of a sovereign state and an international court put in place to monitor compliance with a regional human rights treaty. The differences are extensive. The US Supreme Court operates in a national federal system with a common law tradition, whereas ECtHR monitors compliance within a treaty body of sovereign states, almost all of which are civil-law jurisdictions. The US Supreme Court is a national supreme court, whereas the ECtHR is a human rights court. The US Supreme Court wields sovereign powers that an international human rights court can only dream of exercising: it can interpret legislation and nullify it as unconstitutional, and those decisions are immediately and directly binding in national law. The US Supreme Court commands a degree of cultural and political respect

that contrasts starkly with the common view of the ECtHR as a distant and bureaucratic creation of global internationalism.

These objections, however, are mostly exaggerated or not entirely relevant to the analysis undertaken in this paper. For example, it is true that most state parties to the European Convention on Human Rights (the "ECHR") have civil law systems in contrast to the US common law approach, and that comparing such systems may pose challenges. But the ECtHR has adopted an approach to precedent that makes it resemble an American court more closely than, say, a Dutch one. While the court is not bound by its past judgments, it has adopted a policy of following them unless there are strong reasons not to do so.[20] Such an approach was necessary especially in the early days of the court since, at 11,000 words, the Convention did not provide the kind of detail necessary to adopt a more civil law approach. The judges had to make law, and once they had done so, it made sense to stick to it.[21] The common law vs. civil law distinction matters much more in how the judgments are applied in national legal systems. As Judge Zupančič has put it, if the US Supreme Court is at the tip of the American judicial pyramid, the ECtHR is at the tip of 47 different pyramids. Common law systems will more easily take its precedents as law, while civil law systems might be slower in assimilating the Court's caselaw.[22] This, however, does not pose an obstacle to comparison under the terms of this study, where the focus remains at the ECtHR level, not in how the judgements are applied.

More serious is the difference between a national supreme court with a constitutional court function and an international human rights court. But that difference is smaller than it may first appear. While the ECtHR is of course not a national constitutional court, there is nonetheless a large body of literature theorizing the "constitutionalisation" of the Convention and of the consequent role of the ECtHR as, in some respects, a quasi-constitutional court.[23]

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[20] Cossey v. the United Kingdom, 27 September 1990, § 35, Series A no. 184.
[21] Boštjan M. Zupančič, "In the Context of the Common Law: The European Court of Human Rights in Strasbourg" (lecture, Gresham College London, 17 November 2016), https://www.gresham.ac.uk/lectures-and-events/in-the-context-of-the-common-law-the-european-court-of-human-rights-in-strasbourg.
[22] Zupančič, "In the Context of the Common Law."
[23] For example, see Alec Stone Sweet, "On the Constitutionalisation of the Convention: The European Court of Human Rights as a Constitutional Court," Yale Law School Faculty Scholarship Series, Paper 71, 2009. http://digitalcommons.law.yale.edu/fss_papers/71. For a discussion of the problems inherent in the

This claim is controversial and has generated significant debate. For example, the Secretary General of the Council of Europe (the "COE") insisted in 2009 that "[t]he Convention is not intended to be a 'European constitution' and it is difficult to see how the Court could become like any existing national constitutional court."[24] But this claim, repeated by a variety of commentators over the years, tells only part of the story. The Secretary General himself in the same speech approvingly quoted the European Ministerial Conference affirming that "the Convention must continue to play a central role as a constitutional instrument of European Public order on which the democratic stability of the Continent depends."[25] If one looks at the court in functional terms, there are many salient points of similarity between the ECtHR and a constitutional court. Greer and Wildhaber argue, for example, that "the dozen or so principles of interpretation used by the Court – for example, democracy, the rule of law, effective protection of human rights, margin of appreciation, subsidiarity, proportionality and so on- are effectively constitutional principles because they raise two distinct and quintessentially constitutional questions: the 'normative question' of what a given Convention right means including its relationship with other rights and collective interests, and the 'institutional question' of which institutions – judicial/non-judicial, national/European – should be responsible for providing the answer."[26] While the Court cannot overrule domestic laws, it does perform three governance functions that one might expect of a constitutional court in the context of rights cases: "it renders justice to individual applicants (a justice function); it supervises the respect for fundamental rights on the part of state officials, including judges (a monitoring function); and it determines the scope of content of Convention rights, in light of state practice (an oracular, or lawmaking function)."[27] It is perhaps most accurate to describe the ECtHR functionally as a hybrid court

constitutionalisation of the Convention, see Janneke Gerards and Hanneke Senden, "The Structure of Fundamental Rights and the European Court of Human Rights," *International Journal of Constitutional Law* 7, no. 4 (October 2009): 619-653.

[24] Thorbjørn Jagland, Contribution of the Secretary General of the Council of Europe to the Preparation of the Interlaken Ministerial Conference, 18 December 2009, SG/Inf (2009) 20, § 28 (italics in the original), https://rm.coe.int/16805cff31.

[25] Thorbjørn Jagland, Contribution of the Secretary General, § 28.

[26] Steven Greer and Luzius Wildhaber, "Revising the Debate about 'Constitutionalising' the European Court of Human Rights," *Human Rights Law Review* 12, no. 4 (2012): 668.

[27] Alec Stone Sweet, "The European Convention on Human Rights and National Constitutional Reordering," *Cardozo Law Review* 33, no. 5 (2012): 1861.

combining multiple roles, including a cases and controversies court under Protocol 11 with the essential rights-oversight function of a constitutional court.

If that sounds familiar, that is because the US Supreme Court is also not a pure constitutional court in the Continental sense of the term. Article 3 of the US Constitution empowers Congress to establish a federal court system with jurisdiction in a specified list of types of cases and controversies. It calls for the establishment of a supreme court with "appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make."[28] It is in fact a supreme court that carved out for itself a constitutional court function before the concept of a constitutional court had been developed.[29] This role as a constitutional court that could exercise an oracular lawmaking function only emerged in 1803 in the landmark case of *Marbury v. Madison*, in which Chief Justice Marshall essentially invented the power of judicial review. The result was a system in which the Court can review the constitutionality of cases, but is essentially barred from reviewing legislation ex ante or exercising the kind of abstract review capacity which allows most Continental constitutional courts to rule upon questions of the constitutionality of laws before they have inflicted harm upon specific parties.[30] While judicial review developed in the United States, European nations took a different approach in the twentieth century's wave of constitutional reforms, instituting instead mostly separate constitutional courts which provide a specialized locus for the deciding of constitutional questions.[31]

Thus in comparing the US Supreme Court with the ECtHR, what is most at stake is not the category of the court. As Hans Kelsen points out, "[i]t is impossible … to propose a uniform solution for all possible constitutions: constitutional review will have to be organized according to the specific characteristics of each of them."[32] In this case, the characteristic at stake is how "responsibility for rights protection and the democratic pursuit of the public

[28] U.S. CONST. art. 3 § 2.
[29] On constitutional vs. supreme courts, see Lech Garlicki, "Constitutional Courts versus Supreme Courts," *International Journal of Constitutional Law* 5, no. 1 (January 2007): 44-68.
[30] Jamal Greene, "The Supreme Court as a Constitutional Court," *Harvard Law Review* 128 (2014): 142. Two important exceptions to this rule are preliminary injunctions so called "facial challenges" to laws that on their face are constitutionally invalid as established by prior caselaw. These exceptions, however, do not amount to the kind of abstract review regularly practiced by Continental constitutional courts.
[31] Alec Stone Sweet, "Why Europe Rejected American Judicial Review," *Michigan Law Review* 101 (2002-2003): 2745.
[32] Cited in Garlicki, "Constitutional Courts," 44.

interest [is] distributed between judicial and non-judicial institutions each acting in accordance with the rule of law?"[33] That clearly constitutional function is shared by both courts offers a sufficient zone of overlap in function to provide a logical and stable context within which to explore how that responsibility for rights protection has been exercised to balance the needs of religious manifestation with the legitimate rights claims of others. In the US Supreme Court and the ECtHR we have two courts which must adjudicate claims in a culturally and legally decentralized, multi-jurisdictional environment in light of an overarching constitutional rights regime using both textual analysis of the rights-conferring document in question as well as a contested body of interpretive traditions and relevant prior case law. Both courts employ specific modes of balancing interests that they use in conjunction with interpretive tools allowing them to exercise judicial restraint and give deference, when necessary or appropriate, to local decision-makers. The US Supreme Court and the ECtHR face similar challenges and employ tools to address them that are similar in some respects and different in others. Thus to compare the modalities of performing these functions, whatever other differences there may be between the two systems, is therefore both appropriate and useful in terms of better understanding the tensions and conflicts arising from competing rights claims in the context of religious freedom cases. Their differing approaches share a "conception of constitutional law as a battleground of competing interests and their claimed ability to identify and place a value on those interests."[34]

3. Case selection

Once the jurisdictions to be compared have been chosen, typically comparative law methodology will involve comparing a specific selection of contentious judgments[35] from

[33] Greer and Wildhaber, "Revising the Debate," 668.
[34] Aleinikoff, "Constitutional Law," 943.
[35] One of the difficulties of comparative law is the use of terminology. Across jurisdictions in the anglophone world, "case," "judgment," "decision," and "opinion" can all have different meanings. In the US, for example, "opinion" generally denotes the written statement of reasoning of a judge or of the court as a whole, and a judgment might consist of a majority opinion, concurring opinions and dissenting opinions by the various judges involved. In British usage, "opinion" usually refers to the opinion of a barrister or a solicitor. In this paper, I will use "case" as a generic term to refer either a controversy (as in "the Masterpiece Cakeshop case involved a Christian baker…") or object of study (as in "case selection" for "case studies"). "Opinion" will refer to the written analysis of a judge or group of judges, and "judgment" will be used to denote the written opinion(s) of the court in its entirety (*arrêt* in French). This usage conforms to both US and ECtHR practice. However, the

the jurisdictions in question that are similar or analogous in some way, especially if the goal is to compare in order to explore possibly better alternatives for his own jurisdiction.[36] For a qualitative analysis of a comparative legal question, the researcher will need to read and analyze a finite set of judgments; a study of free speech cases in the United States alone would involve analyzing hundreds if not thousands of judgments. While a restrictive principle of case selection is a practical necessity, the process presents its own set of difficulties. The principle of case selection must not only be relatively precise, in the sense of producing a manageable number of judgments to compare within the timeframe available to the researcher, but also must have some kind of overarching relevance. Selecting "free speech judgments in which the plaintiff's family name contains more than five vowels" might well yield a rigorously targeted and manageable caseload to examine, but it would be a hard category to justify rationally.

There are several commonly used approaches to case selection for comparative work: the "most similar cases" approach, the "most different cases" approach, the "prototypical cases" approach, the "most difficult cases" approach and the "outlier cases" approach.[37] Using the 'most similar cases' method can be complicated by the simple and obvious question: "similar in what way?" Each case comes with its own set of facts that will inject personal, cultural and other situational variables into the equation. In looking at religious freedom cases, are "veil" cases similar enough to "cross" cases to be compared in the same study? Both are religious symbol cases – a very popular category to analyze in current freedom of religion scholarship – yet there are myriad other differences that might complicate a genuinely scientific approach to the comparison. The difference in the religious tradition surely matters – in France, the veil is a symbol of a minority religion surrounded by a contentious political

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ECtHR terminology introduces a new problem, that of the term "decision." The ECtHR makes decisions on the admissibility of cases and judgments on the merits of cases. Practice, however, has evolved such that sometimes the ECtHR will find a case inadmissible on the basis of being manifestly ill-founded and yet feel compelled to explore its reasoning in a "decision" that is essentially indistinguishable from a judgment. The ECtHR has even acknowledged this fact, and yet has never clarified why it sometimes undertakes this practice (see Janneke Gerards, "Inadmissibility Decisions of the European Court of Human Rights: A Critique of the Lack of Reasoning," *Human Rights Law Review* 14, no. 1 (2014): 156). For this reason, this paper will include such decisions in the body of judgments to be analyzed, on the basis that these particular decisions contain proportionality discussions (for example, see *Dahlab v. Switzerland* (dec.), no 42393/98, ECHR 2001-V).

[36] Hirschl, *Comparative Matters*, 234-235.

[37] Ran Hirschl, "The Question of Case Selection in Comparative Constitutional Law," *The American Journal of Comparative Law* 53, no. 1 (2005): 156.

discourse, whereas the veil in Bosnia is associated with the majority faith tradition. Surely the majority/minority dynamic is potentially an important variable in understanding how courts interpret the wearing of symbols and the arguments surrounding their removal from the workplace environment. In an experiment in the natural sciences, the experimenter would need to control for this in some way. Comparative constitutional law, however, is not a "hard" science, and our goal in comparing is by necessity an impressionistic portrait of complex systems involving social, legal, cultural and historical factors. In short, the "similar cases" method can only hope to narrow the range of variable static in one's analysis, not to eliminate it.

When it comes to detailed comparison of actual judgments in the US federal court system and the ECtHR, this paper will focus its attention on cases involving the balancing of the religious freedom of one party with important rights or interests of others, and will do so specifically in the context of religion in the workplace. The first choice – that of focusing on cases pitting religion against other rights or interests – seems natural given the overall goal of the paper to understand how we can better balance religious interests against other social goods when the two conflict. But it is important to note that this methodological choice eliminates a large number of religious freedom cases. This paper will not address Establishment Clause cases in the US, nor will it look at the large body of caselaw on the recognition and registration of religious organizations in the ECtHR. The second choice, that of focusing on religion in the workplace, requires more explanation. Admittedly, a study without this restriction would still offer interesting results, but it would involve too many cases to analyze to the degree of detail required for this study. Furthermore, there are several other strong arguments in favor of focusing on religious manifestation in the context of the workplace. Firstly, it eliminates cases of religious manifestation by students and prisoners, both of which inject quite specific concerns into the analysis of balancing freedom versus the rights of others. Secondly, it puts the focus on what is arguably the two most interesting developments in US religious freedom jurisprudence – the recent string of cases establishing religious free exercise rights for companies and the rise of so-called "complicity" cases in which employees or business owners refuse to be made "complicit" in the sins of others by providing them goods or services that they would normally provide to other clients or customers.

Finally, the nature of the workplace – conceived of broadly as including a range of commercial, industrial or service sector settings – is such that it introduces a unique array of personal and power relationships over which individuals may not have complete control. As adults in a free society we generally have the power to decide with whom we will spend our time – the clubs we join, the activities we pursue, the associations we become involved in, the individuals we socialize with. If we do not approve of the people we are surrounded by, we have the option to leave. Work is an important exception to this in several ways. Firstly, even if in theory we can always leave a job, in practice work may be hard to find, and the fundamental need to earn a living may in practice translate into a lack of real choice. Work is best seen in this sense as a utility or a public good, like education, voting rights, or public parks and highways, and yet it is a field that is largely controlled by the private sector. It is for this reason that the workplace became one of the frontlines in the civil rights battles in the United States. Until the passage of the 1964 Civil Rights Act, employment discrimination was rampant and was in large part responsible for maintaining racial segregation and rampant inequality. Title VII of the Civil Rights act banned employment discrimination, but the Civil Rights Movement involved more than just employment.

Moreover, beyond the workplace relationship between employers and employees, commerce in general plays a special role in both economic and social equality. The provision of goods and services in a capitalist society is achieved via businesses or government offices employing civil servants, thus much of public life takes places at the nexus between employer, employee and customer. Discrimination in the provision of services, like in employment, cuts the victim off from the normal stream of commerce and become a major source of inequality. It is no coincidence that the Civil Rights Movement was triggered, at least in part, by what has come to be called a public accommodations case when four African American students sat down at a Woolworth lunch counter in violation of its "whites only" policy.[38] To be equal citizens was to have equal access not only to schools and jobs, but also to the goods and services that form part of everyday life. When interviewed about the experience years later, Franklin McCain, one of the four men involved the Greensboro lunch counter sit-in, commented: "I had the most wonderful feeling. I had a feeling of liberation,

[38] Michele Norris, "The Woolworth Sit-In That Launched a Movement," *All Things Considered, NPR,* 1 February 2008, https://www.npr.org/templates/story/story.php?storyId=18615556.

restored manhood. I had a natural high. And I truly felt almost invincible."[39] To be served as an equal, to not be singled out because of race or religion, is clearly about more than simply access to goods. While it is easier to go to a different restaurant than it is to get a new job, the necessity to go from business to business in search of someone who will serve an oppressed minority not only raises unjust practical problems for minorities, but also inflicts dignitary harm. This idea of dignitary harm was at the heart of the Civil Rights Movement and more recently has become the focal point in a number of interesting cases in the US involving discrimination against LGBTQ customers by business owners or against same-sex couples by civil servants.

Religion may play a complicated role in the workplace because religion can be either the motivation for an employer or an employee to limit the rights of others in order not to be complicit in sin, or it might impose duties that employers wish to prohibit. In all these cases, we see the natural and appropriate desire to create exemptions come into conflict with the fair treatment of others. Such situations effectively ask third parties to forego certain rights in favor of the religious freedom claims of the believer; to put it in more economic terms, they risk permitting the individual manifesting his religious beliefs to externalize the costs of his faith onto third parties. Moreover, in the commercial or employment context, they do so precisely at a particularly sensitive point of convergence of legitimate interests of the state, the employer, the employee and, when it involves a business open to the public, the customer. It places people of conflicting and sometime antithetical beliefs in direct proximity in a situation in which they must work together for a common goal. In short, because is the crucible in which diversity is unavoidable and brings religious manifestation face to face with other vital interests, the workplace is an especially interesting field in which to examine the balancing of interests in religious freedom cases.

[39] Michele Norris, "The Woolworth Sit-In."

PART I: FREEDOM OF RELIGION IN THE WORKPLACE: CONFLICTING ORIGINS AND DVERGING TRENDS IN THE US AND ECTHR

CHAPTER 1: CONTRASTING THE EVOLVING STATE OF RELIGIOUS FREEDOM PROTECTIONS IN THE ECtHR AND US FEDERAL COURTS

Religious freedom in modern constitutional democracies typically exists as a constitutional or statutory rule embedded within a delimited list of rights asserted to be protected from incursion by the state. The concept of limited government is the very basis of constitutionalism as it has been conceived since thinkers such as Locke, Madison and Constant were writing in the 17th and 18th centuries. As Constant wrote, "Toutes les constitutions sont des actes de défiance : car si on croyait que le pouvoir ne fera jamais d'empiétement, nous n'aurions pas besoin de constitutions, ni de chambres, ni de lois répressives."[40] In order to protect rights, the constitution must set limits on the power of government. In addition, most modern constitutions take the added step of defining a list of core rights.[41] These rights may be conceived of as absolute, or as contingent. Philosophers of rights have long debated the nature of rights and their relative inviolability. Nevertheless, rights exist within a social context and inevitably the exercise of those rights must at times come into conflict with urgent needs of the state or with the exercise of other rights. It has therefore been contingent upon constitutional systems to establish methods of balancing those rights for just those cases where rights conflict.

It should be noted first of all that balancing is not a logical necessity in such cases. One could imagine, for example, a system in which rights were ranked in a strict hierarchy; one might say that the right to life always trumps free speech rights, which always trump freedom

[40] Jean-Philippe Feldman, "Le Constitutionnalisme selon Benjamin Constant," *Revue Française De Droit Constitutionnel* 76, no. 4 (2008): 678. ("All constitutions are acts of defiance: because if we believed that power would never overreach, we would not need constitutions, nor legislatures, nor repressive laws.")
[41] UN Office of the High Commissioner for Human Rights, *Human Rights and Constitution-Making*, HR/PUB/17/5 (2018), 7, https://www.ohchr.org/Documents/Publications/ConstitutionMaking_EN.pdf.

of religion, which always trumps freedom of association. In fact, it is arguably quite difficult to create a system in which rights do not enjoy a hierarchical preference over other rights. Yet the need for some means of establishing a hierarchy of rights has nonetheless generated heated debates among academics and practitioners, and efforts at the codification of human rights have always involved disputes over establishing a hierarchy of rights.[42] Moreover, human rights law recognizes the existence of situations in which most rights will be subject to limitations, for example in a situation of national emergency. Philosophers tend to focus on a small number of core rights, but constitutional practice has, in contrast, has tended to develop a jurisprudence recognizing a multiplicity of weaker rights. And a result, constitutional scholars and practitioners across many legal systems have been obliged to theorize how those rights might be weighed against other rights.[43]

Among the most important developments in this process were the rise of proportionality analysis ("PA") in Europe and the development and evolution of tiered review and judicial balancing in the United States. Proportionality has proven so attractive as a model for balancing interests that "[b]y the end of the 1990s, virtually every effective system of constitutional justice in the world, with the partial exception of the United States, had embraced the main tenets of PA."[44] The United States, however, was busily undergoing its own legal transformation when forms of balancing and disputes over tiered review came to dominate rights discussions, particularly in the battles surrounding the Civil Rights movement in the 1960s, when its "rapid growth mark[ed] the balancing test as one of the most significant developments in judging practice in the twentieth century.[45] These two different models of balancing rights arose in very different histories, different cultural contexts and different political and judicial mentalities. The European model of proportionality arose during the "the 'second wave' of global democratization that followed the Second World War, [when] new constitutions were written to entrench rights principles, and, in places like Italy, Germany, and Japan, courts were empowered to review the decisions

[42] Annika Tahvanainen, "Hierarchy of Norms in International and Human Rights Law," *Nordisk Tidsskrift for Menneskerettigheter* 24, no. 3 (2006): 194.
[43] Kai Moller, "Balancing and the Structure of Constitutional Rights," *International Journal of Constitutional Law* 5, no. 3 (July 2007): 453.
[44] Alec Stone Sweet and Jud Mathews, "Proportionality Balancing and Global Constitutionalism," *Columbia Journal of Transnational Law* 47, no. 1 (2008): 74.
[45] Patrick M. McFadden, "The Balancing Test," *Boston College Law Review* 29 (1987-1988): 587.

of elected officials for compliance with these principles."[46] It is a product of both the human rights revolution of post-war Europe and the new constitutionalism that would eventually spread globally in the 1970s, and thrived in the European culture of optimism about the prospects of building rights-protective regimes that were constitutionally barred from returning to the fascism that had shattered the continent in the 1940s.

The American experience was expressive of a different constitutional culture and a different historical context. Balancing in its various forms rose in part as a reaction to a pendulum swing of judicial extremes, beginning in the 1930s *Lochner* era of pro-business and anti-reform judicial activism, running through the countermovement of the New Deal court-packing crisis which revived judicial deference to government authority, and the return to judicial activism of the Warren Court and its robust defense of the new wave of equal protection laws during the Civil Rights Era.[47] The development of balancing was influenced by traditional skepticism of government and a strong culture of separation of powers, as well as the legacy of slavery, Jim Crow laws, and the country's profoundly religious origins. One might say that if the overarching influence on European constitutional developments in the post-war era was that of the horrors of fascism, the dominant influences in the US were reactions to racial injustice and McCarthyism. As a result, while both proportionality and American balancing tests perform similar functions in weighing the relative importance of competing rights claims, they are each a product of their own cultural context and have as a result evolved with their own distinguishing particularities. Those approaches, with their particularities, have been applied to the right to religious freedom at an accelerating rate in the early twenty-first century and have produced a significant body of caselaw. This caselaw forms the backdrop for the workplace cases to be discussed in Part II.

[46] Lisa Hilbink, "Beyond Manicheanism: Assessing the New Constitutionalism," *Maryland Law Review* 65, no. 1 (2006): 17.
[47] Jud Mathews and Alec Stone Sweet, "All Things in Proportion? American Rights Review and the Problem of Balancing," *Emory Law Journal* 60, no. 4 (2011): 811-812.

I. THE EVOLUTION OF TIERS OF REVIEW IN RELIGIOUS FREEDOM JURISPRUDENCE IN THE UNITED STATES

Religion was at the heart of the American colonial experience, but religious freedom was not a central concern during the drafting of the Constitution. There was in fact vigorous debate over whether individual rights even belonged in the new roadmap for the republic, and the Bill of Rights was included as amendments rather than as a central part of the original draft. Even the First Amendment, as written, did not envisage a very strong protection for the right to worship as one saw fit; rather, the guarantee of the Religion Clauses was a guarantee that the right to regulate religion would be a matter for state governments rather than the new Federal government being created in Philadelphia. Moreover, the Judicial Branch set up by the Constitution to police those rights was itself rather weak. Article 3 sets out the structure and powers of the courts in very general terms. Judicial power is "vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." The Judicial Branch is given power to adjudicate various conflicts "arising in law and equity," and the Supreme Court is assigned appellate jurisdiction in all cases except those involving ambassadors and conflicts between states.[48] Apart from a few other brief details about treason and impeachment, that is the only guidance given upon which to create the entire legal system. Excluding headings, it amounts to a mere 369 words.

One of the first acts of Congress was to pass the Judiciary Act of 1789[49] in order to implement Article III and set forth in more detail the structure and powers of the court. Even the Judiciary Act, however, did not give the courts the power of a constitutional court that it enjoys today. A few years later Chief Justice John Marshall took that step and established for the US courts the power of judicial review.[50] This power enables courts to review laws enacted by Congress and to strike them down if they are deemed to violate the Constitution. As he famously wrote in *Marbury v. Madison*, "It is emphatically the province and duty of the Judicial Department to say what the law is."[51] The courts, however, did not use this power

[48] U.S. CONST. art. III.
[49] See https://www.ourdocuments.gov/doc.php?flash=false&doc=12&page=transcript.
[50] Marbury v. Madison, 5 U.S. 137 (1803).
[51] Marbury, 5 U.S. at 177.

aggressively in the nineteenth century, and the focus of the cases was more on working out the balance of federal vs. state powers than on individual freedoms.[52] While religious freedom issues started to arise later in the century, it was not until the mid- twentieth century that the modern period of judicial contestation over free exercise would begin in earnest.

1. Free exercise, from Reynolds to Smith

The early years of the republic were characterized by a broad consensus that the precise details of the relationship between religion and government were best left to the states so long as there was no clear persecution or religious establishment. By 1833 all state constitutions contained religious liberty provisions that largely paralleled those of the First Amendment. Moreover, the population of the United States was overwhelmingly Christian, with most citizens belonging to one of various Protestant denominations or part of a sizeable Catholic minority in some states. Over the course of the nineteenth century, however, the religious landscape of the U.S. changed drastically. The Second Great Awakening gave birth to a wide variety of new Christian sects. Immigration from Europe vastly increased the Catholic presence in America, and the end of slavery brought to light variants of Christianity and Islam that had been prevalent, if largely hidden, among the African-American population in the South.[53] These social changes began to put stress upon the comfortable background assumption that mainstream Christianity was the norm to which minorities needed, at least externally, to conform.

It was in this context that the Supreme Court faced its first free exercise challenge. In *Reynolds v. United States,*[54] a Mormon plaintiff cited the First Amendment as a defense against an anti-bigamy law in the territory of Utah. After carefully discussing the history of anti-bigamy laws, the Court found that the territory was well within its right to outlaw the practice, and that "religious freedom" meant freedom to believe, but not necessarily freedom to act. Chief Justice Waite concluded that "Laws are made for the government of actions, and

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[52] Keith E. Whittington, "Judicial Review of Congress Before the Civil War," *Georgetown Law Journal* 97 (2009): 1257.
[53] See generally John Witte Jr, "History of Religious Liberty in America," *Freedom Forum Institute,* 3 January 2003, https://www.freedomforuminstitute.org/first-amendment-center/topics/freedom-of-religion/religious-liberty-in-america-overview/.
[54] Reynolds v. United States, 98 U.S. 145 (1878).

while they cannot interfere with mere religious belief and opinions, they may with practices."[55] To permit exemptions, Waite explained, would be to "permit every citizen to become a law unto himself. Government could exist only in name under such circumstances."[56] Taken to its logical conclusion, he argued, such an approach would oblige the government to recognize religious practices such as human sacrifice.

Reynolds set a very low bar for state governments wishing to limit religious freedom. So long as the law targeted the *forum externum* rather than the *forum internum*, *Reynolds* suggested that the states were free to limit religious practices that they deemed harmful. The act/belief distinction is appealing for a number of reasons, both practical and cultural. The distinction at first seems quite clear – individuals are perfectly free within their own minds to believe anything they like. The fact that a state can uphold laws of general applicability which may infringe on how people behave does not appear on first glance to limit that right. It is therefore not surprising to find that Western legal traditions instinctively privilege belief over practice. Yet the distinction is problematic. Firstly, it contains an implicit cultural bias. In most denominations of Protestant Christianity, belief is the fundamental criterion for salvation and ritual tends to play a lesser role than in many other religious traditions. This encourages an instinctive bias towards the importance of belief over action in American law, and makes the distinction seem in some way 'natural,' when in fact many religious traditions value practice as much as, or even more than, faith. Scholars in the field of religious studies have, as Yvonne Sherwood describes it, "spent most of their energy in the last thirty years decoupling religion from belief."[57] Finally, the belief/action distinction, if taken seriously, has the effect of rendering the Free Exercise Clause almost meaningless. In practice, the state has little or no means to actually compel belief. One may persuade and punish, but the state simply has no power to make someone believe something against their will. Thus with the belief/action distinction intact, the Free Exercise Clause merely prohibits the state from doing something that it could not in practice achieve anyway. In the *Reynolds* period of American law, however, the distinction seemed obvious.

[55] Reynolds, 98 U.S. at 166.
[56] Reynolds, 98 U.S. at 167.
[57] Yvonne Sherwood, "On the Freedom of the Concepts of Religion and Belief," in *The Politics of Religious Freedom,* ed. Winnifred Fallers Sullivan et al. (Chicago: University of Chicago Press, 2015), 34.

Thus the *Reynolds* period could be characterized as one in which the Free Exercise Clause prevented the Federal government from deliberately singling out one religion for disparate treatment and from prohibiting or compelling beliefs. Once a law involved action, however, it could regulate behavior in such a way that limited the practice of religion so long as it was of general applicability. The importance of the practice in question was not relevant, so long as the law had a rational basis. Moreover, during this period it was not clear whether the Free Exercise Clause applied to state laws.

This state of affairs began to be eroded in the 1930's and 1940's, when a series of Supreme Court cases – especially *Cantwell v. Connecticut*[58] and *Everson v. Board of Education*[59] – explicitly extended the provisions of the First Amendment's Free Exercise Clause (*Cantwell*) and Establishment Clause (*Everson*) to states. This was achieved through what has come to be known as the "selective incorporation doctrine." The Bill of Rights was drafted with specific concerns in mind about the dangers of a strong federal government, and thus the wording of the first ten amendments is specifically aimed at limiting powers of Congress. The "selective incorporation doctrine," developed in a variety of cases over the course of the twentieth century, interprets the Fourteenth Amendment's due process clause – which prohibits states from depriving any person of "life, liberty or property, without due process of law" - as "incorporating" many of the fundamental rights in the Bill of Rights and thereby applying them to state law.[60] Since restrictions on the free exercise of religion mostly occurred at the state level, the incorporation of the religion clauses effectively paved the way for a far more robust judicial enforcement of religious freedom, which would become increasingly relevant as the religious demographics of the United States continued to

[58] Cantwell v. Connecticut, 310 U.S. 296 (1940).
[59] Everson v. Bd. of Educ., 330 U.S. 1 (1947).
[60] The full text, in relevant part, reads: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State 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." The Fourteenth Amendment was one of the key post-Civil War amendments formalizing the end of slavery, and provides the Constitutional basis for modern civil rights legislation. While free exercise cases are generally brought under the First Amendment, cases involving religious discrimination generally depend upon legislation drafted on the basis of equal protection clause of the Fourteenth Amendment.

diversify and American underwent "desecularization" toward the end of the twentieth century.[61]

In the two decades following the *Cantwell* decision selectively incorporated the Free Exercise Clause, the Court addressed a number of related cases, but the broad view of governmental discretion affirmed in *Reynolds* generally continued to hold. The Court did, however, gradually expand the right to free exercise, and in doing so continued to nuance the ways in which balancing tests might operate. In *United States v. Ballard,*[62] the Court affirmed that a jury was not at liberty to question the truth or falsehood of a religious belief. The significance of this is clear, since if religious liberty applies only to "true" religion, and an agent of the state has the power to determine which religious beliefs are true, then minority religions would have little or no protection against the kind of majoritarian religious persecution that the Framers drafted the First Amendment to prevent. In another important Establishment Clause case, *Torasco v. Watkins,*[63] it was established in that a state cannot make a profession of belief in God a requirement for holding public office.

Other cases, however, continued to assert a broad scope for permissible government action even when religious practices were burdened. In *Braunfeld v. Brown,*[64] the Court upheld the constitutionality of a Sunday closing law, reasoning that even if such laws placed an added burden on Orthodox Jewish shopkeepers, they achieved a permissible government purpose and were not deliberately discriminatory. Echoing the Court's reasoning in *Reynolds*, Chief Justice Warren's plurality opinion reaffirmed that as long as the purpose of the law is to "advance the State's secular goals, the statute is valid despite its indirect burden on religious observance unless the State may accomplish its purpose by means which do not impose such a burden."[65] In *Prince v. Commonwealth of Massachusetts*,[66] the Court affirmed the right of the state to regulate the treatment of children even in the face of religious opposition of their parents. In this particular case, the mother of the child concerned obliged

[61] See generally Peter L. Berger, "The Desecularization of the World: A Global Overview," in *The Desecularization of the World: Resurgent Religion and World Politics*, ed. Peter L. Berger (Michigan: William B. Eerdmans Publishing Company, 1999), 1-18.
[62] United States v. Ballard, 322 U.S. 78 (1944).
[63] Torasco v. Watkins, 367 U.S. 488 (1961).
[64] Braunfeld v. Brown, 366 U.S. 599 (1961).
[65] Braunfeld, 366 U.S. at 607.
[66] Prince v. Commonwealth of Massachusetts, 321 U.S. 158 (1944).

her daughter to distribute literature in public places in exchange for 'voluntary donations.' When charged with the violation of child labor laws, Linda Prince responded by claiming that she was merely exercising her religious liberty as a Jehovah's Witness and therefore should be exempted from the law. The Court upheld the law over Ms. Prince's objections, noting that while it could not prohibit an adult from distributing literature, "[t]he right to practice religion freely does not include the right to expose the community or the child to communicable disease or the latter to ill health or death."[67]

But the first truly significant shift in free exercise jurisprudence, and a major leap forward in terms of elaborating a structure for balancing in religion cases, came in 1963 with the Court's landmark decision in *Sherbert v. Verner,*[68] which created a controversial judicial standard that continues to influence religious freedom cases today. Adele Sherbert worked in a textile mill in South Carolina and, in 1957, became a member of the Seventh Day Adventist Church. Her religious conversion posed no problems until 1959, when her employer adopted a six-day work schedule which included work on Saturdays. Sherbert declined to work on Saturday, citing her belief that she may do no work on Saturday, which is the day of Sabbath for Seventh Day Adventists. She was fired, and when she sought employment at other textile mills in the area found that they too had adopted a work schedule that included Saturdays. Unable to find a job, she applied for unemployment benefits. The terms for receiving unemployment compensation in South Carolina, however, stipulated that an applicant would be disqualified from receiving benefits if she failed "to accept available suitable work."[69] The question before the court was whether, in denying compensation to Ms. Sherbert, the State of South Carolina had violated her right to free exercise under the First Amendment, as applied to the state by the Fourteenth Amendment.

The Court held for Ms. Sherbert. Citing *Cantwell*, *Torasco* and other cases, Justice Brennan began the Court's analysis by reaffirming that the state is barred from specifically regulating religious belief but, following the line of argument in *Reynolds*, noted that actions resulting from those beliefs may be regulated. In cases where the Court had previously upheld laws affecting free exercise, Brennan noted that there had always been some kind of

[67] Prince, 321 U.S. at 167-168.
[68] Sherbert v. Verner, 374 U.S. 398 (1963).
[69] Sherbert, 374 U.S. 374, 410 at n3 (citing South Carolina Code, Title 68, §§ 68-114).

"substantial threat to public safety, peace or order."[70] This left only two possible justifications to uphold the lower court's ruling in favor of the state: either Ms. Sherbert's right to free exercise was not substantially burdened or, following the accepted legal standard in cases implicating the infringement of fundamental rights, there was a "compelling state interest" at stake.

This was a major leap forward in the Court's jurisprudence on religious freedom. Prior to *Sherbert*, courts had followed the line of cases proceeding from *Reynolds* and applied a "rational basis" test to determine the validity of laws that incidentally infringed upon free exercise rights. This test had evolved from the due process clause of the Fourteenth Amendment and involved the notion that any law the infringed upon liberty had to have a rational basis. This was, naturally, an easy requirement to meet; the rational basis test merely required that there be some logical relationship between the law and a permissible objective of legislation. In several key cases in the 1940s and 1950s, however, the Court had concluded that a "rational basis" for a law was not sufficient to justify the infringement certain fundamental rights such as the right to free speech or the right to own property. The Court in *Sherbert* was now applying this more rigorous standard to free exercise cases, establishing what has come to be known as the *Sherbert* test. In balancing the right of a claimant to an exemption from a law or regulation pursuant to his or her right to freely exercise his or her religion, the Court determined that any state action that substantially infringed on a claimant's free exercise of religion is a violation of the First Amendment unless the government can demonstrate that the action was narrowly tailored in pursuit of a compelling state interest. Quoting its decision in *Thomas v. Collins*, the Court described such instances as being limited to "the gravest abuses, endangering paramount interests."[71] With this formulation, the Court gave its first clear explanation of what has come to be known as the "strict scrutiny" standard.[72]

Regarding the question of whether the law burdened her free exercise, the Court concluded that it did. South Carolina expressly protected the right of the religious not to have to work on Sundays, thus it could not be claimed that Sabbath rights were not substantial

[70] Sherbert, 374 U.S. at 403.
[71] Sherbert, 372 U.S. at 406 (quoting Thomas v. Collins, 323 U.S. 516, 530 (1945)).
[72] Stephen A. Seigel, "The Origin of the Compelling State Interest Test and Strict Scrutiny," *American Journal of Legal History* 48, no. 4 (2006): 380.

enough to merit protection. Moreover, the Court dismissed the argument that Sherbert was being denied a privilege rather than a right, noting that once the state grants a benefit, it may not use the threat of denying that benefit as a means for suppressing fundamental rights. The more difficult question in this case, however, concerned whether or not the infringement was justified by a compelling state interest. Again the Court thought not, dismissing as unwarranted the proposed concern over potential fraudulent claims. Citing the third element of the newly-minted *Sherbert* test, the Court went on to note that even if there were evidence of serious harm caused by fraudulent claims, it would then be incumbent upon the state to demonstrate that there was no alternative means of preventing such fraud without infringing upon First Amendment rights.

Sherbert thus marked an important change regarding how courts were meant to balance state interests against individual religious interests. Until *Reynolds*, the accepted doctrine was that while religious beliefs enjoyed absolute protection, when it came to actions motivated by religion then state interests would trump the concerns of the individual. In most areas of law this would be a normal state of affairs. A rule against prostitution would make little sense if one provided exemptions for all those who honestly believe that there is nothing wrong with prostitution. As Chief Justice Waite had argued in *Reynolds*, an automatic system of exemptions would "permit every citizen to become a law unto himself. Government could exist only in name under such circumstances."[73] The Court in *Sherbert*, noting that where fundamental rights such as those enunciated in the First Amendment a different standard should apply, took a diametrically opposing view, setting a theoretically difficult standard for the government to meet should it not wish to exempt anyone claiming a religious objection to a law. The dissent in *Sherbert* was aware of the dilemma that this would create and argued that by permitting religious individuals to circumvent laws that continued to bind others the Court was solving a free exercise problem but replacing it with an Establishment Clause problem. To enforce the *Sherbert* test literally would create any number of absurd situations in which the government was actively favoring some religions over others, or over those who did not hold any strong religious beliefs. Citing religious beliefs, people would

[73] Reynolds, 98 U.S. at 167.

have a presumptive right to violate almost any law which, in an extremely religiously diverse country such as the United States, would arguably become both unmanageable and unfair.

The Court was given an opportunity to apply and to refine the *Sherbert* test when in 1972 it was asked to weigh religious freedom against the state's interest in compulsory education in *Wisconsin v. Yoder*[74]. In this case the respondents had been found to be in violation of a Wisconsin law requiring school attendance until age 16. As Old Order Amish, the respondents asserted their free exercise rights in defense, explaining that sending their children to school beyond the eighth grade constituted a threat to the children's salvation "because it takes them away from their community, physically and emotionally, during the crucial and formative adolescent period of life."[75] The state responded that its interest in universal compulsory education outweighed the respondents' free exercise claim.

The Court's decision in favor of the Amish respondents rested on several points. First, Chief Justice Burger in his majority opinion accepted and gave significant weight to expert testimony that an extra two years of school would "ultimately result in the destruction of the Old Order Amish church community as it exists in the United States today."[76] Thus even though there is no explicit doctrine in the Amish order forbidding the attendance of secondary school, enforcement of the Wisconsin law would have a significant impact on the lifestyle of the Amish and as a result would undermine religious practice. As Burger notes, "concept of life aloof from the world and its values is central to [the Amish] faith."[77] Following the *Sherbert* test, the Court then looked at the state's interest in mandatory secondary education, noting that it serves to teach self-reliance and prepares citizens to participate meaningfully in political life. It determined that two more years of education, however, would not further these interests in any crucial way. Given that the burden was significant and touched upon an aspect of life that was central to the Amish faith, and that the interest of the state was not compelling enough to outweigh the religious burden, the Court decided in favor of Yoder. In doing so, *Wisconsin v. Yoder* reaffirmed *Sherbert*'s strict scrutiny requirement and nuanced it by providing a model for how to balance the state's interests against burdens imposed on

[74] Wisconsin v. Yoder, 406 U.S. 205 (1972).
[75] Yoder, 406 U.S. at 211.
[76] Yoder, 406 U.S. at 212.
[77] Yoder, 406 U.S. at 210.

the free exercise of religion. In addition, as part of this balancing test the Court confirmed that a law need not directly compel acts contrary to religious doctrine to be considered a substantial burden so long as the law had a substantial impact on aspects of religious life that are central to the faith in question.

For the next 30 years the Court struggled to make sense of the approach mandated in *Sherbert* and *Yoder*. Faced with a threshold test that, if honestly applied, would permit almost any religiously-inspired behavior, the courts felt obliged to find interpretive strategies that would allow them to continue to place limits on the right to religious exemptions. One strategy was to exclude certain types of cases from strict scrutiny altogether or to radically diminish its requirements During the *Sherbert* period, the Court carved out a variety of cases involving the military and the prison system.[78] *Goldman v. Weinberger*,[79] for example, involved a challenge to Air Force uniform regulations that forbade the wearing of any headgear indoors, with only armed security police being exempted while in the course of their duties. The Supreme Court refused to apply the *Sherbert* test, arguing that "[the Court's] review of military regulations challenged on First Amendment grounds is far more deferential than constitutional review of similar laws or regulations designed for civilian society."[80] The military, in short, is a specialized society to which strict scrutiny was not applicable. Similarly prison cases were carved out as involving special circumstances.[81] In other cases involving government benefits, the Court declined to apply the *Sherbert* test either be denying that there was any real burden[82] or by emphasizing the government's need for efficiency in providing uniform access to benefits programs.[83]

Yet in practice, during the almost 30 years that *Sherbert* governed free exercise cases, strict scrutiny clearly accounted for a victory for religious claimants in only four Supreme

[78] Christopher L. Eisgruber and Lawrence G. Sager, *Religious Freedom and the Constitution* (United States: Harvard University Press, 2007), 43.
[79] Goldman v. Weinberger, 475 U.S. 503 (1986).
[80] Goldman, 475 U.S. at 507.
[81] For example, see O'Lone v. Est. of Shabazz, 482 U.S. 342 (1987).
[82] Bowen v. Roy, 476 U.S. 693 (1986), Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988). These cases will be explored further in Part II Chapter 1 for their addition of the coercion test as part of the substantial burden analysis.
[83] United States v. Lee, 455 U.S. 252 (1982).

Court cases.[84] Three of these four cases – *Frazee v. Illinois*,[85] *Hobbie v. Unemployment Appeals Commission,*[86] and *Thomas v. Review Board*[87] – were employment benefits cases and essentially reiterations of *Sherbert*, and the Court's decision in *Wisconsin v. Yoder* emphasizes the fact-specific nature of that decision to the extent that, apart from having clarified the three-part test to be conducted, it has little precedential value beyond the Amish community. A broader study that looked at all federal and appellate court decisions between 1980 and 1990 found that 85 out of 97 religious exemption claims were denied in spite of *Sherbert's* so-called "fatal" strict scrutiny standard.[88] To put this in context, the survival rate for laws subjected to strict scrutiny cases between 1990 and 2003 was approximately 30%. This rated drops to 24% if religious liberty cases are excluded. In contrast, laws affecting religious liberty and subjected to strict scrutiny showed a survival rate of 59%.[89] This would suggest that strict scrutiny, whatever its merits, was not functioning in religious liberty cases in the same way that it was being applied in other areas of law.

To summarize, the evolution of free exercise doctrine during the period from *Reynolds* until the decision in *Smith* was a somewhat tumultuous one. It can, however, be best understood by focusing on several key debates whose resolution had a profound effect on religious freedom in the United States. The importance of some of these advances is hard to overstate. For example, the clear enunciation and subsequent erosion of the traditional distinction between the right to believe and the right to act on those beliefs fundamentally transformed the way in which religious freedom cases would be argued and decided in the following decades. Likewise, the selective incorporation of the religion clauses into state law via the Fourteenth Amendment gave religious freedom advocates a powerful new weapon by establishing that states, like the federal government, were barred from favoring one religion over another or otherwise taking action to limit the right of free exercise. The *Sherbert/Yoder* test and its enunciation of a strict scrutiny standard for free exercise was also a milestone, but

[84] Eisgruber and Sager, *Religious Freedom,* 43.
[85] Frazee v. Illinois Dep't of Employment Sec., 489 U.S. 829 (1989).
[86] Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136 (1987).
[87] Thomas v. Rev. Bd., 450 U.S. 707 (1981).
[88] See James E. Ryan, "Smith and the Religious Freedom Restoration Act: An Iconoclastic Assessment," *Virginia Law Review* 78, no. 6 (1992): 1407-1462. For a broader view of strict scrutiny in federal courts, see Adam Winkler, "Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts," *Vanderbilt Law Review* 59, no. 3 (2006): 793-871.
[89] Winkler, "Fatal in Theory," 815.

subsequent reinterpretation and limitation of the *Sherbert* doctrine by the court served to deprive that standard of any real teeth. In the years following *Sherbert*, some more subtle but important changes in the court's application of the various steps in strict scrutiny eventually reduced *Sherbert's* relevance and produced inconsistent results. And the longer the Court tried to chart its course among the various obstacles to impartial judgment of religious freedom issues, the more complex and ultimately unworkable the *Sherbert* test became. Ultimately this struggle led the Court to reevaluate the *Sherbert* test in 1990 in *Employment Division v. Smith*[90].

2. The watershed case of Employment Division v. Smith (1990)

Employment Division v. Smith arose when Alfred Smith and Galen Black were fired from their jobs for ingesting peyote, a plant-based narcotic that is classified as a controlled substance under the laws of the state of Oregon, where the case arose. Smith[91] was an alcoholism counsellor and had developed a variety of approaches to alcoholism that drew upon Native American rituals. During this period he also became acquainted with the peyote sacrament of the Native American Church. In the early 1980s he began working with the Douglas County Council on Alcohol and Drug Abuse Prevention and Treatment ("ADAPT"). ADAPT's policies required that all its employees observe total abstinence from all substance abuse, and when it was discovered in 1984 that Smith took Peyote as part of a religious ritual in direct defiance of his employer's warning, he was fired. He applied for unemployment compensation and was refused on the grounds that he had been fired for work-related misconduct.[92]

The case worked its way from the Civil Rights Division of the Oregon Bureau of Labor and Industries to the Oregon Supreme Court, which applied *Sherbert* and found for Smith and Black, concluding the state's interest in keeping down the costs of its unemployment

[90] Employment Div., Dep't of Hum. Res. of Or. v. Smith, 494 U.S. 872 (1990).
[91] The trajectories of the two respondents differ in a few details (Smith was half Klamath, for example, while Black was not Native American and simply got involved in Native American Church rituals through Smith), but for convenience I will focus on the named respondent.
[92] For a detailed and fascinating account of the events surrounding the Smith case, see Garrett Epps, "To an Unknown God: The Hidden History of Employment Division v. Smith," *Arizona State Law Journal* 30 (1998): 953-1021.

insurance program was not a substantial reason to deny exemptions to the two claimants.[93] The case reached the US Supreme Court in March of 1989. Justice Scalia, writing for the majority, begins his analysis of the case by reaffirming the relevance of the fact that peyote use was illegal in Oregon, noting that this offers a key distinction between the situations in *Smith* and in *Sherbert*. The relevant question was thus whether or not it is Constitutionally permissible for Oregon to outlaw peyote use without offering an exemption for sacramental use. If it is not, he reasoned, then Oregon cannot penalize the respondents for behavior that it has no right to prohibit. If it is Constitutionally permissible, on the other hand, then clearly the state has the right to impose a penalty, including denying unemployment benefits. In framing the case in these terms, however, Scalia effectively removes it from the normal course of a *Sherbert* test analysis. Having shifted the discussion away from employment rights and onto the government's right to prohibit controlled substances, Scalia changed the nature of the debate and was thus able in his subsequent arguments to distinguish *Sherbert* and avoid a strict scrutiny analysis. His opinion characterizes the Respondents' argument as claiming that "their religious motivation for using peyote places them beyond the reach of a criminal law that is not specifically directed at their religious practice."[94] Scalia then reverts the principle cited in *Reynolds* and asserts that the Court has "never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate."[95] To further distinguish prior cases, Scalia introduces what has come to be called the "hybrid rights doctrine," in which he asserts that all similar cases in which the Court upheld a right of exemption from generally applicable laws had involved "hybrid cases," that is cases in which the free exercise claim was coupled with another important interest such as the Establishment Clause, free speech or parental rights.

The opinion further distinguishes prior cases by noting that the only other successful claims for exemptions that had succeeded under the *Sherbert* test were unemployment

[93] Smith v. Employment Div. Dep't of Hum. Res. of Or., 721 P.2d 445, 451 (Or. 1986).
[94] Employment Div., Dep't of Hum. Res. of Or. v. Smith, 494 U.S. 872, 878 (1990).
[95] Smith, 494 U.S. at 878-879.

compensation cases.[96] Unemployment cases, he explains, are unique in that "their eligibility criteria invite consideration of the particular circumstances behind an applicant's unemployment," whereas generally applicable criminal law does not. The opinion then holds the *Sherbert* test inapplicable to challenges to "across-the-board criminal prohibition[s] on a particular form of conduct."[97] If states wish to offer heightened protection for such free exercise challenges, the Court concludes, they are free to do so through legislation, but the First Amendment does not require it.

Scalia sums up the decision by reflecting on the effects of excluding judicial balancing from free exercise:

> It may fairly be said that leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in; but that unavoidable consequence of democratic government must be preferred to a system in which each conscience is a law unto itself or in which judges weigh the social importance of all laws against the centrality of all religious beliefs.[98]

In other words, Scalia admits that the result of the decision will be to prejudice the judicial system in favor of majority religions at the expense of minority faiths, but expressly declines to require the courts to make balancing decisions in which they must evaluate elements of religious faith and weigh them against social objectives.

The result of the decision was thus, first and foremost, a rejection of the use of balancing tests in what constitutes the majority of free exercise cases, i.e. cases involving generally applicable laws that inadvertently place a burden on religious practice. Instead, it stands for the proposition that "any government action of general applicability is now categorically constitutional against a free exercise challenge, regardless of the burden it places on an

[96] One's first reaction may well be to point out that *Smith* is an unemployment benefits case, but it must be remembered that Scalia's first argument is to distinguish *Smith* as a case about controlled substance laws rather than about unemployment benefits. One can see here step by step Scalia's strategy in isolating and neutralizing the Sherbert line of cases.
[97] Smith, 494 U.S. at 884-885.
[98] Smith, 494 U.S. at 890.

individual's ability to exercise his religious beliefs."[99] This was a major departure from previous case law and tradition since *Sherbert*.

The Court's decision in *Smith* attracted immediate and vociferous condemnation from critics across the political spectrum, and it continues to be one of the more vilified Supreme Court decisions in recent memory (perhaps now somewhat overshadowed by *Hobby Lobby* and *Citizens United*, to be discussed below). Many in the legal community felt that the decision left the status of free exercise law in complete disarray, while others complained that the decision was relatively clear but evidently wrong on a number of levels.[100] Among notable attacks on the decision was that of influential scholar and Tenth Circuit Judge Michael McConnell, who accused the Court of indulging in a revisionist history of free exercise jurisprudence and "contrary to the deep logic of the First Amendment."[101] In a widely cited article that captures the essence of the various problems arising from *Smith*, McConnell criticizes Scalia's opinion for effectively ignoring the history of the Bill of Rights, of inventing a theory of "hybrid rights" simply as an excuse to distinguish the problematic case of *Yoder*, and of failing to understand the Court's role as a check on majoritarian rule. The news media and religious freedom organizations mobilized as well. To jettison strict scrutiny in the majority of free exercise cases, most commentators seemed to agree, was to deal a stunning blow to religious freedom and constituted a step backwards in rights jurisprudence. A group of 55 Constitutional scholars and a disparate group of religious and human rights organizations signed a petition for rehearing, but the Court declined.[102] Congress quickly picked up on both public and scholarly dissatisfaction with *Smith*, and in response began the drafting of the Religious Freedom Restoration Act ("RFRA").

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[99] Chris Day, "Employment Division v. Smith: Free Exercise Clause Loses Balance on Peyote," *Baylor Law Review* 43 (1991): 577.

[100] For a representative selection see Randy T. Austin, "Employment Division v. Smith: A Giant Step Backwards in Free Exercise Jurisprudence," *Brigham Young University Law Review* 1991, no. 3 (1991): 1331-1352; Chris Day, "Employment Division v. Smith"; Michael W. McConnell, "Free Exercise Revisionism and the Smith Decision," *University of Chicago Law Review* 57 (1990): 1109-1153; Kenneth Marin, "Employment Division v. Smith: The Supreme Court Alters the State of Free Exercise Doctrine," *American University Law Review* 40, no. 4 (1991): 1431-1476.

[101] McConnell, "Free Exercise Revisionism," 1111.

[102] Petition of Rehearing, Employment Div., Dep't of Hum. Res. of Or. v. Smith, 496 U.S. 913 (1990) (reh'g denied).

3. The aftermath of Smith – Lukumi Babalu, the Religious Freedom Restoration Act ("RFRA") and the (re)introduction of (federal) "strict scrutiny"

In the aftermath of *Smith* and the scramble to respond to what so many felt was an attack on a fundamental right, both the judicial and the legislative branches were forced to come to terms with the result and determine how to respond. Congress began what became a several year process of drafting and negotiating what would become the Religious Freedom Restoration Act, but in the meantime courts were left to interpret and implement the *Smith* decision. During this process, Congress and the courts began to diverge in their understanding of balancing and set into motion what has become the fractured system of differing balancing approaches that characterizes the current state of American religious liberty protections.

A. Judicial responses in the immediate post-Smith period

The decision in *Employment Division v. Smith* sent shockwaves through the legal community. Because of the specific nature of common law systems and their reliance on the doctrine of stare decisis, jurisprudential evolution regarding fundamental issues of constitutional interpretation tends to be gradualist in nature. The overturning of such settled points of law as the *Sherbert* test is uncommon, and when such changes involve fundamental liberties guaranteed by the Constitution, one effect is to focus the spotlight on somewhat patchwork nature of America's federal system. For while the Constitution is paramount in federal law, it is not the end of the story. State and federal courts were forced in the aftermath of *Smith* to scramble to interpret the new *Smith* doctrine in the light of their own precedents. This led to a variety of conflicting approaches and a gradual working out of details at all levels of the judicial system, including both state courts (Subsection i) and federal courts (Subsection ii), as well as subsequent rethinking and refinements undertaken by the Supreme Court itself (Subsection iii).

i. State Courts

To understand the state court reactions to *Smith* and their subsequently divergent path in free exercise cases, it should be remembered that the states were originally seen as the primary protectors of religious freedom. The Bill of Rights was conceived of initially as a means of protecting the people and the states from the threat of an overreaching federal government, and it was widely presumed that the states, since they are smaller communities and hence seen as more democratically accountable to their citizens, would protect religious liberty not only with their own state constitutional provisions covering free exercise but also through the legislative process. It was only after 1940 when *Cantwell v. Connecticut* explicitly applied the free exercise to the states by the doctrine of selective incorporation that state courts needed to consider federal free exercise concerns and overlapping jurisdiction with federal courts on religious liberty issues. While some state constitutions offered protections more strict than relatively austere language of the First Amendment, most states defaulted to a standard similar to that followed by the federal courts; that is, in line with Reynolds, they followed the "secular regulation rule" that nondiscriminatory limitations of free exercise that served a public good needed only to pass a rational basis test.[103]

Selective incorporation became more significant after the adoption of the *Sherbert* test because the strict scrutiny requirement now imposed on the states was more stringent than most state constitutional provisions. As a result, during the almost three decades during which *Sherbert* dictated some form of strict scrutiny in free exercise cases, state courts deferred to federal law when examining free exercise cases to the exclusion of state constitutional law. In many cases the state constitution as possible grounds for addressing religious freedom issues was not even mentioned. As Angela C. Carmella explains in a widely cited article on state free exercise claims, "[o]ne effect of reliance on federal doctrine for all or most of the cases involving religion was to prevent any serious development of a comprehensive state constitutional law of religious liberty grounded in the state's text and tradition."[104] State free

[103] Angela C. Carmella, "State Constitutional Protection of Religious Exercise: An Emerging Post-Smith Jurisprudence," *Brigham Young University Law Review* 1993, no 1 (1993): 294.
[104] Carmella, "State Constitutional Protection," 299.

exercise doctrine was, with a number of exceptions where state constitutions already imposed an independent strict scrutiny standard, filed away as a dead letter or historical curiosity.[105]

Thus when *Smith* replaced the *Sherbert* strict scrutiny standard with a rational basis test in cases involving laws of general applicability, state courts were once again obligated to chart their own court and resume the construction of state constitutional jurisprudence in free exercise claims. What is more, given the largely negative reactions to *Smith* and concerns that it had effectively removed the teeth from the federal Free Exercise Clause, the new Supreme Court approach afforded state courts an opportunity to step into the breach and interpret their own constitutions in ways that could offer some of the protection of religious freedom that *Smith* had so suddenly removed. As a result, many state courts found that their own constitutional protections were either clearly more protective of religious freedom than the *Smith* standard or could be interpreted that way. In the period between *Smith* and the signing of RFRA into law in 1993 – thus the heyday of *Smith* jurisprudence – little effect was seen in the results of free exercise claims at state level precisely because state courts found independent grounds in their own constitutions to apply a stricter standard that that required by the First Amendment. Thus the effect of *Smith* was to send a shockwave through what had always been an anemic or nonexistent body of state constitutional free exercise jurisprudence, providing in many states a renewed opportunity to craft balancing tests.

Moreover, it provided the impetus in some cases to draft new legislation designed to shift those decisions from the courts to the legislature. The passage of RFRA (and the subsequent passage of state or "mini-RFRAs") would once again alter this landscape significantly by offering yet another option to state courts. In the end it has been up to each state's courts to see their religion clauses in context to determine what sort of balancing test it will apply post-*Smith* – and up to their legislatures to decide whether or not to preempt those constitutional provisions with legislation offering greater protection than their free exercise provisions are deemed to grant.

[105] States with independently robust strict scrutiny requirements were Tennessee, Maine, Mississippi and Kentucky.

ii. Federal Courts

Unlike the state courts, the federal courts had no separate constitutional tradition to fall back on, and diligently set about applying the holdings in *Smith* to their free exercise caseload. The results were, unsurprisingly, harsher on free exercise claims.[106] Whereas in the pre-*Smith* period most claims were denied, there was usually at least some consideration of the opposing interests via the burden analysis and the compelling state interest analysis. After *Smith*, there was no longer even a requirement to undertake such balancing tests.

One such case was *Salvation Army v. New Jersey Department of Community Affairs*,[107] which involved in part a provision of the New Jersey Rooming and Boarding House Act of 1979 that the prevented the Salvation Army from requiring attendance at religious services as a precondition to living in a homeless shelter. After affirming that the holding in *Smith* is not limited to criminal cases, the Third Circuit rejected the Salvation Army's free exercise claim since the regulation was not expressly limiting religious free exercise (in fact, the provision designed to protect the religious freedom of tenants from abusive landlord practices was no longer relevant since the respondent had waived enforcement of that provision as it applied to the Salvation Army.

Other cases involved property disputes, employment disputes, two disputes over the right of a family to refuse an autopsy for a deceased child, and a variety of hybrid disputes. The property disputes, *St. Bartholomew's Church v. City of New York*[108] *and Cornerstone Bible Church v. City of Hastings*,[109] involved a landmarks preservation law and a general zoning ordinance respectively, and in both cases the courts held that *Smith* applied as precedent and that no religious freedom claim could go forward in the face of generally applicable property use restrictions.[110] The employment disputes were equally unsuccessful for those making free

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[106] Michael P. Farris and Jordan W. Lorence, "Employment Division v. Smith and the Need for the Religious Freedom Restoration Act," *Regent University Law Review* 6 (1995): 65.
[107] Salvation Army v. New Jersey Dep't of Cmty. Affs., 919 F.2d 183 (3d Cir. 1990).
[108] St. Bartholomew's Church v. City of New York, 914 F.2d 348 (2d Cir. 1990).
[109] Cornerstone Bible Church v. City of Hastings, 948 F.2d 464 (8th Cir. 1991).
[110] Despite the extraordinary claims and nearly apocalyptic language of some commentators (for example, see Farris and Lorence, "Employment Division"), it is far from certain whether a balancing test would have resolved either of these cases. In *Saint Bartholomew's Church,* at issue was the church's desire to demolish a historic landmark building and replace it with a highly profitable office block, and it is quite conceivable that their inability might fail the substantial burden test, since the burden was not on their ability to practice their faith

exercise claims, but for very different reasons. In *NLRB v. Hanna Boys Center*[111] in the Ninth Circuit and in *Lukaszewski v. Nazareth Hospital*[112] in the Eastern District of Pennsylvania federal courts ruled against claims that labor laws (the right for non-teacher workers to unionize and the right to protection from age discrimination, respectively) should not apply to workers occupying non-ministerial roles within religious organizations. Hanna Boys Center, however, was not decided under the *Smith* standard – the court believed that *Smith* would not apply because the law in question did not punish "behavior that constituted a criminal act."[113] The Court did not reach a conclusion on whether or not *Smith* would apply because it asserted that the case would not survive even under the *Sherbert* test since there was no cognizable burden to religious exercise. *Nazareth Hospital* did rely in part on *Smith*. Citing the case and noting that the law in question was neutral on its face and did not discriminate against religious organizations, the Court concluded simply and without elaboration that "the Free Exercise Clause [was] not implicated."[114] Whether Nazareth Hospital would have received more favorable treatment under the *Sherbert* test is unclear.

Two more cases are worth mentioning in the context of the federal courts' treatment of free exercise claims in the immediate wake of the *Smith* decision. The first is one of a variety of cases that demonstrate the struggle the courts faced in fleshing out Justice Scalia's hybrid rights doctrine.[115] In *Kissinger v. Board of Trustees of Ohio State University*,[116] the plaintiff had requested and was denied an exemption of classes at veterinary school on that grounds that she objected on religious grounds to participating in educational laboratory operations

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but rather on the church's ability to enter into a valuable real estate transaction. *Cornerstone Church* was more complicated; while courts had found before *Smith* and after RFRA that general zoning laws restricting where churches may be built were not substantial burdens and satisfied the compelling state interest requirement (for example, see Int'l Church of the Foursquare Gospel v. City of Chicago Heights, No. 96C4183, 1996 U.S. Dist. LEXIS 11125 (N.D. Ill. Aug. 1, 1996) for a post-RFRA analysis), the case in *Cornerstone Church* also involved a charge of discriminatory treatment (other non-profits had been allowed to build in the commercial zone in question). The court noted, however, that the law did not specifically target churches – it merely categorized them differently from private clubs for purposes of zoning, and this was not seen as targeting religion. Therefore, the court reasoned, strict scrutiny need not apply. For a thoughtful discussion of the rhetoric used in discussing religious freedom cases in the United States more generally, see Mark Tushnet, "The Rhetoric of Free Exercise Discourse," 1993 *Brigham Young University Law Review* 1993, no. 1 (1993): 117-140.

[111] NLRB v. Hanna Boys Ctr., 940 F.2d 1295 (9th Cir. 1991).

[112] Lukaszewski v. Nazareth Hospital, 764 F. Supp. 57 (E.D. Pa. 1991).

[113] Hanna Boys, 940 F.2d at 1305.

[114] Nazareth Hospital, 764 F. Supp. at 61.

[115] See generally William L. Esser, "Religious Hybrids in the Lower Courts: Free Exercise Plus or Constitutional Smoke Screen," *Notre Dame Law Review* 74, no 1 (1998): 211-244.

[116] Kissinger v. Bd. of Trs. of Ohio State Univ., 5 F.3d 177, 180 (6th Cir. 1993).

using live animals. The Sixth Circuit Court of Appeals denied the claim, citing *Smith*. In response to Kissinger's attempt to argue for a higher standard of protection in reliance on the hybrid rights theory enunciated in *Smith*, the court responded bluntly with an assertion that the hybrid rights doctrine was incoherent and refused to apply it until the Supreme Court clarified it. The court declared that it could not see "how a state regulation would violate the Free Exercise Clause if it implicates other constitutional rights but would not violate the Free Exercise Clause if it did not implicate other constitutional rights" as the hybrid rights doctrine seemed to suggest, and labelled such an outcome as "completely illogical."[117] In *Yang v. Sturner*,[118] the disappointment felt by the District Court of Rhode Island was even more palpable. This case involved an autopsy performed on a Hmong man against the vehement religious objections of his family. In finding against the family in its pursuit of damages, the court wrote: "I have seldom, in twenty-four years on the bench, seen such a sincere instance of emotion displayed. I could not help but also notice the reaction of the large number of Hmongs who had gathered to witness the hearing. Their silent tears shed in the still courtroom as they heard the Yangs' testimony provided stark support for the depth of the Yangs' grief. Nevertheless, I feel that I would be less than honest if I were to now grant damages in the face of the Employment Division [v. *Smith*] decision."[119] These cases demonstrate not only the conceptual difficulties facing the court in interpreting the *Smith* decision, but also the sheer frustration in the lower federal courts with a standard that proved almost immediately to be demonstrable setback for the judicial protection of religious freedom.

iii. The Supreme Court

The Supreme Court followed up on *Smith* by remanding several cases to lower courts in light of the new standard of review,[120] but its own opportunity to apply its newly minted doctrine came only in 1993 while RFRA was still being debated in Congress.

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[117] Kissinger, 5 F.3d at 180.
[118] Yang v. Sturner, 750 F. Supp. 558 (D. R.I. 1990).
[119] Yang, 750 F. Supp. at 559.
[120] Minnesota v. Hershberger, 494 U.S. 901 (1990) and City of Seattle v. First Covenant Church, 499 U.S. 901 (1991).

In her concurring opinion in *Smith*, Justice O'Connor ridiculed what she called the majority's "parade of horribles,"[121] i.e. a list of extreme hypotheticals meant to show the possible consequences of a law. They are the legal version of thought experiments in philosophy; when abused, they risk committing an informal logical fallacy as argumentum ad absurdum, but academics are fond of them as a way of exploring the possible unforeseen consequences of a law when pushed to its limits. The facts of *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*[122] offered the perfect opportunity as a "horrible" to test the state of free exercise jurisprudence and for the Court to clarify the woefully incomplete *Smith* doctrine. The horror in question was religious animal sacrifice.

The Church of Lukumi Babalu Aye professed the Santeria faith, central to which is the practice of animal sacrifice. Followers of Santeria were persecuted in Castro's Cuba, so the faith went underground and was generally practiced in private. Because of general disapproval, the private nature of Santeria continued among the estimated 50,000 followers who had fled the Castro regime to Florida. Ernesto Pichardo, a prominent Santeria priest in Florida, wanted to change all that, and in 1987 his church leased a plot of land in Hialeah with the intention of building a Santeria church and bringing his faith, and its rituals, out into the open. When the City Council became aware of their plans, it held an emergency meeting which resulted in a Resolution expressing its concern about religions that "may propose to engage in practices which are inconsistent with public morals peace or safety." In consultation with the state Attorney General, the Council went on to pass several ordinances targeting the killing of animals "in a public or private ritual or ceremony not for the primary purpose of food consumption" as a subset of the "unnecessary killing" prohibition that already existed under state law. Mindful of the slaughtering practices ordained for halal and kosher food, the ordinances were careful to stipulate an exemption for "licensed establishments" that conducted ritual slaughter for food purposes. The Church responded by filing a complaint relying in part on the Free Exercise Clause of the First Amendment.

The case reached the Supreme Court, who ruled for the Church and in the process clarified how the *Smith* standard is meant to work. The crux of *Smith* was its holding that

[121] Employment Div., Dep't of Hum. Res. of Or. v. Smith, 494 U.S. 872, 902 (1990).
[122] Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993).

strict scrutiny is not required when religiously motivated conduct is prohibited by what Justice Scalia called "neutral, generally applicable laws." As suggested by the troubled and confused record of state and federal court applications of *Smith*, this formula offered little guidance to lower courts or to civil society as to what it means for a law to be "generally applicable," not to mention what is to be done in cases when a law is deemed not to be generally applicable. Commentators had dubbed the *Smith* decision as "the end of strict scrutiny," but despite Scalia's lengthy critique of the compelling state interest test, nowhere in *Smith* does it actually say that strict scrutiny was to be abolished. The *Lukumi* opinion sets out to clarify these points, explaining that *Smith* had established a two-tier system of review for free exercise claims. *Smith* stood for the proposition that neutral, generally applicable laws can permissibly inhibit free exercise and in such cases the government need not demonstrate a compelling state interest. To that extent, the case overruled (or clarified, in Justice Scalia's view) the *Sherbert/Yoder* test. So if a law is found to be neutral and generally applicable, it passes the *Smith* test. If the law fails that test then, Justice Kennedy explains, the law "must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest."[123] In other words, strict scrutiny was declared alive and well, but had now been resituated as the second half of a two-tier test that was implicated only in cases of non-neutral laws or laws that were not deemed generally applicable.

Lukumi is an important case in free exercise jurisprudence for a number of reasons. First, it clarifies that in spite of fears to the contrary, strict scrutiny did not die with the *Smith* decision. It established a two-tier system, with the *Smith* criteria – neutrality and general applicability – as the gateway to a full strict scrutiny analysis. And, while there was not a full discussion of what "general applicability" involves in theory, Justice Kennedy's opinion does nonetheless provide a rough framework for what considerations are relevant in any determination of general applicability. It is not necessary for a law to be universally applicable to everyone without exception, but once exceptions are made, the court must then play close attention to whether the law, in its system of exemptions, favors secular concerns over religious concerns and thus create a kind of "religious gerrymandering." As Kennedy puts it, "[a]ll laws are selective to some extent, but categories of selection are of paramount

[123] Lukumi, 508 U.S. at 531-532.

concern when a law has the incidental effect of burdening religious practice." What this would seem to indicate is that if exemptions are made, religious concerns should be taken as seriously as the very highest of secular concerns or, as Duncan puts it, "religious practice is entitled to a kind of most-favored-nation status" among secular concerns.[124] If religious concerns are granted such status, then the restrictions the law imposes on religious practice do not violate the Free Exercise Clause. If they do not, the court must subject the law to a strict scrutiny analysis.

Justice Kennedy's opinion includes a vibrant defense of the standard to be applied in such cases, insisting the limitations in such circumstances must advance "'interests of the highest order'" and must be narrowly tailored in pursuit of those interests. The compelling interest standard that we apply once a law fails to meet the *Smith* requirements is not "water[ed] . . . down" but "really means what it says."[125] Few laws, this seems to suggest, will survive this exacting standard. Yet given the progressive dilution of the strict scrutiny standard in the period between *Sherbert* and *Smith*, Justice Kennedy's remarks leave open the question of just which "strict scrutiny" standard he is referring to. By asserting that strict scrutiny will not be "watered down," is he saying that the Court would be reconsidering some of the jurisprudence that seemed to "water down" the original *Sherbert* test? Is this a return to the "good old days" when strict scrutiny "meant what it said?" If so, it would nonetheless reintroduce such scrutiny only in cases that were not neutral and generally applicable, when in fact the controversy over *Smith* resided in its position on cases like the peyote sacrament in which laws are not drafted with religion in mind, but where the incidental effects of these neutral laws impose a disproportionate burden on the religious practices or requirements of a specific religious group or individual.

With this kind of infringement of religious freedom in mind, the Senate just a few months later would pass the Religious Freedom Restoration Act.

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[124] Richard F. Duncan, "Free Exercise Is Dead, Long Live Free Exercise: Smith, Lukumi and the General Applicability Requirement," *University of Pennsylvania Journal of Constitutional Law* 3, no. 3 (2001): 880.
[125] Lukumi*,* 508 U.S. at 546.

B. The federal legislative response to *Employment Division v. Smith*: The Religious Freedom Restoration Act

The Congressional response to the *Smith* decision did not wait to see how the Supreme Court or the lower courts would interpret its holding. The *Smith* decision was decided on April 17, 1990. In July of the same year, Representative Stephen Solarz introduced the first version of the Religious Freedom Restoration Act in the House of Representatives.[126] Solarz seemed optimistic about the bills chance of quick passage, announcing before Congress that "in the history of the Republic, there has rarely been a bill which more closely approximates motherhood and apple pie…[i]n fact, I know, at least so far, of no one who opposes the legislation."[127] Others in Congress felt equally passionate about the bill's stated objective, which was to overturn the *Smith* decision. In subsequent debates over the bill in Congress, *Smith* was described as "infamous, disastrous, unfortunate, mischievous, dastardly and ill-advised," prompting on scholar to suggest that "[n]ever before, at least in the history of congressional considerations of free exercise maters, has Congress ever hurled such disrespectful and angry insults at the Supreme Court."[128] The Coalition for the Free Exercise of Religion, a group of 66 organizations supporting and commenting on the drafting process, was staggeringly diverse and reads like a "who's who" of the field of religious freedom – it is almost unthinkable to find the Americans United for Separation of Church and State, the Traditional Values Coalition, the American Civil Liberties Union, Church of Jesus Christ of Latter-day Saints, Church of Scientology, the Native American Church of North America, the North American Council for Muslim Women, the National Association of Evangelicals and the American Humanist Association ever agreeing on anything, even Solarz's sacred concepts of motherhood and apple pie.[129]

And yet, in spite of such diverse and emphatic support, the debate over RFRA would last a full three years. In what may seem like an ironic twist, it was a group of religious

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[126] Robert F. Drinan, and Jennifer I. Huffman, "The Religious Freedom Restoration Act: A Legislative History," *Journal of Law and Religion* 10, no. 2 (1993): 531–541.
[127] Drinan, 534.
[128] Eugene Gressman, "RFRA: A Comedy of Necessary and Proper Errors," *Cardozo Law Review* 21 (1999): 514-515.
[129] For a complete list of the organizations involved, see Douglas Laycock and Oliver S. Thomas, "Interpreting the Religious Freedom Restoration Act," *Texas Law Review* 73 (1994): 209n9.

organizations who held up the bill's passage. As Professor Laycock noted in his vigorous and influential support of the bill, "Religious liberty is popular in principle, but … nearly all [interest groups] think their own program is so important that no religious exception can be tolerated."[130] In this case, several hypothetical uses of the bill arose that became points of contention – the broadening of prisoners' rights and religious objections to the tax-exempt status of religious organizations both were controversial, but the primary issue that delayed RFRA was abortion rights. The concern was that women might use RFRA to obtain exemptions from anti-abortion laws[131] by claiming that their religious convictions compelled them or at least permitted them to abort in certain circumstances. Eventually a compromise was reached. The abortion question was addressed in the legislative reports as a compromise to obtain the support of the United States Catholic Conference, and a section was added affirming that the bill would not affect the Establishment Clause. Amended versions of the bill were introduced in the House by Chuck Schumer (D-NY) and in the Senate by Ted Kennedy (D-MA). It passed unanimously in the House and nearly so in the Senate, and was signed into law by President Clinton in November 1993.

The operative portion of law reads as follows:

SEC. 3. FREE EXERCISE OF RELIGION PROTECTED.

a) IN GENERAL.—Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b).
b) EXCEPTION.—Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person
1) is in furtherance of a compelling governmental interest; and
2) is the least restrictive means of furthering that compelling governmental interest.

As set forth in Section 3, the law appears to be a relatively straightforward reiteration of the strict scrutiny standard: it applies to laws that are of general applicability and impose and incidental but substantial burden, and stipulates the use of the compelling governmental

[130] Douglas Laycock, "The Religious Freedom Restoration Act," *Brigham Young University Law Review* 1993, no. 1 (1993): 230.
[131] At this time there were expectations among many that the Supreme Court was about to overturn Roe v. Wade, 410 U.S. 113 (1973), which held that women had the right to obtain abortions as part of their right to privacy implicit under the 14th Amendment (as established in Griswold v. Connecticut, 381 U.S. 479 (1965)). These expectations evaporated with the Supreme Court's Decision in Planned Parenthood of Se. Pa. v Casey, 505 U.S. 833 (1992). See Drinan and Huffman, "The Religious Freedom," 537.

interest test and lease restrictive means test. But as we have seen from the evolution of free exercise jurisprudence between *Sherbert* and *Smith*, strict scrutiny did not prove as straightforward or as "fatal in fact" as it had done in equal protection or free speech cases. Looking at the sweep of case law in that period, one must conclude that strict scrutiny in free exercise jurisprudence was a moveable feast, in which from year-to-year courts defined, redefined, narrowed and carved out exceptions from the seemingly simple and clear principle established in *Sherbert*.

RFRA's relatively spare description of strict scrutiny raises some difficult questions. How should courts construe the substantial burden requirement? As mentioned above and will be discussed further in Subsection 4(c) below, the concept of burden and balancing evolved (or was applied inconsistently) during the period between *Sherbert* and the drafting of RFRA. How should RFRA be applied to areas such as the military, prisons or internal government procedures? These areas came to be seen as special enclaves within which strict scrutiny was not applied even under the *Sherbert* test, so logically if RFRA really does return to strict scrutiny as applied before the *Smith* decision then it might seem that enclave cases would be unaffected. The legislative history and both Senate and House Reports accompanying RFRA, however, suggest otherwise.[132] Finally, it was not entirely clear that Congress had the Constitutional authority to enact a statute specifying what standard of review courts must adopt in a constitutional question. Congress claimed authority under Article I Section 8 clause 18 of the Constitution empower Congress to "make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department of Officer thereof" (the "Necessary and Proper Clause") and Section 5 of the Fourteenth Amendment, which authorizes Congress "to enforce, by appropriate legislation, the provisions of this article." Congress, and many supporters of RFRA, concluded that it

[132] The question of prisons in particular posed a serious obstacle to RFRA's passage and was the subject of a last-minute amendment by Senator Harry Reid (D-NV) which would have explicitly excluded prisons from RFRA's mandated strict scrutiny. The amendment was defeated, indicating that Congress intended RFRA to apply to prisons. In fact, both House and Senate Reports indicated that as they see it RFRA would overturn *O'Lone*. Likewise, the Reports indicate that RFRA is also meant to apply in military contexts and would overturn *Goldman*. See generally Ira C. Lupu, "Of Time and the RFRA: A Lawyer's Guide to the Religious Freedom Restoration Act," *Montana Law Review* 56, no. 1 (1995): 188 et seq. See also S. Rep. No. 111-103, at 9-10 (1993) and H.R. Rep. No. 88-103, at 8 (1993).

had the power to overturn *Smith* and impose a standard of review, but many legal scholars disagreed, and it was unclear how the courts would respond to what many saw as a serious infringement on the powers of the judiciary. Ironically, what RFRA does is encapsulate a kind of argument between the Court and Congress, in which the Court has asserted that the compelling interest test is not workable (in *Smith*, Justice Scalia writes that to subject generally applicable law to the test "contradicts both constitutional tradition and common sense")[133] and Congress' response was simply to disagree and tell the courts to apply it anyway.

C. Judicial implementation of the Religious Freedom Restoration Act

In the several years that followed the passage of RFRA, the courts helped to answer many of these questions. As it happened, prison and zoning cases took up a large proportion of the free exercise caseload. It is not surprising, given that both these areas of law serve to test the limits of what constitutes a compelling state interest. As Laycock has noted in a critique of *Cornerstone Bible Church*, zoning laws are a prime area in which "neutral and generally applicable laws" may nonetheless have an enormous impact on free exercise. While most zoning laws are merely indifferent to religion rather than overtly hostile to a particular faith, often "the problem is simply that the law restricts the church's ability to carry out its mission. Religious exercise is not free when churches cannot locate in new communities, or when existing churches cannot define their own mission."[134] Likewise, prison cases are important because it is there that the concept of compelling state interest is put to the test – prisoners are entirely dependent upon the state, and the problems of state administration of prisons life are particularly sensitive and in need of expertise and experience, and thus call for a high degree of judicial deference to local authorities.

Even under RFRA, prison administers tended to be accorded such deference. The least restrictive means test did pose a significant obstacle to prison administrators.[135] For example,

[133] Employment Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 885 (1990).
[134] Douglas Laycock, "The Religious Freedom," 228.
[135] Abbott Cooper, "Dam the RFRA at the Prison Gate: The Religious Freedom Restoration Act's Impact on Correctional Litigation," *Montana Law Review* 56, no. 1 (1995): 325-347.

in *Hamilton v. Schriro*,[136] a federal magistrate upheld an inmate's RFRA claim concerning his right to access to a sweat lodge in order to participate in certain Native American religious rituals, criticizing the prison for not undertaking any kind of cost analysis of constructing a sweat lodge or did they consult other prisons or Native American religious leaders to determine what other options might be available.[137] However, the Eight Circuit Court of Appeals reversed, noting that "[a]lthough RFRA places the burden of production and persuasion on the prison officials, once the government provides this evidence, the prisoner must demonstrate what, if any, less restrictive means remain unexplored."[138] The court also concluded that RFRA was intended to overturn O'Lone, but that the least restrictive means test required no more than did the pre-O'Lone standard, and provided for a measure of deference to the judgment of prison officials regarding security concerns.

As the Hamilton case suggests, the least restrictive means test appeared to offer a strict standard, but once applied carefully in conjunction with a close understanding of the legislative history of RFRA, it did not offer a significant increase in protection for free exercise in prisons. In fact, a thorough look at the 168 RFRA related cases in the period of the law's full implementation (from its passage in 1993 to the Supreme Court's ruling it unconstitutional with regard to states in 1996) reveals a striking predominance of prison cases is striking: of these 168 cases, 99 involved prison litigation. Of these, the court denied relief in 85.[139] If RFRA had been passed in the interest of offering robust protection of religious freedom, it seemed to have failed.

The situation was partly remedied by the Supreme Court in *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*.[140] In that pivotal case the Court put flesh on the bones of RFRA's "to the person" language. The Court focused on the Under the "more focused inquiry required by RFRA and the compelling interest test" and clarified that general arguments are not enough; rather, what is at issue is whether the measure is necessary as applied to the person or organization in question. The Court held that the government and not met its

[136] Hamilton v. Schriro, 863 F. Supp. 1019 (W.D. Mo. 1994).
[137] Hamilton, 863 F. Supp. at 1023.
[138] Hamilton v. Schriro, 74 F.3d 1545, 1556 (8th Cir. 1996).
[139] Ira C. Lupu, "The Failure of RFRA," *University of Arkansas at Little Rock Law Review* 20, no. 3 (1998): 591.
[140] Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 423 (2006).

obligation under that test to consider "the harms posed by the particular use at issue here--the circumscribed, sacramental use of hoasca *by the UDV."*[141] Nor did the government show evidence that granting this exemption would "seriously compromise its ability to administer the program"[142] This development promised to give new life to RFRA, but subsequent developments would in turn rob it of much of what power it had.

D. The partial overturning of RFRA: *City of Boerne v. Flores*

RFRA in fact no longer applies to state laws. In 1996 the Supreme Court was given the opportunity to review the law's constitutionality in *City of Boerne v. Flores*.[143] The case involved a zoning request to expand St. Peter's Church, a 1923 mission-style church in a historic neighborhood of Boerne, Texas. The city refused the application in pursuance to a law limiting new construction in a historic district. The church argued that it should be granted an exemption from the requirements of the law by citing RFRA, asserting that the inability to expand the church to accommodate its growing congregation amounted to a substantial burden on its religious freedom. The case, in the end, did not hinge upon the question of the free exercise of religion, but rather on the question of whether Congress had the power under the Fourteenth Amendment (which, *inter alia*, extends the protections of the religion clauses to include the actions of states) to apply RFRA to state law. Section 5 of the Fourteenth Amendment grants Congress enforcement powers, allowing it to pass laws obliging the states to uphold rights already granted in the Bill of Rights, but importantly Section 5 does not empower Congress to alter rights or to create new rights. It relates only to enforcement, and actions taken under its authority must be remedial in nature. In *City of Boerne*, the Supreme Court held that RFRA cannot be applied to states because it does not fall within Congress' Section 5 enforcement power. As Justice Kennedy explains in the majority opinion, "RFRA is so out of proportion to a supposed remedial preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior. It appears, instead, to attempt a substantive change in constitutional protections."[144]

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[141] Gonzales, 546 U.S. at 432.
[142] Gonzales, 546 U.S. at 435.
[143] City of Boerne v. Flores, 521 U.S. 507 (1997).
[144] City of Boerne, 521 U.S. at 532.

RFRA changes the content of the First Amendment right to free exercise of religion; in doing so, it is unconstitutional as applied to the states.

Whether or not the case drastically affected the protection of religious freedom in the US is debatable.[145] However, the impact of this case was significant in that it fractured the already complex landscape of American religious freedom law. Before RFRA was enacted, cases involving religious freedom needed to be situated among various possible jurisdictions, sources of law, and legal standards. A plaintiff may have had recourse to a First Amendment religious freedom claim, a state constitutional claim, a First Amendment free speech claim if religious expression were an issue, a Fourteenth Amendment due process or equal protection claim, and/or a Title VII claim under the Civil Rights Act if the case involved workplace discrimination. RFRA essentially replaced the old *Smith* standard for First Amendment religious freedom claims with a new, stricter standard. *City of Boerne* resuscitated the *Smith* standard for state claims, but left the RFRA standard for federal claims, hence bifurcating federal constitutional claims into two very different types of case involving different arguments, different strategies and very different likelihoods of success for plaintiffs. In 2006, Congress added another moving part in the form of the Religious Land Use and Incarcerated Persons Act (*RLUIPA*) which applies additional protections for zoning case and prison cases.[146] In addition, since *Boerne* 21 states have passed their own versions of the RFRA, sometimes known as mini-RFRAs, in order to mirror the federal RFRA protections on the state level.[147] Moreover, many states that have not passed such mini-RFRAs already provide something akin to strict scrutiny in their state constitutions.[148]

[145] For example, see Ira C. Lupu, "Why the Congress Was Wrong and the Court Was Right – Reflections on City of Boerne v. Flores," *William & Mary Law Review* 39, no. 3 (1997-1998): 798.
[146] Religious Land Use and Incarcerated Persons Act 42 U.S.C. §§ 2000cc–2000cc-5 (2006).
[147] See "State Religious Freedom Restoration Acts," National Conference of State Legislatures, updated 4 May 2017, https://www.ncsl.org/research/civil-and-criminal-justice/state-rfra-statutes.aspx.
[148] Douglas Laycock, "Religious Liberty and the Culture Wars," *University of Illinois Law Review* 2014, no. 3 (2014): 844.

II. THE EVOLUTION OF ARTICLE 9 IN THE EUROPEAN COURT OF HUMAN RIGHTS

1. The Convention system

The European Convention on Human Rights came into force in 1953 with only ten state parties and was the first regional convention to enshrine the principles of the Universal Declaration of Human Rights into law.[149] At the center of the Convention system there were originally three different institutions responsible for enforcement: the European Commission of Human Rights, the European Court of Human Rights and the Committee of Ministers of the COE. [150] At that time, the Commission served to screen applications before sending them on to the Court, but in 1998 the system was reformed and the Commission and old Court were dissolved by Protocol 11 to the Convention. The Protocol replaced this part-time monitoring system with new full-time European Court of Human Rights empowered to take all applications directly, including applications from individuals.[151] Coming at a time of rapid expansion of the COE following the breakup of the Soviet Union and the fall of communist governments in Eastern Europe, the establishment of the new Court saw a rapid expansion in the number of applications. In its first 40 years of existence, the old Convention system received approximately 45,000 applications. By contrast, in 2020 alone over 41,000 were made, and as of 31 December 2020, over 62,000 applications were pending before the Court.[152] Today the Court is widely considered as "one of the world's most influential and effective international institutions."[153]

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[149] Kevin Boyle, "The European Experience: The European Convention on Human Rights," *Victoria University of Wellington Law Review* 40, no. 1 (June 2009): 167-176.
[150] See "European Convention on Human Rights," Official Texts, Council of Europe, last visited 1 September 2021. https://www.echr.coe.int/Pages/home.aspx?p=basictexts&c=.
[151] Andrew Drzemczewski, "The European Human Rights Convention: Protocol No. 11. Entry into Force and First Year of Application," 358-359. https://www.corteidh.or.cr/tablas/a11660.pdf.
[152] Court of Human Rights Public Relations Unit, *The ECHR in Facts and Figures – 2020*, February 2021, https://www.echr.coe.int/Documents/Facts_Figures_2020_ENG.pdf.
[153] Janneke Gerards, *General Principles of the European Convention on Human Rights* (Cambridge: Cambridge University Press, 2019), 1.

A. The limitations clauses

The Convention was designed to implement and to refine a wide range of the rights first outlined in the landmark but non-binding Universal Declaration of Human Rights. It includes a range of individual rights focusing on personal issues such as free speech (Article 10, the right not to be tortured (Article 3), and the right to private life (Article 8) as well as rights associated with guaranteeing democracy and the rule of law, such as the right to free elections (Article 3 of Protocol 1) and a fair trial (Article 6). Some of these rights are absolute, such as the prohibition on torture. Others, however, are qualified and subject to certain limitations. Like most constitutions, the ECHR contains a variety of limitations clauses that indicate the circumstances in which rights may be derogated in favor of other state interests; this is a notable contrast with the US Constitution, in which the permissible limitations on rights have been inferred by the courts rather than delineated specifically in the text itself. The limitations clauses of the ECHR may be express and specific in nature, express and general, or implied. Express specific limitations clauses lay out precisely the circumstances in which the right may be limited. For example, Article 4 prohibiting forced labor contains an express specific list of such situations, including "service of a military character."[154] Many of the core individual rights – expression, religion, family life, to take three examples – are subject to express and general limitations. These limitations are express in the sense that they are laid out specifically in the text of each article, but they are general in that they evoke categories of situations without any great degree of precision or detail.[155] Finally, articles with implied limitations are those that do not list any particular conditions for the limitation of the right but where nonetheless the Court has determined that the Convention was not intended to make the right absolute and non-derogable. The right of access to the courts, for example, was found to be subject to the implied and perhaps obvious limitations inherent in state control of the judicial system.[156] These various limitations clauses make for some of the more interesting and contentious cases to be brought before the Court.

[154] European Convention on Human Rights, Article 4.3(b).
[155] Gerards, *General Principles*, 25.
[156] Gerards, *General Principles,* 26. Specifically, see *Golder v. the United Kingdom*, 21 February 1975, § 37, Series A no. 18.

B. Subsidiarity and the "Margin of Appreciation"

The role of the Court is to supervisory in nature, exercising what Alec Stone Sweet has dubbed "structural judicial supremacy" over state parties in their application of the Convention.[157] The ECtHR is neither a court of fourth instance nor a court exercising judicial review in the sense that the US Supreme Court does.[158] It cannot invalidate national laws.[159] The Court was created to adjudicate disputes under an international convention and thus lacks both the democratic legitimacy and the national legal expertise to effectively function as the high court of all 47 members of the COE. This supranational nature of the Court is enshrined in the doctrine of Subsidiarity, which asserts that the Court's role must remain subsidiary to that of the State in the application of the Convention. As the Court put it in *Handyside v. UK*: "[b]y 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 as well as on the 'necessity' of a 'restriction' or 'penalty' intended to meet them," and that the "initial assessment of the reality" of the situation is the purview of the state.[160]

There is, however, a limit to this deference. The Court has an obligation to ensure the "effective protection" of the rights guaranteed under the Convention. This obligation includes in the context of some rights a positive obligation to ensure that individuals and groups are not prevented by other from exercising their Convention rights.[161] Thus the Court noted in *Handyside* that the "domestic margin of appreciation thus goes hand in hand with a European supervision. Such supervision concerns both the aim of the measure challenged and its 'necessity'; it covers not only the basic legislation but also the decision applying it, even one given by an independent court."[162] As Gerards describes it, the Court's role consists in "checking whether the States have lived up to their responsibilities and have effectively secured the Convention to those falling within their jurisdiction."[163] This delicate balance

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[157] Alec Stone Sweet, "On the Constitutionalisation of the Convention," 3.
[158] Steven Greer, *The Margin of Appreciation: Interpretation and Discretion Under the European Convention on Human Rights,* Council of Europe Human Rights Files No. 17 (Strasbourg: Council of Europe Publishing, July 2000) 19. https://www.echr.coe.int/librarydocs/dg2/hrfiles/dg2-en-hrfiles-17(2000).pdf.
[159] Greer, *The Margin of Appreciation*, 7.
[160] Handyside v. the United Kingdom, 7 December 1976, § 48, Series A no. 24.
[161] Greer, *The Margin of Appreciation*, 29.
[162] Handyside, § 49.
[163] Gerards, *General Principles*, 160.

between protecting rights and deferring to democratically elected sovereign governments is addressed by one of the most significant doctrines of interpretation of the Court – the "margin of appreciation." The margin of appreciation refers to the discretion left to national authorities under specific circumstances, usually where rights conflict with some form of the public interest.[164] The degree of discretion varies depending on the situation, but the idea is that states should be left implementation discretion and that national judicial reasoning should be given some deference since national institutions are better placed to determine how best to implement the convention in the context of their countries' specific conditions.[165] In other words, the doctrine is an acknowledgement that states continue to maintain their sovereignty, but at the same time it is a recognition that if the Court is too deferential, then the Convention is little more than a statement of good intentions. It is in essence a compromise, and as is often the case with compromises, it has exposed the doctrine and the Court itself to criticism from all sides. However, its importance should not be underestimated. In fact, Protocol 15 to the Convention, which came into force on 1 August 2021, specifically amends the Preamble of the Convention to affirm that "the High Contracting Parties, in accordance with the principle of subsidiarity, have the primary responsibility to secure the rights and freedoms defined in this Convention and the Protocols thereto, and that in doing so they enjoy a margin of appreciation, subject to the supervisory jurisdiction of the European Court of Human Rights established by this Convention."[166]

The difficult question is to determine just how much leeway to grant state parties. This decision is highly context driven. Of relevance to the decision is whether there is a "European consensus" on the issue. The Court will scrutinize rights-limiting measures more closely if a majority of European countries have taken a position against such measures. For example, in *Dudgeon v. UK* the Court decided that Northern Ireland's criminalization of consensual homosexual sex between adults violated the Convention based in part on the finding that the consensus in Europe was that sodomy laws were an unnecessary violation of privacy.[167] If there is no consensus among states, however, the Court is more likely to defer to the judgment of the national authorities. For example, in *SAS v. France* the Court upheld the French

[164] Greer, *The Margin of Appreciation*, 32-33.
[165] Greer, *The Margin of Appreciation*, 32-33.
[166] Protocol No. 15 to the European Convention on Human Rights, Article 1.
[167] Dudgeon v. the United Kingdom, 22 October 1981, Series A no. 45.

prohibition on face coverings in public in part because it determined that there was no European consensus on the issue.[168] The importance of the European Consensus approach is that it can operate as a ratchet; as thinking about the nature of specific rights evolves throughout Europe, the overall standard of human rights protection will rise and all state parties will be expected to rise to the common standard. This serves to make the Convention stronger in terms of rights protection but risk undermine the subsidiary role of the Court in policing those rights in countries where social norms do not conform with the overall trends among members of the COE. Seen another way, the system can be dismissive of minority views within the COE, which may in turn erode the credibility of the Convention system as well as international institutionalism more generally. Brexit and the rise of conservative populist governments in Eastern Europe may attest to this danger of growing uneasiness with surrendering sovereignty to transnational institutions like the Court. However, it is a vital part of the Court's "living instrument" doctrine, also known as the principle of evolutive interpretation, whereby the "Convention is interpreted 'in the light of present day conditions,' that it evolves through the interpretation of the ECHR."[169] The European Consensus principle helps lay the groundwork for determining in what direction the Court's interpretations should evolve.

The margin of appreciation granted to national governments can be seen as a sliding scale broken into three categories: the court characterizes the margin as being a "narrow," "wide" or at times a "certain" margin of appreciation. The characterization by the Court is not a formula indicating a defined standard of review.[170] However, relative width or narrowness of the margin of appreciation can have important consequences. A narrow margin of appreciation means that the Court will scrutinize measures closely and place higher expectations on the government to justify the necessity of the limitation. For example, in the *Sunday Times v. UK*, the Court applied a narrow margin of appreciation. The Court contrasted the situation with cases involving moral standards, noting that in the current case the government's aim of protecting the authority of the judiciary was a "far more objective notion" upon which there was "a fairly substantial measure of common ground" and thus

[168] S.A.S. v. France [GC], no. 43835/11, § 156, ECHR 2014 (extracts).
[169] Luzius Wildhaber, "European Court of Human Rights," *Canadian Yearbook of International Law* 40 (2002): 309-322.
[170] Gerards, *General Principles,* 165.

merited "a more extensive European supervision correspond[ing] to a less discretionary power of appreciation."[171] Questions of health and morals, on the other hand, have been given a wide margin by the Court since such conflicts involve norms that vary from culture to culture and national traditions may play a strong role.[172] Where the Court grants a wide margin of appreciation, the burden of proof is on the claimant to show that the measure is not necessary or is otherwise unjustified.[173] As will be seen in the detailed study of cases involving religion in the workplace in Part II, in cases involving a wide margin the Court will often focus on whether the application of the measure involved adequate procedural safeguards.

C. The function of proportionality

Even if the margin is wide, the Court must nevertheless determine whether the measures meet several basic requirements. The measures must be prescribed by laws that meet basic standards of foreseeability, absence of arbitrariness, and adequate procedural safeguards.[174] Moreover, any limitation on Convention rights must be in pursuit of a legitimate aim, be necessary to achieve that aim, and be "proportionate" in the sense of providing a fair balance between the state's legitimate aim and the interests of the party whose Convention rights are being limited. These last three requirements taken together form the backbone of the version of proportionality analysis used by the Court. The deeper logic of proportionality analysis will be the subject of Part II Chapter 1, but it is important to note at this stage that proportionality is not written into the text of the Convention itself. Nor, however, did it arise in the Court's jurisprudence randomly; rather, the concept is to some extent implicit in the structure of the rights as laid out in the individual articles, and especially the limitations clauses, of the Convention. While the limitation clause of each Article is somewhat different, they each contain the basic elements requiring that any limitation must be prescribed by law and "necessary in a democratic society" in pursuit of certain aims. The concept of proportionality strictly speaking as a "fair balance" standard does not appear in the text but

[171] The Sunday Times *v. the United Kingdom (no. 1)*, 26 April 1979, § 59, Series A no. 30.
[172] Greer, *The Margin of Appreciation*, 10.
[173] Gerards, *General Principles*, 166.
[174] For a full discussion of these basic elements of lawfulness as elaborated in the ECtHR caselaw, see Gerards, *General Principles*, 198-219.

must be inferred from the necessity requirement and is perhaps implicit in the very idea of a democratic society.

2. The Convention right to freedom of religion and belief

There are in fact several different provisions of the Convention that touch directly or indirectly on freedom of religion and belief. Article 9 is the main provision touching directly on freedom of thought, conscience and religion, but Article 14 includes religion among the relevant grounds upon which discrimination is prohibited. Moreover, the First Protocol to the Convention ratified in 1952 includes in Article 2 "the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions."[175] Indirectly, religious freedom by its very nature can be interconnected variously with the right to respect for family and private life (Article 8), freedom of expression (Article 10), freedom of assembly and association (Article 11) and of course the right to marry (Article 12). While these Articles in themselves are not the focus of this study, it is important to keep in mind when evaluating the efficacy of the Court that defending religious liberty is not limited solely to Article 9 jurisprudence.

A. The text of Article 9

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.

[175] Protocol No. 1 to the European Convention on Human Rights, Article 2.

The text of Article 9 follows the same general pattern of the articles with express general limitations clauses, Articles 8-11. Paragraph 1 explains the right, while paragraph 2 outlines the permissible limitations of that right. It is important to note that the limitations clauses apply specifically to the "freedom to *manifest* one's religion" [emphasis added]. The significance of this, often highlighted in the case law, is that laws may at times need to limit how an individual or group behaves in response to their religious beliefs, but laws may not aim at limiting belief itself. The belief component is a firmly non-derogable right.

B. The Court's development of Article 9: from Arrowsmith to today

i. The early period: cases prior to Protocol 11 reforms in 1998

In the early days of the Convention, religious freedom cases were largely underrepresented in the overall caselaw of the Commission and Court. In fact, from 1975-1992 only four decisions were reached on the basis of Article 9, none of which declared a violation (compared with 27 decisions on Article 10, including 11 violations).[176] The situation seemed to change in 1993, due both to the admission of Eastern European countries to the COE following the collapse of Communism as well as the accelerating trend of religion more assertively taking part in political life.[177] The year 1993 was also notable in that it saw the ECtHR's landmark decision in *Kokkinakis v. Greece*.[178] Kokkinakis seemed to inaugurate a new period of relevance for Article 9 and cases involving religious freedom more generally. However, *Kokkinakis* was not transformative in the sense that *Sherbert* or *Smith* were in the United States. Rather, the evolution of religious freedom jurisprudence in the ECtHR is better characterized as a stumbling, piecemeal elaboration of norms after a long period of doctrinal neglect. It was a process of accretion rather than a series of leaps forward. That process accelerated in 1993, but only changed meaningfully in 1998 when the new Court replaced the Commission.

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[176] Silvio Ferrari, "The Strasbourg Court and Article 9 of the European Convention: A Quantitative Analysis of the Case Law," in *The Lautsi Papers: Multidisciplinary Reflections on Religious Symbols in the Public School Classroom*, ed. Jeroen Temperman (Netherlands: Brill, 2012), 23n26.
[177] Ferrari, "The Strasbourg Court," 24.
[178] Kokkinakis v. Greece, 25 May 1993, Series A no. 260-A.

Prior to the creation of the new Court in 1998 the Commission and, to a lesser extent, the original Court, had the opportunity to establish positions on a number of fundamental issues in spite of their limited caseload. What emerged in this period was firstly the fundamental distinction between belief and manifestation. As mentioned above, this distinction is made clear in the text of Article 9 itself; the Commission, however, established clearly that the *forum internum* and the *forum externum* involved distinct rights and obligations, the former being protected absolutely and the latter subject to regulation by the state where appropriate. Furthermore, when exploring the kinds of beliefs and manifestations protected by the Convention, the Commission determined that what constitutes protected belief is to be broadly construed.[179] However, in *Campbell and Cosans v. UK* it concluded that the belief must be of sufficient "cogency, seriousness, cohesion and importance."[180] Moreover, a fundamental distinction that appears frequently in the case law – that not every act motivated by religion is protected by Article 9 – was first enunciated in *Arrowsmith v. UK*.[181] In that case, the applicant was a pacifist sentenced to 18 months in prison for distributing leaflets to convince British soldiers to disobey order to serve in Northern Ireland. The Court noted that while it considered pacifism a belief falling within the ambit of Article 9,[182] the distribution of the leaflets in question did not amount to a manifestation that belief. In particular, it noted that to be a "practice" amounting to a form of manifestation of a belief, the action must express the belief concerned.[183] In this case, the leaflets encouraged soldiers not to serve in Northern Ireland, but did not advocate the philosophy of pacifism *per se.* Thus while reiterating in *Arrowsmith* a broad notion of what constitutes belief, the Commission took a restricted view on what would amount to manifestation of that view. This would set the pattern for future Article 9 cases.

Two other pre-*Kokkinakis* cases are worth noting for the precedents they set. Firstly, *C. v. UK* reasserted the distinction between the absolute protection of belief and the qualified

[179] Malcolm Evans, "The Freedom of Religion or Belief in the ECHR since Kokkinakis. Or 'Quoting Kokkinakis,'" *Religion and Human Rights* 12 (2017): 86.
[180] Campbell and Cosans v. the United Kingdom, 25 February 1982, Series A no. 48.
[181] Arrowsmith v. the United Kingdom, no. 7050/75, Committee of Ministers decision of 12 June 1979, http://hudoc.echr.coe.int/eng?i=001-49229; Arrowsmith v. the United Kingdom, no. 7050/75, Commission report of 12 October 1978, Decisions and Reports 19, http://hudoc.echr.coe.int/eng?i=001-104188.
[182] Arrowsmith, Commission report, § 69.
[183] Arrowsmith, Commission report, § 71.

protection of manifestation, noting that beliefs cannot confer on the believer a right to disobey laws that apply "neutrally and generally in the public sphere."[184] The case involved the payment of taxes that might use for military expenditures. The Commission also hinted at an approach that would be taken in later cases when it noted that the applicant, while unable to manifest his beliefs by not paying taxes, could manifest them in other ways in that he was free to "advertise his attitude and thereby try to obtain support for it through the democratic process."[185] Finally, in *X. and Church of Scientology v. Sweden*, the Commission reversed its approach to religion in its collective dimension in that it accepted the Church of Scientology's right to petition on behalf of its members.[186] This set the stage for later cases involving group rights of religious institutions.

Kokkinakis v. Greece involved a husband and wife, both Jehovah's Witnesses, who were convicted for proselytism. The crime of proselytism under Greek law targets anyone trying to convince another to change religion "by any kind of inducement or promise of an inducement or moral support or material assistance, or by fraudulent means or by taking advantage of his inexperience, trust, need, low intellect or naivety."[187] The Court's judgment in the case is actually quite simple. Making a distinction between evangelism and "improper proselytism," the Court concluded that Greek proselytism laws were compatible with the Convention "if and in so far as they are designed only to punish *improper* proselytism, which the Court does not have to define in the abstract in the present case" [emphasis added]. In this case, the government had not produced evidence that the applicants had engaged in the "improper" variety of proselytism. Thus the case stands for the principle that bearing witness to one's faith is a protected manifestation of religion or belief subject to certain constraints designed to protect the rights of others.

This does not explain why the case is one of the most often cited judgments on religious freedom in the ECtHR.[188] In fact, most of what is cited in *Kokkinakis* is the Court's assertions about the importance of religious freedom and its recitation of doctrine gleaned from the

[184] C. v. the United Kingdom, no. 10358/83, Commission decision of 15 December 1983, Decisions and Reports 37, p. 142 at p. 147, http://hudoc.echr.coe.int/eng?i=001-73635.
[185] C. v. the United Kingdom, at p. 147.
[186] X. and Church of Scientology v. Sweden (dec.), Application No. 7805/77, Commission decision of 5 May 1979, Decisions and Reports 16, p. 68.
[187] Laws nos. 1363/1938 and 1672/1939, cited in Kokkinakis v. Greece, 25 May 1993, § 16, Series A no. 260-A.
[188] Evans, "The Freedom of Religion," 83.

earlier body of Commission decisions. The Court affirms that "freedom of thought, conscience and religion is one of the foundations of a 'democratic society' within the meaning of the Convention. It is, in its religious dimension, one of the most vital elements that go to make up the identity of believers and their conception of life, but it 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." It goes on to note that manifesting one's religion can take place both alone and in community with others, and that without the right to evangelize and teach, the freedom to change one's religion "would be likely to remain a dead letter."[189] Behind the rhetoric, this text reasserts the fundamental nature of religious freedom as a right and reminds states that it should be limited in only serious circumstances. The "democratic society" language mirrors that of the Convention text itself, but also suggests that a measure must truly be "necessary in a democratic society" if it is to limit a right that is one of the "foundations" of democracy itself. Perhaps most importantly, the case establishes a strong link between religious freedom and pluralism; in fact, it establishes a relationship in which "religious freedom stands in the service of pluralism" which has been repeated in a number of cases, if not always observed in the Court's judgments.[190] Overall it is perhaps best to say the *Kokkinakis* was not pivotal in a doctrinal sense, but rather signaled a consolidation of prior caselaw and a shift in attitude towards the viability of Article 9 as a grounds for complaint.

In the years that followed, the Commission and Court reaffirmed the lofty rhetoric of *Kokkinakis*, but the principles they established in the few cases they dealt with up until 1998 did not inspire confidence that the system would become more protective of religious freedom. The Court derived from Article 9 a right to have one's religious feelings protected, which seems a mixed result in terms of protecting freedom of belief and manifestation more broadly, but subsequent cases have upheld the speaker's Article 10 rights over the Article 9 right not to be offended.[191] The Court gave mixed messages on the extent to which one may be compelled to express beliefs that one does not share. In *Valsamis v. Greece*, the Court found no violation for a Jehovah's Witness student who was compelled to participate in a

[189] Kokkinakis, § 31.
[190] Zachary Calo, "Pluralism, Secularism and the European Court of Human Rights," *Journal of Law and Religion* 26, no. 1 (2010-2011): 262.
[191] Otto-Preminger-Institut v Austria, 20 September 1994, Series A no. 295-A.

school parade celebrating a military victory, sticking to the line that there is no general right to accommodation from rules that were neutral and generally applicable.[192] In *Buscarini v. San Marino*, however the Court found a limit to this approach, affirming that the swearing of a religious oath as a requirement of being seated in Parliament was a violation of Article 9.[193] This distinction between coerced participation that may imply endorsement and compelled speech seems to have carried on into the Court's later jurisprudence, as will become apparent in the study of the workplace cases in Part II.

ii. The modern period: key jurisprudence from 1998 to today

The basic tensions and questions that appeared in the early period – individual vs. group religious freedom, the scope of the right, and the functioning of the limitations clauses – have carried on into the new Court's caseload and continue to be revisited and refined. In order to understand the Court's approach to religious freedom, we will look at the caseload to see what kind of cases appear in significant numbers or with significant consequences, and then briefly explore what doctrines can be derived from these cases.

Religious Symbols and Clothing

Many of the Court's religious freedom cases have involved religious dress or symbols, and the majority of these cases concerned the wearing of the Islamic niqab or hijab. These cases have arisen with relative frequency in France, Turkey and, to a lesser extent, Switzerland, as these three countries have constitutional traditions of state secularism and correspondingly stringent restrictions on religious symbols and dress. The success or failure of complainants in these cases has depended in large part on the context in which the symbol or clothing has been worn. Public servants hoping to wear religious adornment in the workplace have universally lost, often at the admissibility stage. These cases will be discussed in greater detail in Part II as they take place in the workplace context, but of note at this stage is the distinction that the Court has made between the situation of public servants and other contexts. The Court notes in several of the cases that states have the right to defend

[192] Valsamis v. Greece, 18 December 1996, *Reports of Judgments and Decisions* 1996-VI.
[193] Buscarini and Others v. San Marino [GC], no. 24645/94, ECHR 1999-I.

the principle of secularism by, *inter alia,* limiting the rights of public servants to wear religious symbols or clothing in the course of their duties.[194] Moreover, public servants are a distinct category in that they are "representatives of the State engaged in public service" in contrast to private citizens, who are not "bound, on account of any official status, by a duty of discretion in the public expression of their religious beliefs."[195]

In the context of schools, teachers in Europe are mostly civil servants and their right to wear religious adornments can be limited as described above. A number of cases have also arisen involving students wearing religious dress, as well as one very prominent Grand Chamber case, *Lautsi v. Italy*, where the right of the school to decorate classrooms with crucifixes. The Court has generally upheld the right of state school systems to forbid religious dress in defense of secularism. In *Leyla Sahin v. Turkey*, for example, the claimant was denied the right to wear a hijab in class or in exams. The Court found no violation, citing Turkey's tradition of secularism and noting that permitting a student to wear clothing that was seen by many as a religious obligation could put pressure on other students to do likewise.[196] Other cases in Turkey and France involving both Muslim and Sikh students have met with similar results. The *Lautsi* case was particularly interesting in that the Grand Chamber overturned the original chamber judgment finding a violation of Article 9. The case arose when the parent of a child in the Italian public school system complained that as atheists their right to religious freedom under Article 9 as well as the right to education (Article 2 of Protocol 1) was being violated by presence of crucifixes in classrooms. The Court held that the crucifix did not violate the principle of secularism because it was "an essentially passive symbol" and did not in itself constitute a form of indoctrination. [197]

The Court has also upheld laws limiting religious clothing in the context of security checks at airports[198] and for visa applications,[199] as well as for official identity photos.[200] Even in public spaces the Court has generally upheld the right of states to prohibit the wearing

[194] Ebrahimian v. France, no. 64846/11, § 57, ECHR 2015.
[195] Ebrahimian, no. 64846/11, § 64 (citing Ahmet Arslan et autres c. Turquie, no. 41135/98, 23 February 2010, http://hudoc.echr.coe.int/eng?i=001-97535).
[196] Leyla Şahin v. Turkey [GC], no. 44774/98, ECHR 2005-XI.
[197] Lautsi and Others v. Italy [GC], no. 30814/06, § 72, ECHR 2011 (extracts).
[198] Phull v. France (dec.), no. 35753/03,ECHR 2005-I.
[199] El Morsli v. France, no. 15585/06, 4 March 2008, http://hudoc.echr.coe.int/eng?i=001-117860.
[200] Mann Singh v. France, no. 24479/07, 13 November 2008, http://hudoc.echr.coe.int/eng?i=001-89848, see English summary at http://hudoc.echr.coe.int/eng?i=002-1856.

of the niqab. In *S.A.S. v. France*[201] and *Belkacemi v. Belgium* the Court asserted that states were within the margin of appreciation to prohibit face coverings in public in order to protect the rights of others, specifically the right of "living together" (which is not mentioned in the Convention).[202] Importantly, neither France nor Belgium specifically targeted face coverings motivated by Islam or by religion more generally, thus avoiding claims of discrimination. In the case of the French ban, however, almost every other conceivable reason for face covering, apart from bank robbery, was exempted from the ban, leaving little doubt about the true aim of the law. The Court, however, chose to ignore this argument, and in the end gave little weight to the parliamentary debates leading up the law which were replete with discussions about the niqab. In one case, however, the Court found a sanction against a group of protesters wearing religious clothing in public to be a violation of the Convention because they were not in any position of authority, were in public, and did not appear intended to put pressure on others.[203]

In the context of religious dress in the courtroom the Court has been more sympathetic to claimants. In *Hamidović v. Bosnia and Herzegovina*, the Court found a violation for sanctioning a witness in a court case for appearing in court wearing a skullcap, noting that he was a private citizen, was required to appear in court, and did not appear to wear the cap with the intention of inciting others to reject secularism.[204] In *Lachiri v. Belgium* the Court found a violation of Article 9 when the claimant was excluded from a courtroom for refusing to remove her headscarf, noting that in the given instance the purpose of the law was to prevent disrespect and the disruption of proceedings, neither of which would have been affected by permitting the claimant to keep her headscarf on.[205] This is the first (and at the time of writing the only) case in which the Court has found a violation on a restriction of wearing the hijab.

Finally, to be discussed in more detail in Part II, the Court found a violation of Article 9 when British Airways ("BA") forbade a flight attendant to wear a visible cross while in

[201] S.A.S. v. France, [GC], no. 43835/11, ECHR 2014 (extracts).
[202] See S.A.S., § 122.
[203] Ahmet Arslan and Others v. Turkey, no. 41135/98, §52, 23 February 2010, http://hudoc.echr.coe.int/eng?i=001-97535.
[204] Hamidović v. Bosnia and Herzegovina, no. 57792/15, §43, 5 December 2017, http://hudoc.echr.coe.int/eng?i=001-179219.
[205] Lachiri v. Belgium, no. 3413/09, 18 September 2018, http://hudoc.echr.coe.int/eng?i=001-186461.

uniform.[206] In that case, the measure was deemed disproportionate in relation to the legitimate but hardly weighty aim of protecting BA's corporate image.

Conscientious objection

Conscientious objection from military service on religious grounds has a long history, and today most European countries have legislation in place to make room for alternative forms of service in such situations. It has in fact become enshrined in the European Union's Charter of Fundamental Rights.[207] In early cases the Commission denied any right to accommodation for military conscientious objectors.[208] Under the influence of the "living instrument" doctrine, however, the Court over time responded to the growing European consensus around the need for some form of objector status and eventually recognized the right clearly in *Bayatyan v. Armenia* (2011).[209] The judgment affirmed that "opposition to military service, where it is motivated by a serious and insurmountable conflict between the obligation to serve in the army and a person's conscience or his deeply and genuinely held religious or other beliefs, constitutes a conviction or belief of sufficient cogency, seriousness, cohesion and importance to attract the guarantees of Article 9."[210] From the text of the judgment one can conclude that this includes both secular conscience and religiously motivated belief. However, the Court has explained subsequently that political objections are not necessarily sufficient reason for requiring an accommodation under the Convention if the objections are not to military service itself but rather to military service for a particular government. In *Enver Aydemir v. Turkey*, the claimant's objection was to serving for a secular state, and he freely admitted that he would be willing to serve if Turkey's government were based in Sharia.[211] Since this was not a "a firm, permanent and sincere objection to any participation in war or to the bearing of arms," it could not be considered as the kind of belief or conviction protected under Article 9.[212] In several other cases involving objections to

[206] Eweida and Others v. the United Kingdom, nos. 48420/10 and 3 others, ECHR 2013 (extracts).
[207] Charter of Fundamental Rights of the European Union, Article 10.2.
[208] For example, see, G.Z. v. Austria, no. 5591/72, Commission decision of 2 April 1973, unreported, http://hudoc.echr.coe.int/eng?i=001-100491.
[209] Bayatyan v. Armenia [GC], no. 23459/03, ECHR 2011.
[210] Bayatyan, § 110.
[211] Enver Aydemir v. Turkey, no. 26012/11, 7 June 2016, http://hudoc.echr.coe.int/eng?i=001-163940.
[212] Aydemir, § 83 ("une objection ferme, permanente et sincère à une quelconque participation à la guerre ou au port des armes" [the author's translation]).

military service, the Court found a violation of Article 9 based not specifically on the denial of accommodation but on the lack of procedural safeguards.[213] Other cases have established that claimants must provide some evidence that their convictions are genuine,[214] and that any alternative forms of service must strike an adequate balance between the needs of society and those of the individual.

The term "conscientious objection" is usually associated with objection to military service, but it has come to be applied in other situations as well where an individual refuses to perform an obligation on the basis that to do so would be a direct violation of a religious or moral belief. In the context of schools the Court has by and large been less accommodating of such claims than in the military context, but has recognized more generally that students should not be coerced to violate religious beliefs unless it is necessary in a democratic society.[215] In *Folgerø and Others v. Norway*[216] and *Grzelak v. Poland*[217] the Court upheld the right of atheist students to be exempted from mandatory religion classes and to be give a reasonable alternative to those classes (unsupervised time in the school library was deemed an insufficient "alternative"). The Court denied, however, the right to conscientious objection to state school entirely in the form of home schooling.[218] The concept of conscientious objection has also been applied to the context of the workplace. These cases will be explored in detail in Part II, but it is worth noting at this stage that the Court has been hesitant to acknowledge such a right in any strong form and has been, for the most part, deferential to the needs of employers when the rights of others risk being infringed by an accommodation.

Autonomy and Liberty of Religious Institutions

The Court has decided quite a few cases involving religion or belief in its collective dimension and, in particular, the extent to which the state must accord religious institutions a degree of autonomy greater than that given to other organizations or groups. These cases have involved legal personality, building permits, labor rights, and other church autonomy issues. On balance the Court has been relatively protective of religious group rights as

[213] For example, see Savda v. Turkey, no. 42730/05, 12 June 2012, http://hudoc.echr.coe.int/eng?i=001-111414.
[214] Dyagilev v. Russia, no. 49972/16, 10 March 2020, http://hudoc.echr.coe.int/eng?i=001-201903.
[215] Adyan and Others v. Armenia, no. 75604/11, 12 October 2017, http://hudoc.echr.coe.int/eng?i=001-178084.
[216] Folgerø and Others v. Norway [GC], no. 15472/02, ECHR 2007-III.
[217] Grzelak v. Poland, no. 7710/02, 15 June 2010, http://hudoc.echr.coe.int/eng?i=001-99384.
[218] Konrad v. Germany (dec.), no. 35504/03, ECHR 2006-XIII.

compared, for example, to the approach of the European Court of Justice.[219] This was not the case in the first two decades of the Convention system, but with the Commission's position in *X. and Church of Scientology v. Sweden* in 1979 establishing that religious organizations could be rights-bearers on behalf of their congregations the Commission and Court began to carve out a space for the autonomous functioning of religious institutions relatively free of state interference. Some of the most interesting case law in group rights arises in the context of the church as employer and will be discussed in more detail in Part II, in particularly the widely-discussed case of *Fernandez Martinez v. Spain*.[220] But briefly, these cases have established that member states are expected to take a more hands-off approach in applying labor laws in the context of the religious workplace than in cases involving secular, for-profit employers. While there is no European consensus on the question of church autonomy, the Court has protected church employers in cases where the behavior of the employee constituted in some way a threat to the integrity of the group's religious message. Such threats have included the establishment of a labor union,[221] open criticism of church doctrine[222] and even the carrying on of an extramarital affair by a church leader.[223] In these cases the Court has indicated that religious institutions have a right to expect a certain degree of loyalty from their employees.

Outside the employment context, church autonomy cases have often arisen in situations where governments either try to prevent the group from operating or try to interfere in the inner workings of the institution. In *Metropolitan Church of Bessarabia v. Moldova*, the Court reaffirmed the right of a religious institution to act on behalf of its members and noted that registration that would give a church such legal personhood may not be arbitrarily withheld.[224] Some cases have dealt with state interference in decisions involving church leadership and membership.[225] For example, in *Hasan and Chaush v. Bulgaria*, the government was found in violation of Article 9 for interference in the selection of the Mufti

[219] John Witte Jr. and Andrea Pin, "Faith in Strasbourg and Luxembourg? The Fresh Rise of Religious Freedom Litigation in the Pan-European Courts," Emory Law Journal 70, no. 3 (2021): 657.
[220] Fernandez-Martinez v. Spain [GC], no. 56030/07, ECHR 2014 (extracts).
[221] Sindicatul "Pastorul Cel Bun" v. Romania [GC], no. 2330/09, ECHR 2013 (extracts).
[222] Fernandez-Martinez.
[223] Obst v. Germany, no. 425/03, 23 September 2010, http://hudoc.echr.coe.int/eng?i=001-100464.
[224] Metropolitan Church of Bessarabia and Others v. Moldova, no. 45701/99, ECHR 2001-XII.
[225] Svyato-Mykhaylivska Parafiya v. Ukraine, no. 77703/01, 14 June 2007, http://hudoc.echr.coe.int/eng?i=001-81067.

and thus with the internal organization of the Muslim community.[226] The Court observed that a "believers' right to freedom of religion encompasses the expectation that the community will be allowed to function peacefully, free from arbitrary State intervention.[227] Zoning laws have also come into conflict with church autonomy. Recently in *Jehovah's Witnesses v. Ukraine* the Court found a violation of Article 9 when a church was repeatedly and arbitrarily refused planning permission, noting that "using buildings as places of worship is important for the participation in the life of the religious community and thus for the right to manifestation of religion."[228] However, the Court has upheld a constitutional amendment in Switzerland banning minarets despite the clearly discriminatory intent of the clause.[229]

The Court has also held that governments have a positive obligation to provide adequate protection to minority religious groups to worship free from violence and intimidation by people of other faiths. In *97 Members of the Gldani Congregation of Jehovah's Witnesses & 4 Others v. Georgia*, the Court noted that the state's role is to ensure that religious groups tolerate one another, and that failure to act on the part of local authorities in response to abuse from a group of Orthodox extremists constituted a violation of Article 9.[230]

C. The ECtHR's cautious approach to Article 9

The ECtHR has been slow to develop an identifiable and coherent approach to religious freedom. Whereas in the US courts the approach has undergone several waves of rapid and substantive change from – from very little protection to the heightened scrutiny of the *Sherbert* test to the minimalist *Smith* standard and then to RFRA – the ECtHR has had no truly comparable transformative moments. However, several important cases discussed above combined with incremental adjustments and clarifications arising in the case law have established the Court's position in a variety of ways with regard to both the scope of the right and the appropriate application of the limitations clauses.

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[226] Hasan and Chaush v. Bulgaria [GC], no. 30985/96, ECHR 2000-XI.
[227] Hasan and Chaush, § 62.
[228] Religious Community of Jehovah's Witnesses of Kryvyi Rih's Ternivsky District v. Ukraine, no. 21477/1, § 49, 3 September 2019, http://hudoc.echr.coe.int/eng?i=001-195539.
[229] Ouardiri v. Switzerland (dec.), no. 65840/09, 28 June 2011, http://hudoc.echr.coe.int/eng?i=002-504.
[230] Members of the Gldani Congregation of Jehovah's Witnesses and Others v. Georgia, no. 71156/01, 3 May 2007, http://hudoc.echr.coe.int/eng?i=001-80395. Also see Karaahmed v Bulgaria, no. 30587/13, 24 February 2015, http://hudoc.echr.coe.int/eng?i=001-152382.

Questions about the scope of the Article 9 arise in the attempt to define what constitutes religion or belief, what counts as a manifestation of belief, and what kinds of restrictions can be considered an interference with belief or its manifestation. In general the Court has avoided trying to define religion specifically and has adopted a broad view of the kinds of beliefs or practices that may be seen as either religious or other beliefs worthy of protection. The Court has repeatedly affirmed that "not all opinions or convictions constitute beliefs in the sense protected by Article 9." The Commission has suggested that non-traditional faiths must make a case that they qualified as religions where there was any doubt about the matter. In *X v. United Kingdom*, for example, the Commission noted that the applicant had not "mentioned any facts making it possible to establish the existence of the Wicca religion."[231] And in *X v. Germany*, the Court found the complaint of a "light worshipper" manifestly ill-founded in part because the applicant had failed to "explain in what manner he wished to practice his religious belief and in what way the prison authorities refused him the right to do so."[232] However, in neither of these cases was there a finding that the individuals' beliefs did not qualify in themselves as religious under the Convention, and the Commission and Court have generally avoided the question where possible.[233] The Court will generally the assertions of religious conviction on face value in the absence of evidence to the contrary, and have not disputed the claims of groups like the Moon Sect or the Divine Light Zentrum on the basis that their beliefs did not constitute "religion or belief" within the meaning of Article 9.[234]

On the other hand, beliefs that are sufficiently cogent, serious, coherent and important are protected even if they are not religious or spiritual in nature.[235] The Court has either

[231] X. v. the United Kingdom, no. 7291/75, Commission decision of 4 October 1977, unreported, http://hudoc.echr.coe.int/eng?i=001-74370.
[232] X. v. the Federal Republic of Germany, no. 4445/70, Commission decision of 1 April 1970, unreported, http://hudoc.echr.coe.int/eng?i=001-3123.
[233] For example, see Chappell v. the United Kingdom, 30 March 1989, Series A no. 152-A, where the Commission assumed for purposes of the application that Druidism was a religion because it found the application manifestly ill-founded anyway.
[234] See X. v. Austria, no. 8652/79, Commission decision of 15 October 1981, Decisions and Reports 26, p. 89; Omkarananda and the Divine Light Zentrum v. Switzerland, no. 8118/77, Commission decision of 19 March 1981, Decisions and Reports 25, p. 105.
[235] Campbell and Cosans v. the United Kingdom, 25 February 1982, § 36, Series A no. 48.

accepted or not contested pacifism,[236] atheism,[237] communism[238] and veganism[239] as constituting beliefs worthy of protection.[240] The Court has attempted, however, to distinguish between such beliefs and mere opinions; in *Pretty v. UK,* for example, a belief in assisted suicide was considered not to rise to the level of Article 9 protection.[241] Nor was the desire, however strong, to scatter the ashes of a loved one at home.[242] The distinction being made in these cases is that beliefs under Article 9 must be broad enough to constitute an important part of one's worldview or to be part of a "coherent view on fundamental problems."[243]

When deciding on what counts as a manifestation, however, the Court has been somewhat less flexible in its approach. Article 9 lists worship, teaching, practice, and observance as recognized forms of manifestation. But the Court has repeated asserted that not all acts motivated by religious belief qualify as manifestation. It distinguishes acts "motivated or inspired by a religion or belief"[244] from acts that manifest a belief. The distinction is somewhat flexible, and the Court has done little to clarify the issue. The most important case law remains *Arrowsmith*. In that case the Court agreed that pacifism was a belief under Article 9, but considered that it was not worship, teaching, practice or observance. The Court focused on the term "practice" and observed that "when the actions of individuals do not actually express the belief concerned they cannot be considered to be as such protected under Article 9.1, even if they are influenced by it."[245] The leaflets urging soldiers not to fight did not *per se* advocate pacifism; rather, they merely expressed the

[236] Arrowsmith v. the United Kingdom, no. 7050/75, Committee of Ministers decision of 12 June 1979, http://hudoc.echr.coe.int/eng?i=001-49229.
[237] Angeleni v. Sweden, no. 10491/83, Commission decision of 3 December 1986, Decisions and Reports 51, p. 41.
[238] Hazar and Acik v. Turkey, nos. 16311/90, 16312/90 and 16313/90, Commission decision of 11 October 1991, unreported, http://hudoc.echr.coe.int/eng?i=001-1178.
[239] W. v. the United Kingdom, no. 18187/91, Commission decision of 10 February 1993, unreported, http://hudoc.echr.coe.int/eng?i=001-1503.
[240] Kokkinakis is often cited as upholding the beliefs of "agnostics, skeptics and the unconcerned" as worthy of protection under Article 9, but in fact the case does no such thing. It merely points out the religious freedom is a valuable asset to those groups. Nor, despite some claims to the contrary, has the Court determined that anti-abortion beliefs in themselves, divorced from their religious context, would constitute beliefs under Article 9.
[241] Pretty v. the United Kingdom, no. 2346/02, ECHR 2002-III.
[242] X v. the Federal Republic of Germany, no. 8741/79, Commission decision of 10 March 1981, Decisions and Reports 24, p. 137.
[243] X. v. the Federal Republic of Germany, no. 8741/79.
[244] Kalaç v. Turkey, 1 July 1997, § 27, *Reports of Judgments and Decisions* 1997-IV.
[245] Arrowsmith v. the United Kingdom, no. 7050/75, Commission report of 12 October 1978, Decisions and Reports 19, § 71, http://hudoc.echr.coe.int/eng?i=001-104188.

author's disapproval of the conflict in Northern Ireland. Thus their distribution did not constitute the "practice" of pacifism; rather, it was merely inspired by pacifism.

Arrowsmith on its face is a relatively narrow holding, but it implies that the nexus between belief and practice must be close. The Court has subsequently used this implication to bolster its narrow view of manifestation. Moreover, the Court has done very little to clarify the distinctions between worship, teaching, practice and observance or to delineate the parameters of these concepts.[246] Instead, it has tended to recite the terms without making clear distinctions, and even when afforded clear opportunities to define the terms has avoided doing so.[247] In earlier cases this strict interpretation led the Court to a *de facto* position that the behavior must be required by the religious beliefs behind them in order to count as manifestation rather than mere inspiration. However, the Court often recognized manifestations without exploring the element of necessity,[248] and in *Eweida et al. v. UK* the Court indicated a more flexible, context driven approach. It distinguished situations in which manifestation was clear ("act[s] of worship or devotion which form part of the practice of religion or belief in a generally recognized form") from those inhabiting a grey area, noting that "the existence of a sufficiently close and direct nexus between the act and the underlying belief must be determined on the facts of each case."[249] The Court elaborated on this view in *S.A.S. v. France*, where it restated *Eweida* to stand for the principle that applicants "are not required to establish that they acted in fulfilment of a duty mandated by the religion in question."[250] However, *Eweida's* "sufficiently close and direct nexus" standard does little to clarify the question of what constitutes religious manifestation, nor does it serve to delineate between the different types of manifestation mentioned in Article 9. In fact, the opinion seems to treat worship as a subsection of practice, thus blurring the distinctions even further.

Once the Court had identified religion, belief and (sometimes) manifestation it must determine whether there has in fact been limitation on her right to religion and belief. The Court usually does not contest that there has been an interference because in most cases the

[246] Paul M. Taylor, *Freedom of Religion: UN and European Human Rights Law and Practice* (Cambridge: Cambridge University Press, 2005), 219.
[247] In *Kokkinakis*, for example, the Court sees proselytism as related to teaching, but does not reflect any further on what else teaching might entail or what other distinctions there might be between the two activities. See Taylor, *Freedom of Religion,* 217.
[248] For example, see, Leyla Şahin v. Turkey [GC], no. 44774/98, § 78, ECHR 2005-XI.
[249] Eweida and Others v. the United Kingdom, nos. 48420/10, and others, § 82, ECHR 2013 (extracts).
[250] S.A.S. v. France [GC], no. 43835/11, § 55, ECHR 2014 (extracts).

interference is relatively obvious. However, the Court has carved out some limitations on the grounds that belief or its manifestation are not interfered with if there is another way in which the applicant can manifest her beliefs. In *Cha'are Shalom Ve Tsedek v. France* the Court recognized ritual slaughter as a religious practice, but held that there would be an interference with the Article 9 rights of the applicants "only if the illegality of performing ritual slaughter made it impossible for ultra-orthodox Jews to eat meat from animals slaughtered in accordance with the religious prescriptions they considered applicable."[251] In this case, the applicants could import *glatt*[252] meat from Belgium, thus the French authorities did not interfere with their rights simply because they denied them a license to butcher *glatt* meat in France. It made the religious practice more difficult, but not impossible. Older cases have held that there is no interference in the religious rights of employees where they have the "right to resign" in order to avoid violating their conscience;[253] however, the Court explicitly overturned this approach in *Eweida*. The Court has also been willing at times to assert that the applicant is simply incorrect in their claim that a measure interferes with their religious practices in spite of its stated reluctance to pass judgment on the content of religious beliefs.[254] In *Valsamis v. Greece*, for example, the Court concluded that it was no interference with the pacifist beliefs of the applicant to attend a parade in honor of a military victory.

The Court's doctrine of interpretating when a limitation may be put on the right is largely captured in Part II's discussion of proportionality analysis. It is worth noting at this stage several aspects of the Court's approach that relate generally to the Court's application of the limitation clauses in Article 9 cases. Firstly, the increasing attention paid by the Court to the concept of positive obligations under Article 9 has highlighted the difficulty of finding a space for both religious pluralism and state neutrality. Since *Kokkinakis* the Court has quite self-consciously attempted to remain neutral among religions and not to take sides in conflicts between differing beliefs. This is increasingly challenging when states are expected to fulfil their positive obligation to ensure that everyone be able to enjoy their right to religious

[251] Cha'are Shalom Ve Tsedek v France [GC], no. 27417/95, § 80, ECHR 2000-VII.
[252] Glatt is stricter version of the kosher requirements of Jewish dietary laws.
[253] For example, see Stedman v. the United Kingdom, no. 29107/95, Commission decision of 9 April 1997, Decisions and Reports 89-B, p. 104; Sessa Francesca v. Italy, no. 28790/08, ECHR 2012 (extracts) (to be discussed further in Chapter 2).
[254] As the Court reasserted in Eweida, "the state's duty of neutrality and impartiality is incompatible with any power…. to assess the legitimacy of religious beliefs or the way in which those beliefs are expressed." Eweida and Others v. the United Kingdom, nos. 48420 and 3 others, § 81, ECHR 2013 (extracts).

freedom free of constraints imposed by third parties. The Court has made frequent use of the "rights of others" under Article 9(2) to justify interferences, but note that in order to do so it cannot remain "neutral" – it must often choose among conflicting beliefs and interests.[255] The state may need to choose between its negative obligation not to interfere with religion and its positive obligation to interfere with an exercise of rights that may prevent others from fully exercising their religious freedom. The Court in *Eweida*, after insisting that it has no place assessing the legitimacy of beliefs, acknowledged that a "fair balance … has to be struck between the competing interests of the individual and of the community as a whole, subject in any event to the margin of appreciation enjoyed by the State."[256] In other words, choices must be made when the state needs to intervene to defend the right to religious freedom from the actions of others, especially if those actions are also motivated by religion or belief. As will be seen in the discussion of the workplace cases in Chapter 2, the Court has leaned heavily in favor of a version of neutrality that involves limiting or altogether erasing visible signs of religious diversity. As Malcom Evans puts it, "somehow, in 25 years of jurisprudence built upon the recognition of the vital importance of religious pluralism to democratic life, we have arrived at a position in which banning religious believers from merely wearing their religiously inspired clothing in public appears capable of being necessary in a democratic society."

The margin of appreciation has played a vital role in these cases and in Article 9 jurisprudence generally. Because of the variety of approaches to the relationship between church and state to be found among ECHR state parties, the margin of appreciation has become a key doctrine in deciding many religious freedom cases. The Court has repeatedly noted that it will generally afford states a wide margin of appreciation in religious freedom cases. This wide margin has generated a great deal of criticism on this point as it underscores the challenge of being a human rights court with a culturally varied constituency, particularly in against a political backdrop of rising nationalism, populism and confessional politics. Minority religions are particularly at risk in such a system, since in deferring to democratic processes it defers ultimately to majoritarian preferences.[257] Human rights, on the other hand,

[255] Malcolm Evans, "The Freedom of Religion," 94.
[256] Eweida, § 84.
[257] Stephanie E. Berry, "Religious Freedom and the European Court of Human Rights' Two Margins of Appreciation," *Religion and Human Rights* 12 (2017): 200.

are in part inherently counter-majoritarian when applied in democracies since their purpose is to place limits on state power (even if that state power represents the will of the majority). The result, according to critics, has been a Court that has not stood up for religious freedom of, *inter alia*, Muslim women who wear the hijab or niqab.[258] Ironically, it has done so citing the need for states to protect the rights of others. As will be seen below, this has been particularly the case in countries where state secularism is a fundamental constitutional value.

On a final note, the ECtHR's caselaw on Article 9 got a late start compared with its jurisprudence on other fundamental rights. As a result, it is often criticized as weak, inconsistent, and overly protective of Christianity as compared with other religions. However, one should not lose sight of the fact that the Court's doctrine continues to evolve. As the Court's relatively complex judgment in *Eweida* demonstrates, it is fully capable of refining its doctrines and jettisoning approaches that are no longer working or that have come to be perceived as insufficiently protective of rights. Discontent will remain, in particular with regard to the Court's treatment of the veil cases. Challenges loom on the horizon for the Court in charting a course through the ever-changing currents of evolving social norms, particularly with respect to gender, while maintaining the rights of religious groups to live according to their own values. As will be seen in Chapter 2, however, the Court faces similar challenges as those dealt with by the older and more voluminous body of cases in the US Courts. And as will become apparent, both Courts have lessons to learn from each other in how to balance religious freedom and other fundamental rights.

CHAPTER 2: COMPARING THE OUTCOMES IN CASES INVOLVING RELIGION IN THE WORKPLACE

Having explored the significant differences between the legal and institutional contexts in which religious freedom cases are brought, we now turn our attention to the comparative task of understanding how these two systems function in assessing religious freedom in the workplace. This Chapter 2 will offer a comparative study of these two jurisdictions through the lens of the issues raised and the outcomes of the cases. In other words, it will be a

[258] For example, see, Susanna Mancini, "The Crucifix Rage: Supranational Constitutionalism Bumps Against the Counter-Majoritarian Difficulty," *European Constitutional Law Review* 6 (2010): 6-27.

substantive comparison with a focus on understanding the different categories of complaints being brought, the nature of arguments being made, who wins or loses in each jurisdiction and why. The substance of the cases will be compared across two different schemes: (i) a comparison by type of complaint, and (ii) a comparison by type of employer. This comparison will offer a practical understanding of the key issues and actors in workplace-related religious freedom cases across the two jurisdictions in question and set the stage for an analysis of the role that balancing techniques may play in judicial efforts to guarantee religious freedom while protecting the rights of others.

I. COMPARATIVE BREAKDOWN BY TYPE OF CLAIM

A cursory review of the cases in the preceding chapter reveals that much of the debate surrounding religious liberty involves not the inherent validity of the laws in question but rather the validity of applying those laws in the particular case of a claimant for whom compliance with that law would constitute an act in violation of her/his conscience. This is especially true of the body of cases that form the subject of this study. States rarely try to pass laws that are openly discriminatory against a particular religion or religious practice, and none of the countries being examined in this paper permit religious discrimination in the normal course of doing business in the workplace. Rather, the majority of cases involve situations requiring accommodation of religious practice; that is to say, either granting an exception to the law in a particular instance or construing the law such that it does not apply to individuals or organizations who, if they were to comply, would be required to act in a manner incompatible with their religious views. Such situations involve both prohibitions on certain activities, such as the wearing of symbols or proselytizing at work, or the requirement of specific actions that may violate beliefs or render the believer complicit in sin, such as compelled speech or anti-discrimination laws.

1. Common challenges and diverging approaches to accommodation

The concept of granting religion-based exemptions to generally applicable rules exists in greater or lesser measure in both North American and Europe. Instances of accommodation in the US go back at least as far as the Revolutionary War, when the colonial army allowed

religious pacifists to pay a tax in lieu of performing military service.[259] Likewise, Quakers at the time were not required to take oaths.[260] Laws protecting conscientious objectors to military service survive today, as do other legislative protections for specific contexts in which a generally applicable law is not applied to religious objectors. The clergy-penitent privilege that permits a priest not to testify concerning what he has learned in confession, for example, is provided for in law. Such instances of the specific protection of religious conscience are relatively uncontroversial. European jurisdictions commonly design legislation with targeted exemptions for religious observers; examples include conscientious objector status and the swearing of oaths. Moreover, broader requirements of reasonable accommodation for religion have been established in a number of European countries such as Bulgaria, Croatia, Denmark, Romania, Spain and Sweden, as well as in some regional/provincial legislation.[261]

The idea that the state has an interest in preventing religious discrimination is uncontentious, at least in relatively secular nations. But why should the state grant exemptions or force employers to make exceptions to rules that do not specifically target religion? This question contains within it several distinct issues. Firstly, should religion be treated differently from other forms of belief? And if so, should such beliefs be accommodated by the law even if it means treating groups differently? This debate involves a variety of assumptions about the meaning of equality, the role of the state, and the relationship between the state and the individual. Secondly, what is the role of the judiciary in the process of applying the law? This aspect of the debate centers more on which branch of government should have the power to grant exemptions, if at all, raising questions about democratic accountability and judicial discretion. Finally, should the state compel private parties, in particular employers, to grant exemptions from their own policies or business practices?

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[259] Kathleen A. Brady, "Religious Accommodations and Third-Party Harms; Constitutional Values and Limits," *Kentucky Law Journal* 106, no. 4 (2018): 724.
[260] Kathleen A. Brady, "Religious Accommodations," 726.
[261] Erica Howard, *Religious clothing and symbols in employment: A legal analysis of the situation in the EU Member States* (Luxembourg: Publications Office of the European Union, 2017), 7, https://ec.europa.eu/newsroom/just/document.cfm?action=display&doc_id=48810.

A. The debate over religion versus other beliefs: is religion special?

The notion of special circumstances that need to be taken into account when applying the law is relatively uncontroversial. Aristotle observed that the very nature of equality demands that people be treated unequally and that laws may therefore rationally be applied differently in different situations.[262] As Canadian philosopher Charles Taylor has argued, schools can rationally bar students from carrying syringes with them, yet few would object to an exemption for diabetics.[263] Reasonable accommodation, on this level, seems a matter of common sense. When it comes to belief, however, the situation is less clear, and the right to have one's moral or religious views accommodated when they conflict with the law is neither obvious nor uncontentious. Few would want diabetics to perish in obedience to a relatively banal rule where the costs to the community of the occasional individual noncompliance are quite low. Such an application of the law would be disproportionate to the law's objective. But, the argument goes, no one is likely to lose their life if they are prevented from wearing religious symbols at work or are forced to shave off their beard or show their face in public. Beliefs, in short, are fundamentally different from scientifically proven responses to life-threatening illnesses and thus should not be treated with the same degree of deference. In contrast to this view, many philosophers have explored at length the importance of protecting conscience from both a religious and a secular standpoint. The catechism of the Catholic church sees conscience as paramount in that it forms a vital connection between the individual and God. It notes that "conscience is man's most secret core and his sanctuary. There he is alone with God whose voice echoes in his depths."[264] Contemporary North American philosophers Martha Nussbaum and Charles Taylor see the importance of individual conscience as resting in its capacity to give life dignity and meaning.[265]

Particularly in the United States there is a lively academic debate as to whether religion should be seen as special and be treated differently than other categories of political or moral

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[262] Aristotle and W. Ross, *The Nicomachean Ethics of Aristotle* (London: Oxford University Press, 2009), 99.
[263] Maclure and Taylor, *Secularism*, 67.
[264] Catechism of the Catholic Church, Part Three, Section One, Chapter One, Article 6, https://www.vatican.va/archive/ENG0015/__P5Y.HTM.
[265] See Martha Nussbaum, *Liberty of Conscience: In Defense of America's Tradition of Religious Equality* (United States: Basic Books, 2007). Also see Maclure and Taylor, *Secularism.*

beliefs. The emphasis on religion derives from the language of the First Amendment, which singles out "the free exercise of religion" as opposed to the more general formulae adopted later by human rights treaties. Nevertheless, the Religion Clauses do not clearly specify whether generally applicable laws should be subject to exceptions, thus there continues to be an active debate over the relevance of the concept of reasonable accommodation in the realm of religious free exercise. Some scholars fall into what Andrew Koppelman refers to as the "neo-Rawlsian camp," which holds that all deeply held beliefs should be treated with strict neutrality and that to grant exemptions to some but not to others would be an unfair exercise in favoritism of religion over other meaningful commitments.[266] Among these some, such as Micah Schwartzman, have argued that religion cannot be ontologically distinguished from other forms of deeply-held beliefs, and therefore that it should not be given any special exemptions.[267] Similarly, Charles Taylor sees religion as simply one example of what he calls "meaning-giving beliefs and commitments," but he does not reject accommodation *per se*. The purpose of accommodation, he argues, is to protect people from situations in which they are forced to abandon such commitments, whether or not they are religious. Thus in his view, religion is not different from many other non-religious beliefs, and that such beliefs and commitments all deserve accommodation. Other commentators express concerns that that poorly conceived exemptions based on religion being "special" can serve to favor religion over other meaningful commitments and that, as a result, they are not compatible with secular government.[268]

There remains, however, a strong contingent of American legal scholars who take their cue both from the text of the First Amendment and from the religious context – both historical and sociological – of American society and argue that religion does occupy a rightfully privileged place in American law and should be given special accommodation where possible. Legal arguments for religion's special status situate themselves in the language of the First Amendment, the debates at the time of the drafting of the Constitution, and on the

[266] Andrew Koppelman, "Religion's Specialized Specialness," *The University of Chicago Law Review Online*, 79, no. 1 (2013), https://chicagounbound.uchicago.edu/uclrev_online/vol79/iss1/7.
[267] Micah Schwartzman, "What If Religion Is Not Special?," *University of Chicago Law Review* 79, no. 4 (2012): 1351-1427.
[268] See, e.g., Brian Leiter, *Why Tolerate Religion?* (United States: Princeton University Press, 2012).

somewhat convoluted history of jurisprudence in this area.[269] The normative justifications put forward are various. Some echo the observations of Taylor, Nussbaum and others that religion is fundamentally constitutive of human identity, that it is a primal source of meaning for most people and thus merits special protection. In a similar vein, Michael McConnell has argued for religion's distinctness as deriving from the wide variety of roles it plays in human life.[270] Others derive from a vision of religion as an affirmative social good, since it helps bind human beings in communities, encourages morality, and gives people a reason for living.[271] Further arguments appeal to the history of conflicts over religion, asserting that religion can be, if restricted, a dangerous source of contention. A variant on this theme argues that religion, because of its psychologically and socially constitutive nature, is an especially vulnerable category of belief, and that it is in need not so much of promotion as of protection against discrimination.[272]

In practice, US courts do treat religion as special.[273] This is particularly true in cases involving the Establishment Clause. With respect to the Free Exercise Clause, religion has, since the 1960s, been interpreted to include some meaning-giving beliefs and commitments that are not explicitly theistic. This shift derives in part from the notorious difficulty of crafting a precise definition of the religious, as well as from the historically specific challenges faced by the US courts in enforcing racial equality.[274] In *Welsh v. United States*, for example, the Supreme Court took the position that beliefs that impose a duty of conscience and function as a religion in the life of the believer should be considered on an

[269] Especially see Michael W. McConnell, "Free Exercise Revisionism and the Smith Decision," University of Chicago Law Review 57, no. 4 (Fall 1990): 1109-1154.
[270] Specifically, he argues that religion "is an institution, but it is more than that; it is an ideology or worldview, but it is more than that; it is a set of personal loyalties and locus of community, akin to family ties, but it is more than that; it is an aspect of identity, but it is more than that; it provides answers to questions of ultimate reality, and offers a connection to the transcendent; but it is more than that. Religion cannot be reduced to a subset of any larger category. In any particular context, religion may appear to be analogous to some other aspect of human activity - to another institution, worldview, personal loyalty, basis of personal identity, or answer to ultimate and transcendent questions. However, there is no other human phenomenon that com-bines all of these aspects; if there were such a concept, it would probably be viewed as a religion. See Michael W. McConnell, "The Problem of Singling Out Religion," *DePaul Law Review* 50, no. 1 (2000): 42.
[271] Andrew Koppelman, "Is it Fair to Give Religion Special Treatment?," *University of Illinois Law Review* 2006, no. 3 (2006): 571-603.
[272] Kara Loewenthiel, "When Free Exercise Is a Burden: Protecting Third Parties in Religious Accommodation Law," *Drake Law Review* 62, no. 2 (2014): 453.
[273] Koppelman, "Religion's Specialized Specialness," 73.
[274] Winnifred Fallers Sullivan, "Neutralizing Religion: Or, What is the Opposite of 'Faith-Based?,'" *History of Religions* 41, no. 4 (May 2002): 374.

equal footing with religious beliefs.[275] The Court avoided expanding the legal category of "religion" as a Constitutional matter, as the case involved a claim under federal statute rather than the First Amendment. The opinion suggests, however, that the Court would define religion similarly under Constitutional interpretation as it did under statutory construction.[276] In *Wisconsin v. Yoder* (1970), however, the Supreme Court opined that beliefs that were not religious in nature should not have the protection of the Free Exercise Clause. Federal circuit courts have mostly stuck to the principle that religion means religion, and then proceeded to define religion as broadly as possible, often in ways that echo the ideas put forth in Welsh and the notion of meaning-giving beliefs as expressed by Charles Taylor. Thus in the US courts, religion is seen as being special, but the concept of religion is interpreted broadly.[277]

In the ECHR and in most international human rights treaties, the protection of religious freedom is couched in terms of "freedom of thought, conscience and religion" or freedom of "religion and belief." As a practical matter, religion remains the predominant type of belief that requires the protection by the ECHR, but there is no real debate as to whether religion should be treated differently from other manifestations of sincerely held belief. To the limited extent that the ECtHR enforces a duty to accommodate legal exemptions on the basis of conscience, religion and other deep moral commitments are in principle treated as equally important, and the Court rarely uses a threshold definition of religion and belief to exclude or to decide cases.[278] Moreover, Article 9 cases involving clearly non-religious beliefs are relatively rare. Those that do fall under Article 9 tend to involve the refusal to participate in religious behavior on the basis of nonbelief; most notable are cases in which public officials have been required to swear oaths on the Bible. Those cases have viewed the freedom to be a nonbeliever as a form of religious freedom – the freedom to have no religion – rather than

[275] Welsh v. United States, 398 U.S. 333 (1970).
[276] See concurring opinion of Justice Harlan, *Welsh,* 398 U.S. at 357-61, where he explains that to interpret the statute otherwise would be to impermissibly favor religion over non-religion.
[277] For a detailed analysis of the chaotic development of how courts define religion, see Mark Strasser, "Definitions, Religion, and Free Exercise Guarantees," *Tulsa Law Review* 51, no. 1 (2015): 1-39.
[278] Alice Donald, Karen, Bennett and Philip Leach, *Religion or Belief, Equality and Human Rights in England and Wales* (England: Equality and Human Rights Commission, 2012), Research Report Series, Report no. 84, https://www.equalityhumanrights.com/sites/default/files/research-report-84-religion-or-belief-equality-and-human-rights-in-england-and-wales.pdf.

the broader notion of freedom of conscience.[279] In fact, the Court interprets "belief" quite narrowly. In *Campbell and Cosans v. UK*, the Court specified that in order to qualify for protection under Article 9, beliefs must "attain a certain level of cogency, seriousness, cohesion and importance."[280] Belief systems such as veganism, pacifism and communism have been found to rise to the level of "religion and belief" under Article 9, while opinions such as supporting euthanasia have not.[281] These cases, however, are generally brought as freedom of expression cases rather than as freedom of religion or belief.[282]

In summary, regarding the question of the distinctiveness of religion from other beliefs in the process of deciding on religious accommodation, the US and the ECtHR have somewhat similar positions, but arrive there by very different routes. In the US context, courts treat religion as a special category separate from and more protected than other forms of belief, but they define religion broadly enough that the concept captures a variety of belief systems so long as they perform a role in the believer's life that is similar in some way to that of religion. The ECtHR position, on the other hand, is essentially that religion should be treated as deserving more protection than personal opinions about, say, vaccinations, but it is not seen as different from other deeply held and meaning-giving belief systems like humanism.

B. The role of the judiciary in granting exemptions for religion or belief

Most scholars and judges both in the US system and in Europe support the view that some accommodations of specifically religious beliefs are necessary in order to protect religious freedom and to uphold a sense of fairness and equality that takes the circumstances of individuals into account.[283] As Kristin Henrard explains, "duties of reasonable accommodation were developed as a particular manifestation of the right to equal treatment,

[279] For example, see *Buscarini and Others v. San Marino* [GC], no. 24645/94, § 34, ECHR 1999-I, where the Court found that Article 9, "in its religious dimension," implicated the "freedom to hold or not to hold religious beliefs and to practise or not to practise a religion."
[280] Campbell and Cosans v. the United Kingdom, 25 February 1982, § 36, Series A no. 48.
[281] See Jim Murdoch, *Freedom of Thought, Conscience and Religion* (Belgium: Council of Europe, 2007), Human Rights Handbooks, no. 9, 11, https://rm.coe.int/168007ff4f.
[282] Murdoch, *Freedom of Thought*, 11.
[283] Loewentheil, "When Free Exercise Is a Burden," 452-453.

and they are still often placed in this "equality" frame."[284] But once this basic necessity is accepted, the locus of the debate shifts to concerns over who should make the decisions about the kinds of circumstances that justify accommodation. There are, at least under the kinds of capitalist constitutional democracies installed in Europe and North America, three options in the workplace context. The first option would be to leave the choice to the employer. In situations where no accommodation is mandated, a sense of empathy and the dictates of good business management may well convince an employer in certain circumstances to make an exception to accommodate the sincere convictions of an employee even if she is not required by law to do so. Those resistant to mandatory religious accommodation would argue that such an approach is more in keeping with the democratic process, and on a practical level may even feel that employers are better placed to evaluate the burden that such exceptions would put on their businesses.

Second, aligning with some in the non-accommodationist camp as well as with some conservative pro-accommodation thinkers, is the position that the appropriate arena for deliberation and decision-making about religious accommodations would be in the democratically elected legislative branch of government, not in the unelected judiciary. While this may at times put minority religions at a disadvantage, proponents of this "minimal-accommodation" view have argued that such bias in favor of majorities is an "unavoidable consequence of democratic government" but is preferable to "a system in which each conscience is a law unto itself or in which judges weigh the social importance of all laws against the centrality of all religious beliefs."[285] This position also seems implicit in the ECtHR's margin of appreciation doctrine in its tradition of deference to national legislators and partly explains the relatively low success rate of Article 9 claims.

Finally, we are left with the courts, who will inevitably have to make decisions both of law and fact regarding religious accommodation in the workplace so long as any accommodation is seen to be mandated either by the Constitutional or Conventional right to religious freedom or by statute. The extent of the role of the judiciary in this process in statutory cases will vary depending on how precisely legislation regarding accommodation

[284] Kristin Henrard, "Duties of Reasonable Accommodation on Grounds of Religion in the Jurisprudence of the European Court of Human Rights: A Tale of (Baby) Steps Forward and Missed Opportunities," *International Journal of Constitutional Law* 14, no. 4 (2016): 964.
[285] Employment Div. Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 890 (1990).

has been drafted, but in modern multi-cultural democracies there will likely always be gray areas that require judicial interpretation. The modern concept of a duty of reasonable accommodation implemented by the courts originated in physical disability cases in Anglo-American law and was only later adopted in Europe.[286] The idea that courts, as opposed to legislatures, can carve out exemptions remains controversial on both sides of the Atlantic due to understandable concerns over democratic accountability and the erosion of the separation of powers. But, as evidenced by the cases explored in this study, Courts in both the US and Europe continue to explore their powers in this area.

C. Contrasting approaches to religious accommodation in the workplace

In the US context, legal historians can point to a variety of cases in state courts that suggest that religious accommodation was a viable option in several states in the early nineteenth century.[287] This has led some scholars to assert that religious accommodation is historically the norm in American law.[288] But, as discussed above in Chapter 1 Section I, the Supreme Court's first interpretation of the Free Exercise Clause came only in 1878 in *Reynolds v. United States* where the Court explicitly rejected the idea of any implicit duty of religious accommodation to an otherwise valid law.[289] Apart from during the three decades when the court applied the *Sherbert* test the Supreme Court has consistently held that there is no Constitutional right to religious accommodation from neutral and generally applicable laws. The current position, and the position for most of American legal history, is that Congress has the power to grant religious exemptions, but it is not Constitutionally required to do so in most situations.[290] And where it is not required by statute, courts will rarely find a Constitutional need for accommodation of religious beliefs in the absence of overt discrimination.

In the United States courts, religious accommodation cases in the workplace have arisen in the context of both government and private employers, but with appeals to different

[286] Henrard, "Duties of Reasonable Accommodation," 964.
[287] Stephanie H. Barclay, "The Historical Origins of Judicial Religious Exemptions," Notre Dame Law Review 96, no. 1 (2020): 55-124, 63-64.
[288] For example, see McConnell, "Free Exercise Revisionism."
[289] Reynolds v. United States, 98 U.S. 145 (1878).
[290] Koppelman, "Religion's Specialized Specialness," 73.

sources of law. Depending on the context, religious freedom may involve the First Amendment via either of the Religion Clauses or the Free Speech Clause, the Religious Freedom Restoration Act, and/or Title VII. With regard to Constitutional claims brought under the First Amendment, such cases are limited to cases involving government employees or employers motivated by religious beliefs since the Constitution does not directly guarantee freedom from interference with religious free exercise *per se*, but only prohibits the government from imposing limits on free exercise. Thus it is no surprise that the US Supreme Court has dealt with only a small number of religious freedom in the workplace cases that were grounded in the Free Exercise Clause. The main line of cases in this area consists of four unemployment benefits cases discussed in Chapter 1 Section I: *Sherbert v. Werner, Thomas v. Review Board, Hobbie v. Unemployment Appeals Commission*, and finally *Employment Division v. Smith*. The culmination of these cases in *Smith* offers a partial explanation of why the Free Exercise Clause is rarely dispositive, and often not even plead, in modern cases post-*Smith*. *Smith*'s rational basis scrutiny standard is a difficult standard for claimants to overcome, as the government need only demonstrate that the law is rationally related to a legitimate government interest and is both neutral and generally applicable. RFRA offers more fertile ground for claimants so long as they are seeking accommodation from laws or regulations of the federal government. RFRA imposes a strict scrutiny standard on federal government actions, requiring the government to accommodate religion in the workplace unless enforcing the measure in the context in question is the least restrictive means to accomplish a compelling government interest. This has taken on great significance in the caselaw regarding the Affordable Care Act's (the "ACA") reproductive health mandate as well as in cases involving anti-discrimination laws under Title VII where religious employers or employees feel compelled to discriminate in order to avoid complicity with what they perceive to be sin. The "least restrictive means" test has become the primary focus of such cases, and what has emerged from recent religious accommodation caselaw is that the government is expected to be as flexible and proactive as possible in negotiating accommodations for religious employers, while it seems to retain somewhat more discretion in dealing with religious government employees.

One of the reasons that the federal government has more power with regard to employees is the Establishment Clause. For the most part this study is not intended to address the

Establishment Clause as that involves a vast and largely distinct set of cases with different sets of standards and principles. However, the Establishment Clause does come into play in certain government employee cases and sets some limits particularly on religious expression in the government workplace. Moreover, this clause has some relevance in accommodation cases inasmuch as the government must be careful to be evenhanded in its accommodation of religion and not permit religious government employees to end up receiving preferential treatment over employees of other faiths or of no faith. The dynamic between granting accommodation and avoiding the imposition of costs on third parties that amount to preferential treatment has at times raised Establishment Clause concerns. In *Thornton v. Caldor, Inc*., for example, the Court invalidated a Connecticut statute that required employers to accommodate days off for any putative Sabbath day requested by employees, arguing that a law that so favored religious employees over non-religious ones and so burdened employers amounted to an Establishment Clause violation.[291]

The majority of infringements of religious freedom in the workplace can be framed in terms of discrimination, and those cases are usually brought on a statutory basis pursuant to Title VII of the Civil Rights Act.[292] While this specific grouping of cases lies beyond the scope of this study since it is not easily comparable with the caseload of the ECtHR and follows a different set of balancing norms, it forms an important context for understanding the treatment of religious freedom in the workplace. Therefore, a basic understanding of how it operates is helpful before examining the specific First Amendment and RFRA cases. The specific requirements of Title VII are, first, that an employer may not "discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."[293] Moreover, the protections of Title VII extend to "all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business."[294] The result of the

[291] Ira C. Lupu, "Reconstructing the Establishment Clause: The Case Against Discretionary Accommodation of Religion," *University of Pennsylvania Law Review* 140, no. 2 (1991): 605.
[292] Civil Rights Act of 1964, Pub. L. No. 92-261, § 2(7), 86 Stat. 103 (codified as amended at 42 U.S.C. § 2000e (2000)).
[293] Civil Rights Act of 1964, 42 U.S.C. § 2000e-2,(a)(1) (2000).
[294] Civil Rights Act of 1964, 42 U.S.C. §2000e(j) (2000).

statute defining religion in this way is that it makes firing or otherwise punishing an employee whose religious exercise interferes with his duties in the workplace constitute a form of discrimination. In order to get relief under Title VII, the plaintiff must first make a *prima facie* case that there has been interference with his ability to practice his religion and that no reasonable accommodation has been made. This can be done in one of two ways: a disparate treatment claim (i.e. direct discrimination against religious practice) or a disparate impact claim (neutral rules nonetheless impose more of a burden upon the religious believer than upon other similarly situated employees).[295] Once a *prima facie* case has been made, the burden of proof shifts to the employer, who can avoid liability if she can demonstrate that to accommodate the religious practice in question would pose an undue hardship for the business.[296]

The text of Title VII does not define the meaning of undue hardship, and it is precisely the challenge understanding what this entails that has formed the crux of much of the litigation in this field. The nature of undue hardship was first set out by the Supreme Court in *TWA v. Hardison*,[297] a case involving changing the work schedule of an employee to accommodate his religiously-motivated request to not be scheduled work on Saturdays. The Court's decision established that an accommodation would be considered an undue hardship upon the employer if it would impose more than *de minimis* costs upon the employer, or in situations where it would accord preferential treatment to the employee and thus negatively affect rights of other employees.[298] While *Hardison* was as step forward in understanding when employers must accommodate religion under Title VII, the standard of what counts as *de minimis* remains vague and has been variously interpreted by lower courts.[299] The stipulation that the accommodation must not engender preferential treatment is implied rather than stated outright; in the context of *Hardison*, the issue was specifically whether the employer would have to exempt the employee from the terms of a collective bargaining agreement that had put in place a system of allocating preferred working times based on

[295] EEOC v. Abercrombie and Fitch, 135 S. Ct. 2028, 2038 (2015) (Thomas J., dissenting).
[296] Rachel M. Birnbach, "Love Thy Neighbor: Should Religious Accommodations That Negatively Affect Coworkers' Shift Preferences Constitute an Undue Hardship on the Employer under Title VII," *Fordham Law Review* 78, no. 3 (December 2009): 1343.
[297] Trans World Airlines, Inc. v. Hardison, 432 U.S. 63 (1977).
[298] Hardison, 432 U.S. at 84.
[299] Birnbach, "Love Thy Neighbor," 1344, 1344n85.

seniority. However, the equation of preferential treatment to undue hardship, like the content of the "*de minimis*" standard, has been developed by lower courts in subsequent cases and appears to be settled law at least in its general principle if not in its specific application.[300]

In Europe it is to be expected that the landscape of reasonable accommodation would be more complicated in that the cases arise in a wide range of countries with conflicting histories of religious freedom. In fact, practices and attitudes within European states vary widely with regard to when and if it is appropriate to accommodate religion in the workplace.[301] In France, for example, the tradition of *laïcité* and its focus on neutrality and equality make the idea of special treatment for religious minorities unpopular and difficult to implement, whereas in England and The Netherlands there is more openness to the concept.[302] Attitudes and approaches to accommodation may also be affected by the widely differing models of church-state relations encountered across Europe. The Establishment Clause issues encountered in the US context will look very different in a legal landscape that must incorporate both highly secularized states like France and Turkey with states that have an established church, such as the UK or Malta, or with states that acknowledge a role of primacy for a specific religious tradition, such as Greece.

The ECtHR has been resistant to adopting the concept of Convention-based duty to accommodate religious convictions. In *Thlimmenos v. Greece*, the Court opened the door by acknowledging the role of differential treatment in defending substantive equality and holding that a failure to treat someone differently despite their materially different circumstances can indeed amount to a violation of their rights under the Convention.[303] However, the Court remained hesitant to develop this line of thinking. Even in *Thlimmenos*, the Court focused on the disparate treatment of criminal offenses generally and offenses committed due to religious convictions, and explicitly declined to answer the broader question of whether a refusal to make such an accommodation to the law on religious grounds

[300] This view of preferential treatment is particularly interesting in light of the debate over whether religion should be treated as a special category, but ultimately it can be seen as intellectually consistent with the idea that religion be treated as an inherent part of a person's identity and capacities that is comparable to a physical disability.
[301] Veit Bader, Katayoun Alidadi and Floris Vermeulen, "Religious Diversity and Reasonable Accommodation in the Workplace in Six European Countries: An Introduction," *International Journal of Discrimination and the Law* 13, no. 2-3 (2013): 63.
[302] Bader, Alidadi and Vermeulen, "Religious Diversity," 63.
[303] Thlimmenos v. Greece [GC], no. 34369/97, § 44, ECHR 2000-IV.

would itself be a violation of Article 9.[304] Subsequent cases mostly found no interference with religious manifestation or explicitly denied accommodation, often citing a lack of European consensus on a given issue or the broad margin of appreciation given to states in matters relating to relations between religion and the state, which are seen as being at the heart of national identity. In *Konttinen v. Finland*, for example, the Commission found accommodation unnecessary since the complainant was free to seek employment elsewhere, giving rise to the so-called "freedom to resign rule."[305] Other workplace cases were similarly dismissive of the need to accommodate,[306] as were cases involving education.[307] Only in prison cases,[308] or cases in which there could be said to be a European consensus,[309] did the Court seriously entertain the notion of a duty to accommodate. For example, in *Jakobski v. Poland* in 2010, the Court opened the door to the kinds of accommodation discussions that have become standard in some statutory cases in US courts when it ruled for the plaintiff in a prison case asking for meat-free meals to accommodate his Buddhist convictions. In that case, the Court held that striking a fair balance between the needs of prison administration and the religious requirements of an individual prisoner meant that meals should be provided so long as it was not unduly disruptive of the management of the prison system.[310] However, as will be discussed further below, the Court's approached shifted in the landmark case of *Eweida et. al v. United Kingdom* in 2013, which gathered together four cases involving the failure to accommodate religion in the workplace.[311] In *Eweida*, the Court acknowledged that there is at least an obligation to make efforts at reasonable accommodation in the workplace, and that such accommodation must not be discriminatory in its application.

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[304] Thlimmenos, § 53.
[305] Konttinen v. Finland, no. 24949/94, Commission decision of 3 December 1996, Decisions and Reports 87-A, p. 68, at p. 69.
[306] For example, see Kosteski v. the Former Yugoslav Republic of Macedonia, no. 55170/00, 13 April 2006, http://hudoc.echr.coe.int/eng?i=001-73342.
[307] For example, see, Dogru v. France, no. 27058/05, 4 December 2008, http://hudoc.echr.coe.int/eng?i=001-90039.
[308] See Jakóbski v. Poland, no. 18429/06, 7 December 2010, http://hudoc.echr.coe.int/eng?i=001-118282.
[309] See Bayatyan v. Armenia [GC], no. 23459/03, ECHR 2011.
[310] Jakóbski v. Poland, no. 18429/06, 7 December 2010, http://hudoc.echr.coe.int/eng?i=001-118282. For further discussion see Saïla Ouald-Chaib and Lourdes Peroni, "Jakóbski v. Poland: Is the Court opening the door to reasonable accommodation?," *Strasbourg Observers* (blog), 8 December 2010, https://strasbourgobservers.com/2010/12/08/jak%CF%8Cbski-v-poland-is-the-court-opening-the-door-to-reasonable-accommodation/.
[311] Eweida and Others v. the United Kingdom, nos. 48420/10 and 3 others, ECHR 2013 (extracts).

Religious discrimination plays a less powerful role in the ECtHR as a rationale for bringing workplace-related religious accommodation cases. It must be remembered that Title VII requirements rely upon statutory interpretation rather than checking conformity with Constitutional or Conventional guarantees. There is no ECtHR equivalent to America's Title VII cases since it is not the role of the ECtHR to interpret or enforce domestic law. As we have seen, cases granting accommodation of religious beliefs are rare in the ECtHR, but even in the various ECtHR cases that have explored the option of accommodation, the Court tended to avoid coming to conclusions regarding religion in the workplace based on a discrimination rationale.[312] Religion is a specific ground for complaint under Article 14 as it is under Title VII. However, Article 14 is parasitic on other articles; that is, it has no independent existence and must be plead in conjunction with another article of the Convention. [313] It does not prohibit discrimination as such, but discrimination in the application of the specific rights of the Convention. Thus very often the Article 14 discussion is never reached because the claim regarding the primary right being infringed has failed – at that point, the Article 14 claim is extinguished and need not be considered by the Court.

To consider an Article 14 claim, "there must be a difference in the treatment of persons in analogous, or relevantly similar, situations."[314] What counts as analogous is not always clear; in *Grimmark*, for example, the Court did not view the situation of a midwife who refused to participate in abortions as being sufficiently analogous to that of other midwives to raise Article 14 concerns.[315] On the other hand, in *Thlimmenos* the Court explained that failure to treat differently people whose situation is fundamentally different could also amount to discrimination.[316] In theory Thlimmenos suggests that not providing reasonable accommodation may amount to discrimination, and accommodation arguments have found some success in the context of education and physical disability claims.[317] But as will be developed below in the breakdown of accommodation cases by type, the question of whether

[312] Henrard, "Duties of Reasonable Accommodation," 970.
[313] Thlimmenos v. Greece [GC], no. 34369/97, § 40, ECHR 2000-IV.
[314] Eweida and Others v. the United Kingdom, nos. 48420/10 and 3 others, §87, ECHR 2013 (extracts).
[315] Grimmark v. Sweden, no. 43726/17, § 44, 11 February 2020, http://hudoc.echr.coe.int/eng?i=001-201915. The applicant had suggested that other nurses who objected to specific duties for non-religious reasons would have been treated differently, and that she was thus a victim of discrimination.
[316] Thlimmenos, § 44.
[317] For example, see Enver Şahin v Turkey, no. 23065/12, 30 January 2018, http://hudoc.echr.coe.int/eng?i=001-180499.

refusal of the applied-for accommodation was discriminatory is often raised by claimants but rarely addressed by the Court. And when it is addressed, it loses as an argument.

2. The treatment of religious adornment: clothing, grooming, and symbols

Many of the accommodation claims faced by the courts have involved some form of visible manifestation of faith, including religiously-inspired or mandated symbols, clothing, and grooming requirements. Personal appearance can have religious significance in a variety of ways. Some forms of religious adornment can be seen as expressive conduct related to religious beliefs or practices. The guarantee of freedom of expression exists as a standalone right in both the US Constitution and the ECHR, and is seen, along with freedom of religion, as one of the most basic of human rights guarantees and an essential underlying condition for the enjoyment of other rights.[318] However, freedom of expression is not absolute, and can be regulated in many contexts. With regard to the workplace, employees in the US and Europe do not generally enjoy an unfettered right to free expression at work. Religious expression, however, is different. This is the case because the right being protected in religious expression cases is the right to manifest one's religious beliefs and to adhere to the practices compelled or inspired by one's faith.

Such conduct often has an expressive component but may also involve the performance of a duty. Some Christians, for example, wear a cross because they wish to express to those around them that they hold certain beliefs and a perhaps a specific religious affiliation. They may also wear it for personal reasons – the cross may not be so much about telling others, but rather a personal affirmation and reminder of one's own faith. However, some Christians also feel that they have a religious obligation to speak their faith, to express it publicly at all times. In such a case, the cross is certainly expressive; it is being work to communicate a message to others. However, it is also performative; the wearer is discharging a perceived duty to God that goes beyond conveying information to others. Jehovah's Witnesses have a faith-based duty to proselytize; this behavior is expressive, but again goes beyond merely a desire to convey an opinion.[319] In Islam, interpretations of various sources of Islamic law,

[318] For example, see "Freedom of Expression: A Fundamental Human Right Underpinning All Civil Liberties," 70th Anniversary, UNESCO, accessed 11 January 2021, https://en.unesco.org/70years/freedom_of_expression.
[319] As discussed below, the landmark ECtHR case of *Kokkinakis v. Greece* hinged on this particular injunction.

including verses in the Koran, the a*hadith* (records of the deeds of the Prophet) and the *ijma* (consensus of scholars)[320] impose duties related to dress including the wearing of beards by men and the wearing of some form of head covering by women.[321] Neither practice is seen as universally required by the Koran, but both practices are widespread. The wearing of a hijab or niqab by women in public is sometimes motivated by a desire to express their faith or their cultural affiliation with Islam, and sometimes following the injunction to dress modestly.[322]

Cases arising in the ECtHR and US federal courts have included Jewish kippahs, Christian crosses, Sikh turbans and kirpans, Muslim head coverings, beards, and dreadlocks. These cases are often lumped together as "religious symbol" cases but do not all involve symbols since they are not necessarily expressive and, moreover, are not actually symbols (i.e. representations of something else). Thus this study will group these various phenomena under the term "religious adornment." What unites these cases is that they are visible manifestations of faith that have an ongoing character making them difficult to avoid in the workplace. One can be asked to pray elsewhere during coffee breaks. Beards, however, are another matter entirely. And the point of the hijab is that it be worn in public, not in the privacy of one's own home after work. Another common factor of many of these cases, and another reason that they are often different from other religious expression cases, is that their effects on the rights of others are often disputable or indirect. Some might perceive the very act of accommodation as a form of unequal treatment amounting to unfair discrimination in favor of religion. Religious adornment can also interfere with the image that the employer wishes to present to the public. For private companies, the question of image may include the desire to maintain a uniform in order to project the company's brand, or it may simply be that the company is aiming to project a certain "look." In the case of government employers, that image usually means the government's duty to remain neutral and not appear to favor religion in general or any particular religion. Permitting public officials to wear visible

[320] For the sources of Islamic law, see John Esposito, *Islam: the Straight Path* (Oxford: Oxford University Press, 1988), 75-89.
[321] Cases treated here involved either a hijab or jilbab, which consist of head coverings that leave the face exposed. Other important religious freedom cases have involved niqabs or burqas, which cover the face and body, but those iterations of the Koranic injunction for women to dress modestly have not arisen in US federal courts or in the ECtHR jurisprudence.
[322] Raphaël Liogier. *Une Laïcité "Légitime": La France et Ses Religions d'Etat*. Paris: Entrelacs, 2006 : 144-145.

indications of their religious affiliations has implications for secularism-based doctrines such as establishment in the US or *laïcité* in France. Symbols or clothing can also, in certain contexts, pose health and safety concerns.

In this section the cases will be compared in two groups: (i) cases with image concerns and (ii) cases involving health and safety concerns. In Section II below, the implications of the public vs. private status of the employer will be considered in greater detail regarding both religious clothing/symbol cases and other forms of religious behavior and/or expression.

A. Adornment cases involving the public image of the employer

Religious adornment cases in US federal courts have been brought under all three of the principal avenues of complaint discussed above, and in some cases have involved both Title VII and either RFRA or First Amendment complaints. Most of those cases have been governed by Title VII and have been settled by the EEOC or in district courts. Public sector cases, however, implicate constitutional concerns, and have included government office workers, public school teachers, the military, and paramilitary services such as the police or prison guards. In the context of schools there have been relatively few cases that have reached the Circuit Courts or Supreme Court, as the law in this area appears relatively settled by several cases emerged in the 1980s and 1990s. The question of teachers wearing religious adornment inhabits the middle ground between the requirements of the Free Exercise Clause and the Establishment Clause. Teachers retain their constitutional rights including the right to free exercise even in the classroom,[323] but it is also clear that teachers in public schools are agents of the state and as such must not be seen to advocating a religious belief or affiliation. Thus the situation of ostentatious religious expression or exercise involving clothing or other visible symbols puts the two concerns of the Religious Clauses at odds with one another. The balance that has been struck in US courts is that schools may forbid teachers from wearing overtly visible or provocative items endorsing a religion or expressing religious affiliation, but such prohibitions cannot extend to small expressions of religious affiliation or belief such as a small cross or Star of David. The cases that have more or less defined the

[323] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969) ("It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.").

boundaries of religious adornment by teachers arose mostly in the three states – Nebraska, Oregon and Pennsylvania – which have "religious garb statutes" that expressly forbid teachers to wear religious dress or plainly visible religious symbols in the classroom. The leading case frequently cited in this context was *United States v. Board of Education for the School District of Philadelphia*, [324] which involved a Muslim teacher who wanted accommodation from the "garb statute" in order to wear a hijab. The Third Circuit held for the school district and affirmed that the concern over religious neutrality in schools qualified as a compelling state interest and thus survived both the *Sherbert* test and by extension the undue hardship test under Title VII. The Court in this case and other courts who have dealt with similar situations have framed this interest both in terms of the need for neutrality under the Establishment Clause as well as the public interest concern that children are particularly vulnerable to being influenced by teachers. Other cases have mostly been resolved in state and federal district courts and have refined some of the contours of just how far a school district can go in banning religious adornment. Wearing a small cross, for example, does not violate the Establishment Clause and cannot be forbidden in the absence of evidence that it proves disruptive in the classroom.[325] Wearing a T-shirt with JESUS 2000-J2K on the front, on the other hand, was seen as potentially raising Establishment Clause issues and it was deemed to fall within the discretion of the school district to restrict the teacher's free exercise and religious expression rights.[326] In these cases there is no empirical evidence offered for the claim that religious expression would give the impression that the state endorsed a particular religion or religion in general; reasoning is deemed sufficient to conclude that a cross on a necklace would not undermine religious neutrality but that a T-shirt might.

Religious adornment cases in the context of the police have also introduced Establishment Clause concerns as well as free speech issues, and police departments have largely been granted deference in deciding what is appropriate in that highly specialized context. In *Daniels v. City of Arlington*, a case from the Fifth Circuit, a police officer who wanted to wear a cross pin on his uniform was denied an exemption from the uniform policy.

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[324] United States v. Bd. of Educ. for Sch. Dist. of Phila., 911 F.2d 882 (3d Cir. 1990).
[325] Nichol v. Arin Intermediate Unit 28, 268 F. Supp. 2d 536 (W.D. Pa. 2003).
[326] Downing v. West Haven Bd. of Educ., 162 F. Supp. 2d 19 (D. Conn. 2001). Part of the district court's reasoning in this case was that the wearing of a T-shirt was not seen as central to the exercise of the plaintiff's religious religion.

The Court cited, *inter alia*, *Goldman v. Weinberger* to uphold the idea that police and military should be held to a different standard. Without demanding any specific evidence of hardship, the Court noted somewhat bluntly that "[a] police department cannot be forced to let individual officers add religious symbols to their official uniforms."[327] Thus the Court found a rational relationship between the no-pins rule and the state aim of the police department to convey an image of discipline and neutrality.

While such cases hold military and police departments to a different standard, they do not extend as far as permitting application of rules in such a way that they treat religious reasons for exemptions as being less valid than other reasons such as medical concerns. This is the case even under the less protective standard applicable under *Employment Division v. Smith*. In *Fraternal Order of Police v. Newark*, a leading case from the Third Circuit, the Court ruled for the employee, a police officer who was denied an exemption from a no-beards policy in the Newark Police Department.[328] Notably, the police department specifically raised the "public image" argument, contending that it wanted "to convey the image of a 'monolithic, highly disciplined force' and that '[u]niformity [of appearance] not only benefits the men and women that risk their lives on a daily basis, but offers the public a sense of security in having readily identifiable and trusted public servants.'"[329] The Court, however, declined to accept this contention, in spite of many precedents that were more deferential to police uniform policies, because the Department had already granted exemptions to the beard policy for medical reasons. These exemptions, the Court reason, undermined the Department's claim that permitting a religious exemption would erode public confidence in the police. In other words, the Court considered the empirical evidence of other officers wearing beards without any disruptive influence and concluded that a beard worn for religious reasons would therefore also not undermine public confidence in the police. Moreover, the Court concluded that the policy was applied in a discriminatory way in the sense that it did not treat religious concerns as being at least on an equal footing with secular concerns. As discussed in Chapter 1, the *Smith* decision clarified that a system of individualized exemptions that accommodates secular needs but does not accord the same

[327] Daniels v. City of Arlington, 246 F.3d 500 (5th Cir. 2001).
[328] Fraternal Ord. of Police Newark Lodge No. 12 v. City of Newark, 170 F.3d 359 (3d Cir. 1999).
[329] Fraternal Ord. of Police, 170 F.3d at 366.

deference to the exigencies of religious free exercise is a violation of the Free Exercise Clause. The opinion in *Fraternal Order of Police* uses the logic of *Smith* to set a clear boundary on the limits of judicial deference in the context of police and military employment – if exemptions are granted, religion must be treated at least as well as other concerns.

In the European context, image-related religious adornment cases that have reached the ECtHR have mostly involved the wearing of the hijab in the context of workplaces that stress the importance of secular neutrality. Not surprisingly, several of these cases arose in France and Turkey, two ECHR signatory states with highly robust traditions of secularism. But religious symbol cases related to public image have also arisen in Switzerland, a secular state without a comparable national-level doctrine of strict separation, and the UK, which endorses an official state religion. As in the US context, the distinction between public and private employer has proven to be of great importance, and due to the need for neutrality in the public sphere, public employer cases have dominated the caseload that has reached the ECtHR. While the US cases have tended to involve the police and military, in Europe, where there is greater state involvement in public services, cases have concentrated mostly in the education and health sector. In the private sector most disputes have been settled at the national level, but two instances of private employers were included in the landmark consolidated case of *Eweida et. al. v. United Kingdom*.

The earliest of the religious adornment cases in the workplace arose in the context of the public school system in Switzerland. In *Dahlab v. Switzerland*,[330] the Court had to consider whether to entertain a request for religious accommodation from a teacher in a Swiss primary school who wished to wear a hijab while teaching. In its decision on the admissibility of the case, the Court declined to consider a generalized right to accommodation, focusing primarily on two lines of argumentation and hinting at a third. The first basis for the decision was the argument that in a secular state where the Constitution guarantees nondenominational public education, the preservation of religious neutrality is a legitimate aim required in order to protect the rights of others.[331] Secondly the Court emphasized the specific context of the case, noting in particular that Ms. Dahlab taught very young children, and that it is "very difficult

[330] Dahlab v. Switzerland (dec.), no. 42393/98, ECHR 2001-V.
[331] Dahlab, p. 462.

to assess the impact that a powerful external symbol such as the wearing of a headscarf may have on the freedom of conscience and religion of very young children." It therefore concluded that under such circumstance, "it [could not] be denied outright that the wearing of a headscarf might have some kind of proselytizing effect" upon on the students.[332] Thus it considered the rational evidence for the likelihood of the hijab undermining state neutrality in schools, but chose to defer to the state's judgment of that evidence. Finally, the Court suggests that in addition to the mere fact of a proselytizing effect, the content of the alleged proselytizing was deemed to endanger the values underpinning democratic societies. The decision notes that since the hijab "appears to be imposed on women by a precept which is laid down in the Koran," that the practice of wearing it is "hard to square with the principle of gender equality."[333] Thus the Court found it "difficult to reconcile the wearing of an Islamic headscarf with the message of tolerance, respect for others and, above all, equality and non-discrimination that all teachers in a democratic society must convey to their pupils."[334] Interestingly, only two paragraphs earlier the Court asserts that the school's decision was clearly based on its concern for denominational neutrality and "not on any objections to the applicant's religious beliefs." As many commentators have observed, the casual foray into theology by the Court does much to undermine its claim to be defending a principle of neutrality.[335] However, it should be noted that the Court has backpedaled from this view, asserting in a later case that "a State Party cannot invoke gender equality in order to ban a practice that is defended by women – such as the applicant – in the context of the exercise of the rights enshrined in those provisions, unless it were to be understood that individuals could be protected on that basis from the exercise of their own fundamental rights and freedoms.[336]

In *Kurtulmuş v. Turkey* the situation was somewhat different, as the employee wanting to wear the hijab was a university professor rather than a primary school teacher. The Court acknowledge this difference, explicitly contrasting the case with that of *Dahlab*, but nevertheless reached a similar conclusion that the prohibition of the hijab fell within Turkey's

[332] Dahlab, p. 463.
[333] Dahlab, p. 463.
[334] Dahlab, p. 463.
[335] For example, see Carolyn Evans, "The 'Islamic Scarf' in the European Court of Human Rights," *Melbourne Journal of International Law* 7, no.1 (2006): 52-73.
[336] S.A.S. v. France *[GC]*, no. 43835/11, § 119, ECHR 2014 (extracts).

margin of appreciation. They noted in particular that whereas in *Dahlab* the young age of the students made them vulnerable, the prohibition in *Kurtulmuş* was "justified by imperatives pertaining to the principle of neutrality in the public service and, in particular in the State education system, and to the principle of secularism."[337] As in *Dahlab*, there was some evidence of the rules being at times ignored without consequences. In this case, the complainant pointed out that in the context of her university the Rules on Dress also regulated the length of skirts and forbid the wearing of sandals, but those dress concerns were not enforced as was the wearing of the hijab. As in *Dahlab*, the Court did not accept this as evidence that would undermine the application of the prohibition on hijabs. In fact, the Court undertakes only a cursory proportionality analysis, considering the necessity of the prohibition only in terms of the overall legitimacy of the principle being upheld rather than acknowledging any possible option of accommodation.

The more recent cases of *Eweida et al. v. United Kingdom* (2013) and *Ebrahimian v. France* (2015) suggest that the treatment of religious adornment cases involving concerns over image or neutrality is evolving, but that the magnitude of this shift should not be exaggerated at this stage. *Eweida et al.* was a consolidation of four cases from the UK involving different aspects of religious freedom in the workplace. The eponymous case of *Eweida v. UK*, the only one of the four cases to be decided in favor of the claimant, involved a British Airways flight attendant who wanted to wear a visible cross while on duty. The decision was immediately celebrated for, *inter alia*, the Court's reversal of its previous "freedom to resign" approach. The opinion asserts that "rather than holding that the possibility of changing jobs would negate any interference with the right, the better approach would be to weigh that possibility in the overall balance when considering whether or not the restriction was proportionate."[338] Moreover, the Court abandoned its previous position that only "core beliefs" are relevant in determining whether there has been an interference with the right to manifest one's religious beliefs.

The claimed burden for the employer in *Eweida* was that allowing the claimant to wear a cross visibly would undermine BA's ability to "communicate a certain image of the company and to promote recognition of its brand and staff," and the Court readily

[337] Kurtulmuş v. Turkey (dec.), no. 65500/01, ECHR 2006-II, p. 307.
[338] Eweida and Others v. the United Kingdom, nos. 48420/10 and 3 others, § 83, ECHR 2013 (extracts).

acknowledged the validity of that aim.[339] However, unlike in *Dahlab* or *Kurtulmuş* , the Court in *Eweida* carefully considered and took seriously evidence regarding the lack of harm done to the image that the employer wished to project. Specifically, the Court noted that:

> There was no evidence that the wearing of other, previously authorized, items of religious clothing, such as turbans and hijabs, by other employees, had any negative impact on British Airways' brand or image. Moreover, the fact that the company was able to amend the uniform code to allow for the visible wearing of religious symbolic jewelry demonstrates that the earlier prohibition was not of crucial importance.[340]

By placing such an emphasis on the company's other accommodations as evidence for what would or would not compromise company image, the Court seems to have shifted to a position more similar to that taken by US courts in more assertively evaluating the empirical evidence of past practice or accommodation in analogous situations. Interestingly, the judgment also mentions empirical evidence suggesting that the uniform rules may not have seriously infringed upon the claimant's religious beliefs, noting that she had worn the cross for years under her uniform but had expressed no need to wear it visibly before the uniform became a V-neck top that no longer concealed it from view. However, the Court accorded that evidence very little weight, and instead focused on the fact that BA's policy had been applied unevenly and, even more importantly, had demonstrated that the rule was unnecessary when they voluntarily modified it in response to criticism.

The Court also considered the size and relatively unobtrusive nature of the cross in deciding that the national courts had accorded it too much weight in their approach. In doing so the Court was willing to replace BA's judgment of its corporate image with the Court's own unsubstantiated assertion that "Ms. Eweida's cross was discreet and cannot have detracted from her professional appearance."[341] This evaluation also seems to echo the position taken in the US district court decisions in the school context mentioned above. Finally, it is significant that the Court ruled for the claimant even though she was offered and

[339] Eweida and Others, § 93.
[340] Eweida and Others, § 94.
[341] Eweida and Others, § 94.

refused the accommodation of working in a back-room position where she would not have contact with customers. This brings ECtHR jurisprudence more in line with US thinking on accommodation, where under Title VII cases it is well established that segregating employees who wear visibly religious symbols is not a permitted accommodation.

While *Eweida* appears to mark a shift in the Court's thinking towards a more protective stance regarding religious symbols in the workplace, the judgment in the 2016 case of *Ebrahimian v. France* demonstrated some of the limits of that shift. This case involved a public servant, specifically a social worker in the psychiatric unit of a public hospital, who challenged the hospital's application of a uniform policy forbidding, *inter alia*, the wearing of the hijab in accordance with French law governing the rights and duties of civil servants.[342] The Court's judgment in this case upheld the right to impose a ban on religious adornment including headscarves across the entire public sector. The particular focus of this case, as with other public sector employer cases, was on what the Court refers to as the "imperatives pertaining to the principle of neutrality in the public service."[343] While much of the judgment focusses on the Court's continued support for the idea that neutrality is a legitimate aim that can justify refusal to permit religious adornment in public services, there is little discussion of the specific contextual issues that must be taken into account when considering whether or not the refusal of accommodation would be proportionate. Context, the Court asserts, is more relevant when evaluating the proportionality of the sanction imposed on the employer, rather than in determining the appropriateness of any kind of special accommodation. The Court observes with approval that the severity of the sanction was assessed by national courts "with due regard to the nature and degree of ostentatiousness of the sign in question, and of the other circumstances."[344] But ultimately the case reflects the Court's unwillingness to require accommodation in the context of states such as France whose tradition places great emphasis on the appearance of strict secular neutrality in its public services. This rejection of an individualized consideration of the precise circumstances is quite explicit. The Court notes that "the applicant has not been accused of acts of pressure, provocation or proselytism toward hospital patients or colleagues. The fact of wearing her veil was perceived as an

[342] Law no. 83-634 of 13 July 1983,cited in *Ebrahimian v France*, no. 64846/11, § 25, ECHR 2015.
[343] Ebrahimian, § 57.
[344] Ebrahimian, § 69 (quoting Conseil d'Etat Opinion no. 217017 (Ms Marteaux)).

ostentatious manifestation of her religion, incompatible in this case with the neutral environment required in a public service."[345]

Moreover, the ECtHR's stance on the obtrusiveness of religious adornment in *Ebrahimian* seems to contradict its prior approach in *Lautsi v. Italy* and to complicate the Court's treatment of the cross in *Eweida*. In *Lautsi* the Grand Chamber held that a crucifix in a classroom was to be considered a "passive symbol" so long as the content of the coursework did not actively promote Christianity.[346] It is unclear how a hijab without proselytism is a more "active" symbol than a crucifix without religious instruction. It appears from the language used in the two cases that the distinction lies in how others perceive the symbol, whereas in *Eweida* the Court merely observed that the cross in that case was small and therefore not obtrusive. In *Lautsi*, the Court considered that a crucifix in a classroom (in every classroom, in fact, hence neither small nor inobtrusive) is a passive symbol even though it "confer[s] on the country's majority religion preponderant visibility in the school environment" because it is so omnipresent and linked to the country's history that it could be seen as carrying a secular meaning as well as a religious one.[347] It is so obtrusive, in fact, that it has become inobtrusive. The Court also found it relevant that the crucifix was "not associated with compulsory teaching about Christianity."[348] In the case of *Ebrahimian* (or *Dahlab*, for that matter), the hijab reflects a minority religious practice; it is difficult to escape the conclusion that it is this fact that makes the hijab "*perceived* as an ostentatious manifestation of … religion."[349] If that is the case, it is not so much whether the symbol is large or small, obtrusive or inobtrusive, but rather what emotional response it triggers in the majority of users of the public service in question. Perception – i.e. a majority's discomfort with a minority faith – seems to be what drives the distinction between the crucifix as a "passive symbol" and the hijab as an "ostentatious" and "powerful" symbol.

In light of the above it is difficult to come to any clear conclusions regarding the direction of the ECtHR's approach to adornment in the workplace. *Eweida* has been rightly hailed as an important shift in the Court's thinking, but much of its application appears to be limited

[345] Ebrahimian, § 62.
[346] Lautsi and Others v. Itlay [GC], no. 30814/06, § 72, ECHR 2011 (extracts).
[347] Lautsi, § 71.
[348] Lautsi, § 74.
[349] Ebrahimian, § 62.

to the private sector. What is vital about the case is its rejection of the centrality requirement and the "right to resign" doctrine, which seems to bring the ECtHR approach more in line with US practice. However, the various inconsistencies in approach noted above make it premature to declare any clear convergence in practice. Moreover, the US adornment cases do not offer and clean or simple comparison with those of the ECtHR. This is in part because so much of the US caseload is governed by antidiscrimination law under Title VII, and in part because of the multiple levels of scrutiny in the limited number of US federal appeals cases. What can be said is that this area of law appears to be heavily context-driven in both courts. Both courts have expressed concern for the possible proselytizing effects of religious adornment in schools or in the public workplace. Both courts have taken into consideration the nature of the symbol, but the ECtHR has gone deeper in terms of thinking of how symbols function. In contrast, the US courts have tended to shift the focus more towards discrimination and equal treatment. This is most striking when considering the ECtHR's treatment of the hijab, where the Court seems willing to defer to biased public perceptions of Islam. US Courts, in contrast, have repeatedly held that an employer may not use a fear of customer bias to justify limiting the fundamental rights of employees.[350] Finally, the ECtHR appears to be less interested than US courts in verifying the evidentiary basis underpinning the state's claims that a limitation is necessary to protect the rights of others. US courts have required evidence in particular where accommodation of rules forbidding symbols or dress has been granted for secular reasons but not religious ones. The ECtHR, on the other hand, has been largely deferential to government claims of necessity even when based on suppositions rather than actual evidence. But as will be seen below, this difference is not unique to cases involving symbols, and has more to do with the Court's margin of appreciation and willingness to allow states to police neutrality in the public sector than with any specific doctrine about religious manifestation.

[350] See EEOC v. R.G. &. G.R. Harris Funeral Homes Inc., 884 F.3d 560, 586 (6th Cir. 2018). However, it should be noted that the Court's implicit position in *Ebrahimian* conflicts with its own assertion in another case that "it would be incompatible with the underlying values of the Convention if the exercise of Convention rights by a minority group were made conditional on its being accepted by the majority." See *Bayev and Others v. Russia,* nos. 67667/09 and 2 others, § 70, 20 June 2017, http://hudoc.echr.coe.int/eng?i=001-174422.

B. The fact-sensitive approach to health and safety issues

A relatively small subcategory of religious symbol cases have involved concerns over health and safety issues rather than concern over corporate image or perceptions of state neutrality. In these cases it would not be surprising to find courts viewing the balance between religious adornment and safety somewhat differently from that between religion and mere image issues. In fact relatively few of such cases have been brought before the US federal courts or the ECtHR, in part because there are relatively few religious practices that might be carried out in the workplace that would likely create any kind of danger. Moreover, most such cases are resolvable by the EEOC or at the district court level, since safety concerns would easily pass the rational basis test under *Smith* or even the compelling government interest test under RFRA, and requiring an employer to ignore safety clearly falls within the concept of "undue hardship" under Title VII. When such cases have arisen, it is usually attributable to the contextual specificities of the job description in question. In both the US and ECtHR, courts have been quick to acknowledge this fact, and have been willing to acknowledge that health and safety concerns are in principle a legitimate aim that might entail a restriction of religious manifestation rights in the workplace. In the US, cases rising to the Circuit Court level have involved prison guards and a federal worker for the IRS, while the relevant case to arise in the ECtHR involved a nurse in a hospital. As can be seen from a closer examination of those cases, safety often hinges on very context-specific issues, and such specific considerations seem to weigh heavily in both court systems' evaluations of the burden of accommodation. In these cases, however, the courts have not simply deferred to the specialist knowledge of the particular service as US courts did in military/police cases, but rather have demonstrated a willingness where necessary to impose their own evaluation of the validity of the health and safety concerns at issue.

Tagore vs. United States involved the wearing of a kirpan, the ceremonial dagger that Sikhs are required to wear throughout the day.[351] US courts have faced a number of kirpan-related cases, but usually the issue arises in the context of students wishing to wear the kirpan at school. In *Tagore*, however, the plaintiff was a government worker who was forbidden to bring the dagger because it violated security guidelines for federal buildings, specifically 18

[351] Tagore v. United States, 735 F.3d 324 (5th Cir. 2013).

U.S.C. § 930 which prohibits, *inter alia*, knives with blades 2.5 inches or longer. The plaintiff sued under both Title VII and RFRA. The Court held that the refusal to accommodate *Tagore* was not a violation of Title VII since all the proposed accommodations constituted an undue burden on the employer. RFRA's strict scrutiny standard, however, requires much more of the government in order to permit a refusal to accommodate religious practice. The district court had found that the government had met its burden under strict scrutiny to show that it pursued a compelling government interest using the least restrictive means possible. The Circuit Court, however, noted that the policy had since been changed to permit individualized exemptions in the case of kirpans over 2.5 inches long. This, the Court noted, seemed to undermine the government's claim that a blanket ban was truly the least restrictive means to ensure safety in federal buildings, since the government's claim had rested in part on the supposedly impractical nature of case-by-case determinations. The Court made a point of underscoring the "fact intensive nature of the RFRA strict scrutiny as well as "the importance of deferring to officials charged with maintaining domestic security," but concluded balancing this deference with the requirements of RFRA necessitated further analysis by the lower court.[352] Thus, as in the image-based adornment cases, the Court's deferential approach to government decision-making in sensitive contexts was forced to give way in the presence of empirical evidence undermining the government's claim. Religious freedom won out over the imperatives of government policy, but only because the government had undermined its own claim.

In another safety-related case, the Fourth Circuit addressed a question involving a Rastafarian prison guard who was disciplined for wearing dreadlocks in violation of a grooming policy that forbade beards and long hair.[353] The reasoning behind the policy was deemed by the court to include, *inter alia*, the concern that long hair constituted a safety hazard for correctional officers working in close quarters with potentially violent prisoners. Because of the choice of pleadings in this particular case the court addressed the issue under equal protection grounds rather than under the First Amendment, but the court's reasoning clarifies its position somewhat with regard to the considerations involved in balancing religious adornment and safety concerns in the workplace. Reciting the language of *Smith*,

[352] Tagore, 735 F.3d at 331-332.
[353] Booth v. Maryland, 327 F.3d 377 (4th Cir. 2003).

the court noted that the prison was perfectly within its rights to enforce the grooming policy so long as that policy was facially neutral with regard to religion and was a rule of general applicability. The case was decided in favor of the plaintiff on the grounds that there was evidence that the policy was applied unevenly "in a manner that favors other religions over [the plaintiff's] religion."[354] There seemed to be no additional consideration given to the nature of the government interest or the work context other than that the government's presumed aim was legitimate. All that mattered, under the *Smith* standard, was that the rule was applied unevenly.

In the consolidated case of *Eweida et al. v. UK* the second applicant, Ms. Chaplin, was a geriatric nurse who felt religiously obligated to wear a cross visibly while on duty. This was in violation of hospital policy that set out detailed requirements for what kinds of jewelry or clothing accessories could be worn while on duty and which stipulated that "[no] necklaces will be worn to reduce the risk of injury when handling patients."[355] The hospital offered a variety of accommodations that took into account the risk of patients grabbing the necklace as well as the risk of infection presented by a cross dangling on a chain. However, Chaplin rejected them all. The ECtHR upheld the national court ruling in favor of the hospital on both Article 9 and Article 14 claims. In a moment of particular relevance to understanding the court's position on religious adornment, the decision distinguished the case from *Eweida v. UK* by asserting that "the reason for asking her to remove the cross, namely the protection of health and safety on a hospital ward, was inherently of a greater magnitude than that which applied in respect of Ms. Eweida" (namely British Airways' concerns over corporate image).[356] In addition, the Court highlighted the special context of this particular workplace and the fact-sensitive nature of the case, noting that "hospital managers were better placed to make decisions about clinical safety than a court."[357] As has been seen in other adornment cases, in assessing the discrimination claim the Court examined accommodations made for other nurses and concluded that there was no evidence that Chaplin had been treated unfavorably compared with employees of other religions. Requests to wear hijabs, Sikh bangles or kirpans had been rejected, and the only similar accommodation that had been

[354] Booth, 327 F.3d at 382.
[355] Eweida and Others v. the United Kingdom, nos. 48420/10 and 3 others, § 19, ECHR 2013 (extracts).
[356] Eweida and Others, § 99.
[357] Eweida and Others, § 99.

granted was a "sports hijab" that clung tightly to the head and thus did not pose safety or hygiene concerns.

C. A trend towards convergence in religious adornment cases?

With regard to the comparable US cases, it can be seen that the US courts remain more open to the idea of accommodation, even in the context of asserting the religious neutrality of agents of the state. Their response to symbols and their effect on image or neutrality is not only more favorable to religious freedom in general but is also more insistent on the precise set of circumstances of the individual case, with the notable exception of the categorical deference shown in the context of the military as an employer. The ECtHR, in line with the varied practices in state parties to the convention, remains open to general prohibitions on religious adornment in workplaces, both public and private, but can be seen to be inching towards a conception of reasonable accommodation. It has begun increasingly to address concerns over weighing the obtrusiveness of the symbol and the legitimacy of the aim, as well as engaging in a context specific discussion of workplace specificities, including empirical evidence that may support or undermine the employer's claims about the necessity of the rules in question. Nevertheless, the Court remains hesitant to question too closely defenses based on state neutrality, as neutrality affects the rights of others and may implicate national traditions. The ECtHR also has treated health and safety as a valid rationale for employers to limit the rights of employees, but the Court has shown some expectation that there be at least rational evidence of the alleged danger. The Court has also indicated the relevance of discrimination in this area; however, it has continued by and large to avoid explicitly addressing inequality issues in the workplace.[358] And in *Eweida v. UK*, it is important to note that she won her case even in the absence of a claim of unequal treatment. It is not unreasonable to expect a continued shift in ECtHR thinking towards a more generalized expectation of reasonable accommodation, although an ECHR level accommodation requirement is not likely to be as robust as in the US due to the diversity of national traditions of state parties to the Convention.

[358] It should be noted that the locus of those debates has shifted to the European Court of Justice for those ECHR signatories who are also EU members, although by and large without success. For example, see, Judgment of 14 March 2017, *Achbita v G4S Secure Solutions NV*, Case C-157/15, EU:C:2017:203.

3. Proselytism and religious opinions at work

As we have seen in the religious symbol cases discussed above, religious freedom often involves an expressive component. At times, that component is central to religious observance; for example, cases that involve a perceived religious duty to visibly express one's adherence to a particular faith through the wearing of a religious symbol (as in *Eweida*). Expression, however, extends beyond symbols. A variety of religious traditions carry with them obligations for adherents to proselytize their faith, and some people interpret this obligation to extend to every aspect of their lives, including the workplace. In the context of religious employers – specifically religious organizations whose purpose is to propagate a specific set of religious beliefs – the religious expression of employees can be of particular relevance to the organization's ability to carry out its mission. In most circumstances in the private sector, the right of an employee to religious expression is governed by her contractual relations with her employer and by statue. There is no Constitutional or Convention-based right to free expression in the private workplace and the accommodation of religious convictions in the workplace is governed – to the extent that it is governed at all – by anti-discrimination law rather than by the generalized right to freedom of religion. As discussed above, duties of accommodation by employers are more robust in the US than in Europe, and those duties can extend to the private workplace. Religious speech can nevertheless encounter significant limitations in the private workplace on both sides of the Atlantic without the need for much involvement by the courts. Had Mrs. Eweida insisted that she be allowed to preach to BA passengers in-flight, her case would never have gotten off the ground.

Such limitations become more complex, however, in the context of the public sector and in cases involving religious employers. This section will focus on how courts have approached religious expression in the workplace generally, while Section II will explore the significance of the type of employer for how courts treat religious freedom.

US Constitutional litigation has generated a rich body of jurisprudence related to free speech in general. The specific situation of free speech in the government workplace is covered by what has become known as the *Pickering* test. The test arises from *Pickering v. Board of Education*, in which a teacher was fired for writing a letter critical of the Illinois

Board of Education which was published in a local newspaper.[359] The Supreme Court enunciated a balancing test in which it weighed the government employer's need to function efficiently against the employee's right as a citizen to speak out on issues of "public concern."[360] The concept of a "public concern" has been elaborated in subsequent Supreme Court cases, in particular *Connick v. Meyers*[361] and *Garcetti v. Ceballos*[362], which most notably distinguished public concerns from speech made in connection to the employee's official duties. The principal issue that has arisen with regard to the "efficient" function of a public service is the conflict between free speech and free exercise with the first component of the First Amendment – the Establishment Clause. The fundamental test regarding the Establishment Clause is the Lemon Test, enunciated by the Supreme Court in *Lemon v. Kurtzman*.[363] The classic formulation of this test is that any state action must have a secular purpose, not have as a primary effect to advance or inhibit religion, and not encourage "excessive government entanglement with religion."[364] The vexing question in the context of the government workplace is how to balance the employee's right to comment on issues of public concern with the imperatives of not having government officials advocating or otherwise pronouncing upon religious matters in their role as an agent of the state.

In *Brown v. Polk County*[365] and *Berry v. Department of Social Services*,[366] courts made use of the *Pickering* test on speech by government employees as an analytical tool to balance the employees' free exercise needs and the state's interest in functioning efficiently. In *Brown* the court held for the employee, arguing that the defendant had not carried its burden under the *Pickering* test (or under Title VII's undue hardship standard) to show that Brown's religious activities posed an actual problem; specifically, the Court pointed to the fact that there was no evidence of actual harm, and that the defense's arguments were too hypothetical in nature.[367] The activities that were prohibited –isolated instances of spontaneous prayer in meetings and religious materials displayed in the employee's office, *inter alia* – did not, in

[359] Pickering v. Bd. of Educ., 391 U.S. 563, 564 (1968).
[360] Pickering, 391 U.S. at 568.
[361] Connick v. Meyers, 461 U.S. 138 (1983).
[362] Garcetti v. Ceballos, 126 S. Ct. 1951 (2006).
[363] Lemon v. Kurtzman, 403 U.S. 602 (1971).
[364] Lemon, 403 U.S. at 612.
[365] Brown v. Polk Cnty., 61 F.3d 650 (8th Cir. 1995).
[366] Berry v. Dep't of Soc. Servs., 447 F.3d 642, 646 (9th Cir. 2006).
[367] Brown, 61 F.3d at 657.

the Court's view, pose an Establishment Clause issue and, when put in the balance with the employee's free exercise concerns, did not justify disciplinary measures. The court in *Berry v. Dept. of Social Services* addressed the case of a social worker who persisted in discussing religion with clients and colleagues at work and in decorating his office cubicle with religious messages. In its decision for the employer, the Ninth Circuit affirmed the appropriateness of the *Pickering* test to cases of religious expression in the government workplace. In applying this test (to be explored in more detail in Part 2), the Court considered that discussing religion with clients and putting religious messages in his cubicle where he received members of the public could reasonably be deemed to create an Establishment Clause concern. Citing earlier cases involving a public school teacher and a computer analyst for the Department of Education, the Court emphasized that what was pivotal in balancing the state's needs versus individual free speech was the state's interest in avoiding one of its agents proselytizing *to the public*, which it deemed ran the risk of appearing to be the government's endorsement of religion.[368] In the situation of a teacher speaking to students, there was a real risk of the religious content appearing to be endorsed by an agent of the state. In contrast, the expression of religious convictions by a software developer to his colleagues "could in no way cause anyone to believe that the government endorsed it."[369]

What these cases demonstrate in the US courts treatment of religious expression in the public workplace is that the interference with government interests needs to be demonstrable rather than hypothetical unless it implicates clear Establishment Clause concerns. However, this is a relatively underdeveloped area of law. Courts borrow from free expression jurisprudence and adapt the *Pickering* test to situations involving religious speech, but to do so is arguably to ignore the religious dimension entirely. It should be noted, however, that the Supreme Court has yet to hear a case in which the *Pickering* test might be applied to religious expression in the government workplace, and whether the Court would choose to simply apply the test or to craft a new one remains unclear.[370]

[368] Peloza v. Capistrano Unified Sch. Dist., 37 F.3d 517, 522 (9th Cir.1994).
[369] Tucker v. Cal. Dep't of Educ., 97 F.3d 1204, 1214 (9th Cir. 1996).
[370] Scott R. Bauries, "The Logic of Speech and Religion Rights in the Public Workplace," *Marquette Benefits & Social Welfare Law Review* 19, no. 2 (Spring 2018): 152.

In the ECtHR, religious expression cases have appeared in the context of judges, the military, healthcare and religious education. In *Pitkevich v. Russia*,[371] the Court found no violation of Article 9 for the applicant's dismissal as a judge for praying during hearings and improperly promising better treatment to litigants who joined her church. Such behavior, the Court noted, was reasonably deemed to be incompatible with the specific job requirements of a judge and the need to maintain an impartial and authoritative judiciary. The military, like the judiciary, was deemed by the Court to merit special consideration as a context with unique needs that would justify restrictions on the right to religious manifestation that might not be justifiable in other situations. In *Larissis and Others v. Greece*,[372] the applicants were officers in the Greek military and had been disciplined for repeatedly discussing their Pentecostal religious beliefs and encouraging men under their command to visit their church in violation of Greek law against proselytism.[373] The Court found no violation of Article 9, basing its reasoning in large part on the nature of military service and in particular the potential abuse of position by a superior officer. Referring to the hierarchical nature of the military, the Court noted that what might be a simple expression of ideas in civilian life could amount to "harassment or the application of undue pressure in abuse of power" when undertaken by someone of superior rank in a military setting.[374] Thus the reasoning of the Court differs from that in the religious symbols cases in the sense that it relies not on the need for neutrality in a secular state, but rather on the specific power structures inherent to military employment. Similarly in *Kalaç v. Turkey*,[375] a military judge advocate was forced into early retirement because he had joined a prohibited religious group suspected of promoting a fundamentalist ideology and, in particular, had allegedly "given it legal assistance, had taken part in training sessions and had intervened on a number of occasions in the appointment of servicemen who were members of the sect."[376] The Court found no violation of Article 9, underscoring (as in *Larissis*) the special nature of military service and the understanding of all who join that they are accepting constraints on some freedoms that are taken for granted in civilian life.

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[371] Pitkevich v. Russia, no. 47936/99, 8 February 2001, http://hudoc.echr.coe.int/eng?i=001-5726.
[372] Larissis and Others v. Greece, 24 February 1998, *Reports of Judgments and Decisions* 1998-I.
[373] Law no. 1363/1938, as amended by Law no. 1672/1939.
[374] Larissis, § 51. This concern was particularly relevant since Greek law defining the crime of proselytism refers specifically to taking advantage of another person's inexperience, trust or need (Section 4).
[375] Kalaç v. Turkey, 1 July 1997, *Reports of Judgments and Decisions* 1997-IV.
[376] Kalaç, § 25.

Decisions involving expression by employees of religious institutions likewise have taken note not so much of the nature of religious employment, but rather of the special mission of religious institutions and the particular need for employee loyalty to the church's message. In *Lombardi Vallauri v. Italy*,[377] a Catholic university declined to renew the contract of a professor of philosophy of law because he had allegedly expressed views during class that were contrary to Catholic doctrine. This case is something of an outlier in the range of cases dealing with church autonomy (to be discussed in more detail in Section II below) in that the Court sided with the claimant rather than upholding the autonomy of the religious institution. It is important to note, however that the reasoning acknowledges repeatedly the weight of the university's position with regard to religious autonomy (for example, in paragraph 44 where the Court notes "l'intérêt qu'a l'Université à dispenser un enseignement suivant des convictions religieuses qui lui sont propres")[378]. However, unlike in similar US cases discussed below, the Court engaged in a balancing exercise in which the lack of transparency of the proceedings that denied him employment outweighed the university's right to autonomy.

In *Fernandez Martinez v. Spain*,[379] a Catholic priest was barred from teaching religion at Catholic schools because of his activism in favor of abolishing mandatory celibacy for priests. This placed the claimant's right to private life under Article 8 and right of expression under Article 10 in conflict with the church's Article 9 rights to freedom of religion in its collective dimension. This case rested heavily on the Court's proportionality analysis, to be discussed below in Part 2 Section II. The Court considered that the Church's right to autonomy outweighed the claimant's rights. Beyond exploring the importance of church autonomy, the Court found it significant that the claimant, in exercising his right to free expression, had nonetheless violated a duty of loyalty to the church. In the court's words, he was "voluntarily part of the circle of individuals who were bound, for reasons of credibility, by a duty of loyalty towards the Catholic Church" and "the fact of being seen as campaigning publicly in movements opposed to Catholic doctrine clearly runs counter to that duty."[380]

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[377] Lombardi Vallauri v. Italy, no. 39128/05, 20 October 2009, http://hudoc.echr.coe.int/eng?i=001-95150.
[378] Lombardi Vallauri, § 44 ("the interest of the University in providing education according to its own religious convictions").
[379] Fernandez-Martinez v. Spain [GC], no. 56030/07, ECHR 2014 (extracts).
[380] Fernandez-Martinez, § 141.

This, in the Court's view, outweighed the claimant's various rights under the Convention. This focus on the importance of loyalty in order to maintain the credibility of religious institutions has been highlighted in a variety of other cases as well and remains a vital consideration in balancing the religious institution's Article 9 rights and the rights of its employees.[381]

Finally, the ECtHR recently dealt with two expression-based claims touching upon religious freedom in the context of health care, both involving nurses who objected to performing abortions. In *Grimmark v. Sweden*,[382] the claimant was dismissed from one job and was not hired in another due to her refusal to perform abortions. In addition to her Article 9 claim that she should be granted accommodation because her refusal was motivated by her religious convictions (to be examined further below), Ms. Grimmark argued that she was denied employment in a new post because she had expressed her religious belief publicly in a newspaper article. In *Steen v. Sweden*,[383] the claimant similarly lost her position and argued that her firing was due in part to her having expressed her religious opinion. In both cases, the Court dismissed the expression arguments, noting that the termination and refusal to hire were not, as a question of fact, based on the expression of an opinion but purely on the claimants' "refusal to perform all duties inherent to the vacant posts, including abortions."[384]

4. Compelled expression and complicity claims

This section addresses several different kinds of cases that overlap to some degree with the cases involving expression. What unites these cases and distinguishes them from the preceding cases for purposes of analysis is that the believers are being asked to actively do something or to participate in something they find sinful, rather than being prevented from engaging in expressive behavior that is inspired or required by their faith.[385] The activities deemed sinful are as various as religious beliefs themselves, but for purposes of this analysis

[381] For example, see *Siebenhaar v. Germany*, no. 18136/02, 3 February 2011, http://hudoc.echr.coe.int/eng?i=001-103236.
[382] Grimmark v. Sweden, no. 43726/17, 11 February 2020, http://hudoc.echr.coe.int/eng?i=001-201915.
[383] Steen v. Sweden, no. 62309/17, 11 February 2020, http://hudoc.echr.coe.int/eng?i=001-201732.
[384] Steen, § 30.
[385] The problematic nature of distinguishing acts from omissions had generated an enormous body of commentary. For the purposes of this study, it will simply be noted that the distinction is taken seriously in law frequently enough that it provides a legitimate basis for differentiation.

they can be divided into two partially overlapping categories. The first category comprises cases in which the religious believer is being asked to express or associate herself with a statement, idea or concept that she finds objectionable on religious grounds. This category can include cases involving the swearing of oaths, participation in birthday celebrations of colleagues, or being asked to engage in other expressive acts that might signal approval of underlying beliefs or ideas. These may be referred to as "compelled expression" cases. The second category covers cases in which believers are asked to perform duties that are seen to facilitate or enable the sins of others. Several prominent cases in this category have arisen in recent years in both court systems and are often referred to as "complicity" cases.

A. Contrasting traditions of compelled expression

Particularly in the United States, the concept of "compelled speech" as a violation of freedom of expression is evolving at a rapid rate, and has become one of the most litigated issues of Free Exercise jurisprudence.[386] In large part because of its longer history of dealing with religious freedom issues in a diverse and nominally secular political system, US jurisprudence has largely resolved the kinds of cases involving straightforward compelled expression of belief such as the swearing of oaths. Such cases therefore do not appear in the list of recent cases that are the focus of this study. That public officials cannot be compelled to swear oaths on the Bible, for example, is settled law and no longer a source of contention. Likewise, most other public forms of compelled speech – from saluting the flag[387] to being required to have a state motto on a license plate[388] - have been ruled violations of, variously, the Free Exercise Clause, the Establishment Clause or the free speech clause of the First Amendment. Likewise, the state cannot compel an individual to reveal his religious belief or nonbelief.[389] Cases involving the idea of compelled expression have, however, proliferated in other areas. One group of cases has involved resistance to expressive actions that are less direct disclosure requirements instituted in the interest of consumer protection or health and

[386] Ashutosh Bhagwat, "The Conscience of the Baker: Religion and Compelled Speech," *William & Mary Bill of Rights Journal* 28, no. 2 (December 2019): 287-318.
[387] West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).
[388] Wooley v. Maynard, 430 U.S. 705 (1977).
[389] Illinois *ex rel*. McCollum v. Bd. of Educ., 333 U.S. 203, 210 (1948), holding that "neither a state nor a federal government can force or influence a person to . . . confess a faith or disbelief in any religion."

safety. The courts have been relatively generous in according weight to claims that compelled disclosures can violate the First Amendment. In *NIFLA v. Becerra* (2018), for example, the Supreme Court concluded that a law obliging a Christian "pregnancy crisis center" to inform its visitors of the availability of low-cost abortions was a violation of the plaintiff's First Amendment right against compelled speech.[390] Another line of cases has established that compelling people to fund speech constitutes forced expression and a violation of the Free Speech Clause.[391] Still other cases have explored the free speech implications of public accommodation laws that require businesses in the creative sector - photographers, florists and bakers, to take three well-publicized cases – not to discriminate even when they object to the content of the message they are being hired to create. In such cases, the question often arises whether such disclosures or creations truly can be considered the speech of the person being compelled to produce them.

In *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission,*[392] *the* Supreme Court considered the situation of a baker who refused to bake a wedding cake for a gay couple citing his religious objections to same sex marriage. A number of arguments were put forward, once of which was that making a wedding cake involved symbolic speech and hence implicating jurisprudence related to compelled expression. In order to tap into the free speech argument, the Brief for the Petitioners, many of the Amicus briefs filed in the case, and much of the opinion itself focusses on the expressive nature of wedding cakes. While the case is peripheral in terms of the workplace environment inasmuch as it does not implicate employment relations as do the other cases in this study, it is significant with regard to how the courts may continue to consider compelled speech arguments in the context of religious liberty cases. The compelled expression argument in this case was related to the larger argument of complicity, but was important in that, if successful, it would have implicated the Free Speech clause and the rigorous strict scrutiny standard that is applied in free speech cases. The choice can thus be seen as largely strategic. Less than four pages of the 26-page

[390] Nat'l Inst. of Fam. & Life Advocs. v. Becerra, 138 S. Ct. 2361, 2371-76 (2018).
[391] For example, see Janus v. Am. Fed'n of State, Cnty. Mun. Emp, Council 31 (AFSCME), 138 S. Ct. 2448 (2018).
[392] Masterpiece Cakeshop, Ltd., et al. v. Colorado Civil Rights Commission et al., No. 16-111, slip op (U.S. June 4, 2018).

Brief for the Petitioners[393] addressed the Free Exercise Clause, while the vast majority focused on free speech arguments in support of which the Brief consistently describes Phillips as a "cake artist" rather than as a "baker." Cakes were argued to be "temporary sculptures" in an attempt to reframe the debate as one about free speech precisely because, under the rational basis scrutiny applied to religious freedom cases under *Smith*, the case was likely to lose. Under a free speech rationale, however, strict scrutiny would apply and the baker would most likely succeed in his claim. While the majority of the Court focused on other issues, Justice Thomas in his concurring opinion endorsed the compelled speech rationale and focused his attention on the social history or wedding cakes and whether baking one implies a personal endorsement of the marriage it is baked for. Thomas emphasized that "[the baker's] creation of custom wedding cakes is expressive. The use of his artistic talents to create a well-recognized symbol that celebrates the beginning of a marriage clearly communicates a message."[394]

The argument did not in the end win; however, it remains potentially viable and threatens to extend the concept of compelled speech into new territory, allowing the Free Speech Clause and the rigorous caselaw that has accumulated around it to be extended activities that are only peripherally and symbolically associated with the kind of expression of ideas that the framers of the Constitution wanted to protect. This would raise questions even more directly relevant to employment-related workplace contexts. For example, can an employer who provides employee benefits for spouses deny them to same-sex couples on the grounds that to provide them would be a compelled symbolic endorsement of gay marriage?

The other context in which compelled expression has been argued to defend religious liberty in the workplace is an important group of cases that challenged the contraceptive mandate of the Affordable Care Act, commonly referred to as "Obamacare." Each of these cases, eventually consolidated in *Zubik v. Burwell*,[395] involved a notification requirement pursuant to the exemption for religious non-profit organizations from the mandate to provide employee health care benefits that include access to family planning services. Such services include a form of contraception that some Christians feel is tantamount to abortion, and the

[393] Brief for the Petitioners, Masterpiece Cakeshop, Ltd., et al. v. Colorado Civil Rights Commission et al., No. 16-111, slip op (U.S. June 4, 2018).
[394] Masterpiece Cakeshop, Opinion of Thomas, J. at 7.
[395] Zubik v. Burwell, 136 S. Ct. 1557 (2016).

organizations in question objected on religious grounds to having to provide health care plans that would enable their employees to do what they considered to be sin. While exempt from the requirement, they were required to fill out a form to notify the government that they were opting out. They objected to this requirement on complicity grounds but also on the grounds of compelled speech. Such arguments were universally unsuccessful. Compelled speech claims become viable only when "an individual is obliged personally to express a message he disagrees with, imposed by the government." In these cases, as various circuit courts explained, the appellees under these circumstances were not obliged to express anything they disagreed with; rather, they were simply being obliged to indicate what they do believe in order to claim an exemption from the contraception mandate.[396] The argument was not taken up when these cases reached the Supreme Court, so it appears settled for now that being required to sign an opt-out clause to benefit from a proposed accommodation is not compelled speech.

In Europe the fact patterns involving the intersection of compelled speech and religious freedom have been more limited. Unlike in the US, the swearing of oaths has been at issue in the ECtHR in recent years, specifically in the cases of *Buscarini v. San Marino* (1999),[397] *Alexandridis v. Greece* (2008),[398] and a series of cases under the name of *Dimitras and others v. Greece.*[399] In *Buscarini* two members of the parliament of San Marino were required to take part in a swearing in ceremony which involved swearing an oath on the Bible. The Court found a violation of Article 9 on the basis that the two applicants were being required in effect to swear allegiance to a particular religion.[400] Similarly in *Alexandridis* the applicant was required as an advocate of the court to swear an oath on the Bible or, in the alternative, to indicate that he was unable to do so on religious grounds. This meant, in practice, that he would be forced to reveal that he was not Orthodox Christian. The Court found a violation

[396] For example, see Geneva Coll. v. Sec'y, U.S. Dep't of Health & Hum. Servs., 778 F.3d 422, 438-39 (3d Cir. 2015) ("If anything, because the appellees specifically state on the self-certification form that they object on religious grounds to providing such coverage, it is a declaration that they will not be complicit in providing coverage.").
[397] Buscarini and Others v. San Marino [GC], no. 24645/94, ECHR 1999-I.
[398] Alexandridis v. Greece, no. 19516/06, 21 February 2008, http://hudoc.echr.coe.int/eng?i=001-85188.
[399] Dimitras & Others v Greece, nos. 42837/06 and 4 others, 3 June 2010, http://hudoc.echr.coe.int/eng?i=001-99012; *Dimitras & Others v Greece (no. 2)*, nos. 34207/08 and 6365/09, 3 November 2011, http://hudoc.echr.coe.int/eng?i=001-107277; *Dimitras & Others v Greece* (no. 3), nos. 44077/09 and 2 others, 8 January 2013, http://hudoc.echr.coe.int/eng?i=001-115754.
[400] Buscarini, § 39.

of Article 9 on the grounds that the right to manifest religious beliefs includes the right not to manifest them, noting that "la liberté de manifester ses convictions religieuses comporte aussi un aspect négatif, à savoir le droit pour l'individu de ne pas être obligé de faire état de sa confession ou de ses convictions religieuses et de ne pas être contraint d'adopter un comportement duquel on pourrait déduire qu'il a – ou n'a pas – de telles convictions."[401] Similar conclusions were reached in the various proceedings of *Dimitras and Others v. Greece*. An important factor in these cases was that while there was the possibility to swear an affirmation, that option entailed indicating an objection on religious grounds. A case in which the oath or affirmation could be chosen without further commentary on the reasons behind the choice would most likely have been decided differently. In fact, in *Alexandridis* the government argued that such an option existed; however, the Court noted that there was no way for the complainant to have known that, and therefore the existence of the option was irrelevant.

Thus few conclusions may be drawn from the compelled expression cases, since the fact patterns that arise in the two systems are very different. It is nonetheless useful to note that forced expression has not been developed as a concept in the ECtHR in the broad sense that some have tried to use it in the US. While freedom of expression has arisen in religious freedom cases in the ECtHR, it has not been mobilized as a way of standing in for religious manifestation by reframing actions as symbolic speech. While in both court systems there remains a negative right against being compelled to express religious views with which one does not agree, the ECtHR has indicated that the negative right to not express religious convictions extends to a right not to be put into a position of having to reveal one's convictions. The ACA cases in the US arose in a very different context, but ultimately involve a similar question of whether one can be seen as being compelled to express a religious conviction in order to receive an accommodation on religious grounds. Such a declaration in some form seems unavoidable under that fact pattern – the very fact of accepting the accommodation reveals something about the beliefs of the person being accommodated - and US courts have rejected the invitation to decide such cases on free speech grounds. In the ECtHR Greek oath cases, an alternative could be envisaged that did not compel the revelation of one's religious convictions, making the cases somewhat different. In any case, the ECtHR

[401] Alexandridis, § 38.

cases were decided on Article 9 grounds, not on freedom of expression, reasoning that what they were protecting against was being compelled to perform an action tantamount to a manifestation of religion. The fact that that action centered on expressive conduct did not seem to weigh heavily in the decision-making of the Court. Ironically, the conclusion is that while compelled speech is a more developed and exploited concept in US courts, it has proven somewhat more effective in European cases where the expression involves revealing one's religion.

B. Complicity and the behavior of third parties

A final category of accommodation arguments to be considered are what Douglas NeJaime and Reva Siegel have referred to as "complicity-based conscience claims," or "complicity claims" for short.[402] These are cases in which claimants object to requirements by the government or by an employer to behave in such a way that they believe would make them complicit in sin by enabling the perceived immoral acts of others. The unique element of these cases is the type of third-party harm that they involve. Rather than incidentally placing a burden on others – creating costs for an employer or some sense of inequality among employees, for example - complainants use complicity arguments to claim that they should not be required to enable others to exercise their rights in ways that they disapprove of. This new variety of claim has gained prominence especially since the Supreme Court's decision in *Burwell v. Hobby Lobby* in 2014 and often involved "culture war" issues of sexual morality. As NeJaime and Siegel explain,

> There are at least two important dimensions to such claims. The claim concerns the third party's conduct—for example, her use of contraception—but, crucially, it also concerns the claimant's relationship to the third party. Complicity claims are faith claims about how to live in community with others who do not share the claimant's beliefs, and whose lawful conduct the person of faith believes to be sinful.[403]

[402] Douglas NeJaime and Reva B. Siegel, "Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics,*" Yale Law Journal* 124 (2015): 2516-2591.
[403] NeJaime and Siegel, "Conscience Wars," 2519.

For the religious observers making such claims, the argument is that they should not have to participate in conduct they feel is violation of their religious convictions, even if that participation is indirect. One of the key problems of such claims is that the claimants are often asking to be exempted from laws designed to protect third parties from precisely the discrimination that the claimants seek the freedom to exercise. As such, they often run counter to public policy aims linked to protecting historically disfavored classes of individual, the obvious and frequently implicated example being members of the LGBTQ community. This distinguishes such claims from the main thrust of transformative religious freedom cases in which a religious minority needed protecting from the overreach of a government seeking to further majoritarian interests and values at their expense.

While complicity claims have received renewed and somewhat urgent attention from both legal scholars and the media in the wake of *Hobby Lobby*, concern over forcing religious observers to be complicit in assertedly sinful conduct emerged largely in the 1990s as the "culture war" debates began to take on greater significance in American politics.[404] Various attempts were made to introduce "conscience clause" language into legislation that would protect health care workers from having to participate in abortions, and it was only following the defeat of a similar bill that would have exempted religious business-owners from complying with the ACA's contraceptive mandate that the Beckett fund approached Hobby Lobby about litigating the matter.[405] Since then, complicity cases have proliferated both in relation to the ACA and in response to the Supreme Court's decision in *Obergefell v. Hodges*[406] which obliged states to recognize same-sex marriages.

The source of much of the complicity-based litigation lies in the fact that while religious institutions were granted an exemption from the contraceptive mandate, religious non-profit organizations and for-profit businesses were not. The result was dozens of cases were filed across the country leading to over 30 appellate court cases across all circuits courts,[407] which some commentators have argued are more the result of a process of politicizing religious

[404] NeJaime and Siegel, "Conscience Wars," 2538.
[405] NeJaime and Siegel, "Conscience Wars," 2551.
[406] Obergefell v. Hodges, 576 U.S. 644 (2015).
[407] For a useful attempt at a database, see the Becket Fund website at https://www.becketlaw.org/research-central/hhs-info-central/hhs-case-database/?fwp_database_profit=718922d7c06d05c1e7c4894ca554492d&fwp_database_courts=appellate&fwp_paged=2.

freedom litigation in the interests of a broader conservative political agenda than of actual concerns over religious free exercise.[408] A number of these cases were then addressed by the Supreme Court, including *Hobby Lobby*, *Wheaton College*, and a group of seven cases by nonprofits that were ultimately consolidated in *Zubik v. Burwell*.

The Supreme Court's decision in *Hobby Lobby* offered a transformational interpretation of RFRA and of the scope of religious freedom more generally, and as such has generated an enormous amount of controversy and commentary. The Court had already surprised many observers with its contentious decision view in *Citizens United* that corporations could be rights holders for purposes of the Free Speech clause of the First Amendment. While controversial, in part because of its potential implications for the country's electoral system, the concept of corporate speech was already familiar from previous caselaw, even if it had never yet risen to the level of a protected right in the same sense that free speech is a right for individuals; rather, the concept of commercial speech was one used to distinguish the degree to which different kinds of speech could be regulated. In other words, it was a concept that limited the application of free speech. In *Citizens United*, the Court treated for profit corporations as if they were people. *Hobby Lobby* extended this reasoning, arguing that a for-profit corporation could have religious beliefs and exercise those beliefs, and that its right to do so was protected under RFRA. It also greatly extended the scope of accommodation claims by taking a broad view of the conditions under which a person or organization might justifiably feel that she is being compelled to be complicit in the sins of others and therefore, in a moral sense, being compelled to participate in sin.

Hobby Lobby's claim, which the Supreme Court accepted, was that by paying for a health insurance for its employees that covered reproductive health it would be violating its religious beliefs because one of its employees might possibly use that insurance to use a form of birth control that it considered the equivalent of abortion. The awkwardness of the concept is palpable in its very description, and it is likely that the implications of extending religion in its collective dimension will require further elaboration in future cases. However, even more significant for accommodation cases was the fact that the Court uncritically accepted the company's contention that paying for health care made it morally responsible for what

[408] For a strong version of this argument, see Gregory M. Lipper, "The Contraceptive-Coverage Cases and Politicized Free-Exercise Lawsuits," *University of Illinois Law Review* 2016, no. 4 (2016): 1331-1346.

an employee might do with that healthcare. The Court's position regarding the substantial burden phase of strict scrutiny even before *Hobby Lobby* was that so long as it believed in the sincerity of the belief in question it was not appropriate for the Court to pass judgment upon the reasonableness of the belief itself. Typically this has extended to the question of moral culpability.[409] *Hobby Lobby* confirmed that this traditional deference to believers on questions pertaining to religious belief extends even to the empirical claims that underpin their conclusions about complicity.

To understand why, one must look more closely at the elements of an argument required to establish that a law or measure imposes a substantial burden on someone's religious beliefs or right of free exercise. Such arguments involve three components: moral, empirical, and relational. The moral component is metaphysical in nature – it is a claim regarding right and wrong, and as such it is beyond the scope of what a court may decide. The empirical component, however, involves questions of fact. Part of Hobby Lobby's assertion of complicity was grounded in dubious empirical claims about the functioning of the contested birth control methods specifically relating to the mechanism of preventing the implantation of the egg in the uterine wall. Normally the Court would be empowered to take a position on such questions of fact; yet in *Hobby Lobby* the Court deferred to the respondents' subjective beliefs concerning their relation to the assertedly immoral result of "abortion," in spite of empirical evidence that may have rendered such claims irrational. The mere belief was deemed enough to render participation in the ACA mandate a substantial burden under RFRA.[410] Finally, the relational component is the nature and degree of connection needed between the legally compelled behavior and the conduct that the believer wants to distance himself from. In other words, what kind of relationship is there between the two acts, and is

[409] For example, see United States v. Lee, 455 U.S. 252, 257 (1982) in which an employer felt that paying social security taxes was immoral based on the Amish belief in self-reliance. The Court accepted without question the respondent's view of the moral implications of paying into the social security fund despite the argument that simply paying into the fund was not the same thing as violating the core Amish belief itself. As the Court argued, "It is not within 'the judicial function and judicial competence,' however, to determine whether appellee or the Government has the proper interpretation of the Amish faith; '[c]ourts are not arbiters of scriptural interpretation.' Thomas v. Rev. Bd. of Indian Employment Security Div., 450 U. S. 707, 716 (1981). We therefore accept appellee's contention that both payment and receipt of social security benefits is forbidden by the Amish faith."

[410] For a methodical discussion of the argumentative structures involved in this line of reasoning, see Amy J. Sepinwall, "Conscience and Complicity: Assessing Pleas for Religious Exemptions in Hobby Lobby's Wake," *University of Chicago Law Review* 82, no. 4 (Fall 2015): 1897-1980.

it sufficient to entail moral responsibility for the results. This element is partly moral in the sense that it is a speculation about when moral responsibility attaches. However, that question rests in part upon the empirical elements of any question about causation. As Sepinwall explains, "there are causal "facts"- claims of causal connection that, for the purposes of practical reasoning, we take to be no less true than empirical facts."[411] We require, at minimum, some correlation in order to plausibly argue for causation. The court, as trier of fact, should logically have some role in determining at least this empirical element of the relational aspect of complicity. This was the position of almost all of the various circuit courts dealing with the ACA cases prior to the Supreme Court's ruling in *Hobby Lobby* (and even afterwards, as will be shown below in the discussion of *Harris Funeral Homes*).

Yet the Court in *Hobby Lobby* declined to question either the sincerity or the empirical coherence of the claim of complicity. As a result, they simply deferred to the respondents' subjective conclusion that the HHS mandate constituted a substantial burden on their religious liberty. Justice Ginsburg, in her dissent, contested this point, distinguishing between "'factual allegations that [the plaintiffs'] beliefs are sincere and of a religious nature,' which a court must accept as true, and the 'legal conclusion ... that [the plaintiffs'] religious exercise is substantially burdened,' an inquiry the court must undertake."[412] Sepinwall takes issue with Ginsburg's dissent, arguing that *Hobby Lobby* is in line with other cases, including those cited by Ginsburg, in avoiding any evaluation of the claim of complicity itself. However, what makes *Hobby Lobby* significant is its affirmation, in a context where the rights of a discreet set of third-parties are being put at risk, that it will take no position on even the empirical element of the inquiry into complicity in establishing a substantial burden. The Supreme Court had evaded such questions before, but in those cases the risk of third-party harm were far more remote and spread out among the population as a whole. And in those cases, the Court argued that the substantial burden imposed upon the religious observers was not of the kind that merited recognition at all.[413] Here the Court viewed the nature of the complicity immaterial and instead focused on the existence of an obvious accommodation already available to religious non-profits in order to ensure that the employees continue to

[411] Sepinwall, "Conscience and Complicity," 1936.
[412] Burwell v Hobby Lobby Stores, Inc., 573 U.S. 682, 759 (2014) (5-4 decision) (Ginsburg, J., dissenting) (quoting *Kaemmerling v Lappin*, 553 F.3d 669, 679 (D.C. Cir. 2008)).
[413] Sepinwall, "Conscience and Complicity," 1914 (n61), evaluating *Bowen v Roy*, 476 U.S. 693 (1986).

have insurance coverage without further involvement from the employer. It furthered the argument already embedded in much of US free exercise jurisprudence that religious claims must almost unavoidably be taken at face value, even when put forward by a for-profit corporation.

Just three days after *Hobby Lobby* the Court ruled on another ACA challenge, this time by a religious educational institution. In *Wheaton College v. Burwell,*[414] an exemption from the contraceptive mandate was already available. As a religious non-profit, Wheaton could profit from this exemption by signing a form (EBSA 700) indicating that they are a religious non-profit and object to the provision of contraceptive services and providing that for to the insurance provider. Once this form has been sent, non-profits have no further involvement with the contraceptive mandate; the insurance provider takes over from there in order to ensure that the beneficiaries of the health insurance continue to be covered for the contraceptive services guaranteed by the Department of Health and Human Services under the ACA. Wheaton, however, objected to being obliged to fill out the form. Once again the plausibility of the moral complicity claim was deemed immaterial, and the very same accommodation that appeared reasonable in *Hobby Lobby* was dismissed in *Wheaton College* because the employer asserted that they still would consider themselves complicit.

In the various other circuit court cases, however, there is a range of views on how to approach the question of complicity. Kaleb Brooks' survey of the cases has identified three different approaches to the question.[415] The majority of courts have taken the position that while it is not their place to question the validity of sincerely held religious beliefs there is, as outlined above, an empirical component to questions involving complicity that can and must be evaluated by the courts. Facts, in short, matter. Brooks summarizes the distinction succinctly: "[t]he former concern is a question of fact wherein the court is confined to consider only the sincerity of plaintiffs assertions, but the latter concerns are questions of law that are within the court's purview. This view mirrors the position of the dissent in H*obby Lobby*, as well as the views of the Second, Fifth, Seventh, Tenth, and federal DC Circuits in cases all since vacated by the Supreme Court in *Zubik v. Burwell*. These cases specifically

[414] Wheaton Coll. v. Burwell, 134 S. Ct. 2806 (2014).
[415] Kaleb Brooks, "Too Heavy a Burden: Testing Complicity-Based Claims Under the Religious Freedom Restoration Act," *Indiana Law Journal Supplement* 92, no. 5 (2017): 40-59.

took issue with the claim that the opt-out form somehow "triggered" the provision of contraceptive coverage, arguing that the right to coverage existed by virtue of the ACA mandate, not because of the plaintiff's actions. A number of these courts went further and supported a position distinguishing burdens on actual conduct from mere burdens on conscience. In those cases, courts considered that the plaintiff's complicity should be considered a burden only when compels them to violate their religious beliefs themselves but not when it obliges them not to obstruct the behavior of others in a way that weighs upon their conscience. The Third Circuit's reasoning in *Geneva College v. Burwell*[416] best exemplifies this position – the court based its decision on the college's admission that the accommodation offering self-certification was not an issue, but rather the actions that might be taken by third parties in response to their opting out (i.e. the government and the insurance provider ensuring the provision of contraceptive services and the possible use of those services by the college's employees).[417] In response, the Third Circuit Court rejected the notion that religious employers could exercise a "religious veto against plan providers' compliance with those regulations"[418] or for that matter against their employee's reproductive health decisions. The third position taken by a minority of Circuit Courts mirrored that of the Supreme Court majority in *Hobby Lobby*, that the religious employer was burdened by complicity with purported sin so long as they believed themselves to be and that no further inquiry was necessary to find that their religious exercise had been substantially burdened.

This tension between the Supreme Court's view in *Hobby Lobby* and the majority of Circuit Courts on how to determine complicity as a substantial burden under RFRA is likely to continue to evolve. Notably, the Supreme Court studiously avoided answering the question in *Zubik v. Burwell*, the consolidation of seven appeals from various circuit courts. Rather than decide the case, the Court asked for supplemental briefings and determined that a possible compromise existed that had not been considered by the lower courts. It was an unusual move which some have interpreted as a desire to avoid a split decision in the absence of a ninth justice on the court due to the recent passing of Ruth Bader Ginsburg. As the Court

[416] Geneva Coll. v. Sec'y, U.S. Dep't of Health & Hum. Servs., 778 F.3d 422, 441 (3d Cir. 2015).
[417] Brooks, "Too Heavy a Burden," 53.
[418] Geneva Coll., 778 F.3d at 439.

explained it, "[g]iven the gravity of the dispute and the substantial clarification and refinement in the positions of the parties, the parties on remand should be afforded an opportunity to arrive at an approach going forward that accommodates petitioners' religious exercise while at the same time ensuring that women covered by petitioners' health plans 'receive full and equal health coverage, including contraceptive coverage.'"[419] By doing this, the Court arguably signaled its continued adherence to its position in *Hobby Lobby* regarding the subjective interpretation of complicity under RFRA, since existence of a compromise form of accommodation relates to the least restrictive means test, which is only necessary once a substantial burden has been identified. The details of those accommodations are mostly still being worked out at the time of writing; however, it is difficult to envisage precisely how *any* method of informing the government would not make the nonprofits complicit by their own terms. Presumably, however, given the Court's position on the pure subjectivity of complicity in *Hobby Lobby*, the only relevant criterion is acceptance by the nonprofits. In its most recent ACA ruling, the Supreme Court merely reaffirmed that it had as yet made no determination as to whether the ACA's contraceptive mandate continued to violate RFRA even with the "opt-out" accommodation for nonprofits.[420]

While the ACA cases numerically dominate the field of complicity-based claims, the circuit court cases present variations on the same questions: what constitutes complicity (and by extension what constitutes a substantial burden), is further accommodation necessary or desirable (in other words, the least restrictive means test), and how precisely should the government interest be defined. With almost identical fact patterns, it is not surprising that the discussions become somewhat repetitive. Given that these questions correspond with the various steps of RFRA's strict scrutiny test, they will be explored in further detail in Part II Chapter 2. For purposes of this section, the relevant question is what commonalities can be found with the treatment of complicity-based claims between cases and between the US and the ECtHR. To do that, we must look in greater detail at several other US cases that have arisen which shine a slightly different light on the question of complicity-based accommodation claims in the workplace.

[419] Zubik v. Burwell, 136 S. Ct. 1557, 1557 (2016).
[420] Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania, 140 S. Ct. 2367 (2020).

Stormans v. Wiesman (9th Circuit)[421] involved a pharmacy owner who sought an accommodation from a state law requiring pharmacies to deliver any and all prescription medications requested by customers unless one of several enumerated exemptions applied. Those exemptions did not include religious objections such as those the appellants harbored to supplying contraceptives that in their opinion constituted abortion. In this case the Court did not question the pharmacists' belief that the provision of the "Plan B" or "ella" drugs (commonly known as "morning after" pills) constituted "direct participation" in abortion, in spite of the fact that it operates by delaying the release of an egg from the ovary and thus does not terminate a pregnancy.[422] Instead, the Ninth Circuit focused its First Amendment analysis on the neutrality and general applicability of the law pursuant to the *Smith* standard, and found that the law permissibly created an incidental burden on religion and thus required no accommodation.[423] The case was later denied certiorari by the Supreme Court.[424]

In *EEOC v. Harris Funeral Homes*,[425] a case under RFRA, a Christian-owned and operated funeral home had been found guilty of sex discrimination when the owner fired a biologically male employee for wanting to come to work in traditionally female clothing in anticipation of sex reassignment surgery. The employer explained that, among other objections, he believed that "authorizing or paying for a male funeral director to wear the uniform for female funeral directors would render him complicit "in supporting the idea that sex is a changeable social construct rather than an immutable God-given gift."[426] While the district court ruled that RFRA precluded enforcement of Title VII, the Sixth Circuit reversed. Specifically with regard to complicity, the Court relied on the distinction between religious beliefs and religious exercise and concluded that it could not identify any religious "action or practice" that had been burdened. Moreover, the Court was not receptive to Harris' argument that the exercise at issue was his capacity to serve mourners who would be disturbed by a transgender funeral director, vehemently rejecting the idea that one can use the potential biases of customers to establish a substantial burden.[427] Finally, apart from the

[421] Stormans, Inc. v. Wiesman, 794 F.3d 1064 (9th Cir. 2015).
[422] "Is Plan B the Same Thing as the Abortion Pill? And 13 Other Questions, Answered." Healthline, accessed 30 March 2021, https://www.healthline.com/health/healthy-sex/is-plan-b-abortion.
[423] Stormans, 794 F.3d at 1075-76.
[424] Stormans, Inc. v. Wiesman, 136 S. Ct. 2433 (2016).
[425] EEOC v. R.G. &. G.R. Harris Funeral Homes, 884 F.3d 560 (6th Cir. 2018).
[426] Harris Funeral Homes, 884 F.3d at 569.
[427] Harris Funeral Homes, 884 F.3d at 586.

belief/exercise distinction or the reliance on the biases of others, the Court rejected Harris' theory of complicity outright, asserting that "tolerating Stephens's understanding of her sex and gender identity is not tantamount to supporting it.[428] In making this ruling, the Court relied on the views of the majority of circuit courts in the ACA cases in distinguishing between the sincere conviction of a religious objector that they were being made complicit in an action and whether they actually were as a matter of law. Thus the question of who decides whether a believer is complicit – the believer or the courts – appears to remain in question as the time of writing.

The Supreme Court decision in *Masterpiece Cakeshop* has been discussed above; however, in addition to a compelled speech argument, the appellants relied on a theory of complicity in claiming an exemption from Colorado's anti-discrimination laws. The argument made by the appellants was that making a wedding cake was, in his view, a personal creative act of celebration of the wedding the cake is made for. To be compelled to celebrate a same-sex wedding in violation of his religious beliefs would constitute "a personal endorsement and participation in the ceremony and relationship that they were entering into" in violation of his understanding of the teachings of the Bible.[429] The nexus between the baker's act and the assertedly sinful conduct giving rise to complicity is, in this view, directly linked to the expressive component of baking discussed *infra*. In the view of the appellant, the cake inherently sends a message of approval and celebration of the particular marriage and therefore is a form of participation in the ceremony. This participation would, on this theory, make him complicit in the marriage itself. Thus this case presents a more direct connection between act and consequences than did the nonprofit cases against the ACA contraceptive mandate. The Colorado Civil Rights Commission theorized that this connection was nonetheless insufficient; in their view, any message carried by the cake would not be attributed to the baker himself, but rather to the customer who ordered the cake. In other words, no one at the ceremony would be likely to associate the cake with the personal sentiments of the baker or believe that the purpose of the cake at the ceremony was to allow the local baker to present his endorsement of the wedding. Moreover, the Commission

[428] Harris Funeral Homes, 884 F.3d at 588.
[429] Masterpiece Cakeshop, Ltd., et al. v. Colorado Civil Rights Commission et al., No. 16-111, slip op, Opinion of the Court at 4, (U.S. June 4, 2018).

considered that the dignitary harm done to the same sex couple in being refused service was precisely the kind of harm that its antidiscrimination laws were drafted to prevent. The Supreme Court, however, avoided responding to the complicity argument or its rebuttal, and instead focused on a perceived non-neutrality of the Colorado Civil Rights Commission.[430] In doing so, the Court was able to find for the appellant under *Smith*'s version of strict scrutiny without having to take a position on the complicity issue.

In the ECtHR recourse to complicity arguments has been more limited, and the Court's reaction far less accommodating than in the United States. In *Pichon et Sajous c. France*,[431] the appellants faced the same choice as those in *Stormans v. Weisman* – they owned a pharmacy and refused to distribute contraceptives citing their religious beliefs. In this case, the complicity claim was implicit rather than explicit, but the logic of their appeal rests upon the idea that to sell contraceptives is to facilitate others in their use of the product. The locus of the moral claim is not in the transaction, but rather in the willful prevention of a pregnancy. The Court's response is both cursory and incoherent; as will be explored further in Part II, the Court tries to employ proportionality arguments in order to conclude that there has been no interference with the claimants' Article 9 rights. In the process of doing so, however, it reveals its reasoning about the relative weight and importance of accommodating business owners to avoid complicity in the sins of others. The Court in part seems to rely on the monopoly position of the pharmacy in providing contraceptives, predicating its decision on the conditional clause "as long as the sale of contraceptives is legal and occurs on medical prescription nowhere other than in a pharmacy…"[432] This suggests that an accommodation might be appropriate if customers had other options for purchasing contraceptives, an approach sometimes referred to as the "specific situation rule."[433] It also demonstrates that where the parties – pharmacists and customers – cannot both be accommodated, the right of customers wins. However it is unclear whether that was the intention of the Court, which ruled the case manifestly ill-founded on the grounds no interference with the claimants' Article 9 rights. The Court seems to offer a generous view of accommodation with one hand

[430] Masterpiece Cakeshop, Opinion of the Court at 13.
[431] Pichon and Sajous v. France (dec,), no. 49853/99, ECHR 2001-X.
[432] Pichon and Sajous, p. 388.
[433] Megan Pearson, "Article 9 At a Crossroads: Interference Before and After Eweida," *Human Rights Law Review* 13, no. 3 (2013): 589.

only to take it away with the other, noting that the claimants were free to manifest their beliefs in other ways.

The two other significant cases raising complicity issues both appeared in the consolidated case of *Eweida et al. v. United Kingdom*. This case joined four different applicants, the first two of which involved symbols. The third and fourth applicants, however, both raised freedom of conscience issues that involved complicity in the sins of others. The third applicant, Ms. Ladele, worked as a registrar and was fired for her religious objections to registering same-sex marriages. Mr. MacFarlane, the fourth applicant, was a counselor providing sex therapy and relationship counselling services and was fired for his religious objection to counselling same-sex couples.

In both of these cases, the Court ruled against the complainants citing a wide margin of appreciation granted to states in balancing Article 9 rights against the Convention rights of others. The reasoning in the two cases, however, was somewhat different in large part because Ms. Ladele did not bring her case directly under Article 9, but rather chose to pursue a legal strategy of focusing on Article 14 (discrimination) in conjunction with Article 9. However, in neither case did the Court choose to give careful consideration to the role of complicity in the case. The Court thus has taken a very broad view of what counts as religious belief and manifestation and seems unbothered by the implications granting accommodations for people with respect to facilitating the purportedly sinful actions of others. Instead, it has granted a wide margin of appreciation to states when Article 9 rights conflict with other rights, and in doing so have made accommodation a rare option in ECtHR cases. In regard to Mr. MacFarlane, the Court suggests that the nature of the right of others being protected is of some importance, considering that "the most important factor to be taken into account is that the employer's action was intended to secure the implementation of its policy of providing a service without discrimination."[434] With regard to Ms. Ladele, however, the Court remained more opaque in its decision-making, noting without elaboration that the balance struck by the national court in evaluating the discrimination claim did not surpass its margin of appreciation.[435]

[434] Eweida and Others v. the United Kingdom, , nos. 48420/10 and 3 others, § 109, ECHR 2013 (extracts).
[435] Eweida and Others, § 106.

C. A disparity in focus in regard to complicity

Thus ultimately little can be concluded in comparing the results of forced expression or complicity related cases in the two court systems apart from the general observation that such claims are somewhat more likely to win in the US than in Europe. In both situations, courts seem to accept the notion that accommodation should be granted in some circumstances. What is at stake is how the courts understand the approach to balancing competing interests and assessing third party harm. Neither court system appears willing to allow religious conscientious objection in a situation where it imposes significant costs on third parties. The US has taken a more proactive and generous view of when accommodation may be an option, especially in cases involving RFRA. First Amendment claims have in general proven to be less fertile ground for accommodation claims, but in the employment context even First Amendment claims argued under the rational basis test have succeeded where the court has found any inequality of treatment between religious and secular interests. In Europe the ECtHR has acknowledged the option of accommodation in principle but has proven very reluctant question the evaluations of national courts of how to balance religious freedom and third-party harm.

What is striking in comparing the approaches in these cases is that it reveals a genuine difference in how religious manifestation is conceptualized by the two court systems. The ECtHR shows in these cases a tendency to view Article 9 as protective of religiously motivated behavior but not of religiously motivated desire to not be associated or connected with behavior of which the believer disapproves. Thus as we saw in the oath cases, the ECtHR is very willing to step in even in the workplace context to prevent employees from directly being compelled to negate their beliefs. But the violation of belief must be intimate and personal in nature; as soon as religious manifestation involves the kinds of social interactions that make both workplaces and society in general function efficiently, the ECtHR has proven very reluctant to side with the religious worker. The desire of the religious worker to be able to distance herself from the choices of others does not rise to the level of cogency to justify the Court's intervention in state decisions on human rights grounds. In other words the manifestation of religion is protected by Article 9 but freedom of conscience, broadly considered as the right to conscientiously object in the workplace, is given much less of a priority. The tensions raised by this view were made evident in the dissenting opinion of

Judges de Gaetano and Vučinič in *Eweida*, who argued that the case of Ms. Ladele and Mr. Macfarlane should be analyzed as conscientious objector cases rather that looking at them through the lens of religious manifestation. In *Bayatyan v. Armenia* the Court for the first time held that a right to conscientious objection from military service, if motivated by "deeply and genuinely held religious or other beliefs, constitutes a conviction or belief of sufficient cogency, seriousness, cohesion and importance to attract the guarantees of Article 9." [436] While the Court in *Bayatyan* were focused on objection to military service, Judges de Gaetano and Vučinič argued that the concept should be applied in other complicity-style cases like *Ladele*. Their dissent, though widely condemned for making a distinction between "human rights" and "gay rights," highlights two fundamental points about the ECtHR's approach that distinguishes it from US courts. Firstly, the ECtHR does not perceive conscientious objection as a central form of manifestation of religious beliefs. In other words, the court is not prepared to defend a negative right against cooperating in the performance of workplace duties that may violate one's religious or moral beliefs. For this reason, it has been more open to the argument that religious manifestation may take place in a variety of ways and that it need not always be protected in the workplace. Secondly, in the dissent's dismissal of gay rights as a kind of second tier of human rights, it underscores the tendency of the ECtHR to take the rights of others in the context of religious freedom very seriously and to resist arguments that would place religious rights on a higher level than other convention rights.

This contrasts with the US approach, where the exigencies of complicity claims are taken far more seriously, and where a tradition of conscientious military objector cases have paved the way for a broader consideration of a citizen's right not to be implicated in behavior that violates his beliefs to even include such situations where the complicity is merely the enabling of others to sin. The US courts in this sense may be seen as more focused on the individual and less protective of the collective rights that might be burdened by religiously motivated abstention from actions that would otherwise be required of employees or employers. The US Constitution is also far more amenable to arguments that religious rights may in many contexts take precedence over other rights. As a result, US courts have been

[436] Bayatyan v. Armenia [GC], no. 23459/03, § 110, ECHR 2011.

a battleground over what kinds of complicity matter and what kinds of burdens others may be required to bear in order to provide religious accommodation to conscientious objectors to providing contraception or appearing to condone same sex marriage. While both the US courts and the ECtHR tend to give benefit of doubt to religious litigants regarding the content and sincerity of their beliefs, US Courts have differed significantly among themselves in their approach to understanding the relationship between those beliefs and the rights of others. The majority of US circuit courts are willing to enter into details of nexus between act and sin. The Supreme Court, however, has accepted a view of complicity as a perceived connection, whether there is a rational basis for the connection between the belief and the action or not. Given this continued split, it is unclear where such cases will head in the near future, but one might presume that the current heavily conservative configuration of the Supreme Court will ensure that it remains highly defensive of such complicity claims in future and is unlikely to rethink its position on the purely subjective nature of the substantial burden test.

5. Convergence and polarization in the types of claims

In this section we have explored the issues, outcomes and reasoning employed by the US federal courts and the ECtHR in cases involving religion in the workplace through two overlapping but distinct lenses. In the first subsection the cases were grouped and analyzed with regard to the subject matter of the claims, in particular what kinds of accommodation were being sought and on what theory of constitutional rights. While the cases often include multiple claims, and there is certainly a degree of subjectivity in how one classifies those claims, for purposes of this paper the cases were broken down into three categories: religious adornment cases, proselytism cases, and compelled expression/complicity cases.

Similar tensions run through the categories and across jurisdictions. In particular, both courts have had to consider how to balance accommodation claims and the rights of others, in particular the rights of other oppressed groups not to be discriminated against. Both courts have shown significant concern for this issue; however, the US has been more receptive of arguments that ant-discrimination claims against religious believers can in themselves constitute a form of discrimination. Especially in the cases involving religious symbols, both courts have consistently reiterated their rejection of any role in evaluating the content of

beliefs or the centrality of specific practices in their respective religious traditions. Success in avoiding such questions has been mixed; in the ECtHR in particular there has been a willingness to pass judgment, or at least to hint at moral judgments, in particular with reference to the Islamic practice of wearing the niqab or hijab. In the US, the Supreme Court has taken an extreme view with regard to not passing judgment on the content of belief, even to the point of abdicating its role in determining whether a substantial burden has been placed on religion. However, there remain a substantial number of circuits who seem determined to maintain their right to judge religious claims where they are made concerning traditional questions of law such as complicity. This tension within the US courts has perhaps encouraged an active caseload and energetic debate on the role of complicity claims in religious freedom protections, whereas such claims have thus far not been successful in the ECtHR.

Regarding the interests of others that are usually at the heart of claims that a particular religious accommodation is not practicable, there has been a variety of interests considered for protection by the courts. Both courts take the nature and gravity of the third-party interests into account. However, the ECtHR has generally been more willing to evaluate the burdens placed on third parties and to weigh those burdens against those being placed on religious manifestation. The US, on the other hand, has tended to favor religion in general, with the notable exception of cases in which the Establishment Clause has been implicated. Both courts have been generally willing to given health and safety issues significant weight, along with the need for state neutrality and efficiency in the provision of government services. Concerns like corporate image, however, have fared less well.

Finally, both courts have had to consider in various contexts the role of evidence in evaluating the third party harm imputed to religious accommodation. In this regard, the US has tended to be more proactive in questioning the judgment of employers regarding the harm caused by certain religious practices. The ECtHR, on the other hand, has been inconsistent on this point, at times questioning the evidence and at times rather cursorily deferring to employer claims regarding the possible effects of religious practices in the workplace and accepting the mere theoretical possibility of harm to be sufficient grounds for restricting religious manifestation. This is partly because the employers are often themselves organs of the state, and the ECtHR is generally more deferential to national courts evaluations of

evidence due to the wide margin of appreciation afforded to state parties with regard to managing the relationship between religion and state.

II. COMPARATIVE BREAKDOWN BY TYPE OF WORKPLACE

The purpose of this Section II is to reframe the comparison of workplace cases in the US federal courts and the ECtHR in terms of the nature of the employers in order to determine the ways in which the employment relationship itself may bear upon the arguments and outcomes encountered in the two systems. What is quickly apparent from a survey of the case law is that the cases break into three different groups depending on the type of employer: public employers, religious organizations and private companies. While it would be easy to assume that private companies are the norm and the other two categories are variants, in fact public and religious employers account for the majority of cases under examination. While this may well be the case in lower courts, private company cases rarely implicate the kinds of constitutional questions that the other cases we have been examining raise. In the US system, this is because the First Amendment only applies to government action and, even more specifically, because the US has a well-honed statutory system under Title VII for accommodation cases that raise issues of discrimination. Private employer cases therefore are infrequent and have involved employer claims for exemptions from labor relations laws rather than employee claims for accommodation. In the ECtHR, private workplace claims only arise when the state party to the Convention appears to have manifestly failed to protect the rights of a private employee.

Cases in which the government is the employer can raise a number of issues including, as we have seen in Section I above, the right to wear religious dress or symbols at work as well as expression issues in the public workplace. At issue is often the need for state neutrality with regard to religion in providing public services, but other issues can come into play as well, such as discrimination or the basic need to efficiently provide services. The third category of employer involves religious organizations. These may include churches or religious schools, but also involve to some extent nonprofits whose primary purpose is religious in nature. As will be discussed below, these types of employers raise a distinct set of issues from those implicated in private or state employment scenarios.

1. Cases involving government or government-mandated employers

The situation in which the government is also functioning as an employer can raise a number of concerns that pose additional challenges when trying to balance the needs of religious employees with the rights of others. When an employer is engaged in selling goods or services to the general public for profit, it is conceptually rather straightforward for society to impose certain duties on those employers towards their employees in exchange for access to the marketplace. Minimum wage requirements are a simple example of this; mandatory pension contributions are another. Such requirements are built into the cost of doing business, and so long as they are not excessive and affect employers evenhandedly they are not controversial. The consequences may be a reduction in efficiency or in the quality of service, at least by certain metrics, so ultimately they are borne by the business in terms of lost profits and/or the consumer in terms of price or quality. When the government is the employer, the question of burden sharing is complicated by the nature of the relationship between the "employer" (the state) and the employee on one hand and the "customers" (citizens) on the other. From the employee perspective, the employer/employee relationship is complicated by the dual relationship in the government workplace context – the rights and duties of the state are quite different from the rights and duties of a normal employer. And yet a government employer is both at once. For example, my employer generally has the right to limit free speech in the workplace. The government generally does not have the right to limit free speech in the workplace. When government acts as employer, its dual role complicates the scope the free speech in the public workplace.

Moreover, the government employs people in order to carry out tasks on behalf of all its citizens in fulfillment of a perceived social contract. Government employees are referred to as "civil servants" for a reason; they work on behalf of the people to fulfill the government's mandate. As agents of the state, the quality of their work cannot be reflected in higher or lower prices to the consumer, since the relationship is not a commercial transaction in the classic sense. The government's interest in efficiency is in the fulfillment of its mandate and affects all citizens. Moreover, the state and its agents have a duty of equal treatment toward all its citizens. There are, in theory at least, no "preferred customers" or "gold card members," as all citizens are deemed equal before the law. As a result, the gravity of the state's duty to its citizens may at times outweigh the government's duty to its individual employees. Even

as the government's special role may impose on it a duty to be a model employer, it may also mean that the government is held to higher standards of care with regard to its provision of services and thus be in greater need of regulating its employees behavior in the workplace. This is especially the case since in the provision of its services the government is often in a monopoly position; if an insurance company provides poor service an unhappy customer is free to take her business elsewhere, but there is no competitive market in police officers, judges or marriage registrars. Government employees often occupy key positions as the gatekeepers to essential services. As Douglas Laycock has argued in the context of same-sex couples, religious freedom for public employees must be protected, "but not if they occupy choke points that empower them to prevent same-sex couples from living their own values. If the dissenters want complete moral autonomy on this issue, they must refrain from occupying such a choke point. occupy choke points for access to essential services."[437] Thus the workplace relationship implicates not only labor, but also citizenship; not only efficiency, but duty. The end product is not only about satisfying desires, but defending rights and fulfilling fundamental human needs.

Neither the US[438] nor the ECtHR has developed any clear doctrine to navigate the specific issues raised in state employee religious freedom cases. Some US Courts have tried to adapt the test that has been developed in government employee free speech cases. As discussed in Section I above, the courts in *Brown v. Polk County* and *Berry v. Department of Social Services* both adapted the *Pickering* test to religious free exercise cases, and some have suggested that this practice be extended to government employee religion cases in general.[439] The inquiry developed in Pickering and its related cases involves several questions. First, is the speech made in the course of the employee's official duties? If so, it is not protected, since the employee was speaking not as a citizen but rather as an agent of government. Second, if indeed the speech was not made in the course of official duties, did it concern a matter of public interest? If not, the speech is not protected because it does not

[437] Douglas Laycock, "Afterword," in *Same-Sex Marriage and Religious Liberty: Emerging Conflicts,* eds. Douglas Laycock, Anthony R. Picarello and Robin Fretwell Wilson (Washington: Rowman & Littlefield, 2008), 200.
[438] Statutory cases under Title VII so have a set methodology focusing on whether the accommodation poses an undue burden on the employer.
[439] See Caroline Mala Corbin, "Government Employee Religion," *Arizona State Law Journal* 49 (2017): 1193-1256.

rise to the level of the kinds of speech that require special protection even in the context of the workplace. Third, does the speech cause "undue disruption" to the ability of the government to carry out its functions efficiently. This third element involves balancing the value of the speech in terms of public interest with the disruption caused.[440]

Brown and *Berry* are illuminating for religious freedom in the public workplace particularly because the crucial factor that distinguishes the contrasting results in these two cases – *Berry* for the employer, *Brown* for the employee – is the effect of the free exercise on the relationship between the state and the public seeking its services. Mr. Berry was proselytizing to the public, whereas Mr. Brown was interacting with colleagues, so what made the behavior in *Berry* qualify as "undue disruption" was its interference with the state's duty of neutrality and the exigencies of the Establishment Clause. It is important to note, however, that the *Pickering* test was easy to adapt to *Brown* and *Berry* because both of those cases involved religious proselytizing and thus were clearly "speech" in the straightforward sense of the term that just happened to involve religion. Cases with different fact patterns, like *Fraternal Order of Police*, have eschewed the *Pickering* model and adopted the standard analysis appropriate under either *Smith* or RFRA. In *Tagore* and *Booth*, the issue was safety-related and the nature of the employer did not play an important role – both were decided for the employer because of uneven application of the rule rather than the rule being unconstitutional *per se.* In *Daniels*, however, the public nature of the employment, and specifically the special deference due to police and military discretion in decision-making, was dispositive, with the Court essentially exempting the employer from even the basic requirement of showing evidence of actual hardship.

The ECtHR cases are more numerous, and while no overarching doctrine or approach can be identified in their treatment of workplace religious manifestation in the public workplace, there are several interpretive issues relating to the margin of appreciation that were consistently relevant in the decisions. The Court has tended to see the state's need to uphold religious neutrality as underpinning the Convention's core values, and thus has been relatively deferential to government actions that police neutrality in the provision of public services. In *Dahlab*, *Ebrahimian*, and *Kurtulmuş* , the need for neutrality is fundamental to the Court's conclusion that the state was within its margin of appreciation to limit religious

[440] Corbin, 1201-1202.

freedom of the public employee in each case. Secularism is a related but slightly different issue – it is the right of a country to ensure this neutrality as well as religious freedom by limiting the role of religion in public life. In countries that have espoused a strong form of secularism – France, Turkey and Switzerland – the Court has granted a wider margin of appreciation to the state to limit religious activity in the public workplace in order to uphold the principle of secularism. In *Ebrahimian*, for example, the Court emphasizes that it "has already approved strict implementation of the principles of secularism … and neutrality, where this involved a fundamental principle of the State."[441] It also refers to the local importance of secularism in *Kurtulmuş* and *Kalaç*, and indicates that so long as states apply the limitations with respect to proportionality the Court will not intervene in the state's policing of secularism in public service.

Several of the cases also make pointed reference to the special nature of specific public services where the Court, either explicitly or implicitly, grants the state a wider margin of appreciation than it would in the private sector or in less critical posts of public employment. Here the Court's reasoning is similar to that found in several of the US cases. In *Kalaç*, for example, the Court acknowledges the special nature of military service, noting that becoming a soldier means accepting "a system of military discipline that by its very nature implied the possibility of placing on certain of the rights and freedoms of members of the armed forces limitations incapable of being imposed on civilians."[442] Likewise teachers are seen as occupying a special role as "both participants in the exercise of educational authority and representatives of the State" and thus accepted the states argument for a wider margin of appreciation in weighing "the protection of the legitimate aim of ensuring the neutrality of the State education system against the freedom to manifest one's religion."[443] Likewise, in *Pitkevich*, the Court found gave significance to "the prominent place among State organs which is occupied by the judiciary in a democratic society."[444] In many of these cases – *Kalaç, Steen, Grimmark, Dahlab, Ebrahimian*, and *Kurtulmuş* - the Court also indicated the significance of the idea that these civil servants knew that the jobs they were signing up for involved restrictions on behavior, and thus had tacitly waived their right to object to the

[441] *Ebrahimian v. France,* no. 64846/11, § 67, ECHR 2015.
[442] *Kalaç v. Turkey*, 1 July 1997, § 28, *Reports of Judgments and Decisions* 1997-IV.
[443] *Dahlab v. Switzerland* (dec.), no. 42393/98, ECHR 2001-V, p. 462.
[444] *Pitkevich v. Russia*, no. 47936/99, 8 February 2001, p. 12, http://hudoc.echr.coe.int/eng?i=001-5726.

limitations on their religious expression. In *Ladele*, this was clearly not the case, since the duties of a registrar did not include licensing same-sex marriages when she accepted the position, but rather came about later when Islington Council redefined the duties of registrars to include civil unions, including same-sex unions. In this case, however, the Court noted the wide margin of appreciation given to cases involving conflicting Convention rights.

Beyond the margin of appreciation, the nexus between the religious behavior and the professional duties of the employee was a significant factor in several of the cases. This was particularly important in several of the cases that involved loyalty to constitutional principles such as secularism, as well as more generally in state neutrality- related cases. In *Pitkevich, Kalaç*, and *Sodan v. Turkey* in particular, there seemed to be some question as to just how invasive the religious manifestation was in relation the workplace, since in both cases the state seemed to be targeting belonging to a particular sect or espousing a particular set of beliefs. In *Sodan*, the employee was a government administrator who was demoted to a provincial post because of his lifestyle and the fact that his wife wore the veil were not deemed secular enough for a public official. He complained under, *inter alia*, Article 9 and Article 8 (private life). The Court took their decision with regard to Article 8, finding that the employee had been sanctioned for elements of his private life than did not involve his professional performance. The Court did not exclude the possibility of requiring that public employees exercise restraint in their public behavior or expression, even while off-duty, that might reflect upon their ability to perform their professional functions in a manner upholding the principle of secularism.[445] However, in this case the nexus between his private beliefs and his wife's sartorial choices was insufficient grounds upon which to demote him. In *Pitkevich* and *Kalaç* the nexus between beliefs and the workplace were also questioned – these cases involved a judge and a military officer, respectively, who belonged to religious groups deemed suspect by the government. In both cases the Court emphasized that mere belonging to an organization was not sufficient to entail a sanction; however, in each case the Court found that the sanction was related to behavior in the workplace. The judge in *Pitkevich* proselytized in the courtroom and intimidated parties to proceedings, while the

[445] Sodan v. Turkey, no. 18650/05, § 52, 2 February 2016, http://hudoc.echr.coe.int/eng?i=001-160681 ("La Cour réaffirme que la Convention n'exclut pas la possibilité d'imposer un certain devoir de réserve ou une certaine retenue au fonctionnaire dans le but de garantir la neutralité du service public et d'assurer le respect du principe de *laïcité*.").

soldier in Kalaç had intervened in the appointment of members of his sect to military positions. In each case this was considered punishable behavior, and thus the sanction was not because of the exercise of religion but rather because of inappropriate workplace behavior.

Thus in comparing the two bodies of case law it can be concluded that in the absence of a clear doctrine or methodology applicable to religious manifestation by public employees, both courts have shown an appreciation for the implications of state's dual role as governor and employer and have tended to grant the government some deference in determining where to draw the line between its function as government and its function as employer. Moreover, the need for efficiency and neutrality in the provision of government services played a key role in the reasoning of both US courts and the ECtHR. In lower US courts this deference to governmental decision making has been the norm except in very clear cases of injustice.[446] Even so, in the US appellate cases under review for this study the employee won in on First Amendment or RFRA arguments in the majority cases either at trial or in a settlement upon remand to a lower court. The ECtHR results have consistently favored state employers; in fact, the only cases in which the state lost were those involving the swearing of oaths and one concerning the off-duty conduct of a Turkish civil servant.[447] This difference in results may be attributed to a number of factors. First, the doctrine of subsidiarity and the resulting margin of appreciation give to state parties to the Convention must always be kept in mind in evaluating the results of ECtHR cases. It is thus not surprising to see the ECtHR being somewhat more deferential to state employers; as an international adjudicator of treaty-bases human rights norms, the ECtHR plays a weaker hand than does the US Supreme Court in its role as constitutional court with the power of judicial review and no credible fear of states formally withdrawing from their constitutional obligations.

Moreover, the difference may to some extent be attributable to the particularities of the cases and the legal contexts in which they arose. Several of the ECtHR cases – in particular, *Ebrahimian, Dahlab*, and *Kurtulmuş* – were religious adornment cases involving the Muslim headscarf in France, Switzerland and Turkey where secularism in public services is seen as

[446] Michele L. Booth, "Shahar v. Bowers: Is Public Opinion Transformed into a Legitimate Government Interest When Government Acts as Employer," *Boston University Law Review* 78, no. 4 (October 1998): 1267.
[447] Sodan v Turkey. In this case the Court found a violation of Article 8 (private life) in conjunction with Article 9, rather than on a straight Article 9 claim.

a constitutional value of the highest order. Thus while they are comparable as religious adornment cases to US cases like *Booth v. Maryland* or *Fraternal Order of Police*, their legal and social significance is very different, particularly in the context of public services, and thus the difference in outcome is not surprising. There have been no federal appellate level cases involving hijabs in the US brought under the First Amendment or RFRA, although one particularly high-profile case was successfully brought to the Supreme Court under Title VII.[448] This speaks both to the success of Title VII legislation but to the relative strength of RFRA, whose strict scrutiny standard makes it highly implausible that courts would uphold such a statute. States, of course, are not bound by RFRA and a carefully drafted neutral law against any headgear, for example, would possibly survive scrutiny under the *Smith* standard, especially in a police setting, schools, or in other positions dealing directly with the public.

The cases involving wearing crosses or other religious adornment in public employment offer a clearer basis of comparison. As has been described above in Section I, results in these cases have hinged upon a variety of details, including the willingness to compromise. Ms. Tagore was willing to negotiate about the size of her kirpan and won, while both Mr. Daniels and Ms. Chaplin lost after giving no ground on displaying crosses at work, and Ms. Chaplin went as far to insist that had to hang on a necklace rather than be worn as a pin in order to allay health and safety concerns. While there are too few ECtHR cases in this area to come to any firm conclusions, what is noticeable in the public workplace cases is that the arguments in the US cases have been far more focused on the precise details of what kind of compromise might be reached. This is to be expected from a system which puts greater emphasis on the overall concept of accommodation in the workplace but may also be related to the far greater pervasiveness of public functions in life in Europe than in the US. For example, in France the public sector has been estimated as accounting for as much as 25% of the total workforce,[449] in comparison with an estimated 15% of the US workforce (which includes 1,4 million active-duty military personnel).[450] A too-generous system of accommodation may

[448] EEOC v. Abercrombie and Fitch, 135 S. Ct. 2028 (2015).
[449] Géraldine Russell, "Nombre, statut, recrutement : les vrais chiffres sur les fonctionnaires," *Le Figaro*, 3 December 2016, https://www.lefigaro.fr/economie/le-scan-eco/dessous-chiffres/2016/12/03/29006-20161203ARTFIG00118-nombre-statut-recrutement-les-vrais-chiffres-sur-les-fonctionnaires.php.
[450] Fiona Hill, "Public service and the federal government," *Policy 2020*, *Brookings*, 27 May 2020, https://www.brookings.edu/policy2020/votervital/public-service-and-the-federal-government/.

well be seen as a danger to the overall functioning of government and thus less viewed as within the plausible range of options for government policy.

2. Cases involving religious employers

The question of religious employers and their rights to accommodation from laws that govern other employers is a particularly contentious one in the area of religious freedom law in general. If the special complications in area of public employment are arguably undertheorized, the question of the exceptions for religious organization and institutions from otherwise applicable labor law and in particular discrimination law has received a vast amount of attention from scholars, judges and pundits alike, especially in the United States. There are various potential reasons for this. Religion, firstly, as opposed to mere belief, is to a great extent a group endeavor, "an eminently collective thing" as Emile Durkheim described it.[451] While individual faith is a powerful force in many people's lives, for many the collective dimension of religion – fellowship, belonging, collective worship and ritual – is at least as important as the personal one. The ability to organize as a group and worship to together is thus at the heart of religious experience and is an aspect that, precisely because it involves group action, is likely to raise conflicts with secular laws that are ultimately about how we interact with one another. The application of such laws touches not only on a sensitive issue for the faithful, but also lies at the heart of church/state relations and the meaning of a secular society. Moreover, as western societies grown increasingly multicultural, the rise of religious communitarianism and sectarian rivalries can pose challenges to the strong cultural strain of individualism to be found in Europe and especially the United States. Finally, as social mores continue to evolve, particularly in society's changing attitudes towards discrimination and gender issues, religious group rights have become a means of resisting the erosion of traditional ideas involving marriage, race, gender, or disability. Religion in its collective dimension thus poses particular challenges to traditional liberal individualism, progressive social change, and the notion of a secular society; it is therefore not surprising that such cases have become a flashpoint in so-called

[451] Emile Durkheim, *The Elementary Forms of Religious Life,* trans. J. Swain (New York: The Free Press, 1954), 47.

"culture war" debates. Nowhere has this been more evident than in the question of applying labor rights to religious institutions.

A. Religious employers and the ministerial exception in the US

The passage of Title VII of the Civil Rights Act posed significant issues for religious organizations in their hiring practices, since by their very nature most religious groups are discriminatory in the sense that they unabashedly promote one vision of the good and often a particular set of moral commands over other conceptions of morality. Given that such organizations are set up to promote their own religious vision, it is to some extent natural that they would prefer to hire coreligionists. A Catholic church, for example, will want to discriminate in hiring Catholics and in not hiring atheists. In order to protect religious institutions' ability to remain consistent in their core function, Congress included an exception for any "religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on … of its activities."[452] This exception applies to discrimination on the basis of religion only; it does not permit religious organizations to discriminate on the basis of race, sex, or disability.

Beyond this statutory protection, the courts have interpreted the Religion Clauses as providing an inherent exception for religious institutions known as the ministerial exception. This exception was first articulated by the Fifth Circuit in 1972 in a suit about discrimination regarding equal pay brought by a female minister in the Salvation Army.[453] The Court found that it was not the intention of Congress in passing Title VII to "regulate the employment relationship between church and minister"[454] as doing so "would result in an encroachment by the State into an area of religious freedom which it is forbidden to enter by the principles of the Free Exercise Clause of the First Amendment."[455] It would take another 40 years for the Supreme Court to confirm the ministerial exception. In the interim, however, it had the opportunity to make narrower rulings whose argumentation prefigures the Supreme Court's

[452] Civil Rights Act of 1964, Title VII, Section 702, 42 U.S.C. § 2000e-l(a).
[453] McClure v. Salvation Army, 460 F.2d 553 (5th Cir. 1972).
[454] McClure, 460 F.2d at 561.
[455] McClure, 460 F.2d at 560.

eventual adoption and clarification of the doctrine in the 2012 landmark case of *Hosanna-Tabor v. EEOC*.[456] In *NLRB v. Catholic Bishop of Chicago*, the Court used similar reasoning to hold that the National Labor Relations Board's jurisdiction did not extend to certifying labor unions in religiously-affiliated schools, arguing that doing so would "necessarily involve inquiry into the good faith of the position asserted by the clergy-administrators and its relationship to the school's religious mission. It is not only the conclusions that may be reached by the Board which may impinge on rights guaranteed by the Religion Clauses, but also the very process of inquiry leading to findings and conclusions."[457]

Various Circuit Courts had the opportunity to interpret the doctrine in the years between *McClure* and *Hosanna-Tabor*. Because these decisions were essentially superseded by the Supreme Court's ruling, they do not form a part of detailed case-by-case analysis of this study; however, it is important to take note of the variety both of situations which generated appellate level cases as well as the differences in approaches to the doctrine adopted by the various circuits.[458] While all the circuit courts affirmed the existence of the doctrine and agreed that the rule survived regardless of the Supreme Court's abandonment of strict scrutiny in *Employment Division v. Smith*, the body of case law across the circuits left a great deal of uncertainty regarding what kinds of employee would qualify and what kinds of conduct the exception would cover. The question of whether the organization should be considered to be "religious," did not play a major role in most cases. In *Hollins v. Methodist Healthcare*, the Sixth Circuit noted that "in order to invoke the exception, an employer need not be a traditional religious organization such as a church, diocese, or synagogue, or an entity operated by a traditional religious organization."[459] In another case, the same Court

[456] Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 188 (2012).
[457] NLRB v. Cath. Bishop of Chi., 440 U.S. 490, 502 (1979).
[458] For example, see Rweyemamu v. Cote, 520 F.3d 198 (2d Cir. 2008); Hollins v. Methodist Healthcare, Inc., 474 F.3d 223 (6th Cir. 2007); Petruska v. Gannon Univ., 462 F.3d 294 (3d Cir. 2006); Rayburn v. Gen. Conf. of Seventh-Day Adventists, 772 F.2d 1164 (4th Cir. 1985); Dole v. Shenandoah Baptist Church, 899 F.2d 1389 (4th Cir. 1990); EEOC v. Roman Cath. Diocese of Raleigh, 213 F.3d 795 (4th Cir. 2000); Combs v. Cent. Tex. Annual Conf. of the United Methodist Church, 173 F.3d 343 (5th Cir. 1999); Alicea-Hernandez v. Cath. Bishop of Chi., 320 F.3d 698 (7th Cir. 2003); Scharon v. St. Luke's Episcopal Presbyterian Hosp., 929 F.2d 360 (8th Cir. 1991); EEOC v. Pacific Press Publ'g Ass'n, 676 F.2d 1272 (9th Cir. 1982); EEOC v. Fremont Christian Sch., 781 F.2d 1362 (9th Cir. 1986); Werft v. Desert Sw. Annual Conf. of the United Methodist Church, 377 F.3d 1099 (9th Cir. 2004); Alcazar v. Corp. of the Cath. Archbishop of Seattle, 627 F.3d 1288 (9th Cir. 2010); Bryce v. Episcopal Church, 289 F.3d 648 (10th Cir. 2002); Gellington v. Christian Methodist Episcopal Church, Inc., 203 F.3d 1299 (11th Cir. 2000); EEOC v. Cath. Univ. of Am., 83 F.3d 455 (D.C. Cir. 1996).
[459] Hollins, 474 F.3d at 225.

described a religious organization as one whose "mission is marked by clear or obvious religious characteristics."[460] Regarding the kinds of adverse employment decision involved, discrimination based on gender, pregnancy, psychological disability were mostly protected under the doctrine, although gender discrimination cases received mixed treatment.[461] Whereas the Court in McClure involved Title VII, but has been found to be potentially applicable with regard to any legislation that interferes with internal decisions of religious institutions.[462] Regarding who would qualify as a minster under the exception, no clear standard had been established other than the fact that all circuits agreed that a senior minster was clearly a minister. The status of teachers in religious schools or other workers in religion-related functions remained unclear. For example, an "associate in pastoral care" was deemed to be a minister,[463] whereas a church secretary was not.[464] In *Rayburn v. General Conference of Seventh Day Adventists* the Fourth Circuit offered a relatively clear definition based on the functions performed by the employee: an employee is a minister if her duties involve "teaching, spreading the faith, church governance, supervision of a religious order, or supervision or participation in religious ritual and worship."[465] A consensus gradually started to develop in a majority of circuits around the notion that the key issue was the function played by the employee.

In *Hosanna-Tabor*, the Supreme Court upheld the ministerial exception, confirming the principle that in cases brought against a religious institution by an employee who can be considered as a "minister," courts are required by the Religion Clauses to dismiss the case. Moreover, the Court confirmed that the type of employment dispute does not matter; the applicability relates purely to the role and function of the person at the center of the dispute, i.e. the person being fired or disciplined, and not to nature or substance of the behavior

[460] Shaliehsabou v. Hebrew Home of Greater Wash., Inc., 363 F.3d 299, 310 (4th Cir. 2004). In this case, the organization was a Jewish nursing home.
[461] For example see Dole v. Shenandoah Baptist Church 899 F.2d 1389 (4th Cir. 1990) and EEOC v. Fremont Christian Sch., 781 F.2d 1362 (9th Cir. 1986), which disallowed the ministerial exception, in contrast with Alicea-Hernandez v. Cath. Bishop of Chi., 320 F.3d 698 (7th Cir. 2003) and EEOC v. Roman Cath. Diocese of Raleigh, 213 F.3d 795 (4th Cir. 2000), both of which upheld the exception.
[462] Caroline Evans and Anna Hood, "Religious Autonomy and Labour Law: A Comparison of the Jurisprudence of the United States and the European Court of Human Rights," *Oxford Journal of Law and Religion* 1, no. 1 (2012): 91, citing Ross v Metropolitan Church of God, 471 F. Supp. 2d 1306 (2007).
[463] Rayburn v. Gen. Conf. of Seventh-Day Adventists, 772 F.2d 1164 (4th Cir. 1985).
[464] EEOC v. Pacific Press Publ'g Ass'n, 676 F.2d 1272 (9th Cir. 1982).
[465] Rayburn, 772 F.2d at 1168-69.

leading to the dismissal or sanction. Thus when the ministerial exception is invoked, the case is meant to be dismissed without reaching the merits of whether the dismissal is unlawfully retaliatory in nature or otherwise in violation of labor law or Title VII antidiscrimination requirements. Nor does it matter whether the reasons for the discrimination or retaliatory dismissal are in any way related to religious dogma; the ministerial exception precludes the court from that inquiry altogether. Appellate courts in the past had used the idea to dismiss suits entirely unrelated to religion or the role of a minister, such as complaints about gender discrimination, national origin discrimination, sexual harassment, retaliatory dismissals. The Supreme Court affirmed that stance, affirming that concern over the motives of the firing "misses the point of the ministerial exception [which is] not to safeguard a church's decision to fire a minister only when it is made for a religious reason. The exception instead ensures that the authority to select and control who will minister to the faithful."[466] This protects both the church's autonomy and its ability to care for the content and credibility of its message.[467] All that matters is whether the person in question is in fact a "minister."

The Court declined to define a precise test for who qualifies as a minister, but tried – arguably unsuccessfully – to bring greater clarity to the scope of the doctrine by providing four criteria that it considered relevant to determining who was a minister. These criteria included whether the institution holds the employee out at a minster, whether the employee's title suggests religious training, whether the employee himself holds himself out as a minister, and finally whether the employee performs important religious functions for the institution in furtherance of its religious mission.[468] There was some disagreement among the justices on the relative weights of these four criteria. Justice Thomas felt it sufficient that the employer consider the employee to be a minister, reasoning that "[a] religious organization's right to choose its ministers would be hollow… if secular courts could second-guess the organization's sincere determination that a given employee is a "minister" under the organization's theological tenets."[469] Thus in his view the other three criteria carry no

[466] Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 194-195 (2012).
[467] Hosanna-Tabor, 565 U.S. at 200-201.
[468] Hosanna-Tabor, 565 U.S. at 191-192.
[469] Hosanna-Tabor, 565 U.S. at 197 (Thomas, J., concurring). This argument is problematic. Firstly, the notion that judicial scrutiny of the exercise of a right (in this case, the right to choose who speaks for a Church) would inherently "hollow" out that right is disturbing one to hear from a Supreme Court justice. Moreover, what is at issue is who is a "minister" for the purposes of the First Amendment as a question of law, not who is a "minister"

analytical weight. Justices Alito and Kagan, on the other hand, recognized that the term "minister" was subjective and in any case not part of the tradition of many faiths. They argued that the Court should not focus on evaluating the title or subjective views of the employer, but rather look to the functions undertaking by the employee to determine whether she plays the kind of role in the organization that merits First Amendment protection.[470]

Subsequent cases have continued to hinge on whether the employer was a minister, and the various circuit courts have not surprisingly taken inconsistent approaches in light of the Supreme Court's lack of clarity in *Hosanna-Tabor*. The Second Circuit has largely continued with the approach it took prior to *Hosanna-Tabor*, focusing on the function of the employee regardless of their title. In *Fratello v. Roman Catholic Archdiocese of N.Y.* the Court considered that the principal of a Catholic school qualified as a minister despite her lack of religious title. The Court justified its approach by asserting that the criteria in *Hosanna-Tabor* were mere considerations that courts might take into account and noting that the Supreme Court's analysis "neither limits the inquiry to those considerations nor requires their application in every case."[471] The Fifth Circuit has also taken an approach in line with Alito's concurring opinion in *Hosanna-Tabor* in focusing on religious function rather than making specific requirements of the employee's title. In considering a case involving a church music director, the Court noted that since he "performed an important function during the service, … he played a role in furthering the mission of the church and conveying its message to its congregants" and thus was a minister for purposes of applying the ministerial exception.[472] However, the Court framed this as the conclusion of an "all-things-considered" approach in respect of *Hosanna-Tabor's* rejection of a rigid test and interpreted the Supreme Court's comments to imply that "courts may not emphasize any one factor at the expense of other factors."[473]

The Sixth, Seventh and Ninth Circuits have also rejected a purely functional test and have more methodically taken into account the first three criteria of *Hosanna-Tabor*. In

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under the employer's "theological tenets." To simply allow the employer to decide this *ad hoc* without any right to scrutiny by the court is an abdication of the court's duty to balance the constitutional rights at stake. However, if Thomas is correct in his characterization of judicial scrutiny as "guessing," perhaps it is for the better.

[470] Hosanna-Tabor, 565 U.S. at 200 (Alito, J., concurring).

[471] Fratello v. Roman Cath. Archdiocese of N.Y., 863 F.3d 190, 204-205 (2d Cir. 2017).

[472] Cannata v. Cath. Diocese of Austin, 700 F.3d 169, 180 (5th Cir. 2012).

[473] Cannata, 700 F.3d at 176.

Conlon v. Intervarsity Christian Fellowship/USA, the Sixth Circuit found only two of the four criteria to be applicable to a "spiritual director" of an evangelical university campus organization – her title was sufficiently indicative of being a minister (criterion 1), and her functions were ministerial in nature (criterion 4).[474] Citing the Thomas and Alito concurrences in *Hosanna-Tabor*, the Court held that fulfilling these two criteria provided sufficient grounds for applying the ministerial exception, and refused to take a position on whether a purely functional test would be sufficient.[475] The Seventh Circuit court came to a similar conclusion regarding a Jewish day care worker in *Grussgott v. Milwaukee Jewish Day School*, where at most two of the four criteria were met.[476] The Court in this case explicitly rejected a purely functional test, noting that the Supreme Court had adopted a "totality-of-the-circumstances test" necessitating that "all facts must be taken into account and weighed on a case-by-case basis."[477] Two cases in the Ninth Circuit took an even stronger stance in favor of the necessity of considering more than one factor, but were overturned by the Supreme Court in *Our Lady of Guadelupe v. Morrissey-Berru* in 2020.[478] In Ninth Circuit cases, the Court considered the criteria outlined in *Hosanna-Tabor* in the totality of the circumstances and offered a detailed discussion of the function of the employee. In *Biel v. St. James School*[479] only the function factor was present, which the Court deemed insufficient, clearly affirming that the Ninth Circuit did not "read *Hosanna-Tabor* to indicate that the ministerial exception applies based on this shared characteristic alone. If it did, most of the analysis in *Hosanna-Tabor* would be irrelevant dicta."[480] Moreover, the Court reaffirmed that it did not consider the lack of formal title to be dispositive. However, after an analysis of the employee's function, they determined that her role was not sufficiently religious to trigger the ministerial exception. In *Morrissey-Berru v. Our Lady of Guadelupe School*[481] the facts were similar, however the employee's religious function was somewhat clearer – she taught religion, and her contract included an obligation to model and promote the school's

[474] Conlon v. Intervarsity Christian Fellowship/USA, 777 F.3d 829 (6th Cir. 2015).
[475] Conlon, 777 F.3d at 853.
[476] Grussgott v. Milwaukee Jewish Day Sch., Inc., 882 F.3d 655 (7th Cir. 2018).
[477] Grussgott, 882 F.3d at 660.
[478] Our Lady of Guadelupe v. Morrissey-Berru, No. 19-267, slip op (U.S. Jul. 8, 2020).
[479] Biel v. St. James Sch., 911 F.3d 603, 608 (9th Cir. 2018).
[480] Biel, 911 F.3d at 609.
[481] Morrissey-Berru v. Our Lady of Guadalupe Sch., 769 F. App'x 460 (9th Cir. 2019).

religious mission.[482] The Ninth Circuit Court similarly deemed her role to be insufficiently religious.

The Supreme Court, in what seems to be a significant shift in its position on the ministerial exception, overturned both cases. Writing for the majority, Justice Alito reasserted his concurring position in *Hosanna-Tabor* but with greater clarity (and the majority of the Court behind him) that the factors listed in *Hosanna-Tabor* "are not inflexible requirements and may have far less significance in some cases. What matters, at bottom, is what an employee does."[483] Moreover, the standard of determining how "ministerial" the function of the employee must be seems to have shifted. Alito castigated the Ninth Circuit for treating the criteria like a checklist, despite the Ninth Circuit's explicit insistence in *Biel* that they were looking at the totality of the circumstances and resting their decision on the standard explicitly set in *Hosanna-Tabor*, where the function of a minster was described as to "preach [their employers'] beliefs, teach their faith, . . . carry out their mission . . . [and] guide [their religious organization] on its way." [484] The Supreme Court instead recharacterized the guidance in *Hosanna-Tabor*, saying that both teachers "prayed with their students, attended Mass with the students, and prepared the children for their participation in other religious activities," and that this was sufficient for applying the ministerial exception. In other words, it appears that the functional test has emerged as the new standard, and that the religious functions required to be a minister are relatively minimal in the case of teachers at religious schools.[485]

Since *Hosanna-Tabor* there has also been more consideration of the first prong of the ministerial exception, that the organization be a religious institution. Various courts have given guidance on this in a variety of contexts. The Ninth Circuit for example, has considered an organization religious for the purpose of Title VII exemption if it "[1] is organized for a religious purpose, [2] is engaged primarily in carrying out that religious purpose, [3] holds itself out to the public as an entity for carrying out that religious purpose, and [4] does not engage primarily or substantially in the exchange of goods or services for money beyond

[482] Brief of Petitioner-Appellant at 16, Morrissey-Berru v. Our Lady of Guadalupe Sch., 769 F. App'x 460 (9th Cir. 2019) (No. 17-56624).
[483] Our Lady of Guadelupe v. Morrissey-Berru, No. 19-267, slip op at 18 (U.S. Jul. 8, 2020).
[484] Biel v. St James Sch., 911 F.3d 603, 611 (9th Cir. 2018) (quoting Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171,196 (2012)).
[485] Our Lady of Guadelupe v. Morrissey-Berru, No. 19-267, slip op at 21-22 (U.S. Jul. 8, 2020).

nominal amounts."[486] The Sixth Circuit in Conlon noted that for purposes of the ministerial exception "an employer need not be a traditional religious organization such as a church, diocese, or synagogue, or an entity operated by a traditional religious organization."[487] For the non-obvious cases, what seems to have emerged from the various circuits is a holistic consideration of a range of religious characteristics, including the content of the organization's article of incorporation,[488] whom the organization hires, connections with churches or other clearly religious institutions, the group's mission,[489] and even decorations on the premises of the employer in question.[490] Religious schools seem to be uncontroversial as religious institutions, while hospitals with religious affiliations have undergone more scrutiny, and for-profit businesses have been dismissed as not religious in nature for purposes of the ministerial exception.[491] Even if the organization is found not to be a religious group, the Second Circuit held in *Penn v. NY Methodist Hospital* that the relevant factor was whether the hospital "was acting as a religious organization."

Thus the current situation as of 2020 is that the ministerial exception is widely available to non-profit organizations with a religious mission or motivation who wish to protect their employment decisions from court scrutiny on the basis of Title VII discrimination claims. Under the *Our Lady of Guadeloupe* standard, anyone involved in organizing, preparing or facilitating religious activities is potentially a minister who can be subject to adverse employment actions such as demotion or dismissal on any basis whatsoever, be it gender discrimination, racial bias, or even disability discrimination. Nevertheless, there is clearly still room for interpretation within these guidelines – "facilitating" is exceptionally vague

[486] Spencer v. World Vision, Inc., 633 F.3d 723, 724 (9th Cir. 2011).
[487] Conlon v. Intervarsity Christian Fellowship/USA, 777 F.3d 829, 834 (6th Cir. 2015) (citing Hollins v. Methodist Healthcare Inc., 474 F.3d 223, 255 (6th Cir. 2007)).
[488] Penn v. N.Y. Methodist Hospital, 884 F.3d 416 (2d Cir. 2018).
[489] Conlon, (citing Shaliehsabou v. Hebrew Home of Greater Wash., Inc., 363 F.3d 299, 310 (4th Cir. 2004)).
[490] See EEOC v R.G. &. G.R. Harris Funeral Homes Inc., 884 F.3D 560, 582 (6th Cir. 2018).

[491] This has been the position so far; however, in light of Supreme Court's decision in *Hobby Lobby* which acknowledged that a for-profit business is capable of having protectable religious beliefs under the First Amendment, it is conceivable that for-profit corporations may be able to claim the ministerial exception in certain circumstances. Ira C. Lupu raises the hypothetical of a company like *Hobby Lobby* hiring a chaplain – such an employee might be seen as a minister, especially if the company made reference to a religious mission in its articles of incorporation. Even without a primary religious function, a business might be acting as a religious institution in a specific context, as was the case in *Penn v. N.Y. Methodist Hospital*. For a broader discussion of this possibility, see Ira C. Lupu and Robert W. Tuttle, "Religious Exemptions and the Limited Relevance of Corporate Identity," in *The Rise of Corporate Religious Liberty,* eds. Zoe Robinson, Chad Flanders and Micah Schwartzman (New York: Oxford University Press, 2016), 373-398.

without further clarification, and it an almost certain invitation to further litigation. And the most recent treatment of the doctrine by the Seventh Circuit shows that other questions remain unresolved when the Court held that the ministerial exception acts as a categorial bar on hostile workplace claims.[492] Other circuits have held differently, leaving the question open for eventual resolution by the Supreme Court. But while there is still room for discussion in future court decisions, the ministerial exception remains a formidable barrier to state protection of employees in religious organizations, and the outcome of such cases seems increasingly predictable.

B. Additional protections for US religious employers

The ministerial exception, as discussed above, relates specifically to the special role of religious employees who have the responsibility of conveying the message and mission of the religious organization they work for. Other workplace issues involving religious employers cannot benefit from that exception, and thus must rely on the First Amendment or relevant statutory provisions including, if applicable, the RFRA. The majority of these cases has involved religious nonprofits or colleges who have objected to the ACA contraceptive mandate for their employees. We have already explored this body of cases in the US when discussing complicity cases. Regulations implementing the ACA, it must be remembered, exempt religious employers. The definition of religious employers, however, was drafted relatively narrowly[493] and excluded many religious nonprofits as well as religiously motivated for-profit companies. A compromise was reached whereby religious nonprofits with objections would also receive an exemption, but they needed to notify the government to that effect. Most of the ACA related litigation involved nonprofits who objected to the notification requirements, arguing that it compelled them to be complicit in the sin of abortion

[492] Demkovich v. St. Andrew the Apostle Parish, No. 19-2142 (7th Cir. July 9, 2021).

[493] A religious employer for purposes of the ACA was defined by the Department of Health and Human Services as one that "(1) Has the inculcation of religious values as its purpose; (2) primarily employs persons who share its religious tenets; (3) primarily serves persons who share its religious tenets; and (4) is a nonprofit organization described in section 6033(a)(1) and section 6033(a)(3)(A)(i) or (iii) of the [Internal Revenue] Code." The cited sections "refer to churches, their integrated auxiliaries, and conventions or associations of churches, as well as the exclusively religious activities of any religious order." See "Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act," 76 Fed. Reg. 46,621, 46,623 (Aug. 3, 2011).

because notifying the government would "trigger" a process by which the government would ensure coverage for the employee without the nonprofit's further involvement.

The nature of the employer as a religious identity has been crucial in these cases, since what was at issue was whether the government could apply the law to them even if they asserted that it violated their religious ethos. What made the cases particularly interesting in the degree to which is tested the "religious question" doctrine – the doctrine under US law that courts are barred from judging questions of a religious nature such as the content or reasonableness of church doctrine.[494] At issue in many of the cases was the question of whether there was a substantial burden on religion. While this question was in part about the nature of complicity, as discussed above in Subsection 4(ii), it was also about the ability of a religiously motivated organization to decide for itself what does or does not constitute a substantial burden. Thus in this sense the crux of the cases involved a question over the special autonomy of religiously motivated organizations under RFRA.

As noted above, US courts are split regarding the extent to which the religious question doctrine prevents judicial inquiry into the assertion that there has been a substantial burden imposed on the free exercise of religion. As Gedicks has noted, how one sees this depends partly on whether the issue is approached from a free exercise or an Establishment Clause perspective. The Establishment Clause can be interpreted as a disability on judicial power because it leads to undue entanglement of the government in religious affairs. The Free Exercise Clause, however, invites a balancing approach that would argue for the right of the judiciary to examine the undue burden argument in defense of the interests of others.[495] Various circuit courts have approached the question through the balancing framework and insisted that part of the evaluation of the "triggering event" in the ACA cases involves legal interpretation. The University of Notre Dame, for example, contended that the opt-out procedures provided under the ACA regulations required them to act in a way that would, as a consequence, lead to the provision of contraceptive coverage for its employees. Judge Posner's response was that the coverage results from federal law, not the university's actions, noting that "Federal courts are not required to treat Notre Dame's erroneous legal

[494] Frederick Mark Gedicks, *The Religious-question Doctrine: Free-exercise Right or Anti-establishment Immunity?* (Italy: European University Institute, March 2016), 1. Robert Schuman Centre for Advanced Studies Research Paper No. RSCAS 2016/10, BYU Law Research Paper No. 16-12.
[495] Gedicks, *The Religious-question Doctrine*, 8.

interpretation as beyond their reach – even if that interpretation is also a sincere and religious belief."[496] Thus in this decision Posner is theorizing the boundary line dividing the proper jurisdiction and competence of the court from the privileged space of religious autonomy. His argument derives from formal logic. Any syllogism has a major and a minor premise. If both premises are true and the form of the syllogism is valid, then the conclusion must be true. The syllogism in Notre Dame can be seen as the following:

Major premise: We violate our faith if we assist anyone to receive contraceptives.

Minor premise: Our fulfillment of the ACA opt-out procedures would assist our employees to receive contraceptives.

Conclusion: The ACA opt-out procedures force us to violate our faith.

The conclusion is true only if both premises are true. The major premise is religious. The minor premise is a question of law. Thus Notre Dame's conclusion is unsound, but more importantly, it is perfectly legitimate, in Posner's view, for the courts to rule it unsound by taking a position with regard to the truth of the minor premise. This decision, formulated in this way, does not implicate the religious question doctrine. Be that as it may, the Supreme Court has essentially decided that the entire syllogism is off-limits to judicial analysis, and as a result religious employers may effectively decide for themselves whether the law applies to them.

Religious employer cases have also included a few cases of for-profit companies, in particular *Hobby Lobby*, which has also been discussed above in Subsection 4(ii) on complicity cases. It must simply be noted in passing that the decision in *Hobby Lobby* extended RFRA protections to the company on the basis that it was a closely held corporation and thus in some sense inseparable from the rights to religious freedom of the owners. Thus while it is a "religious employer" in the colloquial sense, it was not treated as such in the Court's reasoning. Hobby Lobby did not qualify for the statutory exemption for religious organizations under ACA regulations. Whether it might qualify as a religious organization under other statutes that have provided broad or ambiguous definitions of "religious organization," or in other contexts where courts must craft ad hoc definitions, remains to be seen.

[496] Univ. of Notre Dame v. Burwell, 786 F. 3d 606, 623 (7th Cir. 2015).

C. The European focus on church autonomy

In the context of the European Convention on Human Rights, state parties represent a wide variety of models of church/state relations, and as such there is no easy set of standards to apply in the extent to which religious employers can make religious freedom arguments in defense of their employment-related decisions. The cases rising to the level of the ECtHR have been relatively limited in number but have presented an interesting array of issues testing the limits of religious freedom in its collective dimension and the extent to which church autonomy can be limited in the interest of protecting other rights. These cases in their totality demonstrate a delicate balance of countervailing forces, principal among which are the jurisdictional incapacity of the court to determine religious questions, the degree of loyalty a religious organization can demand of its employees, the importance of the employee being on notice of the professional consequences of his actions, the procedural requirements of balancing competing Convention rights, and the margin of appreciation.

Despite the variety of approaches to church/state relations across Europe, there has been a long-held consensus that the state and its courts have no authority to pass judgments on the truth or credibility of the content of any given set of religious beliefs. As the ECtHR articulated in *Hassan and Chaush v. Bulgaria*, Article 9 "excludes any discretion on the part of the State to determine whether religious beliefs or the means used to express such beliefs are legitimate."[497] This "jurisdictional approach" is reflected in much of the church autonomy case law, but the Court has tended to apply the doctrine in a restrictive way. The best example of such reasoning comes in *Fernandez-Martinez v. Spain* (Third Chamber). This case involved a priest and teacher of Catholic religion and morals in the state school system who had married in violation of the Catholic church's doctrine on celibacy. He was also active in a "movement for optional celibacy" which had received substantial attention in the media. His contract as a teacher of religion was not renewed, with the religious authority taking the decision citing the need to perform duties "without risking scandal." The Court asserted that because the case involved a decision by the Bishop not to recommend the renewal of a contract for someone who was a secularized priest, the employment decision was inherently religious in nature and, as a result, "the principles of religious freedom and neutrality

[497] Hasan and Chaush v. Bulgaria [GC], no. 30985/96, § 78, ECHR 2000-XI.

preclude it from carrying out any further examination of the necessity and proportionality of the non-renewal decision, its role being confined to verifying that neither the fundamental principles of domestic law nor the applicant's dignity have been compromised."[498]

In several other cases in which employees were fired for breaching a religious code of conduct the Court has noted, either explicitly or implicitly, that it has no authority to judge the contents of the code of conduct as such or to comment upon its reasonableness. *Obst v. Germany*[499] and *Schüth v. Germany*,[500] for example, were both cases in which the employee was dismissed because they violated church doctrine concerning the sanctity of marriage. In both cases, the ECtHR refused to enter into any discussion of the reasonableness of the church's position, adhering to its position in *Hassan and Chaush*. These cases, however, produced different results that hinged on what has been seen as a shift away from the traditional approach of jurisdictional incompetence to interfere in church decision-making.[501] As will be explored further in Part II, the ECtHR has arguably maintained the core of the jurisdictional approach in these cases that it continues to avoid involving itself in question about religious doctrine,[502] but rather has insisted that deference to a church's view of its own religious doctrine be coupled with an inquiry by the Court into what kind of balance must be struck between the church's religious claims and the competing Convention rights of the employee. The operative question is not about the value of autonomy to the church in question; rather, it is whether or not to permit that autonomy in the face of the harm done to the employee in question. In each of the church autonomy cases the Court has repeatedly insisted on the duty of the courts to balance the exigencies of religious autonomy with any countervailing Convention rights of employees that autonomous church decisions might endanger. As Evans and Hood explain with reference to *Schüth*, "[i]t is not enough that the Catholic Church believes that adultery is a serious sin and that employing an organist who is known to be living in an extra-marital relationship to play in religious services would

[498] Fernandez-Martinez v. Spain, no. 56030/07, § 84, 15 May 2012, http://hudoc.echr.coe.int/eng?i=001-110916.
[499] Obst v. Germany, 23 September 2010, http://hudoc.echr.coe.int/eng?i=001-100463.
[500] Schüth v. Germany, no. 1620/03, ECHR 2010.
[501] See Evans and Hood, "Religious Autonomy," 16-17.
[502] There are legitimate questions concerning the Court's success in adhering to this position. For example, in *Dahlab v. Switzerland*, the Court rather offhandedly interpreted the Muslim practice of women wearing the veil as an attack on women's freedom and equality, a position which is hotly contested within Islam.

undermine the Church's moral teaching. The Church must also consider the right to privacy, family life and employment prospects of the employee."[503]

So too must the Court. Schüth found a violation of Article 8 on the grounds that the lower courts had not sufficiently balanced the employee's rights against those of the church. By not sufficiently taking into consideration the employee's rights, the state had not fulfilled its positive obligation to secure his rights the freedoms under the Convention. This does not mean that the lower courts got it wrong, but simply that the lower courts did not do their procedural duty in ensuring that the employee could fully benefit from his Convention rights. This is an example of an important way in which the Convention can govern horizontal relations between citizens rather than mere vertical ones between the state and its citizens. As the Court has observed, states under the Convention "are under an obligation to afford judicial procedures that offer the necessary procedural guarantees and therefore enable the domestic courts and tribunals to adjudicate effectively and fairly any disputes between private persons."[504] This procedural emphasis is critically important in understanding the church autonomy cases like *Schüth v. Germany*,[505] where what is being judged is not the merits but the procedure, and has become a dominant feature of Article 9 jurisprudence in recent years, arguably as a means of avoiding taking politically divisive stances that might weaken the position of the Court with its state parties.[506] Similarly, in *Lombardi Vallauri v. Italy*, the Court found a violation because the dismissed employee, a professor at a Catholic University, had been given no opportunity to appeal his dismissal either with his employer or with the Italian courts.[507] These cases thus stand for the proposition that courts take church values as they are, but that courts have an obligation to weigh the right of the church to defend those religious values with the rights of others.

The Court in *Obst v. Germany*, where there was a similar fact pattern of a church employee being fired for marital infidelity, also refrained from judging the fairness of the church's decision. In finding no violation of the Convention, however, the Court observed

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[503] Evans and Hood, "Religious Autonomy," 22.
[504] Sovtransavto Holding v. Ukraine, no. 48553/99, § 96, ECHR 2002-VII.
[505] Schüth v. Germany, no. 1620/03, ECHR 2010.
[506] See Oddný Mjöll Arnardóttir, "Organised Retreat? The Move from 'Substantive' to 'Procedural' Review in the ECtHR's Case Law on the Margin of Appreciation," Paper No. 4 presented at the European Society for International Law 2015 Annual Conference, Oslo, 10-12 September 2015. http://dx.doi.org/10.2139/ssrn.2709669.
[507] Lombardi Vallauri v. Italy, no. 39128/05, 20 October 2009, http://hudoc.echr.coe.int/eng?i=001-95150.

that the lower courts had adequately balanced the importance of the church's reputation with the rights of the employee and found that the church was within its Article 9 rights to terminate the employee. However, it also took account of the reasonableness of the employee. This aspect of the Court's decision-making is evident in several cases and tracks jurisprudence from the Commission, in particular *Rommelfanger v. Germany*, in which the Commission recognized that organizations like churches, established on the basis of certain convictions or value judgments, cannot function without demanding a certain duty of loyalty from their employees that might lead to a limitation on some employee's rights.[508] This heightened duty of loyalty was a significant factor in the Court's decision in *Obst*, as well as in *Siebenhaar v. Germany* and *Fernandez-Martinez v. Spain*. In contrast, the Court in *Schüth* accepted the lower court's finding that under German law a duty of heightened loyalty applies only to employees in ministerial or managerial roles and was not applicable to a church organist.[509]

Along with this heightened loyalty, the Court in several cases has theorized a duty of care of employees inasmuch as, in accepting a job with a clearly religious employer, the employees knew or should have known that violation of the organizations core tenets could lead to adverse employment decisions. This is particularly the case where the employment contract made specific reference to the centrality of the organization's moral mission and the importance that the employee model its values. In *Obst* the Court noted that the employee "having grown up in the Mormon church, was aware or should have been aware from having signed his employment contract and especially paragraph 10 (regarding the observance of strict moral principles) of the importance that marital fidelity held for his employer."[510] Similarly in *Siebenhaar v. Germany* the Court found no violation of the Convention for a school teacher dismissed from her position in the protestant church for also belonging to the Universal Church, noting that she knew or should have known that membership in another denomination would be incompatible with her position, especially given clear language in her employment contract.[511] In *Schüth*, however, the Court questioned the clarity of the

[508] Rommelfanger v. Germany, no. 12242/86, Commission decision of 6 September 1989, Decisions and Reports 62.
[509] Schüth, § 71.
[510] Obst v. Germany, § 50, 23 September 2010, http://hudoc.echr.coe.int/eng?i=001-100463 [translation from French by the author].
[511] Siebenhaar v. Germany, no. 18136/02, § 46, 3 February 2011, http://hudoc.echr.coe.int/eng?i=001-103236.

employee's obligations with regard to his moral duty to remain celibate after his divorce, and in fact seemed to indicate that it found the requirement unreasonable, at least inasmuch as it violated one of the core protections of Article 8 regarding private life. This lack of clarity was one of several factors that led it to its conclusion that the national courts had not sufficiently taken into consideration the rights of the employee.

Finally, in various of these cases the Court has suggested several factors that should be taken into consideration in evaluating the balance between the right to church autonomy and the rights of the employees. While none of these factors in themselves have been dispositive, the Court has noted that the severity of the sanction is a relevant factor in striking the balance between church autonomy and other rights. In *Schüth*, for example, the Court considered the difficulty a church organist would have in finding employment outside the church.[512] In *Siebenhaar*, the length of the employee's tenure as a teacher was taken into account.[513] In *Fernandez-Martinez*, the Court noted that the employee, despite difficulties in getting a new position, was eligible for and did in fact receive unemployment benefits.[514] Balanced against these factors, the Court has also weighed the relative importance of the position of the employee in the organization in determining the duty of loyalty the employee owed to his employer.[515]

Perhaps the most important of these cases, and the most recent clear summary of the Court's approach to church autonomy, arose in 2014 when the case of *Fernandez-Martinez* was revisited by the Grand Chamber. In this case the Court revisited all of the above issues, and unlike in these other cases, conducted a methodical proportionality review. The detailed components of that review will be explored further in Part II, but the outcome of that review offered a thorough snapshot of the Court's current position on church autonomy. The primary difference between the Third Chamber's judgment and that of the Grand Chamber was that the Grand Chamber took a different view on the applicant's status as a priest. The Third Chamber took the view that since the employee was a priest, the Bishop's decision to not recommend his renewal was religious in nature. The Grand Chamber, however, viewed the relevant question as whether the state, as his employer, should have dismissed him as a

[512] Schüth v. Germany, no. 1620/03, § 73, ECHR 2010.
[513] Siebenhaar, § 44.
[514] Fernandez-Martinez v. Spain [GC], no. 56030/07, § 145, ECHR 2014 (extracts).
[515] Obst, § 51.

teacher (who happened to be an ex-priest). This question, the Grand Chamber concluded, was not religious, but rather a direct question regarding the Convention's vertical effect between the state and its citizens. With that difference, the Court reviewed the same criteria as emerged in previous caselaw and subjected them to a proportionality analysis. Because the status of the priest was in question, however, the court has arguably left the door open to the idea that a case involving an undisputed priest would be resolved differently by concluding, as the Third Chamber had, that the Court has no jurisdiction to pass judgment in decisions by a religious body regarding whether "to admit or exclude an individual or to entrust someone with a particular religious duty."[516] But in any other cases it remains clear that the Court will balance the interests, with relevant criteria including the status of the employee within the organization's hierarchy, the degree of loyalty owed to the organization by virtue of the employee's status, the nature of the employee's function, the severity of the consequences on the employee, the foreseeability of the disciplinary action in light of his or her behavior, the degree of harm done to the mission or reputation of the organization, and the adequacy of the procedural safeguards to which the employee had access at the national level. The result of these criteria has been that the ECtHR has been largely deferential to the rights of religious organizations in choosing or disciplining their employees in cases where the employee's role has direct relevance to the organization's mission or public image, so long as there has been adequate consideration taken by both the organization and the national courts that the measure was not excessive. Such situations fall well within the wide margin of appreciation granted to national governments in regulating the relationship between church and state.

[516] Fernandez-Martinez v. Spain, no. 56030/07, § 80, 15 May 2012, http://hudoc.echr.coe.int/eng?i=001-110916. For a discussion of this view, see Stijn Smet, "Fernandez Martinez v. Spain: The Grand Chamber Putting the Brakes on the 'Ministerial Exception' for Europe?," *Strasbourg Observers* (blog), 23 June 2014. https://strasbourgobservers.com/2014/06/23/fernandez-martinez-v-spain-the-grand-chamber-putting-the-breaks-on-the-ministerial-exception-for-europe/.

D. Religious employer cases compared

i. The absence of cases analogous to the ACA cases in the ECtHR

What is immediately apparent from these two bodies of caselaw is that they only overlap in terms of issues to a certain extent. This is in large part due to differences in the political systems of the United States and Europe, as well as the differing approaches to the relationship between church and state. In the United States a significant amount of litigation concerning religious freedom in the workplace has been generated by the Department of Health and Human Services contraceptive mandate under the ACA. Such cases simply do not arise in Europe due to the different structures in place for the provision of health care.

ii. US cases' focus on discriminatory dismissal in contrast with ECtHR's focus on dismissal related to off-duty conduct

The church autonomy cases provide a clearer basis of comparison as both courts acknowledge a basic right to church autonomy and both have had to address cases where employment cases came into conflict with that autonomy. In both sets of cases religious freedom in its collective dimension was at odds with the rights of employees. The US cases the rights in question have tended to relate to discrimination in violation of Title VII, the Americans with Disabilities Act or the Age Discrimination in Employment Act, as well as, in some cases, retaliatory firing for complaining about the discrimination in question. In the ECtHR each case was about the employee's beliefs or behavior that did not conform to church doctrine or, in consequence, the church's expectations of behavior from employees even while off-duty. Cases such as these do exist in the US, but not as constitutional cases. Employment law in the US is less protective of employees, and in the US there is not the same conception of a right to work as exits in Europe. Employment is at will, and employees can be fired without cause unless it is for one of the specific causes laid out in Title VII and other anti-discrimination statutes. It is thus uncontentious that religious employers can make hiring or firing decision based on religious beliefs, as this is specifically provided for in Title VII Section 702, as discussed above. Likewise, the right of a religious organization to fire employees for off-duty behavior that violates religious doctrine is governed by Title VII, so

there has been little call to litigate such complaints under the First Amendment or RFRA. Constitutionally speaking, however, there is nothing in the First Amendment to prohibit being fired for not complying with church doctrine. There is only the Title VII requirement that such firing not be done in a discriminatory manner. So the cases that have involved constitutional issues in the US have been those where the employer invoked the ministerial exception to justifying firing an employee not because of religious doctrine, but rather because of some form of statutorily barred discrimination. In the ECtHR context, however, the Court has more recently needed to work out the specific question of how to balance church autonomy, and particularly the right of a church to expect its employees to embody its teachings, and the countervailing rights of employees.

iii. Contrasting approaches to evaluating reasons for dismissal

While there is a difference in the types of cases that have arisen with reference to the reasons behind the dismissal of the employees of religious organizations, there is also a significant difference in how the courts have approached these reasons in general and their importance in affecting outcomes. The focus in US courts in cases not clearly governed by statute has been the application of the ministerial exception. What makes this doctrine so distinct from the practices of the ECtHR, and indeed distinct from most other First Amendment analysis, is that once cases are determined to fall within the ambit of the ministerial exception they are approached in a categorical fashion. Categorical reasoning precludes balancing the interests or rights of the employee against the collective free exercise rights of the religious organizations for which they work. As Chief Justice Roberts asserts in the majority opinion in *Hosanna-Tabor*, "minister who has been fired sues her church alleging that her termination was discriminatory, the First Amendment has struck the balance for us."[517] Once the employee is deemed to be a minister, the case is essentially over no matter how egregious the behavior of the employer. This is starkly demonstrated in *Biel v. St. James School*, where the employee was let go because the school did not want to be inconvenienced by her need for chemotherapy, and in the pre-*Hosanna-Tabor* case *Elvig v. Calvin Presbyterian Church*, where the employee was fired for filing a sexual harassment

[517] Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 196 (2012).

complaint.[518] It should be remembered that the employee can still seek damages or conviction if the behavior is criminal – the victim can sue for sexual harassment, or if the case involved assault or rape the individual could be prosecuted. But the organization cannot be sanctioned for dismissing the employee, nor can the employee recover damages from the employer for the loss of her job. From an employment perspective, the religious organization is indemnified; the employee is out of luck.

While the reasons for dismissal in the ECtHR cases are quite different, the most essential factor in comparing them to the US cases is the ECtHR's willingness to take into account the rights of the employee and thus, to some extent, evaluate the fairness of the dismissal. While insisting on the fundamental importance of church autonomy as a form of religious freedom in its collective dimension, the ECtHR's caselaw has repeatedly taken a balancing approach to determine when the right to church autonomy should outweigh other Convention rights such as the rights to expression, assembly or private life. In the US cases, church autonomy always wins when the employee is someone performing a ministerial function which, given the very broad conception of a minster adopted by US courts, is most of the time. The effect on the employee is not relevant. For the ECtHR, however, not only is the violation of the employee's rights an issue, but so too is the gravity of the practical harm done to the employee by the violation. In *Schüth v. Germany*, for example, the Court considered it of relevance that the employee, once dismissed, was effectively barred from continuing his career as a church organist. Alongside considerations of the church autonomy and the harm done to the employee, the Court also reflects on the possible harm done to the employer's religious mission, although it is not dispositive as it is the US courts. In *Fernandez-Martinez*, for example, the fact that the employee had been a priest was deemed relevant, although how to characterize his ministerial status was a matter of dispute between the Third Chamber and the Grand Chamber. This consideration by the Court has led to some speculation as to if and how the Court would balance interests in a similar case involving an acting priest in the church.[519] While the degree to which his status as a former priest played a role is unclear, it is suggestive that the Court chose to take into consideration "the proximity between the

[518] Elvig v. Calvin Presbyterian Church*,* 375 F.3d 951, 960 (9th Cir. 2004).
[519] For example see Sylvie Langlaude Done, "Religious Organisations, Internal Autonomy and Other Religious Rights before the European Court of Human Rights and the OSCE," *Netherlands Quarterly of Human Rights* 34, no. 1 (2016): 8-40.

person's activity and the Church's proclamatory mission."[520] In this context, being a teacher of religion was sufficient to warrant an expectation that of a heightened duty of loyalty since, "in order to remain credible, religion must be taught by a person whose way of life and public statements are not flagrantly at odds with the religion in question, especially where the religion is supposed to govern the private life and personal beliefs of its followers."[521] Moreover, the highly public nature of the employee's defiance of church doctrine was also seen as a factor in favor of finding no violation of the employee's right to private life by his dismissal as a teacher of religion.

The need to balance leads to another key difference between the approaches of the two courts, specifically the willingness to delve into church doctrine. As we have seen, the "religious question doctrine" in the US is taken to bar the courts from any evaluation or consideration of questions that might in any way been considered ecclesiastical. The ECtHR has repeatedly disavowed its competence to pass judgment on the merits of any given religious belief. However, in balancing the rights of others against church autonomy, it becomes at times very challenging to avoid passing judgment on religious issues. This is especially true since, as discussed above, in the specific fact patterns dealt with by the ECtHR which have involved employees who were fired for not living in accordance with religious doctrine. In *Fernandez-Martinez [GC]* the Court, in reflecting upon the damage to the church's credibility that might be caused by a teacher dissenting from Church doctrine, the Court noted that in the context of the heightened publicity of the case, it was "necessary to take into account the specific content of the applicant's teaching.[522] In this sense, *Schüth* is an ideal foil to *Fernandez- Martinez*, since in *Schüth* the employee's case "had not received media coverage" and " he did not appear to have challenged the stances of the Catholic Church, but rather to have failed to observe them in practice."[523] In consideration of these issues the Court concluded that the employee's agreement to abide by church teaching "[could not] be interpreted as a personal unequivocal undertaking to live a life of abstinence

[520] *Fernandez-Martinez v. Spain* [GC], no. 56030/07, § 140, ECHR 2014 (extracts).
[521] *Fernandez-Martinez*, § 138.
[522] *Fernandez-Martinez*, § 138.
[523] *Schüth v. Germany*, no. 1620/03, § 72, ECHR 2010.

in the event of separation or divorce" especially since he was not bound to the same heightened duty of loyalty as in *Fernandez-Martinez* or *Obst v. Germany*.[524]

It should be noted that this ability to balance has particular significance given the stronger conception of economic and social rights in Europe and the importance placed on equality in the provision of state services such as health care. This is significant in understanding the position the ECtHR has taken in the set of cases examined in this study, but also in trying to theorize how the Court might react to the kinds of cases that have arisen in the US. The ACA cases are not relevant in Europe because of the different model of providing health care; however, it is instructive to reflect on how the ECtHR approach might engage with a hypothetical ACA case. Against the political and ideological backdrop of contemporary Europe, the Court would be unlikely to contest the decision by any state party that the right to equal provision of contraceptive services outweighed the collective right of a church organization not to be complicit in the sins of others so long the national courts provided sufficient procedural safeguards.

This combination political and cultural factors, along with the different legal approach, lead to very different results in the degree and nature of autonomy granted to religious organizations. Both the US and the ECtHR begin with relatively strong presumption that religious organizations that are deemed "religious enough" in terms of staffing, policies, affiliations and mission - should be granted relative autonomy over their workplace decisions where religious questions may come into the decision-making process. The ECtHR grants a wide margin of appreciation on issues relating to the relationship between church and state, and this margin of appreciation seems more often than not to work in favor of religious organizations – of the five employment cases examined, a violation was found only in two cases where procedural safeguards were deemed insufficient following a balancing analysis of the relative rights and duties of the organization and the employee. Thus while the ECtHR is at times characterized as less protective of religious freedom in its collective dimension, it would be more accurate to say that it is simply more protective of employee rights than the US. American courts, partly because of social and political to labor, partly because of the exigencies of RFRA and the Establishment Clause, has tended to be more deferential to

[524] *Schüth*, § 71.

religious organizations, especially in its refusal to examine the motives of adverse employment decisions where the ministerial exemption is applicable.

3. Religion in the for-profit workplace

The caseload regarding religious freedom in the for-profit workplace, i.e. private sector companies excluding non-profits, raises many of the same issues as the cases arising in public sector and religious workplaces. As a category, however, it is different because these cases are lacking some of the complicating factors of the other two categories of cases. Government employers faced the complication of balancing religious freedom for their employees with their dual role as both employer and agent of the state. Religious organizations, by contrast, were often faced with the challenge of staying true to their guiding missions and strictures of faith while abiding by generally applicable laws applying to employment such as the ACA, anti-discrimination laws or protective labor laws governing the conditions of dismissal. The for-profit workplace is, in a sense, a catch-all category for the vast majority of organizations that employee workers and provide goods and services to the public.

None of the US cases in which the First Amendment or RFRA are concerned involve situations where an employee's religious freedom is being restricted by their private sector employers because the Constitution does not have horizontal effect regulating the treatment of individuals by other individuals.[525] The Bill of Rights protects individuals from government actions, not the actions of others.[526] Moreover, RFRA was drafted essentially to modify Supreme Court precedent and impose strict scrutiny in what would otherwise be First Amendment cases invoking the Religion Clauses and thus also only applies to state action. Instead, cases in which employees' religious freedom are denied by private sector employers are statutory cases arising in the context of Title VII antidiscrimination claims. The Constitutional and RFRA cases of interest in this study involve businesses owned and operated by religious individuals who were seeking accommodation from laws that would

[525] First Amendment claims are made at times, but are quickly dismissed by the courts. For example, see Bodett v. Cox Com, Inc., 366 F.3d 736 (9th Cir. 2004).

[526] This aspect of constitutional law is commonly referred to as the "state action doctrine," and is enshrined in the language of the 14th Amendment, which provides that "no state shall" abridge the rights of citizens without due process or deny any citizen the equal protection of the laws. The accepted interpretation of the wording of the 14th Amendment was established in the Civil Rights Cases, 109 U.S. 3 (1883).

make them either violate their faith or be complicit in the sins of others. We have explored some of these cases in Subsection 4 above when exploring the category of complicity cases. It remains to look at the private sector cases among these in order to determine the role that the type of workplace might play in the courts' decision-making.

A. Debates over corporate personhood in the US courts

The primary issues raised in categorizing these cases together in this way is the overarching question of whether a business can indeed have religious beliefs or "exercise" religion and, if so, under what circumstances can they be accommodated from generally applicable laws and thereby impose costs on third parties. Until the Supreme Court's decision *Burwell v. Hobby Lobby*, courts had either avoided the question of whether corporations could exercise religious rights or had asserted that they could not.[527] In *Hobby Lobby*, however, the Supreme Court had the opportunity to resolve the question. The case involved a complicity claim against the contraceptive mandate of the ACA and put forward a strong version of the argument that substantial burden is essentially a subjective question not to be questioned by courts. But the case was even more controversial for its ruling that a for-profit closely-held corporation was a "person" under RFRA and thus could be deemed to have religious freedom rights on its own behalf. This stance was groundbreaking, in spite of the majority's argument that they were following precedent, since in neither of the precedents cited did the court take the view that a for-profit corporation could exercise rights under the Free Exercise Clause. One – *Braunfield v. Brown* – merely established that a sole proprietor could exercise religion.[528] The other, *Gallagher v. Crown Kosher Super Market,* declined to address the question of standing and rejected the business's claim on the merits.[529] Nevertheless, the Supreme Court in *Hobby Lobby* found that there was no reason why a closely-held corporation could not be treated as a person under RFRA, and thus endowed a company with over 13,000 employees with religious personhood and a conscience worthy of First Amendment protection.

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[527] Scott W. Gaylord, "For-Profit Corporations, Free Exercise, and the HHS Mandate," *Washington University Law Review* 91, no. 3 (2014): 589-658.
[528] Braunfeld v. Brown, 366 U. S. 599 (1961).
[529] Gallagher v. Crown Kosher Super Market of Mass., Inc., 366 U. S. 617 (1961).

An estimated 90% of businesses in the United States are closely held corporations, thus the implications of the case are enormous.[530] The case was widely criticized on a number of points, especially that the case seems to make the central point of corporate personhood –the strict distinction between shareholders and the corporation itself – a "one-way street" that obtains when it serves the interests of the shareholders but that can be set aside when it becomes a burden.[531] Essentially, in order to attribute personhood to Hobby Lobby and the other companies joined in the case, the Court pierced the corporate veil while still permitting the companies to benefit from the advantages and protections of the corporate form.[532] In taking this position, the Supreme Court overturned and explicitly rejected the approach of the Third Circuit in *Conestoga Woods* (one of the cases consolidated with *Hobby Lobby* in the Supreme Court).[533] The Third Circuit's approach had not entirely rejected the idea of constitutional rights for corporations, but rather to disallow corporations from asserting constitutional rights that were "purely personal" in nature.[534] Once the Court had accepted Hobby Lobby as a "person" for purposes of the RFRA, it then took a broad view of what constitutes free exercise to argue that Hobby Lobby's religious liberty, deemed to be one and the same as that of its owners, was violated by the contraceptive mandate. Because the case was governed by RFRA, the question of accommodation became relatively easy, as the Court found that the government's aim in providing contraceptive coverage could be accomplished via less restrictive means.

Other US cases since *Hobby Lobby* have continued to avoid taking a position on the idea that companies can exercise religion. The Ninth Circuit in *Stormans v. Wiesman*[535] essentially ignored the question, following a theory already invoked in the precursor case *Stormans v. Selecky* ("*Stormans I*") whereby a corporation can assert the rights of its owners

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[530] See "Closely Held Corporations," Inc., accessed 6 September 2021, https://www.inc.com/encyclopedia/closely-held-corporations.html.

[531] See Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 756 (2014) (Ginsburg, J., dissenting) "By incorporating a business, however, an individual separates herself from the entity and escapes personal responsibility for the entity's obligations. One might ask why the separation should hold only when it serves the interest of those who control the corporation."

[532] See Ioana Cismas and Stacy Cammarano, "Whose Right and Who's Right? The US Supreme Court v. the European Court of Human Rights on Corporate Exercise of Religion," *Boston University International Law Journal* 34, no. 1 (2016): 18.

[533] Conestoga Wood Specialties Corp. v. Sec'y of the U.S. Dep't of Health & Hum. Servs., 724 F.3d 377 (3d Cir. 2013).

[534] Conestoga Wood, 724 F.3d at 383-384.

[535] Stormans, Inc. v. Wiesman, 794 F.3d 1064, 1079 (9th Cir. 2015).

without itself claiming to exercise those rights.[536] Essentially the Court in *Stormans* treats the company and its owners as identical; however, since the case was brought under the Free Exercise Clause rather than RFRA, the Ninth Circuit applied rational basis scrutiny and held against the pharmacy, requiring it to provide the emergency contraception products to which the pharmacist objected. Thus while the Ninth Circuit remained silent as to free exercise by a corporation itself, the case reasserts the *Smith* standard and thus turned upon whether the rules were neutral and generally applicable. The Supreme Court denied certiorari in this case, thus essentially ratified the Ninth Circuit's approach.

Two other relevant cases arose in 2018, one RFRA and one First Amendment. In *Harris Funeral Homes,* the Sixth Circuit reflected at some length on the nature of the for-profit employer because the Appellant argued that he should be considered a minister under the ministerial exception. However, the focus of the discussion was on the role of the company as a "religious organization," and ultimately did not play a role in determining the RFRA claim. The Court avoided the question of corporate exercise of religion by continuing to view the corporation and its owner as distinct entities, and asking whether not granting an accommodation to Title VII requirements would violate the owner's religious freedom.[537] Finally, in *Masterpiece Cakeshop* the Supreme Court did not address the question of whether the company itself could exercise religion, since for purposes of free exercise and free speech it saw baker and his limited liability company bakery as identical.

In sum, this body of cases suggest that the ruling in *Hobby Lobby* is quite narrow, but continue to leave doubt concerning the extent to which corporate personhood can translate into religious personhood. An often-ignored point in this debate is that the answer may not necessarily the same for purposes of the First Amendment as it is for RFRA. The Supreme Court relied on the Dictionary Act to interpret "person" broadly for RFRA; however, the term "person" does not appear in the Free Exercise Clause, and the evolution of legal concepts of religion, who can exercise it and how for Constitutional purposes has been driven by other concerns. In fact, for the moment, there is no precedent to suggest that the Free

[536] Stormans, Inc. v. Selecky, 586 F.3d 1109 (9th Cir. 2009).
[537] The Court clearly struggles, however, to maintain the distinction, and is inconsistent in its language. For example, it at one point refers to the "Funeral Home's religious exercise." EEOC v. R.G. &. G.R. Harris Funeral Homes Inc.*,* 884 F.3d 560, 570 (6th Cir. 2018).

Exercise Clause extends protection to corporations *per se*. Beyond the question of corporate exercise of religion is the broader question of third party hard.

In *Masterpiece Cakeshop* the concern of the State of Colorado in the case was to police discrimination inspired by religion in the public marketplace and the possible shrinking of market access for certain protected classes of person. Thus in contrast with *Hobby Lobby* and *Harris Funeral Homes*, the third-party harm at issue in *Stormans v. Wiesman* and *Masterpiece Cakeshop* involves the threat to equal access to the commercial public square, a concern with philosophical roots in America's free market orientation as well as the specific history of Jim Crow laws and the civil rights struggles of the 1960s.

B. The European Court of Human Rights focus on context in balancing employee religion and workplace requirements

The ECtHR has been clearer and more consistent in its understanding that for-profit corporations cannot benefit from the protections of Article 9. The Commission articulated this position in both *Company X v. Switzerland*[538] and in *Kustannus OY Vapaa Ajattelija AB and Others v. Finland*.[539] In *Kustannus* the Court explained that even an organization with a religious or ideological mission – in this case the claimant was a publishing company established to promote the ideas of Freethinkers – is barred from claiming religious manifestation rights under Article 9 so long as its choice of corporate form permitted for-profit activities and there had been other options of incorporation that could have firmly established its credentials as a nonprofit. As a result, business exemption claims in the ECtHR are rare. The closest ECtHR case comparable to the US business exemption cases is *Pichon and Sajous v. France* where, as in *Stormans v. Wiesman*, a pharmacist objected to filling prescriptions for contraceptives that they deemed to be a form of abortion. The case was brought in the pharmacists' personal capacity so the corporate form was not relevant. The Court did allude, however, to the public nature of their manifestation of religion, noting as significant the fact that they had the opportunity to manifest their faith in other ways outside

[538] *Company X. v. Switzerland, no. 7865/77, Commission decision of 27 February 1979, Decisions and Reports 16, p. 86.*
[539] *Kustannus Oy Vapaa Ajattelija AB v. Finland, no. 20471/92, Commission decision of 15 April 1996, Decisions and Reports 85-A, p. 29.*

the context of commercial transactions. In other words, the right to manifest one's religious freedom does not necessarily include the right to do so in the workplace, especially if it imposes serious burdens on others (in this case, patients who need to obtain the "morning after" pill and who presumably have a narrow time frame in which to do so). Like in the government workplace context, the court took into consideration that the defendant's pharmacy was the only one in the town, which put them in a monopoly position similar to that of some government service providers.

The relevant cases of employees in for-profit enterprises both arose in *Eweida et al. v. UK*. In *Eweida v. UK*, the applicant was a flight attendant for British Airways, the privatized national airline of the UK, who was disciplined for insisting on visibly wearing a cross in violation of uniform policies and who appealed to the Court on the basis that domestic law had failed to protect her Article 9 rights. It is important to note once again that in the ECtHR cases involving the private sector, the Court is not evaluating the claims de novo; rather, its inquiry is focused on whether domestic law provided adequate protection for the rights in question. In *Eweida* the UK government argued that only in one case had the Court ever found a state in breach of its positive obligations under Article 9, and thus suggested that that positive obligation should be construed very narrowly. In this case, they argued, "even if the State did have some positive obligation under Article 9 in relation to the acts of private employers," that obligation was met by the fact that the employee could seek work elsewhere.[540] The Court rejected these arguments, and in doing so distinguished its approach from prior Commission jurisprudence on the matter, noting that a "better approach would be to weigh that possibility [of finding another job] in the overall balance when considering whether or not the restriction was proportionate.[541]

The Court then examined the proportionality analysis undertaken by the national court and was willing to substitute its own judgment for that of the Court as well as that of the private sector business. In particular, the Court criticized BA and the UK appellate court for giving too much importance to the corporate image of the company, which clearly contrasts with the Court's treatment of a state employer's image-based concerns over appearance of neutrality. In coming to this conclusion, the Court noted that there was no evidence presented

[540] Eweida and Others v. the United Kingdom, nos. 48420/10 and 3 others, § 60, ECHR 2013 (extracts).
[541] Eweida and Others, § 83.

to convince that other accommodations to religious symbols had had a negative effect on BA's corporate image. In fact, the Court used BA's modification of their dress code in response to Ms. Eweida's concerns as evidence that the dress code was not important for the company's image.[542] Ironically, BA's eventual attempt to accommodate Ms. Eweida contributed to their losing the case.

In considering the fourth applicant in *Eweida et al*., Mr. Macfarlane, the Court focused more on the nature of the job than the fact that it was a private sector position. The applicant voluntarily put himself in a position of being responsible for psycho-sexual counseling in full knowledge of his employer's equal opportunity policy and of the impossibility of choosing not to work with same-sex couples. In doing so, the Court's discussion is consistent with its approach in the church autonomy cases; like the employees in *Schüth* or *Siebenhaar*, the employee knew or should have known that the job would carry with it certain expectations. The court makes an effort to underscore the fact that prior knowledge of the conditions of employment is not dispositive, once again highlighting the role of balancing in weighing the interests of the parties.[543] But what is also clear is that prospective employees with religious requirements are held to a certain standard of reasonableness in choosing where to work. It is also of note that the severity of the sanction – in this case dismissal – was also taken into account in the proportionality evaluation.

C. The cases compared: similar reasoning, differing preoccupations

In comparing the two caseloads and their outcomes, the primary distinction to be made is between cases in which companies are seeking accommodation in the practice of their business which would adversely affect employees or the public and cases in which employees in the private sector have sought accommodation from company policies. The body of US cases has been more focused on the issue of employer/business exemptions. A number of reasons may be posited for this focus. First and most powerful of these is the lack of horizontal effect of constitutional rights under the "state action doctrine" and the drafting of RFRA (applicable only to federal government actions) that precludes private sector

[542] Eweida and Others, § 94.
[543] Eweida and Others, § 109.

constitutional/RFRA cases by employees in most circumstances. Second, the statutory system under Title VII essentially excludes the employee cases because they already have recourse to relief which would make any hypothetically relevant constitutional questions unnecessary to resolve. Finally, state action interfering with business interests in the US is complicated by Constitutional jurisprudence as well as by cultural norms favoring private enterprise and fostering resistance to "big government" interventions in the market. In Europe, the positive obligations placed on states by the Convention opens the door to more cases by employers; they remain rare on the ECtHR level simply because national court systems generally have adequate mechanisms in place to deal with such cases. Moreover, the Commission closed the door on the idea of religious manifestation claims by for-profit corporations and thereby has avoided the kind of polemic over corporate religious personhood that ensued in the wake of *Hobby Lobby* and that is bound to carry on into the foreseeable future. Finally, given the standing of the European social model and a higher cultural acceptance of government intervention, situations like that of the resistance to the ACA contraceptive mandate are far less likely to arise. As a result, the caseloads in the two jurisdictions are focused largely in different issues, which is a reflection the preoccupations of the societies in which they are situated and the Constitutional underpinnings of their respective legal systems.

Where there does exist overlap in the questions addressed in private sector cases, the attitudes towards the two courts show certain differences, but also a perhaps surprising amount of congruity. In business accommodation cases that involved dealing with the public, both Courts expressed concern over the need to prevent religious values from unduly burdening the rights of others in the public marketplace. In this sense, the reasoning in *Pichon and Sajous* is similar to that expressed by the Ninth Circuit in both *Stormans v. Wiesman* and *Masterpiece Cakeshop*. This concern leads to the similarity that in both systems the courts will consider it relevant whether the customers had other options; however, because of the history of civil rights struggles that form the background to these cases in the in the US, American courts are naturally reluctant to argue that, in the cases were a discrimination claim is at issue, the customer can simply go elsewhere. The question of dignitary harm in that context is particularly acute. The ECtHR did not address this in its cursory admissibility decision in *Pichon and Sajous*, but it is worth noting that dignitary harm did play a role in

the Court's judgment in *Ladele*, thus the absence of discussion in *Pichon and Sajous* is possibly more related to the Court's tradition of keeping admissibility decisions brief rather than any difference arising from the workplace contexts (for-profit enterprise vs. government service) in which the cases arose. However, it may be the case that dignitary harm is simply a graver problem when coming from the government than coming from a private sector employee, as it touches upon the question of state neutrality.

Overall, neither court system has proven very protective of employee rights in the private sector cases involving religion (with the reminder that discrimination against employees in the US statutory system is not included in this assessment). This includes religious rights of employees as well as the rights of employees that are infringed by religiously motivated employers (a situation that has not yet arisen in the ECtHR). Because of two types of "constitutional" cases – First Amendment and RFRA - and the bulk of cases are covered by statute, it is hard to draw conclusions from the US employer accommodation cases. What is clear is that the law is still evolving in regard to the capacity of private sector businesses to exercise religion collectively in the way that religious organizations can. The Supreme Court's ruling in *Hobby Lobby* remains quite narrow and has encountered resistance in the lower courts, among whom there is no clear consensus on how to think about corporate exercise of constitutional rights, especially religious free exercise. But in wake of *Hobby Lobby*, it appears that corporate religious rights seem poised to take greater precedence than employee rights. While European legal systems tend overall to be more protective of employee rights than the US, they have been relatively comfortable with restrictions on religious exercise in the private sector workplace, and the ECtHR has endorsed that position. Whether the *Eweida* case suggests a shift in this regard it is too early to say. But the limited caseload in the two court systems suggest that Cismas and Cammarano are broadly speaking correct in their assessment that "both courts' recent bodies of jurisprudence favor societally powerful groups. In the US, that jurisprudence serves to entrench the privileges of increasingly powerful corporations, while in Europe it serves to fortify majoritarian interests."[544]

[544] Cismas and Cammarano, "Whose Right and Who's Right?," 44.

4. Evaluating the similar challenges and diverging approaches in specific workplace environments

This section has examined the spectrum of workplace cases by categorizing them according to the nature of the workplace rather than the nature of claim. Close study reveals significant overlapping positions on key issues accompanied by divergent attitudes and priorities regarding the relationship between religion, employers, workers and the state. Both courts have, at least in their discourse, shown a high degree of sensitivity to the special characteristics of both the state and religious organizations as employers. State employers must maintain their neutrality and, where appropriate, secular character. Religious organizations are granted a greater degree of autonomy in order to be able to exercise their missions without state intrusion.

With regard to the state, both have been particularly considerate of the special needs of the military or police as exercising a specialized security function that requires a higher degree of deference than other areas, both because of the need for discipline within the organizations and the imperative that they can carry out their functions with the appearance of neutrality. Both courts have also acknowledged that teachers perform a special social function as representatives of the state who may exercise a great deal of influence over vulnerable young minds, and that as such they can be held to a higher standard of neutrality that may at times require limitations on their free exercise rights.

More generally, both courts show a strong interest in monitoring the effect of free exercise on the provision of public services, both in terms of being able to provide services efficiently and, perhaps more urgently, in maintaining the appearance of neutrality and providing services in a nondiscriminatory manner. Services must be available to all without any added costs of dignitary harm attributable to religious accommodations. In practice, however, the ECtHR has been somewhat more deferential to the state via the margin of appreciation, whereas the US courts have been more willing and able to press the state regarding modes of accommodation that might better protect free exercise while still respecting the needs of the state employer to function relatively efficiently. The ECtHR, on the other hand, has been strongly protective of the right of states to take a hard line on maintaining secularism is government services, and reflecting the practice of states, more willing in general to uphold limitations on the role of religion in public life. US establishment

concerns, while they arise in the government workplace context, do not reach the same level of strictness as French *laïcité*, for example, which along with Turkish secularism represents the extreme end of separate of church and state in Europe.

There has also been significant attention paid by both courts in private sector cases to concerns that religious manifestation must not function in such a way as to punish vulnerable groups in the marketplace, specifically women's access to contraception or the LGBTQ community to services in general. In the US, however, this concern has been somewhat mitigated with respect to employees' rights; courts have defended employees from overbearing religious burdens placed on them by employers mostly through the vector of discrimination cases, but the ACA cases regarding health insurance coverage for contraceptive services remains a special category where the Supreme Court is at odds with several Circuit courts. Moreover, much the court's reasoning and public discourse has been expended on the question of for-profit corporations' ability to exercise religion, a question long settled by the ECtHR.

Perhaps the clearest contrasts between the two courts in terms of how they treat specific types of employer comes from the caseload on religious organizations. Both courts acknowledge the idea that organizations with a religious mission are entitled to some degree of autonomy, and both have shown concern for protecting the content and integrity of the religious missions of such organizations. Beyond that, however, the courts approach the subject with differing priorities and challenges. Much of the US caseload involves challenges to the ACA, and there is no clear parallel to such cases in Europe, at least so far. Moreover, US courts have mostly dealt with cases of discriminatory firing by religious groups in reliance on the ministerial exception, and such cases would most likely fail in the ECtHR. In contrast, European cases have generally involved off-duty conduct (similar cases have been brought in lower courts in the US and won, but there is no significant caseload in appeals courts because the law is settled in that regard). European cases in this category have also been much more willing to posit a duty of employee loyalty to their religious employers; the US courts, in contrast, have not taken this approach; rather, in these cases US courts have avoided considering employee behavior because of the categorical nature of their inquiry under the ministerial exception.

Ultimately this is perhaps the biggest difference between the two courts in this body of cases when viewed from the perspective of the type of workplace. While the US is often more focused on accommodation and compromise, it is very much dependent on the status of the organization. The US has proven far more willing to indulge in categorical reasoning as opposed to genuine balancing. This can be seen in different ways in both the religious organization cases and the debates in the private sector cases regarding the significance of for-profit status and whether the corporate form can constitute personhood for purposes of exercising religion. Once a category is applied, the appropriate mode of inquiry ensues. This is in contrast with the ECtHR's holistic approach, where all relevant aspects of the situation are all taken into the balance.

CONCLUSION TO PART I

The Constitutional history of the United States and the elaboration of Constitutional norms and doctrines by the US courts has told a conflicting and often inconsistent story about the relationship between religion and government. The Founders envisaged a society in which religion could not be used by an overbearing federal government as grounds for persecution of groups who had come to the US seeking liberty. Moreover, the Founders were reacting to a political backdrop of religious strife and mixing of church and state that they felt undermined not only society in general but the credibility of religious institutions in particular. When, as representatives of the various ex-colonies, they came together to negotiate a way of uniting as a single political body, at the forefront of many minds was the fear of another monarch who would impose a single religion on the various states and thus return to a domestic version of the tyranny they had so recently defeated and achieved independence from.

Their original model of freedom, however, was a negative one – freedom from government interference, and specifically from federal government interference. The desire for local autonomy drove the drafting of the Constitution as much as any ideological yearning for liberty as an abstract concept. With that autonomy achieved, religion and the various state governments could in large part negotiate whatever relationships they liked. Once the Bill of Rights was applied to the states via selective incorporation, the stakes of Constitutional rights interpretation became greater, and combined with a gradual increase in the variety, breadth and assertiveness of religion in the US following the Second Great Awakening, First Amendment interpretation began to evolve. This led to a number of important conflicts that continue to be resolved regarding the relationship between religion and the state. Under what circumstances could individuals be exempted from the law? What kinds of values would take precedence? To what extent did religion need to be controlled for the functioning of society at large? These questions became even more acute as society grew more complex and the administrative state began to encroach to an ever greater degree into the everyday life of citizens. Moreover, as notions of civil rights began to evolve, new questions emerged regarding the extent to which the state could or should protect religious exercise of citizens from restrictions imposed by fellow citizens in the market economy, or for that matter protect people from their fellow citizens whose religious exercise burdened them in some way.

Combined with the increasing role of religion in political discourse, these questions have become highly politicized, and an overarching tension has developed between a maximalist account of religious freedom, in which religion must be accommodated and protected in almost all circumstances, and the growing resistance to the ability of powerful religious interests to enforce their beliefs on others through the market. The balance struck so far in cases involving religion in the workplace has been an awkward one that is increasingly perceived as protecting the powerful at the expense of employees. This view, however, is oversimplified. Rather, it is the twin imperatives of religious freedom and discrimination in general that have fueled the tensions in both legislative and federal court understandings of the First Amendment and RFRA as they apply in the workplace. This has led to a multiplicity of differing tests that, although in keeping with the pragmatist and context-driven nature of the American common law system, have led to confusion and arguably at times injustice. Much of the energy devoted to legal discourse on the subject has thus been diverted away from fundamental debates about the nature of religious liberty and into devising somewhat artificial categories or intellectual constructs – ministers, corporate exercise of religion, suspect classes of person – and devising strategic arguments for classifying cases into categories. The result, in terms of rights protectiveness, has been a kaleidoscopic range of protection from the extremes of the ministerial exception to the insensitivity of the *Smith* standard.

The ECtHR, however, evolved under very different political conditions and within a very different social context. The ECHR is a treaty among sovereign states rather than a compact among bodies formal a federation. It brought together a very diverse range of political models, social models and economies ranging from the UK's constitutional monarchy backstopped by an official espousal of the protestant Anglican church to Malta's Catholic-inspired parliamentary democracy to Turkey's radically secular republic overlaid on a strongly religious Muslim majority. It is a social and political space in which Enlightenment values, the Westphalian order, post-Communist politics, the so-called European Social Model and rising multiculturalism compete uneasily under the umbrella of the most well-developed but nevertheless fragile mechanism of human rights on Earth. One might think of the situation as being similar to that of the early American republic that the

Founders were negotiating, but even more diverse and with the continued threat by individual states to leave.

Moreover, religion plays a very different role in the multiple societies of Europe and is embedded in many different if often overlapping histories. The ECtHR thus has developed its own doctrines specific to this context. While the US courts are interpreting the interaction of the federal Constitution, state constitutions, and federal and state statutes, the ECtHR is merely monitoring compliance with a regional human rights treaty. That treaty is essentially a floor beneath which state action cannot sink, and the Court acknowledges that Europe's many legal and political cultures may surpass that minimal standard in many different ways. It has thus, in keeping with the principle of subsidiarity upon which the Convention was founded, developed and refined its margin of appreciation doctrine as an overarching framework within which it applies a version of what has become the relatively standard mode procedure for analyzing rights conflicts: proportionality. At the same time, because of the diversity and sensitivity of legal and cultural norms attaching to religious manifestation in different countries, the Court has been somewhat reluctant to intervene in clashes of religious rights and other obligations of the state. As a result, it has had significant recourse to the margin of appreciation and by and large been very deferential to states except in particularly egregious circumstances.

While the ECtHR is often characterized as being less protective of religious freedom than the United States, the review of workplace cases reveals that the proper distinction to be made between the two jurisdictions is not so much one of degree of protectiveness, but between differing sets of preoccupations and assumption about the role of the state, the relationship between church and state, the relation of rights to one another, and the role of courts in evaluating how to balance religious manifestation with the rights of others in cases in which burdens are perceived to arise from religious practice. At the same time, these two evolving legal traditions have also demonstrated a certain degree of convergence in some areas.

One interesting difference that has emerged in the discussion above is the courts' respective attitudes with regard to evaluating the place of religion among other social goods. In the US there is strong support for the underlying idea that religion must be upheld as a value at least as important as almost any competing secular values (health, for example). In

that sense, the scales in US balancing are already weighted in favor of religion, with religion placed at or near the top of a hierarchy of values. Secular values such as corporate image may be judged, but religious values, such as the importance of wearing a cross at work or the moral distance that must be maintained from the commission of sin, may not. In the ECtHR, on the other hand, religion is treated as one of many competing values, none of which are deemed to be more important than any other. This may in part derive from the nature of the ECHR as an international human rights document and a consequent adherence to the broadly held skepticism in international human rights discourse concerning the creation of hierarchies of rights. It may also reflect the multiplicity of relationships between church and state and the lingering tensions of religion's historical role in the power structures in Europe. Religion, in short, may well be seen in some European countries as a potential threat that might be in need of restraint, whereas in the US discourse is held in tension between the imperatives of the Establishment Clause and the unwaveringly strong role that religion plays in American public life. Hence the ECtHR, faced with the wide array of approaches to religion, is willing to accommodate the skeptical approach to religion by countries like France or Turkey and to closer evaluation of the necessity to accommodate religious manifestations that impose burdens on others.

Both courts have affirmed that it is not the role of a secular court to evaluate or question the validity of religious beliefs themselves, provided that they are deemed to be sincerely held. Yet this principal has been applied inconsistently in the workplace cases. The ECtHR has taken a fairly restricted view of their jurisdictional incompetence in religious matters; the Court has avoided overt judgments, but has arguably been willing to import its own subtle evaluations of the importance or necessity of practices into its process of balancing those practices against the rights of others. In the US, however, the courts have been highly inconsistent. Some circuits have insisted that they be able to judge factual conclusions of religious reasoning, while other circuits and especially the Supreme Court, have rejected that view. Often federal courts have used shifting standards of review and at times employed categorical reasoning instead of balancing in order to avoid passing judgment on religious beliefs. In fact, the US experience has demonstrated that a rigorous refusal to indulge in any evaluation of any religious claim or practice is very much at odds with proper balancing. By refusing to examine religious beliefs in themselves, religious manifestation in all its variety

is flattened out into a kind of featureless, judgment-free landscape. Rather than simply being under-theorized, religion has, in a legal sense, become a theory-free zone off limits to judges. This seems to have shifted legal analysis away from considering what is actually at stake for the individual hoping to manifest her beliefs and onto other questions, chief among them being the context in which the belief is being manifested. What is interesting in this is that, any balancing of religious manifestation against other values is done within a framework in which it is forbidden to ascribe a weight to religion. We are not, as per Antonin Scalia's famous metaphor, comparing the length of strings to the weight of stones.[545] Rather we are comparing the weight of rights with the theoretical weight of an abstract concept of the importance of religious freedom. Both court systems face this challenge, but in somewhat differing contexts and in different ways. In both cases, judgments about the context surrounding the religious exercise take on greater significance, and there is some inconsistency in what elements of those contexts are deemed relevant by the courts.

Another superficial similarity that masks differing attitudes is the way in which the courts often avoid, where possible, religious freedom arguments in favor of viewing cases through the lens of free speech, freedom of assembly or establishment/secularism issues. If debate has shifted away from religion where possible in both jurisdictions, it has done so for different reasons. In the US, nondiscrimination against protected classes of people and the historically strong notion of freedom of speech draws much of the analytical attention away from religion as a subject of complaint. The combined strength of statutory protections against discrimination offered by Title VII and the relatively weak protection of free exercise under the *Smith* standard have encouraged the recharacterizing of religious freedom claims. In Europe, the Court's traditional reluctance to grant relief in Article 9 cases and its strong reliance on the margin of appreciation have led to a relatively anemic caseload under Article 9, encouraging applicants to rest their arguments on other articles of the Convention such as the right to private life or freedom of expression.

Nevertheless, there are some potential points of genuine convergence between the approaches of the courts. Both courts continue to show a strong and perhaps increasing

[545] Scalia's exact comment on balancing constitutional rights was that it was like determining "whether a particular line is longer than a particular rock is heavy." See Bendix Autolite Corp. v. Midwesco Enters., Inc., 486 U.S. 888, 897 (1988).

concern regarding state employees proselytizing in schools and religiously-motivated bias in the provision of government services or even in access to the market. An even stronger point of convergence is an increasing tendency towards accommodation. It was traditionally an important difference between the courts that the US emphasizes accommodation (at least since *Sherbert v. Werner* and Title VII) where possible without undue hardship, whereas the ECtHR has less of a tradition of expecting employers to accommodate. The *Eweida* case, however, suggests that the ECtHR may be moving toward a generalized right to religious accommodation under certain circumstances. This seems to be a genuine evolution in the ECtHR closer to the US model. On the other hand, there is little evidence of any convergence on the question of complicity cases. As the dissent in *Eweida* demonstrated, there is a minority of judges on the Court who wish to extend the concept of conscientious objection to cover such claims. There is no reason to believe at this point, however, that there will be any convergence with the US approach in this regard.

Moreover, in other instances where the ECtHR is moving towards the US it is doing so under somewhat different reasoning. For example, the ECtHR has now abandoned its position that the right to resign was a sufficient guarantor or religious freedom in the workplace, reasoning that a right is not protected if the rights holder is required to incur significant costs in exercising it. This is particularly powerful against the backdrop of European attitudes towards the right to work, even in the absence of any concrete protections for such a right in the Convention. The US courts also would reject the notion that the right to resign is sufficient to protect religious freedom, but they do not arrive at that point via any conception of the rights of workers or the equality of rights in general. Rather, in the US there is a presumption in favor of religion as a 'first freedom' and a notion of equality that frames failure to accommodate employees as unlawful discrimination against religion in general or against a specific religion. Because of the history of the civil rights movement in particular US courts do not entertain the argument that a class of person is being treated equally because they are free to go elsewhere. However, it should be noted that the right to resign seems to remain the norm in cases involving religious employers in both Europe and the US. Arguably the US seems to focus on preventing discrimination whereas there is a more generalized conception of protecting equality as an outcome in Europe, leading to a focus on balancing

rights of equal conceptual value against the backdrop of respect for the particular traditions that have arisen in the various state parties to the Convention.

In any evaluation of these similarities and differences, however, it is imperative to remember that the US operates under a fractured system in which very different modes of analysis are applied depending on the category of the case and on certain pivotal threshold questions that can determine that status. US Courts applying RFRA operate in a legal landscape very different from that that of US Courts applying the First Amendment. Even within the First Amendment, threshold questions about neutrality and general applicability can radically alter the analysis via the application of strict scrutiny. And once a religious employer is involved, an entirely different process is engaged. Thus to truly understand the extent and nature of the differences between the treatment of religious freedom in the workplace in the ECtHR and the US federal courts, it is necessary to deconstruct these various processes of balancing in the two courts and compare them step by step to see how each individual component in the US processes compares to its parallel inquiry in the ECtHR's approach to balancing via proportionality analysis. In other words, it is necessary to undertake a more scientific analysis of how balancing and proportionality work in the protection of religious freedom in the workplace.

This will be the focus of Part II.

PART II: THE BALANCING METHODOLOGIES APPLIED IN CASES INVOLVING RELIGION IN THE WORKPLACE

CHAPTER 1: BALANCING TESTS APPLIED TO RELIGIOUS FREEDOM CASES IN THE US FEDERAL COURTS AND IN THE ECtHR

I. AMERICAN BALANCING AND LEVELS OF SCRUTINY

The US courts, in contrast to the vast majority of judicial systems around the world, never adopted the formal methodology of proportionality analysis.[546] The reasons for this are complex and can be traced to various legal, historical, and cultural factors, including a general resistance in US legal culture to adopting foreign legal concepts.[547] But certainly one reason is that the US approach to balancing rights has its own particular history, built from concepts arising out of nineteenth century Dormant Commerce Clause cases and developed in twentieth century equal protection jurisprudence.

In the latter half of the nineteenth century as the US and its economy expanded, the courts began to see an increasing number of cases brought by merchants against state-imposed limitations on interstate commerce. The "Dormant Commerce Clause" as a doctrine infers from the Commerce Clause the power to strike down state laws that interfere with interstate commerce. In cases using the Dormant Commerce Clause, courts developed what would become the "narrow tailoring" or "least restrictive means" test used in strict scrutiny cases.[548] In the mid- twentieth century, especially in response to the Civil Rights movement, equal protection cases took center stage in the federal courts. Until that time courts, when faced with a law that imposed limits on Constitutional rights, had typically applied what has become known as the "rational basis test." This did not provide a great deal of protection, and courts recognized that this was too blunt an instrument with which to address all rights. In the now famous Footnote 4 in *United States v. Carolene Products Company*, the Supreme

[546] Moshe Cohen-Eliya and Iddo Porat, *Proportionality and Constitutional Culture* (Cambridge, Cambridge University Press, 2013), 14.
[547] Cohen-Eliya and Porat, *Proportionality and Constitutional Culture*, 15.
[548] Mathews and Sweet, "All Things in Proportion?," 819.

Court addressed the need for differing "levels of judicial scrutiny" in cases involving discrimination or violations of Constitutional rights.[549] This idea was taken forward in *Korematsu v. United States* where the Court introduced the doctrine of "suspect classifications," asserting that "all legal restrictions which curtail the civil rights of a single racial group are immediately suspect" and therefore subject to "the most rigid scrutiny."[550] In the 1960s, as the Court under Chief Justice Warren took an activist role in defending equal protection laws, the strict scrutiny standard emerged as a powerful weapon in the civil rights struggle as well as a much-needed alternative to rational basis review that could be applied to suspect classifications.

The polarization of these two standards produced what has become known as "tiered review" in which the courts apply different standards depending on what rights are at stake. On one end of the spectrum, rational basis review is very deferential to the state; for a law to pass Constitutional muster, the government need only show that it is pursuing a legitimate objective and that the law in question is rationally related to achieving that objective. On the other end of the spectrum is strict scrutiny; in these cases, the state must demonstrate that its interest is "compelling" and that it is using the least restrictive means to achieve that interest. Thus these the two tiers of review provided two radically different possibilities – a standard that was very easy for the government to meet, and another that was famously described as being "strict in theory, fatal in fact."[551] As Kathleen Sullivan puts it, "[t]he Court ties itself to the twin masts of 'strict scrutiny' and 'rationality review' precisely in order to resist the siren song of the sliding scale. When applied in its strong bipolar form, such a two-tier system functions as a *de facto* categorical mode of analysis despite its nominal use of balancing rhetoric."[552] The purpose of this move is to avoid overt balancing where values, at times incommensurate with one another, are weighed in an all-things-considered evaluation where the outcome will very much depend on the details and nuances of the case. "Categorial" logic, in contrast, puts ideas into boxes. It offers a series of yes/no questions, and at each step the answer can be decisive without further inquiry. It is a form of binary reasoning equipped with

[549] United States v. Carolene Products Co., 304 U.S. 144 at 155 (n4) (1938).
[550] United States v. Korematsu, 323 U.S. 214 (1944).
[551] Gerald Gunther, "The Supreme Court, 1971 Term-Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection," *Harvard Law Review* 86, no. 1 (1972): 8.
[552] Kathleen M. Sullivan, "Post-Liberal Judging: The Roles of Categorization and Balancing," *University of Colorado Law Review* 63 (1992): 296.

decisive threshold determinations; for example, in ministerial exception cases, the threshold question is whether the employee is a minister. If yes, the case is over. There is no "balancing" of interests. The system of tiered review has never been quite as extreme in this logic as the ministerial exception cases. However, it evolved to rein in unbridled ad hoc balancing by the courts that many felt risked judges to legislate from the bench. And in principle, at least, the choice between strict scrutiny and rationality review can predetermine who wins.

In response to the perceived inadequacy of this choice, courts developed a third tier of review – intermediate scrutiny – to apply in specific situations such as discrimination based on gender or illegitimacy.[553] Under this formula, which can be seen as a midpoint between rational basis and strict scrutiny, the government must demonstrate that the law substantially advances an important government interest.[554] In fact, courts have elaborated a variety of tests that, explicitly or not, can be categorized as intermediate scrutiny. As Stone Sweet argues, "[t]ime and again, the Court has introduced an intermediate standard of review to govern its inquiry in different areas of law. Forms of intermediate review represent efforts to make a space for balancing in the context of rights review. As such, they are also symptomatic of the dysfunctionality of classic two-tiered review."[555]

The effect of these various tiers on judicial decision-making have been hotly debated. Tiered review represents a structured approach to the problem of balancing interests that are fundamental but not absolute. Richard Fallon explains that in order to address the problem of balancing such rights, "a doctrinal structure needed, among other things, to impose discipline, or at least the appearance of discipline, on judicial decision-making and thus to escape the taint both of Lochneresque second-guessing of legislative judgments and of flaccid judicial 'balancing.'"[556] Arguably the proliferation of tiers of review risks being perceived as unprincipled or illegitimate ad hoc solutions to difficult cases.[557] Moreover,

[553] Jack S. Vaitayanonta, "In State Legislatures We Trust?: The "Compelling Interest" Presumption and Religious Free Exercise Challenges to State Civil Rights Laws," *Columbia Law Review* 101, no. 4 (May 2001): 906.
[554] Siegel, "The Origin of the Compelling State Interest Test," 358.
[555] Sweet and Mathews, "All Things in Proportion?," 847.
[556] Richard H. Fallon Jr., "Strict Judicial Scrutiny," *University of California Los Angeles Law Review* 54, no. 5 (June 2007): 1270.
[557] Sweet and Mathews, "All Things in Proportion?," 847.

some have argued that the various tiers of review have introduced a variety of "pathologies" into US rights jurisprudence, in large part because both rational basis and strict scrutiny are ultimately hostile to genuine balancing.[558] Some of these pathologies – for example, the use of litigation strategies to classify religion as expression in order to trigger a stricter standard of review - have plagued religious freedom cases in particular.[559] With some versions of intermediate scrutiny "the Court has brought balancing back in, often in the form of a new ad hoc standard or test."[560] This more ad hoc approach, as will emerge in the detailed comparison portion of this study, introduces balancing in a way that brings the US approach into somewhat closer alignment with European proportionality.

1. The minimal protections of rational basis scrutiny

Rational basis review can be seen as the "default" standard applied by courts when reviewing the constitutionality of government actions. The requirement for the rationality of laws is grounded in the Constitution, particularly in the Necessary and Proper Clause.[561] In *McCulloch v. Maryland*, the Supreme Court interpreted "necessary" quite broadly, not limiting it to the least restrictive means but rather including whatever may be convenient for the government.[562] As Chief Justice Marshall put it at the time, "[l]et the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the constitution, are constitutional."[563]

However, the notion that courts can invalidate irrational laws is not obvious, nor was it taken for granted in early American judicial history. The basic assertion of democratic republican forms of government is that the people elect a government, and that government passes laws; if those laws do not meet the approval of the electorate, the people may choose

[558] Sweet and Mathews, "All Things in Proportion?," 837.
[559] See Gregory Mose, "'Ceci n'est pas un gateau' – The Distorting Effects of Standards of Review in Religious Freedom Cases," https://hal.archives-ouvertes.fr/hal-02615159.
[560] Sweet and Mathews, "All Things in Proportion?," 837.
[561] U.S. CONST., art. I, § 8, granting Congress the power "to make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."
[562] McCulloch v. Maryland, 17 U.S. 316, 405 (1819).
[563] McCulloch, 17 U.S. at 421.

to elect different representatives in the next election. Legislatures are accountable to the electorate in a way that the judiciary is not, and thus there is an arguably anti-democratic strain in the notion that a judge or panel of unelected judges can impose their view of rationality over that of the legislature. However, the idea of courts acting as a backstop against legislative irrationality arose relatively early in the US. The US Supreme Court asserted the right to judicial review in *Marbury v. Madison* in 1803.[564] But judicial review at that time did not include a right to question the motives or the rationality of the legislature; early cases suggest that the courts were far more concerned with policing separation of powers concerns than with defending individual rights. By the mid-nineteenth century, however, courts began to use their power to block legislation unreasonably limiting individual rights, and had continued to refine its approach to doing so to this day.[565]

As heightened forms of scrutiny began to intrude on judicial thinking in equal protection and other fundamental rights cases, the scope of rational basis review began to diminish. It remains, however, the norm rather than the exception and is the default standard in cases involving economic regulations and social welfare legislation where a fundamental right is not being limited and where there is no evidence of discrimination.[566] *Carolene Products* offers a good example of the application of rational basis scrutiny in such cases. In that case, Justice Stone explains that "regulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless, in the light of the facts made known or generally assumed, it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators."[567] In other words, economic regulations are presumptively legitimate and rational in the absence of strong evidence to the contrary. Put that way, it is easy to see how difficult it is for a plaintiff challenging laws under rational basis review. The test has two parts. First is the question of whether the government's aim is "appropriate" or legitimate. The court's view of economic legislation as presumptively legitimate in *Carolene Products* is characteristic of its approach in general, which has been that any purpose that is not forbidden by the Constitution is

[564] Marbury v. Madison, 5 U.S. 137 (1803).
[565] Nicholas Walter, "The Utility of Rational Basis Review," *Villanova Law Review* 63, no.1 (2018): 82-83.
[566] Erwin Chemerinsky, "The Rational Basis Test Is Constitutional (and Desirable)," *Georgetown Journal of Law & Public Policy* 14, no. 2 (Summer 2016): 403.
[567] United States v. Carolene Products Co., 304 U.S. 144, 152 (1938).

legitimate unless proven otherwise.[568] The burden of proof is on those challenging the law to show not only that the government's actual purpose is illegitimate, but that there is no conceivable purpose for the law that might be legitimate. This is rarely achievable, but is not impossible if the plaintiff can show that the measure is motivated by animus to a particular group. The second prong of the test is that the law must be rationally related to furthering the objective. This again is a very deferential standard whereby courts will uphold any measure "unless the government's action is 'clearly wrong, a display of arbitrary power, not an exercise of judgment.'"[569] Overinclusiveness or underinclusiveness (or even both) are not fatal to laws under rational basis review.[570]

In religious freedom cases, as discussed in Part I, rational basis review was the norm until *Sherbert v. Werner*, and once again became the norm for free exercise cases following *Employment Division v. Smith*. This includes free exercise cases brought against state laws only, since federal law cases are governed by RFRA and are subject to RFRA's version of strict scrutiny. The formulation under *Smith* also provides exceptions under which courts must use heightened scrutiny; in particular, to avoid heightened scrutiny laws must be neutral and generally applicable. The Supreme Court elaborated on this requirement in *Church of Lukumi Babalu v. City of Hialeah*.[571] This case, described in Part I, involved an ordinance against animal sacrifice. Justice Kennedy's discussion of neutrality with the observation that "a law lacks facial neutrality if it refers to a religious practice without a secular meaning discernible from the language or context." Noting that the words contained in the ordinances – "ritual" and "sacrifice" – have strong religious connotations, he goes on to explain that this suggestive but does not in itself suggest that the ordinances target religion since those words do have secular applications. The context of the drafting of the ordinances, however, leaves little doubt as to the intent of the City Council to target Santeria. Kennedy quotes as evidence Resolution 87–66, which affirmed that "'residents and citizens of the City of Hialeah have expressed their concern that certain religions may propose to engage in practices which are inconsistent with public morals, peace or safety,' and 'reiterate[d]' the city's commitment to

[568] Chemerinsky, "The Rational Basis Test," 410.
[569] Chemerinsky, "The Rational Basis Test," 413-414, quoting Mathews v. DeCastro, 429 U.S. 181, 185 (1976).
[570] Chemerinsky, "The Rational Basis Test," 414-416.
[571] Church of the Lukumi Babalu Aye, Inc. v. Hialeah, 508 U.S. 520, 542 (1993).

prohibit 'any and all [such] acts of any and all religious groups.'"[572] Moreover, the group of ordinances taken together make it clear that the City Council were carefully crafting the law to apply exclusively to Santeria, constituting a "religious gerrymander."[573] Thus the fact that the law does not *on its face* name a specific religion or target religious motivation is not enough to satisfy the requirements of the neutrality requirement – in this case, the law clearly targeted Santeria even if without naming it, and therefore was not neutral.

Although the City of Hialeah ordinances already violated the neutrality requirement and thus failed the *Smith* test, Kennedy nevertheless goes on to discuss the general applicability requirement. A law is generally applicable if applies to everyone, or substantially everyone. What can make it not generally applicable is if there are carve-outs or exemptions to the law that are unavailable to religious actors and which undermine the objectives of the law as much as a religious exemption would. Kennedy looks to the purposes of the ordinances – public health and the prevention of cruelty to animals – and bluntly notes that the ordinances "are underinclusive for those ends. They fail to prohibit nonreligious conduct that endangers these interests in a similar or greater degree than Santeria sacrifice does."[574] Regarding public health, for example, the City Council claimed that they were concerned with the improper disposal of animal remains, but as Kennedy points out, hunters and restaurant owners could equally pose such problems and yet were not included in the law. And if the goal was to prevent unnecessary cruelty to animals, one might expect that hunting, fishing, pest extermination or use of animals in medical research would be included, yet they are not. Kennedy sums up by noting that the ordinances are designed in such a way as to place burdens on the Santeria religion that the City Council is not willing to place on other secular activities. He concludes that "[t]his precise evil is what the requirement of general applicability is designed to prevent.[575]

Lukumi Babalu used the logic of tiered review to ensure that the rational basis test imposed under *Smith* would not be too deferential to the government and prevents courts from evaluating the link between the aim and the means used to achieve it. *Smith* and *Lukumi*

[572] Lukumi, 508 U.S. at 535.
[573] Lukumi, 508 U.S. at 535.
[574] Lukumi, 508 U.S. at 543.
[575] Lukumi, 508 U.S. at 545-546.

require courts to evaluate that link via the general applicability test. While it does not apply a narrow tailoring requirement, it does at least help to ensure that overinclusive or underinclusive measures can be excluded because they create inequalities in treatment between religiously motivated behavior and other behavior. It serves as a screening process for illicit motives, even when the government attempts to veil those motives by superficial appeals to the public good. If such illicit goals are identified or even inferred from the unsuitability of the means to the ends, then the government loses the advantages of rational basis review and the analysis proceeds under heightened scrutiny. And as will be seen below, this can radically shift the odds in favor of the party challenging the law.

2. The mechanics of strict scrutiny

While the concepts that make up the various tiers of review have a long history, the modern form of strict scrutiny developed rapidly and became firmly ensconced in US Constitutional law in the 1960s. While originally focusing on suspect classifications, the doctrine was expanded to laws that infringe upon fundamental rights and interests of other discreet groups who were in some sense vulnerable.[576] Versions of the test arose independently in several different doctrinal areas, including cases involving race-based classifications, free speech, freedom of association, free exercise, and due process claims.[577] Thus while we speak of strict scrutiny as if it were a single concept, it is better thought of as a series of closely related tests which are applicable in specific contexts and which share a core analytical framework: once the test is triggered, the government bears the burden of demonstrating that its interest in limiting the right is compelling and that the measure in question is narrowly tailored to achieve that interest. These elements are defined and deployed in different ways depending on the context of the rights limitation. Fallon has identified three distinguishable versions of the test.[578] Kelso argues that there are two

[576] Skinner v. Oklahoma involved a law mandating the sterilization of repeat criminal offenders; the Court held that marriage and procreation are so fundamental that strict scrutiny was required even if the classification of criminals was not a suspect classification. See Skinner v. Oklahoma, 316 U.S. 535 (1942). The fundamental rights doctrine would eventually spill over into modern arguments about unenumerated rights and substantial due process. See Victoria Nourse, "Making Constitutional Doctrine in a Realist Age," *University of Pennsylvania Law Review* 145, no. 6 (1997): 1401-1457.
[577] Fallon, "Strict Judicial Scrutiny," 1275-1284.
[578] Fallon, "Strict Judicial Scrutiny," 1271.

versions of strict scrutiny that form part of a range of six different standards of review used in individual rights cases.[579]

The strict scrutiny standard developed in free exercise cases – the *Sherbert* test - was arguably the first modern incarnation of the doctrine, appearing as it did in 1963 in *Sherbert v. Werner*. Precisely formulated in that case, the test asks:

i) Would enforcement of the law in question substantially infringe upon the claimant's free exercise of his or her religious beliefs?
ii) Is there a compelling state interest in enforcing the law in the claimant's case that justifies the infringement of the claimant's right under the First Amendment?
iii) Is there any less intrusive alternative by which the government could protect this compelling state interest?

As discussed in Part I, protection of religious freedom under this "strict scrutiny" standard was less strict than in other areas of law such as free speech. Strict scrutiny for race-based classifications and some categories of free speech is treated as a categorical test under which only the highest government interests survive. Under the religious clauses, however, the standard applied was treated as more of a weighted balancing test structured by its three operative questions.[580] The opinion in *Sherbert* itself shows the balancing logic in action when the Supreme Court distinguishes its holding in *Braunfeld v. Brown*.[581] In that case a statute was upheld despite the burden it posed on claimants because it was "saved by a countervailing factor which finds no equivalent in [*Sherbert*] -- a strong state interest in providing one uniform day of rest for all workers. That secular objective … appeared to present an administrative problem of such magnitude… that such a requirement would have rendered the entire statutory scheme unworkable. In the present case, no such justifications underlie the determination of the state court that appellant's religion makes her ineligible to receive benefits."[582] In other words, in *Braunfield* the compelling interest outweighed the

[579] R. Randall Kelso, "Standards of Review Under the Equal Protection Clause and Related Constitutional Doctrines Protecting Individual Rights: the "Base Plus Six" Model and Modern Supreme Court Practice," *Journal of Constitutional Law* 4, no. 2 (Jan. 2002): 225.
[580] James M. Oleske Jr., "Free Exercise (Dis)Honesty," *Wisconsin Law Review* 2019, no. 4 (2019): 712.
[581] Braunfeld v. Brown, 366 U.S. 599 (1961).
[582] Sherbert v. Verner, 374 U.S. 398, 408-409 (1963).

burden. In *Sherbert* it did not. The Supreme Court, in fact, has repeatedly referred to the *Sherbert* test as a "balancing test," although the courts avoided that language in the actual decisions.[583] Strict scrutiny is often conceived of as a categorical, binary form of reasoning. In practice under *Sherbert*, however, the test exhibited a "disconnect between its binary language and its balancing reality." It was categorical in theory, but balancing in fact.

The *Sherbert* test was eliminated by the Supreme Court's decision in *Smith* but later re-emerged in Federal cases through the requirements of RFRA. That, however, is not the end of the story. RFRA more or less repeats the formula of *Sherbert* with its three components of substantial burden inquiry, the compelling governmental interest and "least restrictive means" test. But the statute leaves a great deal of ambiguity about what each of its operative terms means. In its Findings the Congressional drafting committee asserts that "the compelling interest test as set forth in prior Federal court rulings is a workable test for striking sensible balances between religious liberty and competing prior governmental interests,"[584] suggesting that what they are trying to do is return free exercise to what it had been before the *Smith* decision. However, in what may seem like the intention of the drafters to clarify which standard of review they meant, the drafting committee indicates clearly under Purposes that the primary purpose of the law is "to restore the compelling interest test *as set forth in [Sherbert and Yoder]* and to guarantee its application in all cases where free exercise of religion is substantially burdened."[585] But an interpretation of *Sherbert* and *Yoder* in pure form, undiluted by the subsequent free exercise case law, would suggest a very different and much stricter standard than what the test "as set forth in prior Federal court ruling." As a result, the text of the law itself is internally inconsistent.[586] One might plausibly argue that "Purposes" trump "Findings."[587] However, it is perhaps just as plausible to look to Finding (4),[588] which points to the *Smith* decision as a kind of fall from grace in free exercise jurisprudence, and read therein the suggestion that Congress wished merely to undo the

[583] For example, see Justice Scalia in *Smith*, and Justice Alito in *Hobby Lobby*.
[584] RFRA § 2(a)(5).
[585] RFRA § 2(b)(1) [emphasis added].
[586] Lupu, "Of Time and the RFRA," 196.
[587] Lupu, "Of Time and the RFRA," 196 – 197.
[588] RFRA § 2 (a)(4) finds that "in Employment Division v. Smith, 494 U.S. 872 (1990) the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion."

damage *Smith* had done to the ebb and flow of judicial interpretation of the compelling interest requirement. Given the oddness of finding that one standard was a "workable test for striking sensible balances" and then mandating a substantially different standard, it can be argued that RFRA imposes a kind of pure strict scrutiny more on the model of that used in free speech cases. Were that the case, it would indeed be "strict in theory, fatal in fact," and very few laws would withstand such as test. And if that is not what Congress intended, why did they change the text from an earlier version in which the language was consistent in its references to *Sherbert* and *Yoder*?[589]

Given the *Sherbert* test's inconsistent application between its enunciation in 1963 and its elimination in 1990, RFRA's language raises a difficult question for the courts: which strict scrutiny does RFRA mandate? Did Congress have in mind the strict scrutiny that allowed the Amish to take their children out of school because to do otherwise might endanger the future of the faith, or the strict scrutiny that condoned building a road through the sacred land that Native Americans needed freely practice their faith? Was it the strict scrutiny that defended the Sabbath duties of Methodists in *Sherbert*, or the one that dismissed the sartorial duties of Jews in *Goldman*? Because of this lack of clarity, the precise interpretation of RFRA's version of strict scrutiny remains a contentious area with unanswered questions and significant disagreements among the federal circuits and the Supreme Court. The precise elements of those contentions will be explored in the individual discussions of each phase of the test. Moreover, the particular conflict over the substantial burden test will be elaborated even further in Part II Chapter 2 since the workplace cases have provided a key battleground in resolving the confusion instigated by RFRA.

A. Determining "substantial burden"

One of the most interesting and contentious aspects of strict scrutiny in religious freedom cases has been the evolving debate over how to determine what constitutes a substantial burden. The phrasing of the test seems almost designed to invite controversy since "substantial," at least when taken in its colloquial sense, implies just the kind of value judgment of religious beliefs that US courts have been wary of. Taken in a narrower sense,

[589] Lupu, "Of Time and the RFRA," 196.

substantial can mean "of substance" in contrast to something that is a burden "in principle" but with no practical effect. A restriction on the right of a congregation to organize group prayer in a shopping mall without providing the owners with an hour's notice, for example, would clearly be a burden, but since it does not actually prevent anything, but rather merely imposes a *de minimis* requirement as a courtesy to the mall owners, it would be more of a burden in principle rather than in substance. But even this example shows how difficult it is to determine whether a burden on religion is substantial; it may seem objectively insubstantial, but it would become religiously substantial if the particular religion in question held as a doctrine of faith that any communication with nonbelievers about any aspect of the faith is sinful. The seemingly insignificant burden in this case would take on added weight from the point of view of the believers. As a result, the determination whether the burden is substantial becomes a religious question which in theory US courts may not answer under the religious question doctrine.[590]

Courts have acknowledged this challenge but remain conflicted about how to deal with it. The question is easier if there are reasons to doubt the sincerity of the religious claim, but courts have generally shied away from questioning religious sincerity. This is not entirely surprising given that accusing religious claimants of lying can be seen as "an 'inquisitor-like' tactic for which lawyers and judges have little appetite."[591] One unusual example of a successful use of the insincerity argument can be found in *United States v. Kuch,*[592] where the D.C. Circuit agreed with the government and found no substantial burden on insincerity grounds. While the Court has repeatedly stressed that it may not pass judgment on the truth or falsity of any religious belief or doctrine, it affirmed in *Kuch* that this in no way prevented them from evaluating the sincerity of the claimants. They concluded, without much difficulty, that the beliefs in question were clearly not genuine and were therefore not be burdened by the law.[593] However, *Kuch* is a rare exception and courts both pre- and post- RFRA have generally accepted religious beliefs as sincere in the absence of evidence to the contrary.

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[590] For a discussion of the religious question doctrine, see Gedicks, "The Religious-question Doctrine."
[591] Frederick Mark Gedicks, "'Substantial Burdens': How Courts May (and Why They Must) Judge Burdens on Religion under RFRA," *George Washington Law Review* 85, no. 1 (January 2017): 98.
[592] United States v. Kuch, 288 F. Supp. 439 (D.D.C. 1968).
[593] The "church" in question was a group promoting drug use whose official hymns included "Puff, the Magic Dragon" and "Row, Row, Row Your Boat." Its official motto was "Victory over Horseshit!".

Once sincerity is accepted, however, courts must identify what kind of burden is being imposed on the claimant. The substantial burden question is usually disaggregated into two kinds of burden. Firstly, burdens can be conceived of as the "religious costs" borne by the claimant if he or she obeys the law. In other words, what spiritual harm does the claimant suffer under the law? Secondly, burdens can be seen in terms of the "secular costs," i.e. the sanctions imposed by the state for noncompliance with the law.[594] In *Yoder* the Supreme Court adopted an impact-oriented approach focused on the religious costs of compliance. The court upheld the right for an exemption from compulsory schooling until the age of 16 for Amish families because of the disruptive effect that the law would have on their way of life. Significantly, the court also asserted as relevant the question of the centrality to the adherent's faith of the religious belief being limited. The question of whether the measure would indeed be dangerous to the Amish way of life and whether the common work tradition was central to the Amish faith – both "centrality" issues - were seen as questions of fact answerable by the court. Courts have taken similar approaches in other cases where they have evaluated whether the spiritual harm done is significant enough to be a substantial burden, even if at times they tread a fine line between making factual conclusions and judging religious belief in violation of the religious question doctrine. For example, in *Tony and Susan Alamo foundation v. Secretary of Labor,*[595] the court concluded essentially that the religious plaintiffs were wrong to believe that the burdens on their free exercise were substantial. The case involved an Evangelical non-profit's claim that paying homeless converts minimum wage for their work (rather than paying them with food and lodging) would violate their religious convictions that they should be doing the work as volunteers. The Court dismissed the objections of both the Foundation and its employees, arguing that "there is nothing in the Act to prevent the associates from returning the amounts to the Foundation, provided that they do so voluntarily. We therefore fail to perceive how application of the Act would interfere with the associates' right to freely exercise their religious beliefs."[596]

The importance of the secular cost of noncompliance also played an important role in *Sherbert*-era cases. In *Thomas v. Review Board*, the Supreme Court explained that a

[594] Gedicks, "'Substantial Burdens,'" 96.
[595] Alamo Found. v. Secy of Labor, 471 U.S. 290 (1985).
[596] Alamo, 471 U.S. at 304.

substantial burden exists when "the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs."[597] Notice the emphasis of an "important" benefit and the nexus between the denial of a benefit and the pressure it may place on the believer. This definition is helpful because it highlights both the importance of some government benefits that might be lost by noncompliance and the role that the loss of those benefits can play in creating an obstacle, however subtle, to religious practice. The state, in short, should not be placing pressure on believers to abandon their faith. This fits well into the logic of the coercion test but emphasizes why the gravity of the secular consequences of noncompliance are an important part of the analysis. Likewise in *Hernandez v. Commissione*r and *Jimmy Swaggart v. Board of Equalization* the Supreme Court looked at the severity of the secular consequences of noncompliance to gauge substantial burden as the degree of pressure being placed upon the claimants.[598]

Both of these approaches were used by the courts during the *Sherbert* era and continue to appear in post-RFRA cases.[599] Not all cases have hinged on this distinction, however, and what has emerged was arguably two separate substantial burden tests – a general test focusing on the harm done to the religious party (in either spiritual or secular terms) and a separate test focusing on coercion applicable in cases involving procedures related to the provision of large scale government programs and in some other special contexts such as prisons.[600] In *Bowen v. Roy,*[601] the government was appealing a lower court decision to enjoin the issuance of a social security number to the daughter of the claimants on the grounds that to do so would "prevent her from becoming a holy person" by robbing her of her spirit.[602] The dilemma was that in order to qualify for support under the Aid to Families with Dependent Children and Food Stamp programs, beneficiaries were required to use a social security

[597] Thomas v. Rev. Bd., 450 U.S. 707, 718 (1981).
[598] Hernandez v. Comm'r, 490 U.S. 680 (1989); Jimmy Swaggart Ministries v. B'd. of Equalization, 493 U.S. 378 (1990).
[599] Caleb C. Wolanek and Heidi Liu, "Applying Strict Scrutiny: An Empirical Analysis of Free Exercise Cases," *Montana Law Review* 78, no. 2 (2017): 283.
[600] Jonathan Knapp, "Making Snow in the Desert: Defining a Substantial Burden under RFRA," *Ecology Law Quarterly* 36, no. 2 (2009): 281-282.
[601] Bowen v. Roy, 476 U.S. 693 (1986).
[602] Bowen, 476 U.S. at 696.

number. In overruling the lower court, the Supreme Court employed a new "coercion test" asserting that the Free Exercise Clause offers "individual protection against certain forms of governmental compulsion," but cannot be construed so as to "afford an individual a right to dictate the conduct of the Government's internal procedures."[603] Under this test, if the government is not compelling anyone to violate their religious beliefs then it has not violated the Free Exercise Clause because there has been no cognizable injury. This effectively removed the necessity for strict scrutiny in many cases involving government procedures. Chief Justice Burger opined, and was joined by two other justices, that strict scrutiny should presumptively not apply to any "facially neutral and uniformly applicable requirement for the administration of welfare programs."[604]

While the Court affirmed that it was distinguishing *Sherbert* rather than modifying it, the ruling in *Bowen* marked a significant shift in thinking from the logic that produced the original *Sherbert* decision. In a second Native American case, *Lyng v. Northwest Indian Cemetery Protective Association*[605], the Court followed the precedent it had set in *Bowen* and reaffirmed the Coercion Test. *Lyng* involved the construction of a road by the US Forest Service through an area held sacred for Native Americans and threatening the "privacy, silence, and … undisturbed setting" vital to their religious practice.[606] The Court argued that its decision in *Sherbert* "cannot imply that incidental effects of government programs, which may make it more difficult to practice certain religions but which have no tendency to coerce individuals into acting contrary to their religious beliefs, require government to bring forward a compelling justification for its otherwise lawful actions."[607] The road would not coerce anyone into acting contrary to their religious beliefs or prohibit any religious practice, and as a result the Court found for the government. These cases limited the substantial burden requirement in cases involving government programs to those that actively compelled violations of the believer's faith.

Under *Smith* the question of evaluating the substantial burden was essentially moot; what matters under Smith is not the weight of the burden, but whether the measure imposing it

[603] Bowen, 476 U.S. at 700.
[604] Bowen, 476 U.S. at 707.
[605] Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988).
[606] Lyng, 485 U.S. at 439.
[607] Lyng, 485 U.S. at 450-451.

was directly or indirectly targeting religion. RFRA reinstated the test, but the law's lack of clarity regarding the precise meanings of the individual components of the test has weighed heavily on subsequent legal reasoning over the substantial burden component. One change was made explicit in an amendment passed in 2000 defining religion in such a way as to exclude inquiry into the centrality of any given belief or practice.[608] Otherwise courts were left to figure out which elements of *Sherbert* test were being reinstated. One key issue has been whether the coercion test survives in the RFRA version of the substantial burden test. The Senate report accompanying the bill asserts that RFRA does not affect the decisions in Bowen and Lyng, whereas the House report suggests that the coercion test is no longer applicable.[609]

In the ACA cases the religious organizations were arguing about a particular kind of burden in that they felt they were being made complicit in enabling the sins of others. The circuit courts were mostly skeptical of this view of complicity for a number of reasons (see Part I Chapter 2), but part of the logic behind their rejection of the claimants' arguments was the idea that they were not being coerced to do anything reasonably related to their religious believes. All that was required was the submission of a form – in other words, a *de minimis* administrative requirement and therefore not a substantial burden. This logic focusses on the "religious costs" element of the burden analysis – the circuit courts considered that the religious costs alleged by the claimants, although possibly substantial in theory, were not actually being imposed given the objective underlying fact pattern. What is important to note is how doggedly the courts focus on the factual inquiry, implicitly acknowledging that it is not for courts to decide whether the alleged religious cost of complicity in sin – if actually incurred - are truly substantial. The Supreme Court in *Hobby Lobby,* however, argued that the question of substantial burden from the perspective of religious costs is entirely subjective, essentially depriving courts of the right to question any assertion of religious burden except by either questioning the sincerity of the claimant or by relying on there being *de minimis* secular penalties for noncompliance.

[608] 42 U.S.C. § 2000bb-2(4) (2000).
[609] Knapp, "Making Snow in the Desert," 282-283.

As Gedicks and others have argued, this position effectively creates "the prospect of 'exemptions on demand' [which] renders RFRA's substantial-burden element functionally nonjusticiable."[610] The Supreme Court derives its reasoning from the religious question doctrine, not from anything specific in the text of RFRA, but curiously did not apply similar reasoning in the ministerial exception cases where the burden question is subsumed by the question of whether the claimant is in minister. In those cases the Supreme Court and the circuit courts agree that, rather than defer to the religious organization's definition of who is a minister, the appropriate test is to decide as a matter of law whether the person meets the court's own legal definition of a minister. In the ministerial exception cases, the underlying question is not "whether a … claimant correctly understands his or her religion (which courts may not address), [but rather] whether the claimant has satisfied statutory or other legal requirements for exemption (the adjudication of which has always been an essential feature of the Court's exemption jurisprudence)."[611] This is the logic argued for by the circuit courts in the ACA cases, yet the Supreme Court has chosen to apply a far more deferential standard under the RFRA version of the substantial burden test. The difference can perhaps be explained in that the Court grounds its interpretation in *Sherbert* test jurisprudence (citing *Thomas v. Review Board)* which is appropriate for interpreting the burden test under RFRA but not relevant to the ministerial exception cases. The majority opinion in *Hobby Lobby* frames the ministerial exception and ACA cases as comparable in terms of the burden inquiry; the dissent, as well as most circuit courts, see it differently. More importantly, the very nature of the court's role in determining substantial burden is up in the air. Thus the future of the substantial burden test, and of strict scrutiny under RFRA as a whole, remains in doubt.[612]

[610] Gedicks, "'Substantial' Burdens," 101.
[611] Gedicks, "'Substantial' Burdens," 102.
[612] An interesting counterfactual to be considered when comparing *Thomas* and *Hobby Lobby* is what the court would have decided if *Thomas* had been offered accommodation from a requirement to build tank turrets by offering him a job working on sheet metal that would be sold on to a middleman who may or may not eventually sell it to the government for the war effort. That would be closer to the *Hobby Lobby* situation, and it is not hard to imagine the Supreme Court in that counterfactual version of *Thomas* ruling that the connection was too attenuated for the burden to be deemed substantial.

B. Determining "compelling state interest"

Once a substantial burden has been identified, courts must determine whether the interest being pursued by the government is "compelling." RFRA itself offers little guidance other than referring to the *Sherbert*-era case law in all its inconsistency. The Congressional reports associated with the bill offer some guidance, but as we have seen, these reports are not conclusive and contain often contradictory statements of what the House or Senate had discussed during the bill's negotiation and drafting.[613] The Senate report, for example, notes that to establish an interest as compelling the government "must do more than simply offer conclusory statements that a limitation on religious freedom is required for security, health [or] safety."[614] The doctrine in generally "presupposes that such interests are not only extremely weighty, possibly urgent, but also rare."[615] Such interests have been variously described by the courts as "[preventing] the gravest abuses, endangering paramount interests"[616] and interests "of the highest order."[617]

If the question were simply whether the state interest is very important, the test would not be particularly challenging to determine; most laws are passed for reasons that are arguably important, and the importance of a public policy objective is rightly decided by the legislative branch rather than the judiciary. But two issues render the analysis somewhat more complicated. Firstly, the compelling interest test must be applied in keeping with the "to the person" requirement inherent in both pre-RFRA cases and in the text of RFRA itself. The cases establishing strict scrutiny in free exercise jurisprudence – *Sherbert* and *Yoder* – both took a relatively case-specific approach in their analyses of the governmental interest at stake. In both of those cases the Court considered the state interest not merely in the abstract, but as applied to the specific claimants. Thus in theory the "to the person" requirement predates RFRA, but in the *Sherbert* era cases was not applied always with much vigor. In *United States v. Lee*, for example, the Supreme Court asserted that the general interest in "assuring

[613] A bill, like the Constitution itself, is a product of compromise to which it is often difficult or impossible to ascribe a clear unified "intention." For this reason legislative histories, while at times useful, must be treated with utmost caution.
[614] S. Rep. No. 103-111, at 10 (1993).
[615] Fallon, "Strict Judicial Scrutiny," 1273.
[616] Sherbert v. Verner, 374 U.S. 398, 406 (1963).
[617] Church of the Lukumi Babalu Aye, Inc. v. Hialeah, 508 U.S. 520, 546 (1993).

mandatory and continuous participation in and contribution to the social security system is very high."[618] But when it came to addressing the application to the specific claimants, the Court cited the hypothetical problem of the government being overwhelmed by "myriad exceptions flowing from a wide variety of religious beliefs."[619] The Court did not see a way to distinguish this claimant's situation from that of others, and without any further analysis accepted the government's assertion that America is simply too religiously diverse to be able to craft individualized accommodations.

The Supreme Court's decision in *Gonzales v. O Centro Espirita* brought the "to the person" standard to the fore. The Court emphasized (and perhaps exaggerated) the individualized analysis of the state's interest in the *Sherbert* era cases and noted that RFRA compels a "more focused inquiry." Under that inquiry, the government must "demonstrate that the compelling interest test is satisfied through application of the challenged law 'to the person'—the particular claimant whose sincere exercise of religion is being substantially burdened."[620] The Court reasoned that the state's interest in the "uniform application"[621] of the Controlled Substances Act was not compelling when applied to "the particular use at issue — the circumscribed, sacramental use of hoasca by the UDV [the "Uniao do Vegetal" church]."[622] The burden of proof, the court noted, was on the government to demonstrate the harm that would be done if this particular claimant were granted an accommodation. The court must "look to the marginal interest in enforcing" the law in the particular interest rather than the overall importance of the law in serving the interest at high level of abstraction.[623] This reasoning is a far cry from that used in *United States vs. Lee,* where merely raising the specter of multifarious unspecified religious groups who might want accommodation was enough to preclude any serious analysis of the particular claimant's needs.[624]

RFRA's strong "to the person" approach to strict scrutiny also makes it difficult to clearly distinguish the compelling interest inquiry from the least restrictive means prong of the test.

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[618] United States v. Lee, 455 U.S. 252, 259 (1982).
[619] Lee, 455 U.S. at 259-260.
[620] Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 430–31 (2006).
[621] O Centro, 546 U.S. at 435.
[622] O Centro, 546 U.S. at 432.
[623] Burwell v. Hobby Lobby Stores Inc., 573 U.S. 682, 682 (2014).
[624] It should be noted that the Court repeatedly cites with approval its decision in *Lee* as an example of a compelling interest sufficiently established by the government in contrast to the case in *O Centro* – a close examination of the text, however, reveals *Lee* to be at best underwhelming as an example.

Under this approach "compellingness" itself seems to be a function of two issues: the seriousness of the ends and the effectiveness of the means in the particular situation. If the state's interest is considered "as applied to the person," then the logic of this dual nature of compellingness is relatively clear. An interest is compelling if the social costs of not defending the interest are high. But with the "to the person" approach," an interest must be compelling in the precise situation, which it is not if it is overinclusive or underinclusive. In *Lukumi*, for example, the measure was underinclusive as applied and therefore not compelling. The Supreme Court argued that "[i]t is established in our strict scrutiny jurisprudence that 'a law cannot be regarded as protecting an interest 'of the highest order' . . . when it leaves appreciable damage to that supposedly vital interest unprohibited.'"[625] Overinclusiveness can also be seen as relevant to determining if an interest is compelling as applied to the person. *O Centro* itself demonstrates the problem, since the assertion that the government's interest in not accommodating the claimants is not compelling can easily be redescribed as an assertion that the law could be more narrowly tailored to its objectives by permitting accommodation of religious groups like the UDV.

But the question of overinclusiveness is meant to be answered in the next phase of the test. Thus the result of applying the "to the person" approach under RFRA is that it risks merging the analysis of the ends and the analysis of the narrow tailoring and efficacity of the means.[626] This suggests a more holistic proportionality approach in which the means and the ends are both factors to be considered and balanced to reach a final decision. Strict scrutiny is in fact sometimes described as weighted balancing, and at times seems to function that way.[627] That is not, however, how the court actually treats the test in the workplace cases. As will be explored in Chapter 2, courts in the workplace cases have worked hard to keep the phases of the test distinct and to avoid the intrusion of any kind of ad hoc balancing into strict scrutiny analysis. The result, however, is analytically jumbled and can appear arbitrary in terms of how each step of strict scrutiny is employed.

[625] Church of the Lukumi Babalu Aye, Inc. v. Hialeah, 508 U.S. 520, 547 (1993).
[626] Roy G. Spece, Jr. and David Yokum, "Scrutinizing Strict Scrutiny," Vermont Law Review Vol. 40 (2015) 285- 351: 300.
[627] Fallon, "Strict Judicial Scrutiny," 1306.

C. Narrow tailoring and the "least restrictive means" test

The least restrictive means test involves determining if a measure is necessary to achieve an objective and if it is sufficiently narrowly tailored so that it does not unnecessarily infringe upon rights when another approach could achieve substantially similar results. In cases where "a less restrictive means is available for the Government to achieve its goals, the Government must use it."[628] The theoretical power of the test lies in the use of the superlative – it requires the government to use the "least" restrictive means available rather than simply enjoining it to be careful or to generally tailor legislation narrowly. This phrasing comes from the free speech and equal protection traditions of strict scrutiny but is not used in *Sherbert* or *Yoder.* In *City of Boerne v. Flores* the Supreme Court asserts that the "least restrictive means" language was not used in pre-RFRA cases. This is not quite true, as the phrase or its functional equivalent was indeed used in a handful of cases.[629] That the Supreme Court itself lost track of its own case law on this point attests to the confusion over precisely what standard was being applied in the *Sherbert* era.

However, courts applying RFRA, which does use the phrase "least restrictive means," have held the government to a higher standard in requiring it to consider less rights-restrictive approaches to achieving its aims where religion is involved. This standard is "exceptionally demanding."[630] Strict scrutiny using the least restrictive means test is arguably "the most demanding test known to constitutional law."[631] There must be no feasible alternative that that can advance the state's interest equally well.[632] There are limits to what is expected of the government; it does not mean that the government must consider an unlimited range of unrealistic hypothetical measures. Nor is it required to incur substantial additional costs;[633] moreover, "courts must take adequate account of the burdens a requested accommodation

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[628] United States v. Playboy Ent. Group, Inc., 529 U. S. 803, 815 (2000).
[629] The Supreme Court itself uses the phrase in Thomas v. Rev. Bd. 450 U.S. 707, 718 (1981) incorrectly citing *Yoder*, which did not. *Sherbert* hints that the narrow tailoring of laws would need to be very narrow when the court describes the relevant question as whether "no alternative forms of regulation" would serve the state's interest." Sherbert v. Verner, 374 U.S. 398, 407 (1963). For a broader discussion of this point, see Oleske, "Free Exercise (Dis)Honesty."
[630] Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 728 (2014).
[631] City of Boerne v. Flores, 521 U.S. 507, 534 (1997).
[632] Eugene Volokh, "Freedom of Speech, Permissible Tailoring and Transcending Strict Scrutiny," *University of Pennsylvania Law Review* 144, no. 6 (1996): 2422.
[633] *Hobby Lobby*, 573 U.S. at 730.

may impose on nonbeneficiaries."[634] However, RFRA specifies that the burden of production and persuasion is on the government to demonstrate that it has found the least restrictive means possible, which contributes to making the standard difficult to overcome.[635] And especially in recent years the courts have interpreted the test to be very strict. Justice Alito's opinion in *Hobby Lobby* in particular (to be discussed in Chapter 2 below) suggests that the Supreme Court is moving towards a literal and hardline view of the test that would leave the government exposed to almost any objection related to religious beliefs. Of particular interest and concern was Justice Alito's suggestion that the option of supplemental Congressional appropriations and spending programs, as opposed to mere accommodations, might constitute less restrictive means that could be used to invalidate laws. This suggestion was dicta, but may be an indicator of the direction in which the Court is headed in its consideration of the test.[636] If so, it merely underscores one the main tensions underlying the test, which is the risk of judiciary usurping powers of the legislature and second-guessing their work. The ACA nonprofit cases exemplify this issue well. As will be explored in Chapter 2, the ACA had already crafted a detailed and thoughtful exemption for religious nonprofits. Once the government confirmed that it could see a potential means of refining the exemption to be even further responsive to the nonprofit's concerns while still guaranteeing contraceptive access, the case was essentially lost on the least restrictive means prong. The administrative fine-tuning involved in these cases is extraordinary, but what is clear is that even extremely narrowly tailoring is not enough so long as there is a workable and less restrictive alternative.

Another innovation of RFRA is that, as its text makes clear, the "to the person" requirement already discussed with regard to the compelling interest prong of strict scrutiny also applies to the least restrictive means test.[637] But in practice courts did not pay much attention to this language in RFRA until *O Centro*, and it must be remembered that that case

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[634] Cutter v. Wilkinson, 544 U. S. 709, 720 (2005).
[635] 42 U.S.C. § 2000bb-2(3).
[636] Martin S. Lederman, "Reconstructing RFRA: The Contested Legacy of Religious Freedom Restoration," *Yale Law Journal Forum* 125 (2016): 427-428, https://www.yalelawjournal.org/forum/reconstructing-rfra-the-contested-legacy-of-religious-freedom-restoration.
[637] Specifically, the ordering of the language grammatically necessitates the application to both prongs. The text reads in relevant part: Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person— (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." See 42 U.S.C. § 2000bb-1.

was decided on the compelling interest phase and never considered the test as applied to the least restrictive means phase. Clarification on this point – what one might think of as the "*O Centro* moment" for the least restrictive means test – came with the Supreme Court's decision in *Hobby Lobby*. The majority opinion in *Hobby Lobby* specifies that the government failed to demonstrate "that it [lacked] other means of achieving its desired goal without imposing a substantial burden on the exercise of religion *by the objecting parties in these cases.*"[638] Previously some courts had applied the "to the person" language similarly to *Hobby Lobby*, while others had collapsed the two prongs into one test.[639] *Hobby Lobby* has now clearly established the claimant-centered approach for both prongs of the test.

This formulation strongly favors the granting of exemptions in that accommodating specific individuals will always be a less restrictive option with regard to the individuals in question; the government must in such cases persuade the court that any accommodation offered *to the objecting parties* would undermine the state interest that motivated the law. It is difficult to imagine such a case, and the very idea seems to undermine the principle of equality before the law. Moreover, the "to the person" approach to the least restrictive means test contributes to blurring the two prongs of strict scrutiny; the main reason that exempting any given claimant from a law would not be a plausible less restrictive way of attaining the government's compelling interest is if it somehow undermines that interest. If there is a clearly less restrictive means, then the implication is that the measure is not compelling as applied to the particular claimant. The two prongs ask essentially the same question – why apply the law to these people?

Since government programs function on the basis of mass compliance, government interests underpinning these laws will rarely be compelling as applied to a single individual, and accommodation of the individual in question will always be a less restrictive means of achieving it. That leaves only the substantial burden prong to act as a limiting principle, except that *Hobby Lobby* simultaneously reinterpreted that phase of strict scrutiny as a solipsistic transformation of subjective assertions into legal facts. But without a clear limiting principle in place, the practice of accommodation is grossly unfair as it simply rewards the

[638] Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 728 (2014) [emphasis added].
[639] Tanner Bean, "'To the Person': RFRA's Blueprint for a Sustainable Exemption Regime," *Brigham Young University Law Review* 2019, no. 1 (2019): 21-22.

most litigious members of the community. It becomes a tragedy of the commons. RFRA, as interpreted by *Hobby Lobby*, has removed the limiting principles. The Court has thus reinterpreted RFRA in a way that both rewards religious conservatives by essentially elevating religion above the law and at the same time serves to undermine precisely the kind of government programs that are anathema to political conservatives. It is therefore not surprising that the case has provoked such strong objections not only from legal scholars but from politicians and activists on the political left.[640]

3. Intermediate scrutiny as an ad hoc range of standards

Intermediate scrutiny is formally not one of the options applied by courts in religious freedom cases. Broadly speaking however, it is a tier of review meant to be a compromise between the exigency of strict scrutiny and the minimalist approach of rational basis review. In other words, it is a form a heightened scrutiny that does not quite attain the level of difficulty of strict review and was designed for cases in which a rational basis approach would be unjust but courts were not willing to hamstring the government in the pursuit of interests that might be less than compelling but still important enough to protect. The doctrine was developed in the context of equal protection cases involving "quasi-suspect" classifications such as gender,[641] sexual orientation[642] or illegitimacy[643] and used in free speech cases involving content-neutral regulations of expression.[644] Under this standard, state action must be "substantially related" to "important government interests,"[645] and must be "narrowly drawn," i.e. "not … substantially more burdensome than necessary to advance these interests."[646] Key to this analysis is the fact that the government's actual interests must be clearly identified analyzed in the context of the case. Under the mere rationality standard the

[640] For a contrary view, see Brett McDonnell, "The Liberal Case for Hobby Lobby," *Arizona Law Review* 57 (2015): 777-822.
[641] For example see, Craig v. Boren, 429 U.S. 190 (1976); United States v. Virginia, 518 U.S. 515 (1996).
[642] United States v. Windsor, 570 U.S. 744 (2013).
[643] For example, see Trimble v. Gordon, 430 U.S. 762 (1977).
[644] United States v. O'Brien, 391 U.S. 367 (1968).
[645] Craig, 492 U.S. at 197.
[646] Kelso, "Standards of Review," 234.

court may consider any objective the measure might reasonably serve; in intermediate scrutiny, the state's actual motivations matter and must be justified.[647]

In fact, the term "intermediate scrutiny" can capture a variety of tests that fall between strict scrutiny and rational basis review. Various versions have been articulated by the courts in response to specific contexts. For example, incidental restrictions on expressive conduct are evaluated under the *O'Brien* test, a which is composed of the three steps of intermediate scrutiny leavened with a fourth criterion to tailor it to the situation: to be upheld "the governmental interest [must be] unrelated to the suppression of free expression.[648] Other formulations of intermediate scrutiny sometimes known as "rational basis with bite"[649] have emerged – these are not actual doctrine, but rather are formulations intended to capture the phenomena of courts using a kind of heightened scrutiny in cases where they claim to be applying the rational basis test.[650] Of relevance to this study, the *Pickering* test is a form of intermediate scrutiny specifically crafted for the regulation of speech in the workplace by government employees. This test applies heightened scrutiny when the state employee comments "upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."[651] The "test," however, gives courts an indication of when to balance, but not how to balance, and is in this sense not a proper tier of review at all. It is, rather, a means of distinguishing a certain category of "hard cases" that seem to fall in between the requirements for strict scrutiny and rational basis review. It is therefore no wonder than one author has referred to intermediate scrutiny as "the test that ate everything."[652]

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[647] Russell K. Robinson, "Unequal Protection," *Stanford Law Review* 68, no. 1 (January 2016): 209.
[648] O'Brien, 391 U.S. at 377.
[649] Gayle Lynn Pettinga, "Rational Basis with Bite: Intermediate Scrutiny by Any Other Name," *Indiana Law Journal* 62, no. 3 (1987): 779-804.
[650] Examples include City of Cleburne v. Cleburne Living Ctr., 105 S. Ct. 3249 (1985) and Romer v. Evans, 517 U.S. 620 (1996).
[651] Pickering v. Bd. of Educ., 391 U.S. 563 (1968).
[652] Ashutosh Bhagwat, "The Test That Ate Everything: Intermediate Scrutiny in First Amendment Jurisprudence," *University of Illinois Law Review* 2007, no. 3 (2007): 783-838.

4. Balancing as a misnomer as applied in US courts

The word "balancing" at times appears to be the Swiss army knife of legal terms – it can perform many tasks but none very well. Strict scrutiny has been described as balancing; so has European proportionality analysis. In essence, however, balancing implies any approach where the interests of both sides are in some sense weighed, all relevant input is welcome, and where the results are not a foregone conclusion. Much of the time, that is not really the case in American tiered review. The tiers were conceived of as a structured way in which courts could determine in advance what elements must be considered in rights cases and, significantly, how much importance should be accorded each element. It was therefore from the start a way of pre-determining categories that would guide judges in avoiding an ad hoc form of balancing and what was feared to be the unbridled discretion that comes with it. If cases fall into the category meriting rational basis scrutiny and the measures fall into the category of rational and unbiased behavior, the government wins. There is no real weighing of interests the government's interests in comparison with the claimants in this form of analysis. If strict scrutiny applies, then there follows a series of yes/no questions regarding the nature of the burden, the nature of the interest, and the means/ends fit. In theory, these are discrete steps that do not affect each other. To maintain the metaphor of scales, there is weighing, but there is no balancing of the results.[653] This categorical logic is meant to be the opposite of balancing, if balancing is about weighing what is at stake for each side in a conflict and taking all relevant input into account.

And yet, as discussed above, Justice Scalia's assertion that *Sherbert* was a form of balancing test was not entirely wrong. Scalia set out to change that with his opinion in *Smith*, which replaced an inconsistent approach – one that was arguably categorical in name but balancing in fact – with a more easily policed and rigidly categorical approach to incidental religious burdens. But, as Oleske argues, "*Sherbert* simply assumed that incidental burdens on religion warrant the same scrutiny as targeted burdens on religion. *Smith* simply assumed that incidental burdens on religion warrant no scrutiny because they are different from targeted burdens on religion. Neither case confronted the obvious possibility, long

[653] Strict scrutiny has often been referred to as balancing with a thumb on the scales. The description is colorful, but it is hard not to conclude that if you put your thumb on the scales you are not really balancing at all.

recognized by the Court in other areas of constitutional law, that incidental burdens warrant some scrutiny, but not as much as targeted burdens."[654] Once courts are asked to apply "some" scrutiny, determining how much is going to depend on a comparison between the state's interest and that of the religious claimant. The question is not whether the state's interest is compelling, but rather whether it is compelling *enough* in this context to merit placing *this much* of a burden on the claimant. As we have seen, in some cases courts have tinkered with intermediate scrutiny. But where RFRA is involved, the courts seem to have doubled down on the categorical approach. They have reasserted what Sullivan describes as a rule-like regime that "binds a decisionmaker to respond in a determinate way to the presence of delimited triggering facts [in order to] confine the decisionmaker to [those] facts, leaving irreducibly arbitrary and subjective value choices to be worked out elsewhere" as opposed to a standard-like regime that would "allow the decisionmaker to take into account all relevant factors or the totality of the circumstances."[655]

This tension between categorical and "balancing" approaches is likely to remain a feature of American jurisprudence. Many have argued that categorical reasoning distorts the court's reasoning and introduces a variety of pathologies into its decisions. And arguably the proliferation of "intermediate" forms of scrutiny is an indication of a need for a better formulated and more "balancing-centered" form of balancing than the current system of tiered review provides. In Part II we will explore just how these "balancing" or "categorical" approaches have been implemented in cases involving religious freedom in the workplace, and will compare these methodologies to the version of proportionality analysis employed by the ECtHR. What this will demonstrate is both the determination of American courts to avoid the kind of free-wheeling balancing so deeply criticized by Justice Scalia and the severe limitations of this approach.

[654] Oleske, "Free Exercise (Dis)Honesty," 740.
[655] Kathleen M. Sullivan, "Foreword: The Justices of Rules and Standards," *Harvard Law Review* 106, no. 1 (November 1992): 58.

II. THE MECHANICS OF EUROPEAN PROPORTIONALITY

1. The origins of proportionality

Proportionality as a legal and moral concept is well-anchored in European legal tradition, tracing its philosophical origins to the Old Testament. The concepts of "an eye for an eye" and the "Golden Rule" embody the notion of proportionality and suggest its application as an interpretive guide in both moral and legal contexts.[656] Likewise it appears as a fundamental notion of justice in ancient Greek and Roman legal writings, as well as in the Magna Carta.[657] Its modern incarnation as a positive legal concept, however, is best seen as being grounded in eighteenth century German administrative law. In the latter half of the eighteenth century, as Germany evolved from authoritarian rule into a *Rechtsstaat* (broadly speaking, a state governed by the rule of law), Frederic the Great acted to "establish Prussia's legal system on the basis of principles of rationalism, religious tolerance, and individual freedoms."[658] It arose in the context of police laws, but evolved in the Prussian administrative courts where it was used to regulate police orders through requiring that the sanctions put in place be proportional to the gravity of the harm they were designed to mitigate or repair.[659] By the late nineteenth century, the Higher Administrative Court of Prussia were using a version of what today we would recognize as a least restrictive means test to invalidate police actions.[660] In contemporary Prussian academic writing, the justification for the assertion of such rights and their link to proportionality was grounded in natural law theory. Otto Mayer, a prominent liberal Prussian legal scholar of the time, argued for example that "natural rights demand that the use of police powers by the government be proportionate."[661] The "optimistic belief in rationality and reason [of] the nineteenth century German legal science

[656] Aharon Barak, *Proportionality: Constitutional Rights and Their Limitations* (Cambridge: Cambridge University Press 2012), 175.
[657] Barak, *Proportionality,* 175-176.
[658] Moshe Cohen-Eliya and Iddo Porat, "American Balancing and German Proportionality: The Historical Origins," *International Journal of Constitutional Law* 8, no. 2 (2010): 271.
[659] Barak, *Proportionality,* 178-179.
[660] Sweet and Mathews, "Proportionality Balancing," 101.
[661] Cohen-Eliya and Porat, "American Balancing and German Proportionality," 273.

movement" encouraged a more systematized approach to realizing those natural rights through rational concepts such as proportionality.[662]

When the post-war German government drafted the German Basic Law of 1949, proportionality was not contained in any specific provision.[663] However, it became, and remains, a powerful and pervasive interpretive concept because proportionality was particularly suited to the evolving post-war German constitutional order. Formulated in the aftermath of fascism and war, the Basic Law was intended to create "a new constitutional order grounded in a commitment to human rights enforceable as higher law."[664] This constitutional order enshrined an extensive list of rights that are binding upon the state, so laws are prohibited from interfering with their "essential content" (Article 19 § 2). Moreover, this rights focus was coupled with a Constitutional Court to defend those rights and a right of individual appeal against rights violations.[665] However, in the wake of fascism there was also a natural tendency to take a more cautious approach to traditional notions of legislative supremacy. The need for a protective state was strong, but the prestige of the legislature was low, a situation which prompted German legal scholars and judges to "reconsider the judiciary as a check against legislative disregard of [fundamental democratic] principles."[666] Thus the courts were naturally drawn to a strong culture of judicial review which, married to a strong and details rights framework, creates an ideal background in which to develop detailed conceptions of proportionality. This was especially true for a Germany whose society and infrastructure were largely in ruins after the war, since "a deep commitment to the administrative and welfare state, and the demands of post-War reconstruction, implied an important role for government."[667] To rebuild Germany, the government needed to act, and yet pressing social needs had to be met in the context of a highly detailed and enforceable rights regime. This obliged the German courts to face the difficult question of whether "a state measure that passes an LRM test automatically prevail[s] over the rights they infringe

[662] Moshe Cohen-Eliya and Iddo Porat, "Proportionality and the Culture of Justification," *American Journal of Comparative Law* 59, no. 2 (2011): 467.
[663] Barak, *Proportionality,* 179-180.
[664] Sweet and Mathews, "Proportionality Balancing," 104.
[665] Sweet and Mathews, "Proportionality Balancing," 104.
[666] Mauro Cappelleti, *Judicial Review in the Contemporary World* (Indianapolis: Bobbs-Merrill, 1971), viii, quoted in Lisa Hilbink, "Beyond Manicheanism," 17.
[667] Sweet and Mathews, "Proportionality Balancing," 109.

and, if so, on the basis of what theory of rights, or of the constitution?[668] Such a specific historical and cultural context reinforce the argument that the "expansive nature of constitutional rights creates a structural need for proportionality in its intrinsic sense."[669]

Even as Germany's concept of proportionality was being elaborated and developed, it spread quickly to other countries. This may in part be attributed good timing – the elaboration of German proportionality coincided with two related developments in global constitutional culture. Following the Second World War and the subsequent process of decolonization, there was an unprecedented burst of government reforms across Europe and beyond which has become known as the "new constitutionalism." Despite the vagueness of this term, it is undeniable that the second half of the twentieth century has been characterized by a frantic wave of constitutional reform. As Ran Hirschl notes, "[o]ver 150 countries and several supranational entities across the globe can boast of the recent adoption of a constitution or a constitutional revision that contains a bill of justiciable rights and enshrines some form of active judicial review."[670] This wave of structural legal change has been so thorough and widespread that today constitutionalism arguably "has no rival as a template for the organization of the state."[671] This wave of reforms coincided with a global surge in concern for human rights and a theorization of those rights in universalist terms to serve as a bulwark against totalitarianism. The new constitutions thus linked individual rights with systems of judicial oversight and found themselves faced with the inevitable questions over how rights are to be protected in the context of conflicts with the rights of others or the needs of the state. Proportionality has come to serve that purpose for many of the same reasons that Germany adopted the concept in the first place. Moreover, the fact that so many different constitutional regimes have adopted some form of the concept has had the added benefit that proportionality has come to provide "a common grammar for global constitutionalism."[672] Today, it can be said that "almost all constitutional courts [have adopted] the doctrine of proportionality as their main pillar of constitutional adjudication."[673] The European Court of Human Rights, although not a constitutional court, has adopted proportionality as an

[668] Sweet and Mathews, "Proportionality Balancing," 109.
[669] Cohen-Eliya and Porat, *Proportionality and Constitutional Culture*, 60.
[670] Ran Hirschl, *Comparative Matters,* 2.
[671] Sweet and Mathews, "Proportionality," 84.
[672] Cohen-Eliya and Porat, "American Balancing," 263.
[673] Moshe Cohen-Eliya and Iddo Porat, "Proportionality and the Culture of Justification," 464.

interpretive concept. However, as will be explored below, it is created its own modified version of the standard approach. Other international bodies, such as the European Court of Justice, have followed suit. What is important to remember about PA is that it varies from jurisdiction to jurisdiction, being applied "in many judicial cases by many different courts, in sometimes very different ways, all around the world."[674] This is in large part attributable to its nature as an analytical tool, a "judicial creation which is largely independent of the particular words of the constitutional provisions that justify its application."[675]

2. The traditional test

In order to understand the nature of the ECtHR's approach to proportionality and to evaluate its relative merits, it is important to outline what could be called the "standard model" of proportionality.[676] Proportionality in its pure form can be defined as "the set of rules determining the necessary and sufficient conditions for a limitation of a constitutionally protected right by a law to be constitutionally permissible."[677] Barak's definition clearly takes the concept of "constitutionality" in its broadest sense.[678] The "set of rules" generally provides that a limitation on a right will be permissible inasmuch as it addresses the four following issues, here as formulated succinctly by Rivers:

1. Legitimacy: does the act (decision, rule, policy, etc.) under review pursue a legitimate general aim in the context of the right in question?
2. Suitability: is the act capable of achieving that aim?
3. Necessity: is the act the least intrusive means of achieving the desired level of realization of the aim?

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[674] Francisco J. Urbina, "Is it Really That Easy? A Critique of Proportionality and 'Balancing as Reasoning,'" *Canadian Journal of Law & Jurisprudence* 27, no. 1 (2014): 169.
[675] Tom Hickman, "Proportionality: Comparative Law Lessons," *Judicial Review* 12, no. 1 (2007): 31.
[676] As has been mentioned, proportionality is a broad concept of how to balance rights and as a result is protean in nature. The following discussion takes an abstract, academic approach to the "ideal-type" version of proportionality that functions as the starting point for most evaluations of the concept.
[677] Barak, *Proportionality,* 3.
[678] For an excellent discussion of a broad conception of constitutionalism, see Sweet "On the Constitutionalisation of the Convention."

4. Fair balance, or proportionality in the narrow sense: does the act represent a net gain, when the reduction in enjoyment of rights is weighed against the level of realization of the aim?[679]

It should be noted that the terminology of proportionality analysis can vary from jurisdiction to jurisdiction. Some scholars discuss the legitimacy prong as part of the process, while others focus on the tripartite test that follows the threshold question of legitimacy. Sometimes it is called "proper purpose" or "legitimate goal." In Canada and the UK, jurists speak of a rationality test, whereas in Germany it is characterized as "suitability." The Canadian "minimal impairment" test is called "necessity" elsewhere. This thesis will adhere mostly the German usage with regards to proportionality in general, and use specific jurisdictional terminology and concepts where appropriate, as in the section dedicated to the specific version of proportionality used in the ECtHR.

A. Determining the legitimacy of aims

Whether one speaks of proper purpose, legitimate aims, or legitimate goals, the fundamental threshold question of proportionality analysis is "whether a law (a statue or the common law) that limits a constitutional right is for a purpose that justifies such limitation."[680] It is a threshold question in the sense that it is not part of the balancing test proper, but rather is conducted independently of (i) the gravity of the burden the government measure places upon a protected right, (ii) the means used to achieve the government's objective, and (iii) the means/ends fit between the law and the aim it is meant to achieve.[681] The threshold question is simply whether or not the aim is legitimate. This is in fact not the first threshold test in any given proportionality analysis. The first step in any case, whether explicitly addressed or not, is the determination of whether there has in fact been an interference with a protected freedom. This step seems so obvious that it can be easily overlooked, and this paper will address its concrete application in more detail in Chapter 2 below with specific regard to the ECtHR, since the Court generally makes a practice of

[679] Julian Rivers, "Proportionality and Variable Intensity of Review," *Cambridge Law Journal* 65, no. 1 (2006): 181.
[680] Barak, *Proportionality,* 246.
[681] Barak, *Proportionality*, 246.

discussing it in its judgments. The reason for the "interference with a protected right" phase being a threshold question independent of other components of balancing is relatively clear – if there has been no interference with a right, there is nothing to balance. However, approaching the question of the legitimacy of the government's aims as a threshold question raises more issues than the simple determination of limiting enjoyment of a right.[682] Specifically, we must consider what we mean by the "aim" of a law and what we mean by legitimacy.

i. Psychological vs. pragmatic approaches to defining state objectives

When we speak of aims we generally mean goals. The word in its figurative use as a noun has become a dead metaphor, requiring a moment reflection to recall that the literal meaning refers to a target, something one aims at with a projectile. This serves as a reminder that to choose a goal or an aim requires intent; it is a conscious decision, implying a desired outcome willed into being by a conscious individual. A law or other government action cannot, therefore, have an aim;[683] only legislators, judges or other acting officials can have aims. The law is simply the manifestation of their intent. Seen in this sense, the question of legitimate aims becomes a psychological inquest into the state of mind of the legislators. But that also is not quite accurate. It is certainly true that looking at the *travaux préparatoires* or other background knowledge can offer insights into the motives that propelled legislators to draft and pass a particular law. But to require courts as a general proposition of interpretive doctrine to second guess the state of mind and true intentions of legislators is both impractical and arguably not relevant to the goals of assessing when it is legitimate to restrict fundamental freedoms. It is impractical firstly because, with certain notable exceptions,

[682] As discussed in Section I above, the determination of a limitation can become far more complex if the question is phrased, as it is in strict scrutiny cases, as whether or not there has been a "substantial" burden. Such phrasing admits questions of degree, and introduces the need to determine whether or not the burden is of sufficient importance to merit consideration. In practice, however, judges are generally hesitant to dismiss a limitation on a fundamental right such as religious freedom as *de minimus*, and are more likely to do the intellectual work of determining a case at a later stage of deliberations. There are notable exceptions to this, however, which will be discussed below. The important point for the present discussion is that in proportionality analysis the standard approach assumes that a law with an improper purpose requires no actual balancing because it is *prima facie* illegitimate.

[683] Kai Moller, "Proportionality: Challenging the Critics," *International Journal of Constitutional Law* 10, no. 3 (2012): 712.

legislators do not generally announce discriminatory intent during legislative debates. In the absence of naïve legislators openly announcing religious bias or racial animus, for example, it is not obvious what evidentiary standards could apply in determining the illegitimacy or impropriety of the "aims" of legislation.[684] Secondly, it must be remembered that legislation in any form of representative democracy is the result of negotiations between multiple parties with differing and often opposing agendas. The weakness of most 'original intent' interpretations – whether they are directed at legislation or at constitutional provisions – is that it is difficult to speak of the "intent" of a collection of individuals holding a variety of conflicting interests who have ultimately agreed on a compromise. How many legislators supporting a piece of legislation would have to have illegitimate aims before the entire law would be "tainted" by those aims? Would one be enough? What if she were particularly influential? Or can legislation remain legitimate as long as some legislators had proper motives? Can it be legitimate in parts? Such questions are politically and philosophically interesting but are unlikely to be a fruitful line of questioning for judges.

In addition, it is unclear, as Jeremy Gunn has argued, why such intent should matter. The subjective question of why legislators have passed a law would seem to matter less than what the law actually does, how it functions, what purpose it serves. A law can serve perfectly legitimate purposes even if the state of mind of the legislators was of questionable legitimacy. Gunn observes, by way of example, that "a law restricting immigration does not become invalid in any State on the grounds that the legislators have prejudices against immigrants."[685] Laws restricting untouchability in India served a very legitimate purpose and substantially improved quality of life in India – that would not change in function of the attitudes of the legislators towards untouchables or towards the Hindu traditions that they were limiting.[686]

Instead, a more productive way of thinking about the aim of a law or administrative act is to step away from the "psychological facts" of legislative intent and instead to focus on "whether there are any interests that are candidates for justifying the interference in the sense that it is not entirely implausible that they will at least be rationally connected to the

[684] T. Jeremy Gunn, "Deconstructing Proportionality in Limitations Analysis," *Emory International Law Review* 19, no. 2 (2005): 488.
[685] Gunn, "Deconstructing Proportionality," 488.
[686] Gunn, "Deconstructing Proportionality," 489.

policy."[687] In other words, judges must look to see "whether the policy or decision is objectively justifiable, not whether the persons who made it had the right considerations on their minds."[688] This sounds somewhat like the means/ends test that is associated with the later stages of proportionality analysis, but it remains a distinctive component. The question here is not whether the policy is the best fit for the goal; it is whether there is a plausible claim that merits evaluation at the balancing stage. The goal of this threshold question can be seen as serving a dual purpose with both short- and long-term advantages as it "allows for the discussion and contestation of the kind of grounds that are legitimate to invoke as a restriction on the rights of others."[689] The legitimate aim phase asks whether the range of possible justifications of the law reflect the kinds of considerations that are appropriate for an elected government to consider?

Actual motives are still relevant, however. If a law was passed expressly to forward an illegitimate purpose, it could in such a case be rendered illegitimate even if it had some kind of theoretically valid effect. Article 18 of the ECHR, for example, provides that "[t]he restrictions permitted under [the] Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed."[690] Article 18 jurisprudence has generated a "predominant purpose" test precisely to address the question of mixed motives in legislation.[691] Such cases, however, are rare. As the court has explained in several judgments, "the whole structure of the Convention rests on the general assumption that public authorities in the member States act in good faith. That assumption is rebuttable in theory, but it is difficult to overcome in practice: the applicant alleging that his rights and freedoms were limited for an improper reason must convincingly show that the real aim of the authorities was not the same as that proclaimed (or as can be reasonably inferred from the context). Thus, the Court has to apply a very exacting standard of proof to such

[687] Moller, "Proportionality: Challenging the Critics," 712.
[688] Moller, "Proportionality: Challenging the Critics," 712.
[689] Mattias Kumm, "Democracy is Not Enough: Rights, Proportionality and the Point of Judicial Review," Public Law and Legal Theory Research Paper Series, Working Paper No. 09-10, New York University, March 2009, 23.
[690] European Convention on Human Rights, Article 18.
[691] See Merabishvili v. Georgia [GC], no.72058/13, 28 November 2017, http://hudoc.echr.coe.int/eng?i=001-178753.

allegations."[692] In the absence of such proof, the Court has preferred to accept plausible explanations of legitimate aims.

ii. Legitimacy as consistency with constitutive principles

But what then does it mean for aims to be legitimate? Kumm claims that the legitimate aims prong of proportionality analysis is "relatively easy to satisfy in cases where the constitutional provision does not specifically restrict the kind of aims that count as legitimate for justifying an interference with a specific right."[693] Moller has given a similar assessment of the threshold issue of legitimacy, asserting that "most goals pursued by policies are obviously legitimate." [694] Legitimacy is thus described as something obvious, easily discoverable by our moral intuition as citizens in a democracy. It is, in fact, the "normal" business of government. At the edges, however, things are so simple, and it is clearly unsatisfactory to answer, as Justice Potter Stewart famously did when trying to define pornography, that "I know it when I see it." [695] Somewhat more helpfully, many commentators have looked to the nature of constitutional democracy itself to form a basis upon which courts can derive theories of legitimacy. As Charles Taylor explains, "[a] liberal and democratic state cannot remain indifferent to certain core principles, such as human dignity, basic human rights, and popular sovereignty. These are the constitutive values of liberal and democratic political systems."[696]

From this notion of constitutive values one may derive a principled means of separating legitimate and illegitimate aims of government: if a law undermines the constitutive principles of democracy, it is illegitimate. This then leaves us with a more contentious question: what are the constitutive principles of democratic forms of government? A satisfactory exploration of this topic is well beyond the scope of this paper but we may posit a few principles that might plausibly be evoked in trying to determine the legitimacy of

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[692] Khodorkovskiy and Lebedev v. Russia, nos. 11082/06 and 13772/05, § 899, 25 July 2013, http://hudoc.echr.coe.int/eng?i=001-122697.
[693] Mattias Kumm, "What Do You Have in Virtue of Having a Constitutional Right? On the Place and Limits of the Proportionality Requirement," Public Law and Legal Theory Research Paper Series, Working Paper No. 06-41, New York University, December 2006, 9.
[694] Moller, "Proportionality: Challenging the Critics," 712.
[695] Jacobellus v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).
[696] Maclure and Taylor, *Secularism and Freedom of Conscience*, 11.

legislative aims. Taylor's short list quoted above is a good place to start. Kumm, in contrast, focuses on the use of public reason and sees PA as a kind of public Socratic dialogue. His view is that any limitation on fundamental rights must "qualify as a collective judgment of reason about what justice and good policy requires."[697] Another formulation of the constitutive principles of constitutional democracy comes from the French Revolution: liberté, egalité and fraternité. Aharon Barak sees legitimacy of aims as flowing from two the basic notion of popular sovereignty which is at the heart of the very idea of democracy and the "basic values allowing for the co-existence of different groups within a single democratic society."[698] He includes separation of powers, rule of law, an independent judiciary, and respect for human rights as democracy's "internal morality, without which the regime no longer remains democratic."[699] The basic need for coexistence is central to man formulations of legitimacy, and is embodied in J.S. Mill's "harm principle" as well as in the Declaration of the Rights of Man and of the Citizen (1789), which states that "Liberty consists in the freedom to do everything which injures no one else; hence the exercise of the natural rights of each man has no limits except those which assure that the other members of the society the enjoyment of the same rights."[700]

Beyond these constitutive values, some aims can be seen as legitimate simply because they are in the public interest. Barak explains the public interest in terms of upholding a "minimal democratic experience," which could not exist without government action to protect the continuing existence of the state, the maintenance of a democratic form of government, national security and public order.[701] These are interests shared by all, and thus the promotion of the public interest in theory benefits even those whose rights must be limited in their defense. They are the "conditions under which we may live together."[702] All of these formulations, however, will ultimately involve subjective moral claims, at the very least involving a thin conception of democracy and possible more thick conceptions of what it

[697] Mattias Kumm, "The Idea of Socratic Contestation and the Right to Justification: The Point of Rights-Based Proportionality Review," *Law and Ethics in Human Rights* 4, no. 2 (2010): 159.
[698] Barak, *Proportionality,* 252.
[699] Barak, *Proportionality,* 251.
[700] Declaration of the Rights of Man and of the Citizen, § 4 (1789).
[701] Barak, *Proportionality,* 256.
[702] Richard Ekins, "Human Rights and the Separation of Powers," *University of Queensland Law Journal* 34, no. 2 (2015): 218.

means to live together well. In any case, the role of a judge in scrutinizing the legislature's purposes in limiting rights in the public interest will always be a delicate one where fundamental needs in a democracy such as security, popular sovereignty and pluralism are likely to be at odds.

For this reason, most constitutional regimes choose to offer some guidance regarding what constitutes legitimate aims in what are usually referred to as limitations clauses. A limitations clause serves the purpose, among others, of identifying the kinds of purpose that would be considered legitimate. These clauses can be deployed in a variety of ways. They may be exhaustive, as is the case with the limitations clauses of Articles 8-11 of the European Convention on Human Rights, or non-exhaustive, as in the Constitution of South Africa. Some constitutions contain general limitations clauses, like the Israeli Basic Law permitting rights restrictions only by "a law befitting the values of the State of Israel, enacted for a proper purpose, and to an extent no greater than is required."[703]

Some general limitations clauses are more specific, referring to specific values to be protected. In some Muslim-majority country constitutions, for example, there are "repugnancy clauses" specifying respect for Islam as a reason to limit rights. The Maldives Constitution contains a provision that rights are protected only if exercised "in a manner that is not contrary to any tenet of Islam."[704] Sometimes the concerns raised can be quite specific to the situation of the country. Tanzania's constitution contains a general limitation clause permitting limitations on rights for the purposes of, *inter alia*, "rural and urban development planning, the exploitation and utilization of minerals or the increase and development of property."[705] Others eschew such precision but define legitimate aims in terms of various constitutive principles of democracy such as dignity, equality, and freedom.[706] Human rights treaties may also make use of general limitations clauses; the Universal Declaration of

[703] Basic Law: Human Dignity and Liberty, (No. 1391 of the 20th Adar Bet, 5752) (25 March 1992) (Isr.), Article 8.
[704] Dawood Ahmed and Elliot Bulmer, *Limitation Clauses*, *International IDEA Constitution-Building Primer 11* (Stockholm: International IDEA, 2017), 12, https://www.idea.int/sites/default/files/publications/limitation-clauses-primer.pdf.
[705] The Constitution of the United Republic of Tanzania, 1977, Article 30(2)(b).
[706] For example, see the Constitution of the Republic of South Africa, 1996, Article 36(1).

Human Rights cites "morality, public order and the general welfare in a democratic society."[707]

The predominant approach for modern constitutions, however, is to apply specific limitations clauses that are matched with each right.[708] Many of these mirror some of the concerns that appear in general limitations clauses and are common across constitutions, such as public health or safety. Others can be specific to interests or concerns of the country in question. Iran's Constitution includes specific limitations clauses for most rights; or example the right to free association is guaranteed only on the condition "that they do not negate the principles of independence, freedom, national unity, Islamic criterion, and the foundation of the Islamic Republic."[709] In some cases, as in that of the South African Constitution, specific limitations clauses can be additional to a general limitations clause. The right to freedom of religion and belief is coupled with a specific limitations clause noting that such rights do no "prevent legislation recognizing (i) marriages concluded under any tradition, or a system of religious, personal or family law; or (ii) systems of personal and family law under any tradition, or adhered to by persons professing a particular religion."[710]

What the foregoing suggests is that the "proper purpose" phase of proportionality review can vary enormously from system to system, especially with regard to conceptions of the public interest. However, even specific limitations clauses tend to grant the legislature broad latitude in determining what constitutes a proper purpose. As a result, this phase may best be seen as a point where courts are invited to winnow out any blatantly improper motives or legislation that cannot conceivably advance the public good. Because such cases are relatively rare, and because it is relatively easy to offer plausible objectives for most legislation, most government actions pass this state of the analysis. The proper purpose phase is nevertheless important; as Kumm explains, proportionality "provides a structure for the demonstrable justification of an act in terms of reasons that are appropriate in a liberal democracy. Or to put it another way: It provides a structure for the justification of an act in terms of public reason."[711] By requiring a legitimate aim to be articulated publicly, this prong

[707] United Nations, Universal Declaration of Human Rights (1948), Article 29(2).
[708] Barak, *Proportionality,* 141.
[709] Constitution of the Islamic Republic of Iran, 1989, Article 26.
[710] Constitution of the Republic of South Africa, 1996, Article 15.
[711] Kumm, "The Idea of Socratic Contestation," 150.

of proportionality both limits the capacity for open government malfeasance and forces an ongoing public discussion of the nature of government and the values of society. This obligation of Socratic dialogue helps underpin the moral basis for proportionality by ensuring that the public reason employed in the potential limitation of rights is strictly limited to purposes appropriate to a constitutional democracy.

B. Determining suitability of limitations on free exercise

In modern democracies one must hope that upholding constitutional rights is one of the government's most important objectives. Thus rights limitations arise where there is a conflict between a right and another goal.[712] The suitability prong of PA is part of the bigger question of whether the conflict between the governmental action and the right being infringed is in fact necessary. At the suitability phase judges must determine whether the government action genuinely furthers the purpose it claims to serve. If it does not, then logically the conflict does not exist; sacrificing the right does not further the competing goal and therefore is not "necessary" to achieve it. If, for example, a law is passed limiting freedom of speech in order to protect national security, the suitability prong of PA is meant to determine whether the law does in fact contribute to national security in some way. It is important to emphasize that this is distinct from the question of whether the measure is the best way or the only way; it is, like the proper purpose prong, a threshold test rather than part of the balancing itself.[713] And yet the test raises several issues that render it more complicated than simply asking whether a measure contributes to furthering a goal.

Or rather, it would be better to say that the question of whether a measure contributes to furthering a goal is a more complicated question than it may appear. What does it mean to contribute to furthering a goal? The idea assumes some kind of causal link between the measure in question and an improvement in the state of affairs it targets. In some cases a causal link might be relatively easy to establish. Take, for example, the installation of speed cameras on a stretch of road with the stated purpose to reduce traffic speed in order to reduce accidents and road deaths. Here there would appear to be a relatively straightforward and

[712] Moller, "Proportionality: Challenging the Critics," 713.
[713] Barak, *Proportionality,* 315.

verifiable causal relationship. It involves two questions. First, do speed cameras have the effect of reducing the average traffic speed? Second, does reducing average traffic speed lead to a reduction in accidents and road deaths? Experience and several studies suggest that the answers to both of these questions has historically been "yes."[714] But the causal link is not always clear. For example, a study may show a correlation between the installation of speed cameras and a strong decrease in accident fatalities on the périphérique in Paris. But there may well be other factors in play. During the period of the study in question, there were improvements in car design, improvements to the roads, and perhaps other social factors that affect driving behavior. This is a fundamental difficulty with the nature of causation very familiar to lawyers, but which can render a decision about suitability of a limitation on rights problematic.

Moreover, often limitations on rights are challenged in court shortly after they are passed, in which case the only data that exists is derived from previous similar situations. Would data about road deaths on the périphérique in Paris necessarily be relevant to projected road deaths on rural roads in Provence? Perhaps, but again, other variables may come into play. What the suitability test requires in such a case is a projection about a future state of affairs based on what we know about the past, engendering a degree of uncertainty.[715] But it is important note that it is not a requirement that the limitation be certain to achieve the stated purpose efficiently or even measurably. What is required is that there be a rational connection, that it be "pertinent to the realization of the purpose in the sense that the limiting law increased the likelihood of realizing its purpose."[716] Certainty is not required; rather, the suitability test "sets a factual and normative plausibility threshold. It looks for a chain of possible justification back to the legitimate aim."[717]

Nevertheless, the requirement raises the questions of burden of proof and standard of proof. While it would normally be up to the complainant to establish the initial infringement of a right, the burden of proof in establishing the suitability of the limitation typically shifts

[714] See Erwan Lecomte, "Limitation de Vitesse à 80 km/h : Sciences et Avenir Répond aux Questions que Vous Vous Posez," *Sciences et Avenir,* 2 July 2018, https://www.sciencesetavenir.fr/high-tech/transports/limitation-de-vitesse-a-80-km-h-pourquoi-la-mesure-est-efficace_119659.
[715] Benedikt Pirker, *Proportionality Analysis and Models of Judicial Review - A Theoretical and Comparative Study* (Groningen: Europa Law Publishing, 2013), 27.
[716] Barak, *Proportionality,* 303.
[717] Rivers, "Proportionality and Variable Intensity of Review," 189.

to the state.[718] This may, however, vary from jurisdiction to jurisdiction; in fact, as will be discussed below, the ECtHR is often unclear about which party bears the burden of proof in each prong of the analysis.[719] But how much proof is required to show that a measure "plausibly" advances a legitimate policy goal? The usual answer to this question by most courts would be that, in theory, factual assertions in proportionality analyses in the context of limitations clauses would be that standard of proof used in civil proceedings, generally a "preponderance of the evidence" test.[720] In practice, however, the evidentiary burden in most jurisdictions appears to be quite low due to the nature of the suitability inquiry itself. The question – "is there a rational basis for the legislation that plausibly advances the government's stated goal?" – is framed in a way that the answer will almost always be yes. Legislatures may make bad choices, but they rarely undertake measures that are entirely illogical or implausible. The bar of plausibility is quite low therefore it does not tend to require rigorous proof.

This is especially true since the test generally does not require a specific amount by which the measure must advance the goal, as such a specification would be impossible for practical reasons. Decreasing road deaths is an easily quantifiable goal, but not all goals are. How can one measure the goal of "protecting the rights and freedoms of others?" Or "national security?" There are no easy or uncontroversial metrics for those goals. What this demonstrates is that the real basis of the difficulty in applying any kind of meaningful test for suitability is that the question is heavily fact-specific. For this reason, suitability is rarely dispositive in cases, and often is effectively skipped by courts out of deference to the legislature.[721] It has become a test of limited application.

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[718] Gunn, "Deconstructing Proportionality," 480.
[719] Gunn, "Deconstructing Proportionality," 481; Steven Greer, *The Exceptions to Articles 8 to 11 of the European Convention on Human Rights,* Council of Europe Human Rights Files No. 15 (Strasbourg: Council of Europe Publishing, 1997), 15.
[720] Gunn, "Deconstructing Proportionality," 482.
[721] The European Court of Justice, for example, will not second guess the legislature at this state of PA unless the measure is "manifestly incorrect in the light of the information available to it at the time of the adoption of the rules in question." See Jean-Marc Thouvenin, "The Principle of Proportionality," *European Governance 2* (blog), *leWebPédagogique,* https://lewebpedagogique.com/jmthouvenin/european-governance-2-program/european-governance-2-the-principle-of-proportionality/.

C. Determining necessity

The necessity test can be seen as intimately related to, and logically following from, the suitability test, in that both tests taken together constitute in inquiry into the efficiency of the state's means in accomplishing its legitimate goal.[722] The suitability test asked whether a law is logically related to the state's objective and whether it plausibly advances that objective in some way. The necessity requirement arises from the basic premise that the law should limit rights no more than is required to accomplish its objective. Thus this prong asks whether the measure limits the relevant right in the least intrusive way compatible with achieving the given level of realization of the legitimate aim.[723] At its core, it is a "narrow tailoring" requirement not dissimilar to that employed in US courts. If a measure is not suitable or limits a right more than is necessary then it is clearly disproportionate.[724] The measure should limit the right as little as possible while remaining consistent with achieving the purpose. It is thus an expression of the concept of Pareto-optimization.[725] In aiming to eliminate laws that are overinclusive in their effects to the detriment of rights, the necessity test serves the purpose of "rul[ing] out inefficient human rights limitations."[726]

Like the suitability test, the necessity test is empirical in nature.[727] It is composed of two basic questions:

1. Is there a hypothetical measure that would accomplish the state's objective to the same degree as the limiting law?
2. If so, would this hypothetical law be less intrusive than the limiting upon the right in question?[728]

Each of these questions poses its own set of problems. The first question focuses on the legislative goal. It requires the judge to determine whether there would be another means of satisfying the state's objective. In a sense, it puts the judge in the position of trying to

[722] Cohen-Eliya and Porat, "Proportionality and the Culture of Justification," 469-470.
[723] Julian Rivers, "The Presumption of Proportionality," *Modern Law Review* 77, no. 3 (May 2014): 425.
[724] Sweet and Mathews, "Proportionality Balancing and Global Constitutionalism," 75.
[725] Barak, *Proportionality,* 320.
[726] Rivers, "Proportionality and Variable Intensity of Review," 200.
[727] Moller, "Balancing and the Structure of Constitutional Rights," 456.
[728] Barak, *Proportionality,* 323

hypothetically do the job of the legislature at least as well as the legislators themselves. The purpose is not to find a better means of accomplishing the aims. Rather, the test looks to whether there is a hypothetical measure that would "fulfill the law's purpose quantitatively, qualitatively, and probability-wise – equally to the means determined by the limiting law itself."[729] This standard is generally quite stringent; to be considered a viable alternative, the measure must solve the problem in question just as well as the limiting law being challenged. In practice, an alternative measure will inevitably approach the problem in a different way with a result that is somehow different from the original limiting law. As a result, states typically will respond to a proposed alternative means of achieving their goal by asserting that it is not as effective as the original law. If the state can indeed plausibly demonstrate that the alternative result is in any way less effective or qualitatively different, the court may defer to the legislature and determine that the law is necessary.[730] This is especially true since in practice an alternative means might be equally effective but entail additional expenses by the state. A licensing arrangement might be a less restrictive alternative than an outright ban on firearms ownership, for example. Such an arrangement, however, might require that the state hires more civil servants to issue the licenses, administer gun safety exams, monitor compliance, etc. This might cost more in terms of staff and resources in comparison with a simple ban on gun ownership. The effectiveness of such a measure would not be identical to the ban and thus would suffice to render the original law "unnecessary."[731] In short, the limiting law is unnecessary only in cases where the fulfillment of the law's purpose is achieved through less limiting means, when all the other parameters remain unchanged."[732]

The judgment regarding effectiveness is rendered even more difficult by the fact that claimants and legislators may well disagree over how to characterize the goals of the measure. The same law and the same goal might well be characterized at various levels of abstraction, none of which are necessarily wrong, but which would alter the outcome of a necessity inquiry. Likewise, a law may be aiming at several purposes, each at a different level of abstraction. To see how this might work, let us imagine that the hypothetical example of a firearms ban mentioned above had been passed in the wake of a mass shooting at a school

[729] Barak, *Proportionality,* 323.
[730] Rivers, "Proportionality and Variable Intensity of Review," 200.
[731] Barak, *Proportionality,* 324.
[732] Barak, *Proportionality*, 324.

by a disturbed teenager who borrowed the gun without the owner's consent. What might be the purpose of such a law? One could imagine what both legislative and public debates following such an incident might sound like; in fact, there is no need to imagine, as the United States produces a brief flurry of such discussions in the news media and in academe on an almost weekly basis. The purpose of a firearms ban in such a situation would have multiple goals at multiple levels of abstraction: to safeguard public order, save lives, to stop gun violence, to stop mass shootings, to "make our schools safe again," to prevent firearms from falling into the wrong hands, etc. As Barak notes, "the higher the purpose's level of abstraction, the more likely it is to find alternative means which limit the right to a lesser extent and which can fulfill the goal at the same level of efficiency. In contrast, the lower the level of abstraction, the harder it would be to render the means chosen by the legislator unnecessary."[733] Thus in our example, if the goal is simply to save lives, it would be easy to posit a variety of approaches that might be equally effective and less invasive, such as licensing schemes, background checks, or restrictions on specific firearms such as those with large capacity magazines.[734] If, however, the goal is to ensure that no one have access to firearms except the police and military, then alternative solutions no longer qualify as equally effective alternatives. The result is that, working under the standard model of proportionality, it is not very difficult for a state to make a plausible case that a proposed alternative measure is not as effective in some way as the original measure. The result is likely to be that deference will be shown to the legislator or other primary decision-maker.[735]

The second element of the test focuses on whether the proposed alternative is indeed less restrictive of the claimant's rights. This tends to be a somewhat easier inquiry;[736] often it will be the case that an alternative is clearly less restrictive. In fact, some entire categories of alternative are clearly less restrictive – partial restrictions on free speech are less restrictive than absolute bans, for example. Product labeling requirements are clearly less restrictive

[733] Barak, *Proportionality,* 332.
[734] For a sampling of such debates, see Lisa Hagen, Chris Haxel and Brett Neely, "Democrats Embrace Gun Control on Debate Stage; Researchers Question Policies' Impact," *Politics* (blog)*,* NPR, 31 July 2019, https://www.npr.org/2019/07/31/746813004/democrats-embrace-gun-control-on-debate-stage-researchers-question-policies-impa?t=1566033354208.
[735] Julian Rivers, "Proportionality and Variable Intensity of Review," 182.
[736] Dieter Grimm, "Proportionality in Canadian and German Constitutional Jurisprudence," University of Toronto Law Journal 57, no. 2 (Spring 2007): 383-398, 390.

than banning the product entirely.[737] However as Moller correctly argues, the "traditional formulation of the necessity test, which asks whether there is a less restrictive but equally effective means, is in some ways simplistic."[738] This is because often alternative measures may be effective but only by imposing additions costs. Often, if the law in question is limiting a right by imposing a financial burden, there is a less restrictive option in the sense that the state can assume the financial burden.[739] As we have already discussed, such a measure will generally be considered less effective. The other scenario, however, and one that is becoming more common particularly in religious liberty cases, is where the less restrictive means is equally effective but comes at the price of rights limitations or other sacrifices by other members of society. To take a prominent example, to accommodate the religious sensibilities of a conservative Christian town council registrar by not obliging him to register same sex marriages would be less restrictive on his rights, but imposes extra work or inconvenience on his colleagues and, more significantly, potential dignitary harm on same sex couples.[740] The cost of the alternative measure, to put it in economic terms, is externalized onto others. Different courts approach such situations in different ways. The Canadian Oakes test already takes account of the importance of the law's aim at the necessity stage, thus Canadian courts will more often strike down a law at this stage. This is in keeping with Canada's rights tradition, which has tended to see limitations on rights as being highly exceptional situations that "can be justified only by 'exceptional criteria.'"[741] In the German system, however, which is the more typical model of proportionality as adopted by other countries, then necessity prong is far less prominent. Here there seems to be more acceptance of the notion that rights often must be compromised to protect the rights of others, and that courts have a "constitutional duty to protect fundamental rights not only *vis-à-vis* the state but also *vis-à-vis* threats stemming from private parties or societal forces."[742] Thus in systems based more squarely on the German model, we will expect to find that laws are more likely to survive

[737] Barak, *Proportionality,* 327.
[738] Moller, "Proportionality: Challenging the Critics," 714.
[739] Grimm, "Proportionality," 390.
[740] Eweida and Others v. the United Kingdom, nos. 48420/10 and 3 others, ECHR 2013 (extracts).
[741] Grimm, "Proportionality," 391, citing Chief Justice Dickson in *Oakes*.
[742] Grimm, "Proportionality," 392.

the necessity prong of the test, leaving the real analysis of the whether the means fit the ends to the final phase of balancing *stricto sensu*.[743]

The necessity prong of proportionality is, in most jurisdictions, not in itself a balancing test.[744] Rather, it is an empirical enquiry into whether others measures might be used to achieve the same result at a lower cost to rights-bearers. The question of burden of proof is therefore one again of prime importance. As was the case with the "proper purpose" component of PA, the question may be approached in different ways; in fact, it has been argued that some courts, including the ECtHR, have failed to establish any truly consistent approach to the question of burden of proof in proportionality analysis. In practice, however, the problem of burden of proof in the necessity phase tends to evaporate since the standard of proof in human rights cases is usually a "balance of probabilities" rather than the "beyond reasonable doubt" standard in criminal law.[745] Moreover, in human rights cases, there is generally an elision of the burden of persuasion and the burden of evidence, since the "evidence" will often be argumentative in nature rather than the kind of physical evidence one would use in a criminal trial. Thus while the burden of proof often rests with the government, that burden may in the end not be as unreasonably heavy as it might first appear. The government has the burden to justify their decision that the approach taken was the best, least rights-restrictive approach possible while still accomplishing the goal of the legislation. This approach is the most fair and logical, argues Barak, "based on the central status of human rights, as well as non the access advantage the state enjoys to the factual data that may justify the means chosen and on the state's special status as a party to the legal proceeding within public law."[746]

[743] Grimm, "Proportionality," 390.
[744] Barak, *Proportionality*, 338. The Canadian system can be seen as an exception, in that it takes into account whether the legislative goal is "of sufficient importance to warrant overriding a constitutionally protected right of freedom." See Grimm, "Proportionality," 388. The ECtHR is also something of an exception in how they approach the necessity requirement, as will be discussed below in Subsection 3.
[745] Rivers, "The Presumption of Proportionality," 426.
[746] Barak, *Proportionality,* 447.

D. Proportionality *stricto sensu*

The foregoing steps of proportionality analysis are essentially a means/ends testing of the law or measure being examined. Necessity is a test that merely "rules out inefficient human rights limitations."[747] It does not involve balancing interests in any genuine sense. In other words, there is no interactive evaluation and comparison of different values. In the final step, however, courts must compare the relative weight of two different values and to choose between them. This is the balancing phase, or "proportionality *stricto sensu*."

To understand the delicate nature of this phase of proportionality analysis, it is important to remember the context in which proportionality *stricto sensu* in invoked. This balancing phase of proportionality analysis arises in situations in which a sub-constitutional rule has been drafted to protect one legitimate interest at the expense of a right. If rights are thought of as absolute rules – as categories of behavior which cannot be infringed upon – then balancing as such makes little sense. A law that transgresses upon a fundamental constitutional right, in such a vision of rights, is simply unconstitutional. If two absolute rules conflict, then one must be kept and the other abandoned. There is no balance to be done, no compromise to be made. Proportionality analysis, however, relies on a different understanding of rights. As discussed above [section], rights may be conceived of as rules or as principles. The rules construction of rights sees rights as absolutes, rules that must be respected and before which other interests and values must give way. PA, however, treats rights more like principles to be optimized by balancing – any limitation on a right must be in service of a correspondingly important goal.[748]

Thus while the necessity prong of proportionality calls for a rational and appropriate relationship between the goal and the method of achieving the goal, the balancing formula targets the relationship between the goal and the harm caused by the means to achieve it. Moreover, it requires that that relationship be not merely rational or justifiable, but that it be appropriate to its social context. The standard, in other words, is beyond a mere reasonableness standard; it is almost inescapably a moral standard. It is, however, a very

[747] Julian Rivers, "Proportionality and Variable Intensity Review," 200.
[748] Robert Alexy, *A Theory of Constitutional Rights*, trans. Julian Rivers (Oxford: Oxford University Press, 2002), 47-49.

highly targeted moral standard that, while it leaves a degree of judicial discretion that has rightly provoked a great deal of discussion and no small amount of concern, is not quite as broad as might first appear. Firstly, the focus of the inquiry is on *marginal* effects rather than on a global evaluation of benefit and harm. To consider the balance in a more generalized sense would compel judges to make impossible decisions regarding the relative value lofty and fundamental public goods such as national security and freedom of speech.[749] Clearly that is not the task of a judge. Instead, the goal of the balance is to compare the relative "weights" of the marginal benefit to be derived from a particular law in favor of a given public good to the marginal harm caused by the law when it infringes upon a given right. The judge must "compare the weight of the social importance of the benefit gained by fulfilling the proper purpose and the weight of the social importance of preventing the harm."[750] Thus it is a process of value-optimization which is quite specific and context-driven. Kumm explains that the test "is the means by which values are related to possibilities of the normative and *factual* world. Whenever there is a conflict between a principle and countervailing concerns, the proportionality test provides the criteria to determine which concerns take precedence *under the circumstances*."[751] As an example, he cites the ECtHR case of *Lustig-Prean and Beckett v. United Kingdom,*[752] which challenged a UK law banning homosexual soldiers from serving in the military. In the balancing stage of the analysis, the ECtHR was not weighing the right to respect for private life with the legitimate aim of maintaining morale and military effectiveness in the armed forces. Rather, the question was whether or not the measure could be justified in light of the law of diminishing marginal utility[753] - did the dismissal of homosexual soldiers increase military morale and efficiency enough to outweigh the severity of harm done to homosexual men by infringing upon their

[749] Barak, *Proportionality,* 350.
[750] Barak, *Proportionality,* 350.
[751] Kumm, "The Idea of Socratic Contestation," 147 [emphasis added].
[752] Lustig-Prean and Beckett v. the United Kingdom, nos. 31417/96 and 32377/96, 27 September 1999, http://hudoc.echr.coe.int/eng?i=001-58407.
[753] Also known in economics as "Gossens Law," the law of decreasing marginal utility is described by British economist Alfred Marshall as: "During the course of consumption, as more and more units of a commodity are used, every successive unit gives utility with a diminishing rate, provided other things remaining the same; although, the total utility increases." See "Economics 101: What is Diminishing Marginal Utility? Learn About the Law of Diminishing Marginal Utility in Business With Examples," MasterClass, last modified 8 November 2020, https://www.masterclass.com/articles/economics-101-what-is-diminishing-marginal-utility#what-is-marginal-utility.

liberty interest in being allowed to serve in the military?[754] The analysis compares values at the margins of the right to private life and the need for military efficiency rather than comparing those two values in the abstract.

It is also important to note that when we speak of the importance of the purpose, the "weight" given to the government's objectives, it does not mean utility merely to the specific actors. In other words, in the case of homosexuality in the military, it is not simply a question of how important the goal of efficiency is to the military commanders who directly benefit from the law. It is not a question of convenience to the state; nor is it a question of general utility of the purpose in general. Rather, the marginal utility to be weighed is the marginal social utility of the specific advance towards the government's purpose that would be afforded by the rights-limiting measure in question. Thus our question in the above case, the purpose to be weighed is the overall social value of the marginal increase in efficiency and morale that would be obtained by forbidding homosexual men in the military as compared with the degree of efficiency that existed before the law was put in place, or as compared with a viable alternative to the law that may advance the government closer towards that purpose without the same degree of impairment to the right to private life of the soldiers thereby denied the opportunity to serve. Moreover, as a part of this calculation the judge must take into consideration the probability that the measure will in fact achieve its intended purpose to the degree proposed by the government. As Barak explains, "[t]he weight of an important purpose, whose realization is urgent and the probability of its actual occurrence is high, is not equal to the weights of a similarly important purpose, whose realization is also urgent but whose probability of occurrence is extremely low."[755]

In Barak's view, the next determination made by the judge is the social importance of the right being abridged. The social importance of a right is not necessarily the same as its normative status. In most constitutional systems, constitutional rights are deemed to have equal normative status.[756] So too in international human rights discourse, it is often repeated that human rights are universal, inalienable, indivisible and interdependent, and that one of

[754] Kumm, "The Idea of Socratic Contestation," 149.
[755] Barak, *Proportionality,* 358.
[756] Barak, *Proportionality,* 359.

the consequences of indivisibility is coequal normative status.[757] Social importance, however, speaks more to the urgency of upholding a particular right or defending a particular policy objective in a specific context. Laws concerning the monitoring of police violence, for example, may take on more urgency and therefore more social importance in the United States where police violence, specifically against people of color, is a vital pressing social issue. It may be less urgent in Iceland where the phenomenon is rare.[758] It pertains to a society's "cultural perceptions" which "are shaped by the culture, history, and character of each society."[759] Moreover, rights may acquire increased social importance by virtue of being preconditions of other rights, or by being "suspect" rights that historically have been targeted by authorities for improper purposes. Religious freedom is a strong example of such a right since it has so often been the grounds for persecution. In addition, the judge must consider how severely the right is being infringed upon; a minor "time, place and manner" restriction on freedom of speech does not implicate the same degree of social importance as would a comprehensive gag order on a media outlet. Finally, the likelihood of infringement of the right must be factored in, just as was the likelihood of achieving the legitimate aim of the measure.[760] Other theorists have produced different formulations of balancing, but the differences are largely questions of framing and emphasis.[761]

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[757] For example: "Human rights are indivisible. Whether civil, political, economic, social or cultural in nature, they are all inherent to the dignity of every human person. Consequently, they all have equal status as rights. There is no such thing as a 'small' right. There is no hierarchy of human rights." See "What Are Human Rights?," Convention on the Rights of the Child, UNICEF, accessed 17 June 2020, https://www.unicef.org/child-rights-convention/what-are-human-rights.

[758] Tracy Tong, "Iceland Grieves After Police Shoot and Kill a Man for the First Time in its History," *The World*, 3 December 2013, updated 8 July 2016, https://www.pri.org/stories/2013-12-03/iceland-grieves-after-police-kill-man-first-time-its-history.

[759] Barak, *Principles,* 361.

[760] Barak, *Principles,* 362.

[761] Alexy, for example, describes the process in a similar fashion but is less concerned with the marginal social importance of the right being infringed. See Robert Alexy, "Constitutional Rights and Proportionality," *Revus* [Online] 22 (2014): 51-65, https://doi.org/10.4000/revus.2783. His formula – "The greater the degree of non-satisfaction of or detriment to, one principle, the greater must be the importance of satisfying the other" – focuses on the "degree" of the infringement of the right rather than trying to determine social importance. It is debatable how significant these differences in approach really are in practice. Under Alexy's approach, "serious" harm to a right would affect the balance. An example he gives involved a publication's infringement of the personality right of a paraplegic police officer whom it referred to as a "born murderer" and a "cripple." Alexy – and the German court trying the case – would describe the use of cripple as a deliberate humiliation directed against a disabled person and thus a more "serious" infringement of his personality right. However, what does it mean for the infringement to be more serious? Surely it is not only the degree of humiliation, but also the social context that makes it so humiliating. The word is humiliating because of a social situation in

The balancing phase also involves evaluating the effects of the measure in question in the context of plausible alternatives that impose less of a burden on the rights. These hypothetical alternatives may have been discarded in the necessity phase because they are less effective or more costly ways of achieving the government's aims. However, in the balancing phase the court can resurrect such alternatives in considering whether there is a more proportionate way of meeting most of the state's objectives while sacrificing the opposing right to a lesser degree.[762] For example, in the case of *Lustig-Prean and Beckett v. UK*, one of the reasons the court cited for finding it disproportionate to ban homosexuals from the armed forces in the service of efficiency and discipline was that there are other means of ensuring discipline – codes of conduct, for example - that would not have prevented homosexuals from serving their country. If one accepts the UK's argument that allowing homosexuals in the military would risk eroding discipline and morale (a claim beyond the scope of this paper but which is certainly open to dispute), codes of conduct would most likely be a less effective measure than an outright ban. Therefore the option of instituting specific codes of conduct was not a justification for striking down the measure at the necessity phase. It would have been less rights-restrictive but not equally effective.[763] In the balancing phase, however, the argument re-emerged and contributed to the court finding that the measure was a disproportionate infringement upon the soldiers' right to private life.

Thus the balancing phase of proportionality analysis it more than simply a weighing of interests. It is intended to be a highly constrained process, predicated by a serious of steps to eliminate cases in which a law's purpose is improper, or in which the limitation of the right in question is unnecessary. The final phase has its own logic, and is intended to be a rigorous, neutral and above all rational structure within which the judge can fairly and objectively balance the interests involved in the particular case. It is a mechanism for finding an appropriate balance between rights – seen as principles – and other interests of the state. It takes into account what alternative options there were in the actual situation and evaluates these options in the specific context with broader reference to the social importance of both

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which discrimination against the disabled is regarded as a serious social problem. In other words, the degree of infringement of the right takes it significance from its social importance, deriving from the particular social context. In short, the difference in approach is largely semantic. In either case, one is looking at context and balancing values assigned to marginal benefit versus marginal harm.

[762] Barak, *Proportionality,* 352-353.

[763] Kumm, "The Idea of Socratic Contestation," 148-149.

the right and the government's countervailing interest. This basic structure, however, has been deployed in a variety of iterations by different jurisdictions around the globe. German, Canadian, and Israeli implementation of proportionality analysis all have their own variations on the common theme. The European Court of Human Rights has created its own distinctive approach to applying the principles of proportionality while remaining faithful to the wording of the Convention's limitation clauses.

3. The ECtHR's modified approach to proportionality

For the purposes of understanding the nature and possibilities for justification of infringements, the ECHR's rights provisions may be broken down into various types. Gerards distinguishes six different types of rights:

1. Absolutely non-derogable rights
2. Rights that are non-derogable except when the survival of the nation is threatened
3. Derogable rights governed by specific limitations clauses
4. Derogable rights governed by general limitations clauses
5. Derogable rights without limitations clauses, but which allow for implied limitations
6. Other derogable rights[764]

Freedom of religion or belief is enshrined in Article 9 of the Convention, and is part of a cluster of fundamental rights, Articles 8-11, which have specific limitations clauses and for which proportionality analysis is used extensively. Unless indicated to the contrary, references to Convention rights in the discussion below will apply specifically to the rights contained in Articles 8-11 of the Convention.

The ECtHR's application of proportionality in addressing the limitation of derogable rights does not derive from the Convention itself. While the choice of proportionality by the Court is not surprising today, it must be remembered that there were other options on which the Court could have based their method of reconciling conflicts between specific rights and the rights of others or conflicts between rights and other state interests. In fact the move towards proportionality took place in the context of a confrontation with the United

[764] Gerards, *General Principles*, 19.

Kingdom, where courts developed a competing concept of "Wednesbury reasonableness." Wednesbury reasonableness is a standard of review that would invalidate a law only if a decision were "so outrageous in its defiance of logic or accepted moral standards that no sensible person ... could have arrived at it." Such a standard of review was seen as so deferential to legislative authority that it would render the application of the Convention in the UK nearly impossible. Over a series of cases the Court established that the lack of necessity review in a Wednesbury approach to judicial review constituted a violation of the right to an effective remedy under Article 13.

The court was, in a sense, forced to clarify PA in defense against other methods of reconciling rights conflicts with state interests While the court rejected both a deontological categorical approach and a state-protective Wednesbury reasonableness approach to balancing in favor of an "optimizing" conception of proportionality,[765] it did not simply adopt an "off the shelf" version of proportionality modeled on the German courts. This is not entirely surprising; the cost-benefit logic of proportionality analysis necessarily takes place against a background of the individual characteristics of different forms of government such as constitutional and cultural attitudes towards human rights, federalist v. unitary state structure, the relative powers of the various state institutions, and traditions of judicial deference.[766] Since proportionality does not derive specifically from the Convention, the Court had to develop its own approach.

The ECtHR version of PA evolved from the court's attempt in *Handyside v. UK* to define the meaning of a phrase that appears in the limitations clauses of Articles 2, 6 and 8-11: "necessary in a democratic society." This seminal case does not mention proportionality as an existing doctrine, but in addressing the banning of a book on obscenity grounds, the Court first elaborated on the meaning of "necessary in a democratic society," and in so doing, paved the way for an eventual elaboration of a more complete proportionality doctrine.[767] Because that doctrine has its specific origins in the text of the limitations clauses, it does not, on its face, follow the traditional steps of proportionality in quite the same ways it might in other

[765] Rivers, "Proportionality and Variable Intensity of Review," 176.
[766] Gunn, "Deconstructing Proportionality," 467.
[767] Stefan Sottiaux; Gerhard van der Schyff, "Methods of International Human Rights Adjudication: Towards a More Structured Decision-Making Process for the European Court of Human Rights," *Hastings International and Comparative Law Review* 31, no. 1 (Winter 2008): 131-132.

jurisdictions. The elements of suitability, necessity and proportionality *stricto sensu* are all included, however, and the specific content of those tests has been elaborated in cases such as *Handyside*. In that case, for example, the Court elaborates on the nature of the necessity requirement, and in the process explains that any restriction on a right under the Convention must be "proportionate to the legitimate aim pursued."[768] This formulation remains fundamental to the Court's proportionality reasoning ever since. The necessity requirement was elaborated still further in *Sunday Times v. United Kingdom* (1976). The idea of a need for proportional application of the Convention was picked up again in *Dudgeon v. United Kingdom* (1981),[769] where the Court addressed the question of criminalizing homosexual acts and again concluded that such criminalization was "disproportionate" to the legitimate aims[770] of the "protection of morals" and the protection of the rights and freedoms of others."[771] Over the next several years the Court built up other key elements of their analytical toolkit in cases such as *Silver v. United Kingdom (1983)* and *Lingens v. Austria (1986)*,[772] and ultimately "entrenched a version of PA as a general approach to qualified rights."[773]

The application of the resulting version of proportionality analysis in the ECtHR covers similar conceptual territory as other jurisdictions that use proportionality to come to decisions when non-absolute rights have been limited by state action: first the scope of the right must be determined, and then the soundness of the justification for its limitation must be evaluated. However, it should be noted that in the ECtHR, the first phase of this procedure has often been deemed less important than it is in other jurisdictions such as Germany or the United States, where the bifurcation is more clearly visible.[774] This is true for a variety of reasons, but essentially is related to the court's special nature as a supranational court that must pay a degree of deference to state-level decisions under the principle of subsidiarity. As a result, the court's deliberation is generally focused on how the state applied the laws enabling or

[768] Handyside v. the United Kingdom, 7 December 1976, § 48-49, Series A no. 24.
[769] Dudgeon v. the United Kingdom, 22 October 1981, Series A no. 45.
[770] Dudgeon, § 43.
[771] Dudgeon, § 36.
[772] Aileen McHarg, "Reconciling Human Rights and the Public Interest: Conceptual Problems and Doctrinal Uncertainty in the Jurisprudence of the European Court of Human Rights," *Modern Law Review* 62, no. 5 (September 1999): 686.
[773] Sweet and Mathews, "Proportionality Balancing," 148.
[774] Gerards and Senden, "The Structure of Fundamental Rights," 623-624.

limiting the right and whether there was sufficient justification for the limitation given the specific factual and legal context of the case. In other words, the application of proportionality analysis is highly contextual in the context of the ECtHR, and as a result, it is often less predictable or consistent than national constitutional courts.

The general breakdown of the process will sound familiar in light of the general discussion of proportionality above. First, the Court determines whether the issue falls within the scope of a substantive right and whether the right was in fact limited by a measure authorized or prescribed by law. As mentioned above, this analysis of the scope of the right is not always addressed in detail, and particularly in religious freedom cases the Court often seems to content to grant to the claimant that their right to manifest their religious beliefs has been in some way restricted.[775] The question of whether or not the measure was prescribed by law arises directly out of the more or less standard wording of the limitations clauses of Articles 8-11, and while not explicitly a part of proportionality analysis, is generally implied in any inquiry into the scope of the right in question. To satisfy this requirement, there are four preconditions identified in *Huvig & Kruslin*[776] but elaborated in a variety of cases.

1. The law must sanction the infraction. The Court has clarified repeatedly that the phrase is to be taken substantively rather than formally; a measure is prescribed by law if it is clearly in domestic legislation, but can also be prescribed by case law, regulatory measures by professional bodies or unwritten law (one can think of the unwritten constitution of the UK, for example).[777]
2. The law must be adequately accessible.
3. The law must be "formulated with sufficient precision to enable the citizen to regulate his conduct… [and] to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail."[778]

[775] For example, see *Leyla Şahin v. Turkey* [GC], no. 44774/98, § 78, ECHR 2005-XI. The Turkish government did not contest that the right to religious manifestation had been curtailed, and the Grand Chamber merely endorsed the statement of the lower Chamber that it proceeded "on the assumption that the regulations in issue, which placed restrictions of place and manner on the right to wear the Islamic headscarf in universities, constituted an interference with the applicant's right to manifest her religion."
[776] *Huvig v. France*, 24 April 1990, §§ 27-36, Series A no. 176-B.
[777] For example, see *Leyla Şahin*, § 88.
[778] The Sunday Times *v. the United Kingdom (no. 1),* 26 April 1979, § 48, Series A no. 30.

4. The law must provide adequate safeguards against arbitrary interference with the right. It should be noted that laws that are unduly vague or that give too much discretion to administrative officials have been found to violate the requirement.[779] A degree of vagueness, however, may be accepted as legitimate so long as there are adequate procedural safeguards to prevent the arbitrary abuse of power.[780]

This question, like that of whether or not there was an infringement, is often dealt with in a cursory manner as there is often no real challenge in this regard.

A. Legitimate aim

Once the scope of the law has been established, the ECtHR, like other proportionality-based jurisdictions, investigates whether the state measure is in pursuit of a legitimate aim. In the application of proportionality to Articles 8-11, the legitimate aim test functions somewhat differently in that these articles offer a list of the aims that will be deemed legitimate. Article 9 Paragraph 2 reads in relevant part that limitations must be necessary in a democratic society in service of "public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others." The dynamic here is complex; the aims are defined, and indeed are deemed to be exhaustive, but the first and most obvious point one may note about those defined aims is that they are quite broad. This has taken some of the bite out of the legitimate aims test in the ECtHR, as the application of the requirement has been such that almost any anything that would be in the general public interest can be framed within one of the enumerated legitimate aims and has been deemed to satisfy the test.[781] Not surprisingly, Court has tended to prefer to err on the side of accepting the legitimacy of the aims and to focus its analysis on necessity and the proportionality *stricto sensu* phases if the inquiry.[782] This choice highlights a tension that we will see repeatedly in ECtHR cases. The court is at once a supranational court and a human rights court. It serves a quasi-constitutional function in a context in which it is obligated – both legally and politically – to show some deference to the democratic decision-making of state parties to

[779] For example, see Hasan and Chaush v. Bulgaria [GC], no. 30985/96, ECHR 2000-XI.
[780] Maestri v. Italy [GC], no. 39748/98, § 30, ECHR 2004-I.
[781] Gerards, *General Principles*, 220.
[782] Gerards, *General Principles*, 221.

the Convention under the principle of subsidiarity. It does not require much imagination to evoke the possible political reactions if countries were regularly told that their legislation was irrational or harmful that it was clearly passed for invidious purposes. Thus the court has naturally preferred to focus its arguments on the means-ends fit and the balancing phase rather than to easily accuse states of clear malevolence.

The Court has, however, had cause to perform a substantial legitimate aims inquiry in some cases. Such analyses have tended to be superficial.[783] In certain cases, the issue was simply affirming the exhaustive nature of the aims as listed in the limitations clauses of the respective provisions. More interesting, however, are the few cases in which those aims have required interpretation to determine their precise scope. An example of such as case is *Bayev and Others v. Russia*, where Russia defended a law banning pro-homosexual "propaganda" as a defense of public morals. While the court does not give a definitive list of what kinds of morals do or do not qualify under the Convention, it did establish that some aims are not legitimate whatever moral claims are being made to try to defend them. In this case, the Court noted that it has consistently held that "references to traditions or general assumptions in a particular country cannot of themselves be considered by the Court to amount to sufficient justification for the differential treatment, any more than similar negative attitudes towards those of a different race, origin or colour."[784] While the Court accepted that popular sentiment could be relevant with regard to exemptions based on protection of morality, they seem to draw a line when it came to fully justifying a limitation of a convention right purely on that basis. The Court noted in this regard that "it would be incompatible with the underlying values of the Convention if the exercise of Convention rights by a minority group were made conditional on its being accepted by the majority."[785] What is interesting in this decision is not simply the seemingly ambiguous role of morality as a legitimate aim, but the fact that some aims will be considered as inherently illegitimate if they undermine the core values underlying the Convention. This case highlights that relying on the raw power of the majority to limiting the rights of a minority is clearly contrary to the core values of the Convention (it is, in the bigger picture, contrary to the concept of human rights more generally). In other

[783] Taylor, *Freedom of Religion*, 302.
[784] Bayev and Others v. Russia, nos. 67667/09 and 2 others, § 68, 20 June 2017, http://hudoc.echr.coe.int/eng?i=001-174422.
[785] Bayev and Others, § 70, quoted in Gerards, *General Principles*, 224.

cases, the Court has identified aims based on racial or religious prejudice or gender stereotypes more generally as incompatible with Convention values.[786] The Court does not seem to be entirely consistent on this point, however, as its decision in *SAS v. France* ultimately seems to uphold the legitimacy of France's "veil ban" on the justification that covering the face in public makes most French people uncomfortable.[787] And as discussed above in Part I Chapter 2, the Court in *Ebrahimian* implicitly defers to majority sentiments when determining what makes a religious symbol "ostentatious."

In some cases there arises the question of a discrepancy between the stated aims of the measure and its actual motivations. Such cases should, in theory, taken on added urgency, given that use the limitation clauses for purposes for which they were not intended would clearly contravene Article 18, which states that the limitations clauses "shall not be applied for any purpose other than those for which they have been prescribed." In practice, however, determining the aims of legislation can be difficult, as legislation is often the result of compromise and may well be meant by different legislators to pursue different aims. Legislation may have multiple aims. The Court has been relatively deferential to states in accepting the aims of a measure to be whatever the state claims in its submissions to the Court. The results can be somewhat surprising. In *SAS v. France*, the Court did enter into a detailed discussion of the aims of the ban on concealing one's face in public places, since the aim of the legislation was contested by the applicant. The Court's discussion runs through the various aims listed by the government related to public safety and protecting the rights of others (specifically gender equality and the basic requirements of living together), and in the end discards most of them. It even seems to question the honestly of the government's submission at one point, noting that its arguments for one of its stated aims for banning face coverings – public safety - were so sparse that "it may admittedly be wondered whether the Law's drafters attached much weight to such concerns."[788] This is ironic given that the actual legislative history demonstrates clearly that this was the primary concern for the law.[789]

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[786] Gerards, *General Principles*, 224-225.
[787] Eva Brems, "S.A.S. v. France as a Problematic Precedent," *Strasbourg Observers* (blog), 9 July 2014. https://strasbourgobservers.com/2014/07/09/s-a-s-v-france-as-a-problematic-precedent/.
[788] S.A.S. v. France, [GC], no. 43835/11, § 115, ECHR 2014 (extracts).
[789] For a discussion of the legislative history of the veil ban, see Jennifer Fredette, "The Burqa and the Contestation Over Public Morality Law in France." Law & Social Inquiry, Vol. 40, No. 3 (Summer 2015): 585-610

Moreover, the Court failed to notice that the state's second aim – gender equality – is precisely at odds with its own claim that the law is neutral with regard to religious manifestation because it does not target Muslims. If the law is intended to promote gender equality by targeting the Muslim niqab, it implicates Article 14 prohibiting discrimination. If it is not, then the government was dishonest in its representations to the Court that gender equality was an aim. The Court, however, contents itself with finding one plausible aim, the requirements of "living together." In fact, the Court, after rejecting the stated aims of security, gender equality, and protecting human dignity, eventually had to modify the French government's somewhat vague references to the ideal of fraternity and the "minimum requirement of civility that is necessary for social interaction"[790] into a better argument. The Court considered that seeing faces is a necessary aspect of living together in French culture and the "veil ban" could thus be seen as protecting the rights of others. The Court has in fact announced this explicitly as their approach, noting in the *Merabishvili* case in 2017 that "[e]ven when it excludes some of the cited aims, if it accepts that an interference pursues at least one [legitimate aim], it does not delve further into the question and goes on to assess whether it was necessary in a democratic society to attain that aim."[791] Thus the Court's approach to the legitimate aims test does in theory address the question of stated vs. actual aims, but it cannot be said to do so with any particular rigor. The Court's goal in such inquiries is to ignore any illegitimate purposes, to identify at least one aim that is legitimate, and to move on to determine whether the measure was necessary to achieve that aim.

B. Necessary in a democratic society and the final balance

Traditional approaches to proportionality, as discussed above, involve the court engaging in several subtests to evaluate the means-ends fit of the law in question and to deliver and overall evaluation of the balance struck between the state's legitimate aim and the damage done by limiting the right in question. This is conceived of via the subtests of suitability, necessity and proportionality *stricto sensu*. In ECtHR cases, however, the Court approaches the question in a less structured manner. That is not to say that the same elements are not

[790] S.A.S., § 25.
[791] Merabishvili v. Georgia [GC], no. 72508/13, § 197, 28 November 2017, http://hudoc.echr.coe.int/eng?i=001-178753.

address – they are, or rather they are most of the time. But the process was never formalized in any way and has remained somewhat inconsistent and at times opaque. For example, when the Court has deemed it necessary to address the question of suitability, it has tended to do so by folding it into the necessity discussion. In fact, the core three steps of proportionality are all inferred from the phrase "necessary in a democratic society," which seems to place the emphasis on the concept of whether the limitation on the right is indeed strictly necessary. Moreover, the "democratic society" element of this phrase has never been fully developed into a sustained legal concept,[792] and as a result, proportionality analysis in the ECtHR can conceptually be reduced to the question of balancing means and ends, but done so with a view to determining what constitutes necessity.[793] It is essentially a holistic evaluation of the conflict in its context in order to generate the final "proportionality" analysis. The three traditional elements of proportionality are merged into a flexible and unstructured test which "gives no indication as to which of the traditional proportionality principles are to be applied to particular fact situations, as to what their sequence must be, or the strictness with which they are to be applied."[794] This has opened the Court to sustained criticism with regard to the consistency and reliability of its application of the basic principle of proportionality.[795]

Under the standard formulation used by the Court, the democratic necessity test focuses on "whether the 'interference' complained of corresponded to a pressing social need, whether it was 'proportionate to the legitimate aim pursued,' [and] whether the reasons given by the national authorities to justify it are 'relevant and sufficient.'"[796] This formula is derived from the *Handyside* case, in which the Court first began to unpack the concept of something being "necessary in a democratic society." The Court in that judgment noted, in a highly textual analysis, that while the word "necessary" appears throughout the Convention, it takes on different meanings in different articles. In Articles 2 and 6, the phrasing "absolutely necessary" or "strictly necessary" suggests that in those clauses, only an "indispensable"

[792] This is not, however, to say that the phrase is superfluous – the general idea of what constitutes a democratic society and its basic needs has from time to time been addressed by the Court and served the purpose of determining the standard of review.
[793] Gerards, *General Principles,* 229.
[794] Sottiaux and van der Schyff, "Methods of International Human Rights Adjudication," 133.
[795] For example, see, Sottiaux and van der Schyff, "Methods of International Human Rights Adjudication," Greer, *The Margin of Appreciation,* and Gerards, *General Principles*.
[796] The Sunday Times *v. the United Kingdom (no. 1)*, 26 April 1979, § 62, Series A no. 30.

limitation on the right will be acceptable. Nor can it be construed as "ordinary" or "useful," or "reasonable as appear in Articles 4 and 5 and Article 1 of Protocol 1, as such phrasing would indicate that it is sufficient that the kind of limitation is question is of a customary nature or is practical, rather than urgent, in the accomplishment of the legitimate aim.[797] Thus in this case the Court makes it clear that "necessary" occupies a kind of middle ground – the limitation need not be a condition *sine qua non* for the fulfilment of the state's objective, but it must be in some way compelling enough to make it more than merely helpful. Moreover, the Court asserted that "it is for the national authorities to make the initial assessment of the reality of the pressing social need implied by the notion of 'necessity' in the context."[798]

Having further defined and bounded the concept of necessity within a conceptual range between indispensable and useful (in the context of Article 10, but by extension to the other Articles using term similarly in their limitations clauses, including Article 9) and having introduced the concept of "pressing social need," the *Handyside* judgment adds yet another concept to its broad and somewhat Protean methodology in such cases. The Court noted in Paragraph 50 that the justifications given by the state for the rights limitation must be "relevant and sufficient under Article 10 para. 2."[799] Thus *Handyside* represented a genuine step forward in defining a relatively standard model for proportionality review. However, it remained to define in more precise terms what would qualify as a "pressing social need" and how to determine if the state's justifications for the limitation are relevant and sufficient.

In attempting to define the three elements of the democratic necessity test, there is a natural temptation to align them with the three subtests of proportionality. That is to say, one might assume that "pressing social need" aligns with "necessity," "relevant and sufficient" aligns with "suitability," and "proportional" equates to the general balancing phase. Each of these elements, however, has evolved differently in ECtHR case law. The concept of a pressing social need is not merely "necessity" in terms of social necessity since the phrase as used by the Court has come, usually, to include elements of both necessity and suitability. In the absence of an express suitability requirement, this is logical, since there can be no "need" to apply a measure to solve a problem if the measure is not in fact ineffective in solving the

[797] Handyside v. the United Kingdom, 7 December 1976, § 48, Series A no. 24.
[798] Handyside, § 48.
[799] Handyside, § 50.

problem.[800] Thus the "pressing social need" requirement can be seen as answering two questions:

1. Is this problem urgent enough that we need to put a limitation on someone's convention rights in order to solve it? and

2. Is the limitation likely to be reasonably effective in solving the problem.

Like the suitability and necessity phases of traditional proportionality, the pressing social need test is essentially a means-ends test. Several important points, however, are worth noting.

First, the test takes place within a specific context: the question is not whether a measure is necessary in a democratic society generally, but rather whether it is necessary to accomplish a specific legitimate aim. And since the limitations clauses of the ECHR specify a list of aims deemed legitimate, states often adduce several different motivations behind a measure. The Court must then perform the democratic necessity test on each separately. Second, the word "pressing" indicates that there is already some degree of balancing involved in the concept of necessity, since "pressing" only makes sense in a specific context and when weighed against other factors.[801] As a result, the lines between the various subtexts are blurred even further, merely adding to the opaque nature of the test and to the potential for confusion and inconsistency. Third, in practice the test is applied as a sliding scale between mere reasonableness where the Court affords the state a wide margin of appreciation (including many Article 9 cases) and a more genuine evaluation of how "pressing" the social need is.[802] Given that states do not often behave entirely irrationally, the suitability and effectiveness aspect of the test is rarely dispositive. However, when cases have involved measures that do not quite gel with fundamental democratic values, the Court has been willing to find such measures unnecessary in a democratic society. In such cases the "in a democratic society" seems to retain relevance as part of the analysis, since they hinge on the idea that a measure cannot be necessary for democracy if it undermines its core values. In *Manoussakis v. Greece*, for example, the Court found against the government on the basis that while the

[800] Gerards, *General Principles,* 236.
[801] Janneke Gerards, "How to Improve the Necessity Test of the European Court of Human Rights," *International Journal of Constitutional Law* 11, no. 2 (2013): 482.
[802] Gerards, *General Principles*, 236.

requirement for non-Orthodox churches to receive ministerial authorization pursued the legitimate aim of maintaining public order, the measure as applied undermined the "pluralism, tolerance and broadmindedness without which there is no democratic society."[803] In some other cases, however, it was not enough for the measure to merely be rational and consistent with democratic values; in *Serif v. Greece*, for example, the Court performed something closer to the compelling state interest test, ruling against the government on the basis that there was not enough of a pressing social need.[804] It has been suggested that the Court may be following an unwritten rule that "any state interference with religious freedom that does not easily cohere with democratic norms will be subject to a more searching examination of the circumstances motivating (and perhaps legitimating) the interference." The Court, however, has never made such a rule explicit.[805]

Finally, in some instances the Court applies an even stricter understanding of necessity in the form a least restrictive means test. Normally the concept of a least restrictive means test would be implicit in the necessity phase of proportionality analysis; in the ECtHR, however, it is only rarely applied explicitly, generally in cases in which it has applied a narrow margin of appreciation. When it is applied, it provides the important function of reviewing whether the measures taken by the state are overinclusive and therefore not strictly necessary in the form in which they were applied in order to achieve the state's goals. However, like the suitability element, it has rarely been dispositive.[806] Instead, the notion of effectiveness/suitability reflected in the pressing social need portion of the inquiry is more generalized in nature and is usually used as one element of the balance in the final balancing phase rather than as a threshold requirement.[807] The Court looks, in most cases, merely at whether, in the absence of the measures taken, "the intended results could not or could less

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[803] Manoussakis and Others v. Greece, 26 September 1996, § 41, *Reports of Judgments and Decisions* 1996-IV.
[804] Serif v. Greece, no. 38178/97, §§ 87-88, ECHR 1999-IX.
[805] Jilan Kamal, "Justified Interference with Religious Freedom: The European Court of Human Rights and the Need for Mediating Doctrine under Article 9(2)," *Columbia Journal of Transnational Law* 46, no. 3 (2008): 698.
[806] Gerards, *General Principles*, 236-237.
[807] Stijn Smet, "ECtHR Really Applies Less Restrictive Alternative: Saint-Paul Luxembourg S.A. v. Luxembourg," *Strasbourg Observers* (blog), 1 May 2013, https://strasbourgobservers.com/2013/05/01/ecthr-really-applies-less-restrictive-alternative-saint-paul-luxembourg-s-a-v-luxembourg/.

easily have been achieved."[808] Generally it applies a reasonability standard rather than a least restrictive means standard because the Court, following the principle of subsidiarity, has often noted that state governments are generally better placed to evaluation whether a measure is necessary or likely to be effective. If, however, the limitation implicates a situation which triggers a narrow margin of appreciation and thus a stricter standard of review of the state's actions, the Court may at times use a least restrictive means standard in evaluating the effectiveness and thus necessity of the measure in question.[809] The only other situation which may trigger a least restrictive means test seems to be in situations in which the measure is clearly over-inclusive and there is an obvious alternative.[810]

Regarding the "relevant and sufficient" element of the democratic necessity test, it should be noted that it does not address directly the relevance and sufficiency of the measure in achieving its aim, but rather the separate but related question of the relevance and sufficiency of the reasons the state has offered to support its claim that the measure is necessary in a democratic society. It is the Court's way of indicating that the public rationale offered by the state is adequate to justify in principle their exercise of power within the margin of appreciation afforded them. In practice, however, the test seems to lack much specific content beyond what is already covered in the pressing social need component or what is dictated by common sense in any plausible meaning of the term "necessity." As will be demonstrated below, this component of the Court's inquiry is often blended with the pressing social need and balancing components and, as Gerards has acerbically noted, it appears that the Court "just uses the wording it thinks most fitting in the concrete case."[811] However, in some cases the Court has used this prong of the test to justify an inquiry into the sufficiency of the rights review conducted by the national courts, rather than simply an examination of the state's reasoning in passing a law. In such cases, the "relevant and sufficient" prong is aimed more at the adequacy of the process rather than a substantive evaluation of the outcome. The Court

[808] Gerards, "How to Improve the Necessity Test," 482.
[809] Gerards, *General Principles,* 236.
[810] In *S.A.S. v. France*, for example, the Court used LRM reasoning to rule the "veil ban" disproportionate in pursuing the legitimate aim of security, since the obvious and easier solution would have been to limit the covering of the face in sensitive locations such as government offices rather than implementing a total ban in all public places. The Court did this even though in this case they had affording the state a wide margin of appreciation.
[811] Gerards, *General Principles,* 242.

asks not whether it agrees with the court's assessment, but whether the reasons offered by the Court in upholding state action were adequate enough to constitute a proper procedural safeguard.[812] The question of procedural adequacy is a part of the standard method of review in Article 8-11 cases, so once again this standard can seem to merge with other parts of the analysis and offers a further example of the fluid and holistic (and at times inconsistent or unstructured) approach to proportionality taken by the Court.

To appreciate this fluidity of the Court's approach in the balancing phase of proportionality analysis it is helpful to understand the role of the margin of appreciation in limitations clause cases and in particular the Court's application of the margin in Article 9 cases. The doctrine is a direct consequence of the Convention's role as a treaty among sovereign states rather than as a constitution. From this fact derives the principle of subsidiarity, the notion that a sovereign state should be in a position to decide for itself what it considers appropriate in light of its own history and culture. As is the case with proportionality, the margin of appreciation doctrine is not a product of the Convention itself, but rather arose from case law.[813] The first clear discussion of it was again in *Handyside*; the Court noted that "[b]y 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 [rights] as well as on the 'necessity' of a 'restriction' or 'penalty' intended to meet them." In then asserted that the limitations clause of Article 10 "leaves to the Contracting States a margin of appreciation … to interpret and apply the laws in force."[814]

This has evolved over time into a set of standard criteria by which the Court determines just how much of a margin to afford to a State in a given situation. The Court generally will ask the following questions:

- Are limitations of this sort common in other member states?
- How important or fundamental is the right being limited?
- What kind of limitation is being put in place and on what grounds?

[812] Gerards, *General Principles,* 242.
[813] See *The Cyprus Case (Greece v. the United Kingdom)* (1958-59) in Council of Europe, *Yearbook of the European Convention on Human Rights*, *Volume 2* (Netherlands: Brill, 1960), 172-197.
[814] Handyside v. the United Kingdom, 7 December 1976, § 48, Series A no. 24.

- How might the text of the specific Convention provision affect the margin affording to the State?
- What other contextual factors may argue for a wide or narrow margin?

This method is relatively standard and accepted by the Court.[815] The jurisprudence of the Court has over the years developed standards relevant to specific contexts. For example, the Court has found that states have a wide margin of appreciation under Article 10 in cases concerning restrictions on offensive speech such as obscenity, but only a narrow margin of appreciation in Article 10 cases involving political speech.[816] With regard to Article 9, the margin again can be wide or narrow depending on how the Court frames the interests at stake.

The scope of the margin of appreciation can be wide or narrow based on a number of different considerations, including principally whether there is an emerging consensus among state parties, whether the state is better placed than the Court in the particular situation at issue, and finally the nature and importance of the right at stake.[817] As a result, governments have more discretion in in applying the limitation clauses depending on what rights or values are at stake in the case. The Court has repeatedly noted is especially broad in matters concerning the relationship between religion and state. The protection of state secularism is generally given a wide margin,[818] as are cases involving the military,[819] health care,[820] and labor market relations.[821] However, the margin is meant to be narrow when dealing with religious freedom because it is repeatedly described by the Court as one of the cornerstones of society.[822] The same is true for other "core" rights such as freedom of expression or assembly. Aspects of rights that touch on the fundamental values underlying

[815] Greer, "The Margin of Appreciation."
[816] McHarg, "Reconciling Human Rights," 690.
[817] Gerards, *General Principles,* 172.
[818] Kristin Henrard, "A Critical Appraisal of the Margin of Appreciation Left to States Pertaining to 'Church-State Relations' Under the Jurisprudence of the European Court of Human Rights," in *Test of Faith? Religious Diversity and Accommodation in the European Religious Diversity and Accommodation in the European Workplace,* eds. Kayatoun Alidadi, Marie-Claire Foblets and Jogchum Vrielink (United Kingdom: Ashgate, 2012), 76.
[819] Gerards, *General Principles,* 182.
[820] Gerards, *General Principles,* 179.
[821] See § 4 of the Dissenting Opinion of Judge Lorenzen in *Sørensen and Rasmussen v. Denmark* [GC], nos. 52562/99 and 52620/99, ECHR 2006-I, http://hudoc.echr.coe.int/eng?i=001-72015.
[822] Henrard, "A Critical Appraisal," 70.

the Convention – democracy, pluralism, human dignity and autonomy – will generally lead to a narrower margin of appreciation.[823]

But individual issues can often trump these generalizations about the margin of appreciation. For example, the Court in practice gives states a much narrower margin of appreciation with regard to restricting political speech than it does for other forms of expression, such as offensive speech at times restricted under obscenity laws.[824] It does so because political speech underpins the core values of the Convention, whereas obscenity does not. The narrowness of the margin depends also in part on the degree of consensus found among state parties generally. While there is no strict methodology for determining European consensus, the Court will generally narrow the margin and be more likely to find against a rights restriction if the majority of European countries have come to a consensus on the extent of the Convention right in question.[825] This can be a useful tool for expanding rights protectiveness in the ECtHR, since the doctrine of emerging consensus operates as a kind of ratchet so that once a majority of states have come to a conclusion regarding same-sec marriage, for example, it can oblige other states to follow suit. However, the doctrine has its limits.[826] In *SAS v. France*, for example, the Court took a more permissive attitude towards France's "veil ban" on the basis that no European consensus had formed around the question.[827]

In striking the final balance in its proportionality analysis, the ECtHR holistically assesses the results of all the previous inquiries – the legitimacy of the aim, the necessity and suitability of the measure, the urgency of the social need, and the fit between the means and ends – in the context of the margin of appreciation that it has determined to be appropriate in the context. The discussion if often indistinguishable from or intricately merged with the democratic necessity evaluation. Take, for example, the discussion in *SAS v. France*, where Court noted, after exploring the various stated objectives of the law, that it was "able to accept that a State may find it essential to give particular weight in this connection to the interaction

[823] Gerards, *General Principles,* 188.
[824] Aileen McHarg, "Reconciling Human Rights," 689-690.
[825] Lawrence R. Helfer, "Consensus, Coherence and the European Convention on Human Rights," *Cornell International Law Journal* 26, no. 1 (1993): 138.
[826] Shai Dothan, "Judicial Deference Allows European Consensus to Emerge," *Chicago Journal of International Law* 18, no. 2 (Winter 2018): 397.
[827] S.A.S. v. France [GC], no. 43835/11, § 156, ECHR 2014 (extracts).

between individuals."[828] Thus the discussion of the weighting of the objective, the thought process behind the necessity of the measure and the Court's deference to state decision-making blend into a fluid argument. The discussion of a pressing social need is a deferential one and is integrated into the evaluation of the balance in the sense that it helps establish the weight to be accorded to the state's arguments. Furthermore, after a detailed discussion of the impact of the ban on Muslim women in France who wished to wear the niqab, the lack of severity of the penalty (150 euros), and the lack of consensus, the Court affirms that the law "can be regarded as proportionate to the aim pursued, namely the preservation of the conditions of 'living together' as an element of the 'protection of the rights and freedoms of others.' The impugned limitation can thus be regarded as 'necessary in a democratic society.'"[829] As can be seen in this wording, the democratic necessity test is both a component and a result of the finding of proportionality.

The ECtHR has been subjected to extensive criticism for its particular application of proportionality. Critics have argued that it is inconsistently applied and lacks the rigor of the kind of traditional step-by-step proportionality analysis advocated by Robert Alexy among others. However, what the system lacks in methodological rigor it arguably makes up for it its suitability to the task at hand. The ECtHR is not a national court. It is, rather, a fragile and dynamic construction that must balance the needs and values of the COE's 47 members. Lack of transparency can be, at times, a virtue in this context, as it arguably permits the Court to advance the protection of human rights without unduly alienating state parties.

[828] S.A.S., § 141.
[829] S.A.S., §§ 157-158.

CHAPTER 2: COMPARATIVE ANALYSIS OF THE APPLICATION OF BALANCING AND PROPORTIONALITY

As we have seen in the preceding chapter, the two legal systems have evolved overall contrasting approaches to balancing religious freedom against other state priorities including the rights of others. The challenge in comparing these approaches from a process perspective rather than from the results and attitude perspective explored in Part I is primarily due to the almost kaleidoscopic array of approaches implicit in the system of tiered review and categorical balancing in the US courts. We are not comparing apples and oranges; rather, it is perhaps better to say that we are comparing apples and fruit salad. While this situation discourages systematic comparison, it does not render it impossible. The various potential standards of review generated by US Constitutional rights jurisprudence over the years are composed of basic components that have functional equivalents in the ECtHR's model of proportionality analysis. The approach of this section will be to compare the individual components that arise in the various balancing schemes used in US court with their European counterparts, not simply to contrast the processes but to explore how those individual components have been enacted in the body of cases involving religious freedom conflicts in the workplace. These functional components break down into two categories: (i) assessing the interests of the two parties (i.e., the state and the rights holder), and (ii) assessing the relationships between the interests of the parties. The individual inquiries involved in assessing the interests include evaluating (i) the religious burden, (ii) the legitimacy of the state interest, and (iii) the importance of the state interest. The second grouping of inquires look into the relationships between (i) the means and the ends of the government measure at issue, and (ii) the final balance between the means, ends, and burden. By breaking down the processes into these functional components and analyzing their application in the relevant body of cases we may better identify and understand the extent to which balancing methods may play a role in some of the similarities and differences in approach noted in Part I. Moreover, by understanding the mechanics of these decisions, we may better evaluate the overall approaches of the two courts in their management of the tensions raised by religious freedom in the workplace.

I. COMPARING METHODOLOGIES OF DEFINING THE BURDEN AND THE STATE INTEREST

1. Evaluating the infringement and burden

Both courts begin their balancing analysis with the threshold question of whether an individual's religious freedom has been impeded by state action to merit judicial consideration. There are however, as will be shown, several notable and salient ways in which this inquiry differs, both in terms of the questions asked and the significance of the answers in the subsequent analyses. A close review of the workplace cases also reveals that each court is guilty of a certain degree of inconsistency in approaching the question. Moreover, there remains genuine debate within both legal systems regarding what constitutes an interference with religious freedom, with recent caselaw (to be explored below) indicating that the key components are in flux. These debates appear to have less to do with judicial interpretations of the scope of the right to freedom of religion itself and more to do with pragmatic debates regarding which kinds of arguments the courts wish to emphasize in their reasoning (and, often, which kinds of arguments they hope to avoid pronouncing upon).

The question of identifying an interference logically implies an initial determination of whether the concerns of the claimant involve behavior that is judicially cognizable as religious manifestation or free exercise. In practice, however, neither court has been very eager to foreclose further analysis by concluding that a practice was not religiously motivated. Both courts have struggled with the notoriously difficult task of drawing any clear lines between what is and is not religion, and they have rightly learned to be deferential to believers' assertions of religious beliefs so long as they have no reason to consider them to be insincere or opportunistic. Part I showed that both courts have backed away from earlier rulings that "peripheral" religious duties did not merit protection. Nevertheless, both have continued at times to take centrality-like considerations into account. In this regard, neither court has found the silver bullet for disentangling religion, belief, conscience and mere opinion.

In practice, courts have considered various factors when determining whether there has been a limitation on religious freedom which is significant enough to merit judicial intervention. Again, the challenge has been how to do that without passing judgment on particular religious beliefs. Neither court has been entirely successful in finding a consistent and principled way to do this. However, the cases mostly break down into two types of analysis. One approach has been to evaluate a "burden" or "interference" in terms of the objective severity of the sanction imposed for noncompliance with the law or measure in question (the "noncompliance cost"). The second has been to focus on the subjective severity of the costs of complying with the law at the expense of being able to behave in accordance with religious sentiment (the "compliance cost").[830] As will be explored below, these approaches have been of some use to both courts, but have been deployed in very different ways and with differing degrees of consistency.

A. US Courts and the contentious "substantial burden" test

The term "burden" is used in US strict scrutiny analysis and seems implicitly to involve more than mere interference; a burden implies an interference that is in some sense restrictive. More importantly, however, the phrasing that emerged out of the *Sherbert* test and that has been enshrined in RFRA is "substantial burden," thus insisting that there be more than a *de minimis* burden on free exercise in order to warrant accommodation. In practice, however, the threshold for qualifying as a substantial burden on free exercise has not been unduly high since the passage of RFRA and is arguably more easily established than an "interference" in the ECtHR.[831] This was not always the case – the courts over the years have experimented with and ultimately rejected various tests – in particular the centrality test and the coercion test – that made establishing a substantial burden a challenge in many cases.

Given the cleavage in the US system between RFRA, First Amendment and ministerial exception cases it is perhaps unsurprising that the judicial attention and significance placed

[830] See Wolanek and Liu, "Applying Strict Scrutiny," 10.
[831] Similarly, an "undue burden" in Title VII cases has generally meant anything that is more than *de minimis*.

on the burden evaluation phase of the analysis can vary depending on the type of analysis being undertaken. In ministerial exception cases the substantial burden phase has not been relevant; if the employee in question is found to perform "ministerial functions," broadly construed, then there is by definition a burden. In cases under the Free Exercise Clause, the *Smith* standard is applied; in these cases a burden inquiry is rarely relevant since even claimants suffering from substantial religious burdens receive very limited protection (although at times courts discuss burdens in order to bolster their arguments, as discussed below with regard to *Daniels* and *Brown*). In US cases under RFRA, or subject to heightened scrutiny under the *Smith* standard (because the restrictions are non-neutral or not generally applicable), the burden must be "substantial" in order to merit protection. Only then does the court move to the next step in the analysis, where the burden of persuasion shifts onto the state to show that it has used the least restrictive means to achieve a compelling government interest. In practice, however, the question of how to determine what is "substantial" under RFRA has become a battleground. As discussed in Part I Chapter 2 and Part II Chapter 1, the Supreme Court has put forward a theory that the substantial burden analysis in RFRA cases is essentially a subjective compliance cost inquiry as to whether the complainant considers the requirements to be a burden in a religious sense. Several circuit courts have pushed back, asserting their right to decide what constitutes a substantial burden as a question of law. Beyond that, however, courts are generally in agreement that it means more than merely an administrative inconvenience. They also agree that being obliged to violate a formal religious duty would be a clearly substantial burden. Often the religious impact is obvious and goes unchallenged, and the burden inquiry is simply taken for granted in many of the workplace cases. The interesting questions for purposes of comparison, however, arise where the impact appears marginal to the court.

The noncompliance cost of a law or regulation is usually obvious in the workplace context. *Sherbert*-era cases such as *Thomas v. Review Board*[832] stood for the idea that conditioning the receipt of government benefits should not be conditioned on violating one's religious beliefs because so severe a secular penalty improperly pressures believers to abandon their faith. If the loss of benefits can do this, it goes without saying that loss of employment or financial penalties can do so even more strongly. Thus it is not surprising that

[832] Thomas v. Rev. Bd., 450 U.S. 707 (1981).

in US cases the noncompliance cost is mentioned frequently in the threshold substantial burden determination. Nevertheless, US courts have rarely used a *de minimis* penalty to conclude that there has been no substantial burden placed on free exercise. This is to some degree predictable inasmuch as the penalty in workplace cases tends to be dismissal or demotion, obvious forms of harm which a court could not reasonably consider as *de minimis* due to the serious professional and financial consequences for the employee. In *Tagore*, for example, the court noted that the claimant would violate federal law if she continued to wear her kirpan, exposing her to a fine and up to a year in prison.[833] Likewise in *Hobby Lobby*, the Supreme Court referred to the heavy fines that the businesses would pay in the event of their noncompliance and observed that "[i]f these consequences do not amount to a substantial burden, it is hard to see what would."[834]

Attempts by the courts to evaluate the substantiality of the burden by evaluating the compliance costs of the law or regulation have been more problematic. This approach can involve an evaluation of the seriousness of the belief or simply a determination that the applicant is wrong in claiming that compliance would cause him to violate his beliefs, usually because the logic used by the applicant in evaluating the compliance cost is somehow deemed to be incomplete or unsound. In US jurisprudence, this has taken the form of the examining either the centrality or importance in the belief system of the complainant or whether in the court's view the complainant was actually being coerced to violate her stated beliefs.

Centrality arguments or similar evaluations of the importance of a religious practice have continued to appear in workplace cases governed by the Free Exercise Clause and *Smith* standard in spite of the Supreme Court's disavowal of such arguments.[835] In *Brown v. Polk County*, the Court noted that the conduct in question was not specifically mandated by religious belief therefore "[did] not consider precluding Mr. Brown from directing a county employee to type his Bible study notes to be a 'substantial burden' upon his religious practices."[836] Similarly, in *Daniels* (the policeman who wanted to wear a cross pin on-duty), the court noted somewhat blithely that he "undoubtedly has myriad alternative ways to manifest this tenet of his religion," suggesting that wearing a cross was not a necessary

[833] Tagore v. United States, 735 F.3d 324, 330 (5th Cir. 2013).
[834] Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 691 (2014).
[835] For example, see Hernandez v. Comm'r, 490 U.S. 680, 699 (1989).
[836] Brown v. Polk Cnt'y., 61 F.3d 650, 656 (8th Cir. 1995).

element in Christian devotion regardless of the officer's feelings on the subject.[837] While this does not pronounce directly on the centrality of cross-wearing, the court's reasoning relies logically on a judgment that wearing a cross is somehow fungible with other forms of religious exercise.

Such arguments were explicitly excluded by Congress in an amendment to RFRA in 2000 which defined the exercise of religion to mean "any exercise of religion, whether or not compelled by, or central to, a system of religious belief."[838] As a result, courts have either avoided making judgments regarding the importance of religious practice or have been overruled when they have done so.[839] In some cases, however, courts have delved into the reasoning of the believer and questioned the causal relationship between the behavior in question and the alleged violation of religious convictions. In *Harris Funeral Homes*, the Court refused to base a conclusion as to substantial burden on "a contested and unsupported assertion of fact" [840] and concluded that "as a matter of law, tolerating Stephens' understanding of her sex and gender identity is not tantamount to supporting it."[841] In other words, whatever the feelings of the owner of the funeral home, the Court maintained its right to evaluate related questions of fact and to decide for itself whether the argument about the burden on religious exercise indeed made sense. And in a number of federal appeals court decisions relating to the ACA contraceptive mandate the courts employed similar logic to refute the substantial burden claims of religious nonprofits. In *Little Sisters of the Poor,* for example, Judge Posner argues eloquently and in detail why the EBSA 700 form filing requirement does not, as a matter of fact rather than of dogma, "trigger" or in any way cause the provision of contraceptives to employees. The argument is wrapped up in the complexities of the mechanisms underlying the notification requirement, but ultimately rests on the courts asserting their right to decide if the actions being required by law do in fact have sufficient causal relation with the religious belief in question to create a genuine burden. Likewise in *Hobby Lobby*, the circuit court decision stressed that the complainants were

[837] Daniels v. City of Arlington, 246 F.3d 500, 505 (5th Cir. 2001).
[838] 107 42 U.S.C. § 2000bb-2(4) (2000).
[839] In Holt v. Hobbs, 135 S. Ct. 853, 866 (2015) for example, the Supreme Court overruled a lower court's determination that a prisoner's desire to wear a beard, although inspired by his Muslim faith, was not required by Islam and was therefore optional and subject to restriction.
[840] EEOC v. R.G. & G.R. Harris Funeral Homes Inc., 884 F.3d 560, 586 (6th Cir. 2018).
[841] Harris, 884 F.3d at 588.

simply incorrect about how the birth control pills in questioned worked. The cases drew a line between religious belief and the factual underpinnings of these believers' concerns over complicity, and argued that the complainants were wrong about the moral consequences of compliance because of their factual misunderstandings about the functioning of the notification requirement as well as of what constitutes complicity as a matter of law.[842]

B. ECtHR and the flexible concept of "interference"

The ECtHR, like US courts, has repeatedly declared its hesitation to pass judgment on the content of religious belief; as the Court noted in *Eweida et al.,* "the State's duty of neutrality and impartiality is incompatible with any power on the State's part to assess the legitimacy of religious beliefs or the ways in which those beliefs are expressed."[843] Nor must a particular practice be a requirement of the faith in order to merit Article 9 protection.[844] However, the ECtHR has nonetheless been more willing to impose its judgments on matters that US courts might shy away from for fear of improperly passing judgment on a religious belief. Specifically, the ECtHR have clearly enunciated a limit on what constitutes religious belief or manifestation that is worthy of protection under Article 9. Such beliefs must, at minimum, attain a sufficient degree of "cogency, seriousness, cohesion and importance"[845] to merit protection. Moreover, the Court has variously noted that, apart from being serious and coherent, the manifestation in question must directly express the belief concerned and be more than "remotely connected to a precept of faith,"[846] and that "the existence of a sufficiently close and direct nexus between the act and the underlying belief must be determined on the facts of each case."[847] In other words, the Court has the right to evaluate the belief/manifestation nexus and to judge if the belief plays a sufficiently significant role

[842] It must be remembered, however, that the Supreme Court has not definitively pronounced upon issue, as the question was remanded to the lower courts in search of a workable compromise. But it does appear to have endorsed in *Hobby Lobby* the notion that a perception of complicity in the sin of others may be enough to constitute a substantial burden, and that ultimately a burden is substantial if the claimant perceives it as such.
[843] Eweida and Others v. the United Kingdom, nos. 48420/10 and 3 others, § 81, ECHR 2013 (extracts).
[844] Cha'are Shalom Ve Tsedek v. France [GC], no. 27417/95, §§ 73-74, ECHR 2000-VII.
[845] Bayatyan v. Armenia [GC], no. 23459/03, § 110, ECHR 2011.
[846] Eweida and Others, § 82.
[847] Eweida and Others, § 82.

within the believer's faith to fall within the ambit of Article 9. In practice, such arguments appear often to justify the finding of a burden or interference. In such cases they merely form part of the judicial rights rhetoric used to underline the seriousness of Convention rights and to bolster the legitimacy of courts as their defenders.[848]

The term "interference" is commonly used when discussing proportionality tests generally but the precise wording of Article 9 is that "beliefs shall be subject only to such limitations" as are enumerated in the limitations clause. There is no mention of "substantial" or "important" limitations. In practice, the Court has at times indicated that the limitation needs to be of a minimal degree of severity in order to count as a limitation. In *Cha'are Shalom Ve Tsedek v. France*, for example, the Court found the inconvenience of having to order *glatt* meat from Belgium insufficient to constitute an interference.[849] The ECtHR's apparently greater willingness to impose its own judgments on what constitutes interference has not, however, resulted in a large body of cases being rejected at the admissibility phase on those grounds. In fact, the Court has generally accepted the existence of an interference without much discussion. The few cases to the contrary have, like the US cases, discussed the interference in terms of the consequences of both compliance costs and noncompliance costs. The only example of a case being rejected through the court reasoning that the sanctions for noncompliance were insufficiently severe to constitute an interference is *Francesco Sessa v. Italy*. In that case the Court reasoned that missing a court date was simply not a genuine problem since the applicant's presence was optional. But in most cases, if the noncompliance cost is mentioned at all it is used to highlight the presence and seriousness of the interference. Cases in which the Court addressed the consequences of compliance have been vaguely argued and seem to form a kind of catch-all approach to denying interference in "awkward" cases. For example, the Court has distinguished in several cases religiously-motivated behavior that simply does not benefit from Article 9 protection because what is at stake is not actually the religious belief but rather some other behavior related to but not mandated by religion. The logic of these cases, however, remains vague. The Court has

[848] For example, with almost ritual regularity the ECtHR recites that "freedom of thought, conscience and religion is one of the foundations of a "democratic society" within the meaning of the Convention. This freedom is, in its religious dimension, one of the most vital elements that go to make up the identity of believers and their conception of life, but it is also a precious asset for atheists, agnostics, sceptics and the unconcerned." For example, see *Bayatan,* § 118. US courts have used similar language to similar ends.
[849] Cha'are Shalom Ve Tsedek v. France, [GC], no. 27417/95, §§ 80-84, ECHR 2000-VII.

repeatedly asserted that Article 9 "does not protect every act motivated or inspired by a religion or belief."[850] From this, they have concluded, sometimes unconvincingly, that the desired manifestation of the applicant was motivated by religion but ultimately does not qualify in the specific context. In *Kalaç v. Turkey*, the Court noted that the applicant was disciplined not for exercising his faith by joining a fundamentalist religious organization, but rather for violating military discipline by doing so. In *Kosteski v. FYROM*, the court used similar reasoning to say that the applicant was disciplined not for attending a Muslim religious celebration, but rather for having missed work to do so. In fact, the Court in *Kosteski* does not even definitively assert whether or not there has been an interference; instead, it merely expresses doubt and notes that, "[t]o the extent … that the proceedings disclosed an interference with the applicant's freedom of religion, this was not disproportionate."[851]

However, discussions about the degree and nature of the alleged interference are usually deferred to the balancing phase, where the interference inquiry blends with other components of balancing to form a part of a holistic analysis.[852] The curious logic of doing this is most clearly evidenced in *Pichon et Sajous*. In that case, the Court asserted that there was no interference with the right to manifest religion because, as the US court argued in *Daniels*, the pharmacists had other ways to express their faith. In *Pichon et Sajous* the Court combined this argument with the observation that on balance it would cause serious hardship to others to allow the pharmacy to not sell contraceptives because of its quasi-monopoly position in the town where it was located. In other words, there is a consequentialist reasoning that the harm done by the manifestation was so disproportionate to the applicant's need for it (as determined by the Court) that it must not be an interference with religion to legally prohibit it. But the proportionality examination is not even supposed to occur unless there was an interference. The logic is perfectly circular and renders the interference inquiry irrelevant. But blending the interference inquiry and the balancing phase has proven useful to the Court. It allowed the Court in *Eweida et al.,* for example, to skirt the question of interference in the *Chaplin* case; rather than having to decide if wearing a cross pin is the same as wearing a cross necklace, the Court was able to decide the case by balancing the applicant's desire for

[850] Kalaç v. Turkey, 1 July 1997, § 27, *Reports of Judgments and Decisions* 1997-IV.
[851] Kosteski v. the Former Yugoslav Republic of Macedonia, no. 55170/00, § 39, 13 April 2006, http://hudoc.echr.coe.int/eng?i=001-73342.
[852] Gerards, *General Principles,* 14-18.

religious expression with the health and safety requirements of the hospital, giving them a clearer and more easily justified basis for resolving the case.

Another version of the ECtHR's reasoning in early cases about the compliance cost is that the applicant, should he really need to manifest his religion in a particular way that conflicts with the demands of the workplace, is free to simply resign. Therefore, the logic goes, he is not being coerced to compromise his faith and has not had his Article 9 rights violated. In *Stedman v. UK*, for example, the Commission argued that if the applicant did not want to work on Sundays, he was perfectly free to simply quit and find a different job. Again, this logic has generally been left to the balancing phase. The "right to resign" approach has since been expressly rejected in *Eweida et. al*., where the Court notes that "where an individual complains of a restriction on freedom of religion in the workplace, rather than holding that the possibility of changing job would negate any interference with the right, the better approach would be to weigh that possibility in the overall balance when considering whether or not the restriction was proportionate." But notice that in rejecting the "right to resign" approach of earlier workplace cases, it simultaneously reaffirms its approach to the interference inquiry that such questions, where they bear heavily on a fundamental right like freedom of religion, are best dealt with in a holistic manner.

C. Comparing the roles of religious burden

The ECtHR's tendency to blend the interference inquiry into the balancing phase of proportionality analysis is the most striking distinction from the US approach, and in fact highlights an important structural difference in how the courts approach religious freedom more generally. The interference inquiry and the substantial burden phase of strict scrutiny are meant to operate as threshold criteria. If there is no interference, or the limitation is *de minimis*, then no balancing needs to be done. However, in practice, the ECtHR rarely treats this phase as a true threshold. Rather, it either ignores the inquiry entirely by assuming the existence of a limitation or it blends the interference phase with the balancing phase. In the US, however, the substantial burden phase has become a judicial point of contention, and there remains a live debate about the role of the court in determining the existence of a

substantial burden. While there are strong similarities between the theoretical requirements of the respective tests, the reason for the different application by the courts lies in the nature of the subsequent phases of the balancing tests. As explained above in Chapter 1 and as will be demonstrated in the discussion of the workplace cases in the following subsections, European proportionality analysis offers greater flexibility to judges in weighing relative values in order to find a suitable balance between religious freedom and other fundamental rights. The blending of the interference inquiry into the balancing phase allows a holistic analysis of how serious the interference may be in light of all the other factors. In this way the ECtHR can consider the severity of noncompliance or compliance costs in comparison with what else is at stake. In contrast, the US approach in strict scrutiny cases locks courts into the compelling government interest and the least restrictive means tests once they have identified a substantial burden. Thus the burden phase in the US operates as a true threshold similar to, if not quite as strict as, the categorical reasoning used in the ministerial exception cases. The pressure of these tests has led US courts to think in terms of categories and thresholds with far greater urgency than their counterparts in the ECtHR.

The effects of this should not be overstated. While it is easy to imagine the ECtHR finding no interference in a hypothetical case with the fact pattern of the ACA nonprofit cases, the Court might just as easily accept the interference and find the nonprofit compromise a proportionate balance between the needs of the state and the religious nonprofits. And the ACA nonprofit cases are quite context-specific, not to mention highly politicized, and may not serve as an adequate guide. In fact, an overall evaluation of the application of the interference/burden inquiry in both courts reveals no radical differences in the ultimate outcome of the cases. The claimant's desire to have employees type up his Bible study notes in *Brown v. Polk County* would not have been protected in the ECtHR any more than in the US. And compelling a pharmacy to sell contraceptives in spite of religious objections was permitted in both the US and the ECtHR. Nor are the concerns of the courts very different when it comes to evaluating burdens on religion. Both courts hesitate to judge the legitimacy of religious beliefs or practices, yet both evaluate the importance of the religious practice in their own ways. Both express concern with laws or measures that may put pressure on employees to change their religious practices. And both, in the end, accept that in the workplace context demotion or dismissal constitute serious consequences that

would have a coercive effect on religion. What is different is how the courts go about making the determination. In the US, there is a lot at stake in the burden inquiry and a lot more effort is put into arguing for or against the existence of a substantial burden in cases that are marginal, since the answer to the question will bear heavily on the results. In Europe, however, the ECtHR can more easily defer judgment since it has more flexibility in the subsequent balancing process. This difference opens a space for a more reasoned consideration of the role of religion in public life and a more balanced and fair approach in managing the relationship between religious rights and the rights of others. However, it does so at the expense of transparency.

2. Evaluating the legitimacy of state interest

The necessity of weeding out inappropriate state motives plays a role in the overall balancing analysis of both courts, but there are significant differences both conceptually and in practice between the "legitimate aim" discussion of the ECtHR and its equivalents under the different levels of scrutiny applied in US courts. ECtHR discussions of legitimate aim can seem at times somewhat anemic compared to their US counterparts in strict scrutiny for several reasons. Firstly, it must be recalled that in Articles 8-11 of the Convention there are express general limitations clauses that limit the scope of the government objectives that can be deemed as legitimate reasons for limiting the rights in question. By contrast, the US has no equivalent formalized restriction on what constitutes a legitimate aim. As discussed in Chapter 1 above, Congress did not take the opportunity when drafting the RFRA to clearly define "compelling government interest" beyond confusingly referring to caselaw in general and to *Sherbert* and *Yoder* in particular. One might think that the ECHR's express limiting of legislative and judicial discretion in determining which aims justify rights limitations would make the ECtHR test somewhat stricter than its vague and theoretically malleable American counterpart. The lines are more clearly drawn, and so one might expect the Court to vigorously police them. However, as will be explored further below, this has not in fact been the case. ECtHR cases overall have tended not to rely heavily on this phase of their analysis because the limited objectives are framed broadly enough to encompass most types

of legislation that are intended to promote the general welfare of a state's citizens.[853] In that sense, the ECtHR's test resembles American rational basis review, except that the ECtHR seems to expect more justification of legitimacy in some instances, whereas US courts merely content themselves with any non-irrational objective that is not discriminatory. The greatest distinction between the two approaches is to be found in the US courts determinations of what constitutes "compelling." US courts applying strict scrutiny must determine not only if the aim is legitimate but also evaluate the importance of achieving the aim in the particular case at hand. This element is absent from the ECtHR inquiry, but emerges in the subsequent "necessity" phase of proportionality.

A. ECtHR's conception of "legitimate aims" in the workplace: a permissive approach to a restricted range of objectives

In keeping with its tradition of relatively short and concise opinions as compared with US courts, the ECtHR often entirely omits any discussion of the aims of the government from its reasoning. This is especially true in workplace cases involving for-profit or religious employers where the Court's role is to ensure that that state has met its positive obligation to ensure that rights are protected in dealings among private parties. Thus in *Siebenhaar*, *Obst* and *Schüth* there is no discussion of government aims. Likewise now and then the Court makes no mention of the aim because it is clear (*Macfarlane*)[854], because there is a finding of "no interference" (*Pichon et Sajous*), or because the Court does not strictly adhere to the steps of proportionality (*Alexandridis*).[855] In many cases, the aim is declared legitimate without discussion.

However, given that this phase of proportionality analysis is rarely dispositive, it is perhaps surprising how often the Court pauses to justify or clarify the government aim. Most of the time this discussion is simply a brief clarification of what rights the Court means when they refer to the "rights of others" in the specific context of the case. In *Chaplin*, for example, the Court specifies that the motive of the hospital in prohibiting necklaces was to "protect

[853] Gerards, *General Principles,* 220.
[854] Consolidated in Eweida and Others v. the United Kingdom, nos. 48420/10 and 3 others, ECHR 2013 (extracts).
[855] In Alexandridis the discussion focuses on the existence of the interference without ever considering the limitation clauses, in part because it was unclear whether the measure was even prescribed by law.

the health and safety of nurses and patients."[856] In *Sessa Francesco*, the Court clarified that the goal was to protect "the public's right to the proper administration of justice and the principle that cases be heard within a reasonable time."[857] At times, the formulation includes "public order" (e.g. *Kurtulmuş*) or "public safety and public order" (e.g. *Dahlab*), although the Court does not in these cases explain the additional language or engage in any reasoned discussion of how teachers wearing headscarves may constitute a threat to public safety or order. So long as there is some reasonably justifiable aim, the Court in general does not seem eager to delve further into the inquiry unless the "real" aim is clearly impermissible discrimination. While no such instances appear among the workplace cases, in other Article 9 cases the Court is relatively deferential to the stated aims of governments. In *SAS v. France*, for example, the Court discusses but then seems to discount strong evidence from the parliamentary debates leading to the drafting of the "veil ban" in France that the Assemblée Nationale was motivated in large part by concerns over security and women's rights that were unsupported by evidence. However, as the Court has explained in *Merabishvili v. Georgia*, it is not necessary that all the asserted aims be permissible so long as at least one aim put forward by the government is deemed legitimate.[858]

Workplace cases where the Court walks through its reasoning rather than merely declaring its conclusion are *Thlimmenos*, *Ladele*, and *Ebrahimian*. In *Thlimmenos*, the only case in this study where the Court found no legitimate aim, the reasoning was that since the claimant had already been punished for his refusal to serve in the armed forces, an additional punishment of not permitting him to qualify as a chartered accountant was disproportionate and therefore not a legitimate aim.[859] The logic here is a bit confused in that the Court seems to derive its judgment of the legitimate aim from a premature conclusion about the proportionality of the measure. But as we have seen this is not the only instance of the Court blending the steps of proportionality analysis. In *Ladele* the discussion remains minimal yet interesting in that the judges seem to feel compelled to explain the "evident" legitimacy of the rather specific government aim of being "an employer and a public authority wholly

[856] Eweida and Others v. the United Kingdom, nos. 48420/10 and 3 others, § 98, ECHR 2013 (extracts).
[857] Sessa Francesca v. Italy, § 38, no. 28790/08, ECHR 2012 (extracts).
[858] Merabishvili v. Georgia [GC], no. 72508/13, § 197, 28 November 2017, http://hudoc.echr.coe.int/eng?i=001-178753.
[859] Thlimmenos v. Greece [GC], no. 34369/97, § 47, ECHR 2000-IV.

committed to the promotion of equal opportunities and to requiring all its employees to act in a way which does not discriminate against others."[860] To do so, the Court references Article 14 doctrine that "differences in treatment based on sexual orientation require particularly significant reasons by way of justification."[861] In this case the Court uses its "very weighty reasons" standard (a standard used to evaluate laws that discriminate) to justify the legitimacy of Islington Council's active efforts to ensure no discrimination in their provision of public services. The most detailed reasoning about the legitimacy of a government aim comes in *Ebrahimian v. France*. Here the applicant disputed the asserted government aim of protecting the rights of others by prohibiting hospital staff from wearing religious symbols. The applicant argued that since there had been no complaints about her wearing of a hijab at work – she had never been accused of proselytism, which was the core issue behind the ban[862] - there was essentially no problem to solve. The Court noted the importance of neutrality in the hospital context where patients are in a vulnerable position and cited caselaw upholding antidiscrimination measures and measures in defense of secularism to conclude that the hospital's policies were in pursuit of a legitimate aim in protecting the rights of others – specifically the defense of equal treatment and respect, secularism, and equality of opportunity. It did not specifically address the assertion that there was no evidence that the applicant's hijab threatened any of these aims, but implicit in the opinion is the position that actual evidence in the specific situation is not required. The government may reasonably lock the barn door before the horse has bolted.

In conclusion, despite the restricted lists of objectives permitted under the limitations clause of Article 9, the Court has taken a broad view of what counts as protecting the rights of others against religious manifestation in the workplace. Only in one case was the aim found to be illegitimate, but even then the Court reached the conclusion not by the more categorical reasoning implied by the legitimate aim requirement, but by folding the inquiry into the balancing phase. Moreover, the Court has shown that the threat to the rights of others need not be actual, but rather may be hypothetical in nature.

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[860] Eweida et al., § 105.
[861] Eweida et al., § 105.
[862] The applicant pointed out that the French Conseil d'État had agreed that wearing a religious symbol did not violate the principle of neutrality so long as it was not accompanied by any explicit or implicit proselytising conduct. Ebrahimian v. France, no. 64846/11, § 36, ECHR 2015.

B. The de-emphasized role of legitimacy in US courts

The US caseload can be broken down into three categories with regard to the government interest inquiry. In ministerial exception cases, the preliminary question ignores the government's objective entirely, focusing instead on the role of the employee. This step is categorical in nature; if the employee is a minister, the inquiry stops there. If not, the case proceeds as normal to explore whatever legal arguments are being relied upon by the parties, usually Title VII but occasionally the Free Exercise Clause or RFRA. In Free Exercise Clause cases, the court uses a rational basis test under which the state needs merely to have a rational aim. However, in order for the rational basis test to apply courts must first determine whether the law in question is neutral out of general applicability. Thus once again we see that in the US system courts are faced with a categorical crossroads that may be highly determinative of the outcome of cases since strict scrutiny is much more difficult for a government to overcome than the rational basis test. The neutrality and general applicability inquiry serves as a filter to test for impermissible or illegitimate government objectives, and in this regard is functionally comparable to at least one element of the legitimate aim test. Finally in RFRA cases, and in free exercise cases that have failed the neutrality and general applicability test, courts apply heightened scrutiny. This involves the famously exigent compelling governmental interest test, which effectively overlaps the legitimate aims test and the necessity test found in the ECtHR proportionality approach. For this reason the concept of "compelling" will be discussed both in this section and in Section 3 below.

i. Neutrality and general applicability in the workplace cases

To be subjected to rational basis scrutiny, laws must be found to be neutral. Neutrality is a relatively easy threshold requirement to meet; the law must not target religion as a category or a specific religion or religious practice. A "no pins" or "no beards" policy at work is neutral, while a "no hijabs" policy would not be. Facial neutrality is generally sufficient; in *Stormans*, for example, the Ninth Circuit asserts that the pharmacy rule is neutral because the rules "make no reference to any religious practice, conduct, belief, or motivation."[863]

[863] Stormans Inc. v. Wiesman, 794 F.3d 1064, 1076 (9th Cir. 2015).

Most laws can pass this test since competent legislators know better than to draft laws that overtly target religion. Among the cases studied, the only one to involve state action considered non-neutral was *Masterpiece Cakeshop*, where the Supreme Court detected animus against religion in comments of one member of the Colorado Civil Rights Commission when he observed that religious freedom has historically been used to justify slavery or other forms of discrimination and added that personally he considered the instrumentalization of religious freedom protections in such a way to be "one of the most despicable pieces of rhetoric that people can use to–to use their religion to hurt others."[864] The Court found that the Commissioner's suggestion that the claimant was using religion to justify discrimination had tainted the neutrality of the proceedings, perceiving it as an attack on the claimant's religion itself.[865] This was sufficient grounds to reverse the Commission's ruling without having to take a position on the genuinely difficult Constitutional issues presented by this contentious situation.

General applicability, however, has taken a more prominent role in the cases included in this study. In both *Booth* and *Fraternal Order of Police* the courts found that although the grooming requirements in both cases were neutral measures, they were not generally applicable. In each case the courts referred to Supreme Court's elaboration of the *Smith* standard in *Lukumi Babalu* which explains that a measure is not generally applicable if it allows for personalized exemptions or creates exemptions that treat secular reasons for accommodation as more important than religious reasons. In *Booth* the employer had granted other religious exemptions but offered no clear reason why Booth's claim was denied.[866] In *Fraternal Order of Police,* secular exemptions to the "no beards" policy had been granted for health reasons. The Court observed that the Newark Police had offered no explanation of why permitting religiously-motivated beards would undermine public confidence or the esprit du corps of the police force when they had seemingly concluded that beards worn for

[864] Masterpiece Cakeshop, Ltd., et al. v. Colorado Civil Rights Commission et al., No. 16-111, slip op, Opinion of the Court at 13 (U.S. June 4, 2018).
[865] It is unclear precisely what Justice Kennedy is condemning; the historical observation is a matter of historical record, and he can hardly expect even Civil Rights Commission members not to condemn the dishonest use of religion to justify slavery or to consider discrimination against gay couples to be an invidious form of behavior worthy of condemnation. While it is presumably within the Commission's power to question the sincerity of the baker's beliefs, one can argue that to do so without further evidence and in such a hostile tone indicates animus, but if so it is more animus to the individual than to religion in general.
[866] Booth v. Maryland, 327 F.3d 377, 380-381 (4th Cir. 2003).

secular purposes would not.[867] Other workplace cases, including several ACA cases, also touch upon the requirement and find the measures concerned to be generally applicable. In particular, the DC Circuit observed in Priests for Life that the "ACA's limited or temporary exemptions do not amount to the kind of pattern of exemptions from a facially neutral law that demonstrate that the law was motivated by a discriminatory purpose."[868] In *Stormans v. Wiesman* the Ninth Circuit took a similar position on the existence of certain practical exemptions, noting that "the mere existence of an exemption that affords some minimal governmental discretion does not destroy a law's general applicability."[869] Nor were accusations of selective enforcement by the Washington Pharmacy Quality Assurance Commission enough to trigger heightened scrutiny; the Commission operated a complaints-driven system, and since no complaints were made in the alleged cases, the Commission was not in a position to investigate and enforce the rules on those pharmacies allegedly violating them.[870]

ii. Rational motivations for neutral and generally applicable state actions under Smith

The requirement of legitimacy in US courts is easily met so long as there is no targeting or intentional disadvantaging of religion as compared with other values. The burden of proof is on the employee to negate "any reasonably conceivable state of facts that could provide a rational basis."[871] In other words, any conceivable legitimate government objective will do. In the relevant sample of cases, five were subjected to rational basis review on First Amendment claims: *Daniels*, *Stormans* (9th C.), *Brown, Berry,* and *Little Sisters of the Poor*. In all these cases the government objectives at issue easily qualify as legitimate interests without further discussion, as similar cases have under the ECtHR's legitimate aims test. In *Daniels*, the aim was to convey neutrality of the police force. In *Stormans*, it was to ensure access to prescribed medications. In *Brown* and *Berry* the aim was to maintain a neutral and efficient workplace, with *Brown* adding concerns over the Establishment Clause because the

[867] Fraternal Ord. of Police Newark Lodge No. 12 v. City of Newark, 170 F.3d 359, 366-367 (3d Cir. 1999).
[868] Priests for Life v. U.S. Dep't of Health and Hum. Servs. 772 F.3d 229, 268 (D.C. Cir. 2014).
[869] Stormans Inc. v. Wiesman, 794 F.3d 1064, 1082 (9th Cir. 2015).
[870] Stormans, 794 F.3d at 1082.
[871] Heller v. Doe, 509 U.S. 312, 320 (1993) .

religious activities took place in a context open to the public. In *Little Sisters of the Poor*, the Tenth Circuit affirmed the legitimacy of the government's interest in both accommodating free exercise and in filling any coverage gaps created when doing so. The Court also reflects upon several other conceivable interests that it would consider legitimate, including public health and gender equality (deemed too broad to be compelling interests in *Hobby Lobby*), ensuring access to contraception without cost sharing, ease of administering programs, and alleviating government interference with religion generally. The only potential challenge to the legitimacy of these aims might have been an argument involving a lack of evidence of actual harm as the ECtHR used in *Pichon et Sajous*; such a claim was made in *Brown*, but that argument more properly belongs to an analysis of the suitability of the means used to obtain the objective and not of the objective itself and will be examined below.

Beyond situations of animus, however, a combination of careful drafting of laws and a broad judicial deference state objectives to improve health and safety, promote government neutrality and prevent discrimination in the workplace has meant that most workplace regulations pass the legitimacy phase under both rational basis and strict scrutiny review. Even non-neutral laws are not deemed inherently illegitimate; rather, lack of neutrality simply triggers heightened scrutiny allowing the courts to raise the bar from legitimacy to genuine urgency in the form of the compelling government interest test.

iii. Legitimacy as a component of the compelling government interests under strict scrutiny

The compelling government interest test does not compare easily to the legitimate aim inquiry in PA because it touches on both legitimacy and necessity. In that sense it is more like the "very weighty reasons" test used by the ECtHR in Article 14 cases. Obviously a "compelling" interest must first and foremost be legitimate. But mere legitimacy is insufficient; the interests must also be in some way urgent. This does not mean simply that the overarching objective – nondiscrimination, for example – is of great importance to society. Rather, the objective must be compelling in the specific context of the case. If the harm does not apply in the case, or if it is *de minimis* in the specific context, then the application of the measure will not be seen as compelling. The more concrete mechanism of

determining the "compelling" aspect of the compelling interest test is better discussed in tandem with the European necessity test and, to a certain extent, the proportionality *stricto sensu* phase. What is interesting in the context of this section is to see what objectives are seen as sufficiently legitimate in the abstract and whether the bar is set higher than in rational basis review or indeed in the legitimate aim test. In *Priests for Life* the court enumerated two principal converging compelling interests in support of the ACA mandate: "improving public health through contraceptive coverage"[872] and "assuring women equal benefit of preventive care by requiring coverage of their distinctive health needs."[873] In *Tagore* the court found that security in federal building was "surely" compelling.[874] In *Fraternal Order of Police* the Court acknowledged the safety of police officers as a legitimate concern, as well as encouraging an esprit de corps among the police, although neither of these aims survived heightened scrutiny. The ACA cases all acknowledged public health and access to contraception as legitimate. In *Harris Funeral Homes*, the court discussed the issue at length – the general interest at stake was preventing workplace discrimination. What makes these interests "compelling" rather than merely legitimate, however, is their application "to the person" in the case; in other words, the necessity of applying the law in that instance. That element of the inquiry is described in Part II Chapter 1, and how courts have perceived and applied this form of necessity in the workplace cases will be discussed below.

C. Comparing the two approaches to legitimate state interests

While assessing legitimacy is not a usually a complex analysis for either court, several interesting points of comparison arise in terms of both process and results. Legitimacy is, for the most part, taken for granted by both courts, with the common exception of situations where there are reasons to believe that the state might harbor discriminatory intent. Evaluations of legitimacy in these cases are dealt with in a similar fashion and with similar results. The state may act to protect the rights of others, and this is broadly construed in both systems. Government motives must be unusually inappropriate to be considered illegitimate, although at times both US courts and the ECtHR have shown a willingness to blend the

[872] Priests for Life v. U.S. Dep't of Health and Hum. Servs. 772 F.3d 229, 260-261 (D.C. Cir. 2014).
[873] Priests for Life, 772 F.3d at 262-263.
[874] Tagore v. United States, 735 F.3d 324, 330 (5th Cir. 2013).

motives inquiry and the means/ends test when there has been no evidence that the state's concerns are genuine rather than hypothetical. Both make it part of the process to distinguish stated and actual aims of government measures, but the ECtHR has not been called upon to invalidate any workplace measures on this basis. Ultimately the inquiry in both courts is about filtering government measures for blatantly impermissible motives such as discrimination against religion.

The role of neutrality, however, is treated somewhat differently in procedural terms. Because of the *Smith* standard in US free exercise cases, the inquiry regarding neutrality is automatic, whereas it is less explicit in ECtHR cases unless undertaken under Article 14. As we have seen, however, the ECtHR has been reluctant to strike down European workplace measures on the grounds that they are motivated by an illegitimate discriminatory intent. This has been the case even in the oath cases, which are blatantly discriminatory against nonbelievers and in "veil bans," which even if sometimes couched in facially neutral terms clearly are intended to affect a specific religious practice. In *Buscarini v. San Marino*, for example, the court declined to decide on the legitimacy of the oath to be taken on the Bible since it violated Article 9 simply by compelling the affirmation of a particular religion.

While US free exercise cases focus on this issue more clearly, the result is not dissimilar. Findings that a measure is not neutral or generally applicable does not mean that the state's aim is not legitimate; it simply triggers a shift from a very permissive review to a very onerous one. In the ECtHR there is no need for an explicit neutrality review beyond filtering for actual animus or irrationality, since there is no bifurcated approach to review like in the US, with the exception of "very weighty reasons" review. In the context of religious freedom, however, the ECtHR's very weighty reasons test is applied more narrowly than the inquiry under *Smith*. Even in *Ladele*, the claimant accepted that nondiscrimination was a legitimate aim, and her attempt to use the very weighty reasons test was directed not at the legitimacy inquiry but as an argument that the means were disproportionate.[875] Religion has only recently been recognized as a suspect class for the application of the weighty reasons test, but in that case – *Vojnity v. Hungary*[876] – it is clear that the level of non-neutrality that triggers the test is much higher than general applicability in the *Smith* cases. It goes beyond the mere

[875] Eweida and Others v. the United Kingdom, nos. 48420/10 and 3 others, § 72, ECHR 2013 (extracts).
[876] Vojnity v. Hungary, no. 29617/07, 12 February 2013, http://hudoc.echr.coe.int/eng?i=001-116409.

existence of exemptions and focuses on different treatment clearly based on religious belief or manifestation.

With regard to general applicability, the US places greater emphasis on the existence of exceptions as a threshold inquiry, whereas in the ECtHR the existence of exceptions for non-religious reasons is less emphasized and is evaluated, if at all, as part of the necessity and proportionality phases. In short, neutrality and general applicability are relevant in the ECtHR inquiry, but do not trigger a higher level of review in religion cases unless extreme enough to warrant a very weighty reasons test (applied only once in a religion case so far). These concerns are instead simply taken into account in the balancing phase.

One more interesting point of comparison that may shed light on how these courts think about the relationship between religion and the state in the workplace is to look at the level of abstraction at which the courts define the state interest in each case. Both courts have affirmed that if there are multiple justifications for a measure, only one interest need be legitimate in order to move on to the next phase of balancing. Any given interest in the context of a specific legal conflict may be expressed in terms ranging from very abstract to very concrete. Where a specific statute in involved, the aim may be made quite explicit and there may not need to be much interpretation involved. But state action is often less explicit; laws, administrative regulations or other state measures, including contextual decisions taken by agents of the state in the public workplace, often invoke their objectives in the broadest of terms. What, for example, is the purpose behind the "Stop" sign at the end of my street? Public safety? Of course, but that is expressed at its highest level of abstraction. How about road safety? Preventing accidents? Preventing accidents at intersections? Preventing accidents at this particular intersection? None of these answers are wrong, of course, nor are they mutually exclusive. Nor does it matter much given that as state measures go, stop signs are relatively uncontentious. But when fundamental rights are involved and a court chooses one level of abstraction over another it may well affect the results of a balancing test.

In evaluating the purpose of workplace restrictions on religious manifestation the ECtHR has been somewhat inconsistent in its considerations of the level of abstraction on which it should interpret the state's objectives. The express limitations clauses offer a circumscribed list of purposes, but they are given at a high level of abstraction. As the workplace cases demonstrate, "protection of the rights of others" can be given as the reason for almost any

legislation. If a law does not serve to protect our fellow citizens, it probably should not be a law.[877] In practice, the Court does not always give its reasoning on this issue. When it does, the degree of detail offered in clarifying the specific aim has varied widely. In *Kurtulmuş*, the Court contents itself with alluding to the "rights of others." In other cases it has attached the broad abstract purpose to the details of the situation. In *Larissis*, the aim was given as "preventing disorder in the armed forces and thus protecting public safety and order."[878] In *Dahlab*, it was "denominational neutrality in schools and, more broadly, on that of religious harmony" (notice that here two different levels of abstraction are offered).[879] *Ebrahimian* goes into more detail, identifying not only the industry in question but also zeroing in on the specific case where "the purpose was to ensure respect for all of the religious beliefs and spiritual orientations held by the patients who were using the public service and were recipients of the requirement of neutrality imposed on the applicant, by guaranteeing them strict equality."[880] In *Fernandez Martinez*, the Court identified not only the goal of protecting religious freedom (rights of others), but specifically "those of the Catholic Church, and in particular its autonomy in respect of the choice of persons accredited to teach religious doctrine.[881]

US courts, on the other hand, do not have to link the purposes of state measures to any specific set of permissible aims; rather, they must simply make a case that the aim is rational and not in any way contrary to basic values like non-discrimination. In *Stormans*, for example, the aim was "ensuring that its citizens have safe and timely access to their lawful and lawfully prescribed medications."[882] In *Priests for Life* the goal was equally general but linked to the industry in question, i.e. maintaining a "sustainable system of taxes and subsidies under the ACA to advance public health.[883] However in strict scrutiny cases, for the state interest to be "compelling" rather than merely legitimate the Court must evaluate the importance of the objective "to the person" rather than merely its abstract value to society.

[877] Even seatbelt laws protect the rights of others in the sense that they reduce the medical costs of accidents that ultimately we all pay for in the form of higher insurance premiums or higher taxes.
[878] Larissis and Others v. Greece, 24 February 1998, § 43, Reports of Judgments and Decisions 1998-I.
[879] Dahlab v. Switzerland (dec.), no. 42393/98, ECHR 2001-V, p. 459.
[880] Ebrahimian v. France, no. 64846/11, § 53, ECHR 2015.
[881] Fernandez-Martinez v. Spain [GC], no. 56030/07, § 122, ECHR 2014 (extracts).
[882] Stormans Inc. v. Wiesman, 794 F.3d 1064, 1084 (9th Cir. 2015).
[883] Priests for Life v. U.S. Dep't of Health and Hum. Servs. 772 F.3d 229, 258 (D.C. Cir. 2014).

As this forms part of the evaluation of the importance of the aim rather than its legitimacy, it will be explored in more detail in Subsection 3 below.

Thus the main difference between the two courts is that the ECtHR is in theory bound to express limitation clauses whereas the US courts may adopt a more freeform inquiry. This difference, however, seem to have had little or no impact in how the courts have chosen a level of abstraction to define the state interests in the workplace cases. Both courts seem to be somewhat inconsistent in how closely they attach the state's objective to the specific situation. Sometimes it is hardly mentioned. Most of the time it is generally attached to the needs of a specific industry. And now and then the courts refer to multiple levels of analysis that may even include the individual employer. To the extent that the courts are not fully consistent in how the determine the appropriate level of abstraction, several theories may be put forward. One theory is that courts drill down to precisely the level of abstraction they need to reach an equitable result. This seems unconvincing with regard to the ECtHR inasmuch as their descriptions of the aim tend to amount to justifications of how the specific goal fits within the broad framework of the limitations clause. The Court in *Larissis*, for example, links order in the armed forces to public safety. In the US cases, the rational basis standard is low enough with regard to legitimacy that the court does not need to give a detailed justification of the state's objectives. When they do, the justification tends to be about the importance of the aim rather than its legitimacy. But a number of cases do show evidence of strategic thinking in how the interests are framed. In *Harris Funeral Homes*, for example, the funeral home argued that the relevant interest was "in forcing [the Funeral Home] to allow its male funeral directors to wear the uniform for female funeral directors while on the job."[884] The EEOC, however, framed the interest at a higher level of abstraction, namely "eradicating employment discrimination."[885] Likewise, in *Wheaton College* the claimants characterized the state's interest as being able to "use Wheaton College's health plans to distribute emergency contraceptive drugs."[886] However, this may well be attributable to the highly adversarial nature of American litigation rather than any ideological differences between the US courts and the ECtHR. Another theory to explain the relative inconsistencies

[884] EEOC v. R.G. &. G.R. Harris Funeral Homes Inc., 884 F.3d 560, 590 (6th Cir. 2018).
[885] Harris Funeral Homes, 884 F.3d at 590.
[886] Wheaton College v. Burwell, 791 F.3d 792, 795 (7th Cir. 2015)

in clearly establishing the level of abstraction in these cases is the notion that it is quite simply not possible to do so. This argument has been put forward by Lawrence Tribe, among others, in the context of defining rights rather than defining state interests, but its validity holds in either case.[887] While a detailed discussion of this reasoning is beyond the scope of this study, it is perhaps useful to consider that variations in the approach to defining state interest may simply be unavoidable and an inevitable feature of such decisions.

3. Measuring the importance of the state interest

A. ECtHR's minimalist review of state interests

As has been outlined in Chapter 1, once the ECtHR has identified an interference and a legitimate aim, the Court moves on to determine whether the measure is "necessary in a democratic society" to achieve that aim. This is a very flexible formula that, as will be explored below, can involve a variety of standards and rarely equates to what one might expect from a more colloquial use of the word "necessary." The inquiry generally must account for three issues: the importance of the state's objectives, the suitability of the means used to achieve those objectives (i.e. the means/ends fit), and a final proportionality inquiry into whether a "fair balance" has been struck between the competing interests at issue in the particular case. Some of the work of analyzing the importance of the state's objectives may already been done under the "legitimate aim" test. Legitimacy, however, does not necessarily entail sufficient importance to justify limiting fundamental rights, even if importance, especially when framed as being "compelling" or "necessary," would seem to entail legitimacy. Thus it is important to consider these questions individually.

However, in practice these elements of the analysis are often difficult to separate out, and in many cases the discussion of one element overlaps with or swallows the discussion of the other. For example, an irrational objective is by definition not legitimate. Thus in *Thlimmenos* the Court blended elements of legitimacy and rationality, arguing that the aim of the government was not legitimate because it was not deemed rational to punish a

[887] Laurence H. Tribe and Michael C. Dorf, *On Reading the Constitution*, (Cambridge: Harvard University Press, 1991), 73-80

conscientious objector who wanted to become an accountant when he had already been punished by the criminal justice system. Moreover, these elements at times go hand in hand with the means/ends element of the analysis. This is because the state's aim can be construed at various levels of abstraction and an evaluation of an objective in a specific context can be difficult to distinguish from that of the means used to achieve it since an aim may be legitimate in principle but irrational in the context of a given fact pattern. In *Larissis,* for example, the court distinguished the objective of protecting lower ranking military personnel from improper pressure from their superior officers, which it deemed "justified in principle," from its attempt to protect civilians from proselytism where the hierarchical relationship that gave sense to the measures no longer applied. In other words, the reasoning that justified the measure was not relevant, so the application of the measure did not serve any reasonable purpose.

The ECtHR is often quite cursory in evaluating the objectives of the state. In a number of the workplace cases the Court notes the rationality of the objective and moves on to discuss the means and whether a fair balance was struck between them. In these cases the "necessity" standard being used is closer to "useful" than to "indispensable" to take the terms used in *Handyside*.[888] In these cases the Court often expresses its adherence to this standard when it describes the interference as "justified in principle." Justified in principle can be taken to mean that the objective is rational and the means used could reasonably be deemed to further the state's interest in the situation, and is only used when the Court has given a wide margin of appreciation to the state. In these cases the Court's reasoning with regard to the state's objectives is generally very brief, noting that it accepts the government's aim or finds it "not unreasonable." Anyone used to the US system and rational basis review might expect such a standard to be fatal to the applicant, but the judgments in *Larissis* and *Thlimmenos* demonstrate that the ECtHR can be relatively rigorous in scrutinizing the reasoning of the state, more so than might be expected given the principle of subsidiarity. Similarly, in *Sodan v. Turkey,* the Court found that the interference could not be considered necessary in a democratic society in the case of the applicant because the government had offered no evidence that the applicant's belonging to a religious movement had in any way affected his

[888] Handyside v. the United Kingdom, 7 December 1976, § 48, Series A no. 24.

impartial performance of his duties. The government's aim must at least be rational in the context of the case, and rationality requires evidence.

Beyond mere legitimacy and rationality, the ECtHR's evaluation of the importance of the aim can be expressed in both absolute and relative terms. When evaluating aims in absolute terms, the Court sometimes makes appeals to general principles, usually in the context of asserting the centrality of a particular right to the general conception of a democratic society and thereby confirming the state's wide margin of appreciation. It has become a standard part of the ECtHR's rhetoric in Article 9 cases to quote or paraphrase *Kokkinakis v. Greece* where they affirmed religious freedom's place as "one of the foundations of a 'democratic society' within the meaning of the Convention" and to extoll its social value.[889] At times the Court is more context-specific in its exhortation of the importance of fundamental democratic principles. In *Macfarlane*, for example, the Court refers to "the need to maintain true religious pluralism, which was inherent to the concept of a democratic society."[890] In *Dahlab*, the Court repeatedly notes the importance of protecting children within the context of state education. More often, however, the Court simply acknowledges the aim to be legitimate or justified, or nods to the importance expressed by the lower courts. In *Ebrahimian*, for example, the Court notes that the lower court "had attached importance to the fragility of these users, and held that the requirement of neutrality imposed on the applicant was all the more pressing in that she was in contact with patients who were fragile or dependent."[891] Even in *Dahlab*, most of the discussion is about the argumentation of the lower courts rather than the ECtHR's own appraisal of the state interest. Otherwise, however, little is said in these cases about what is or is not an important aim in objective terms – a somewhat surprising position for a human rights court to take. The Court appears to accept the reasoning of the state, but it declines to explicitly say so.

Even the Court's evaluations of the state's objectives in relative terms, as part of an overall balancing with the countervailing rights and interests in the case, have been relatively modest. In many of the cases, mere legitimacy has been deemed to be enough to warrant a finding that the state was "not unreasonable" in limiting other rights in the specific context of the case. Even in cases where it accepts that objectives are of the highest importance to

[889] Kokkinakis v. Greece, 25 May 1993, § 31, Series A no. 260-A.
[890] Eweida and Others v. the United Kingdom, nos. 48420/10 and 3 others, § 73, ECHR 2013 (extracts).
[891] Ebrahimian v. France, no. 64846/11, § 61, ECHR 2015.

the state (in *Kurtulmuş*, the court noted that "upholding the principle of secularism is undoubtedly one of the fundamental principles of the Turkish State") the Court merely acknowledges that the measures were "justified in principle."[892] Thus while the lexical field used in the necessity phase point to a certain degree of importance or urgency – "*pressing* social need," and "*necessary* in a democratic society," – the Court has not stressed importance in applying these principles. More often than not it has been satisfied with the limitations being "justified in principle" or observing that the reasoning offered by the state or lower courts is "relevant and sufficient."

A closer look reveals that of 25 cases reviewed, only seven explicitly cited the "pressing social need" standard for necessity, and of those none went into further discussion about what might make a social need "pressing" apart from the state's assertion that it was. Far more cases – 15 of the 25 – identified the appropriate standard as being "justified in principle." Some of these cases refine that phrase by applying the relevant and sufficient standard. In the body of cases examined for this study it was used in only five cases – and in all those cases, no violation was found.[893] Other discussions of what it means to be "justified in principle" have been persistently vague. The Court expects "very weighty reasons" in cases of discrimination, thus that standard becomes relevant in cases that have included an Article 14 component. Of the cases examined, 15 contained an Article 14 claim, but the Court addressed the "very weighty reasons" standard in only two of them, and in neither case was the state held to a higher standard in terms of the importance of its objective. This is true in spite of the Court's assertion in *Vojnity* that discrimination on the basis of religion would be subjected to heightened review. Generally the very weighty reasons standard is applied only when the there is a suspect class of discrimination, but "suspectness" may vary depending on the gravity of the harm done. Gerards thus argues that in *Eweida* the test was not applied forcefully because the case involved religious expression which the Court may have felt did not implicate a core component of the applicant's faith.[894] In other words, the Court may well in such cases take centrality of belief into account in applying its standard of review.

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[892] Kurtulmuş v. Turkey (dec.), no. 65500/01, ECHR 2006-II, pp. 306-307.
[893] The cases were Fernandez-Martinez, Dahlab, Pitkevich, Steen and Grimmark.
[894] Janneke Gerards, "The Margin of Appreciation Doctrine, the Very Weighty Reasons Test and Grounds of Discrimination," in *The Principle of Discrimination and the European Convention of Human Rights*, ed. Marco Balboni (Naples: Editoriale Scientifica, 2017), forthcoming copy available at

All this is not to say, however, that the state's objective is not deemed of serious relevance in the ECtHR. Rather, it appears that the Court's practice is to avoid serious discussion of the weight of the state's objectives until the balancing phase. The significance of this is twofold. Firstly it serves to mask the details of the ECtHR's thinking. In the balancing phase it is much easier for the Court to simply conclude that the state measure was not disproportionate without any genuinely transparent process of weighing the relative values involved. Especially in conjunction with the margin of appreciation doctrine, this can help smooth over any criticisms of the Court's reasoning and, perhaps, protect it from rhetorical attacks on its legitimacy – an important consideration for a supra-national human rights body. Secondly, the deferral of evaluation of the state's objectives is important because it arguably diminishes the methodological rigor of the proportionality analysis as a whole. One of the purported virtues of proportionality analysis is that it provides a methodologically rigorous means for weighing rights and obligations. It is meant to add transparency and consistency to contentious legal cases involving fundamental rights. This benefit is significantly eroded when the court does all of the intellectual heavy lifting in an unstructured balancing discussion. Ironically, if this perceived evasiveness of the Court is indeed intended to preserve its sense of legitimacy, the Court may well be achieving precisely the opposite of its objective. The current state of ECtHR Article 9 jurisprudence as evidenced in the workplace cases is a kaleidoscopic array of various criteria inconsistently applied under the influence of a flexible and opaque margin of appreciation and veiled behind a largely unstructured balancing phase. It is not a system to inspire confidence.

B. US courts and the tiered review of state interests

The US approaches in these cases are likewise divided into a fractured landscape of criteria and tests. But if the ECtHR tests can be analogized to a kaleidoscope, the US tests are better characterized as a spectrum ranging from the minimalist demands of rational basis scrutiny through to the categorical exclusion of state interest inquiry in the ministerial

https://ssrn.com/abstract=2875230, 17.

exception cases. In cases treated with lower levels of scrutiny, the US approach is not dissimilar to the treatment of state objectives by the ECtHR in terms of lack of strictness or analytical rigor. It must be remembered that in the US Free Exercise cases governed by *Smith* the courts use a particularized form of rational basis scrutiny. The "rational" in "rational basis" refers both to the objective itself and to the connection between the means used and the ends sought. To qualify for this standard of review in religious freedom cases, the state's aims must first be subjected to a test of legitimacy. The benchmarks of legitimacy are that the law be neutral and generally applicable. Assuming these conditions are satisfied, there are few government objectives that will not qualify as "rational" so long as they have some purpose that can be framed in terms of promoting the citizens' general welfare. A legitimate aim is necessarily rational, and under *Smith* the aim need not be of any particular importance so long it serves some public good. With regard to importance rather than mere rationality, US courts have little to say in these cases. Whereas the ECtHR at times emphasizes the importance of fundamental values such as secularism or non-discrimination in order to justify its granting of a wide margin of appreciation, the US courts have no similar incentive to explain the importance of a state objective. So long as the measure is neutral and generally applicable, the US courts are free to be quite bland in their support of the government's aims. In these cases, rational really means rational and no more. In *Booth*, *Daniels*, *Fraternal Order* and *Stormans* the court in each instance merely acknowledges the legitimacy of the objective without elaborating further.

At the other end of the spectrum, ministerial exception cases have categorically excluded any discussion of the state's objectives, however important they may be. The state interest in workplace cases is usually the protection against discriminatory or other illicit dismissal of an employee. Therefore any inquiry with regard to the importance of the state's interest in such a case will necessarily involve scrutinizing the legitimacy of the adverse employment decision taken by the church. The ministerial exception acts as an affirmative defense that bars such an evaluation in cases where the employee is a minister. The defense is absolute once the employee is found to be a minister. As the Fifth Circuit argued in *Combs v. Central Texas Annual Conference*, it is difficult to imagine "how the federal judiciary could determine whether an employment decision concerning a minister was based on legitimate or illegitimate grounds without inserting [themselves] into a realm where the Constitution

forbids us to tread, the internal management of a church."[895] Various Circuit courts have argued over the absolute nature of the defense, particularly where employment decisions were made on clearly secular and impermissible grounds, arguing that in such cases Establishment Clause interests are less threatened and the vital state interest in combatting discrimination must take precedence. But the question was settled in 2012. Since *Hosanna-Tabor*, cases in which the exception has been applied – i.e. where the employee has indeed been found to be a minister - have universally ruled in favor of the religious organization without hearing arguments about the importance of the state's interest in the case.

This doctrine has no clear equivalent in the ECtHR where, in spite of its solicitude for church autonomy, the Court continues to take the gravity of the state interest into account. The judgment in *Fernandez-Martinez* offers a stark contrast in its mode of reasoning. The Court felt it necessary to conduct "an in-depth examination of the circumstances of the case and a thorough balancing exercise between the competing interests at stake"[896] – explicitly balancing "the applicant's right to his private and family life, on the one hand, and the right of religious organizations to autonomy, on the other."[897]

Some US courts have tried to narrow the attribution of ministerial status to employees who clearly preach the faith, inspired in part by an obvious frustration with the undermining of government objectives as vital as combatting discrimination. In *Biel v. St. James School*, for example, the Ninth Circuit's frustration with *Hosanna-Tabor* is palpable as it explained its refusal to consider Biel to be a minister. The Court argues that the ministerial exception "does not provide carte blanche to disregard antidiscrimination laws when it comes to other employees who do not serve a leadership role in the faith. We cannot read *Hosanna-Tabor* to exempt from federal employment law all those who intermingle religious and secular duties but who do not 'preach [their employers'] beliefs, teach their faith, . . . carry out their mission . . . [and] guide [their religious organization] on its way.'"[898] The fact pattern in *Biel* demonstrated particularly well the extreme nature of the Supreme Court's position. The case involved a grade-school teacher whose involvement with religious instruction was minimal;

[895] Combs v. Cent. Tex. Annual Conf. of the United Methodist Church, 173 F.3d 343, 350 (5th Cir. 1999).
[896] Fernandez-Martinez v. Spain [GC], no. 56030/07, § 132, ECHR 2014 (extracts).
[897] Fernandez-Martinez, § 123.
[898] Biel v. St. James Sch., 911 F.3d 603, 611 (9th Cir. 2018) (citing Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 196 (2012)).

Ms. Biel was fired for reasons clearly having nothing to do with the religious mission of the school, and the school administration openly admitted that they were dismissing her because it was inconvenient to renew her contract after she had taken time off for chemotherapy. As Justices Sotomayor and Ginsburg reiterated in their dissent in *Our Lady of Guadeloupe* in 2020, "the exception is extraordinarily potent: it gives an employer free rein to discriminate because of race, sex, pregnancy, age, disability, or other traits protected by law when selecting or firing their 'ministers,' even when the discrimination is wholly unrelated to the employer's religious beliefs or practices. That is, an employer need not cite or possess a religious reason at all; the ministerial exception even condones animus."[899]

In between these two extremes, however, US cases have been somewhat inconsistent; to misquote Gunther's famous maxim about strict scrutiny, the Court's application of tiered review in these cases has been "strict in theory, messy in fact." Firstly, in spite of the Supreme Court's decision in *Smith*, courts have in some cases found ways around the rigid dichotomy between permissive rational basis scrutiny and the exigent requirements of strict scrutiny. Like in some ministerial exception cases, one can at times sense the frustration of courts when their knowledge and experience are confined to determining whether the state's actions are manifestly irrational or are subjected to a standard so difficult that they risk permitting serious harm because religion is involved. In three cases in this study courts have deviated from the normally applicable rational basis or strict scrutiny: *Fraternal Order of Police, Berry and Brown.* In *Fraternal Order of Police*, the Court found the application of the no-beards policy non-neutral; however, instead of applying strict scrutiny as mandated by *Smith* it chose, quite self-consciously, to apply intermediate scrutiny. Intermediate scrutiny does not normally have a role in free exercise cases, and the reasoning of the Court in *Fraternal Order of Police* in applying this standard is unclear; Judge Alito (later to become Supreme Court Justice Alito) merely comments in a footnote that the Court "will assume that an intermediate level of scrutiny applies since this case arose in the public employment context and since the Department's actions cannot survive even that level of scrutiny."[900] The interest cited by the police department was to "convey the image of a 'monolithic, highly

[899] Our Lady of Guadelupe School v. Morrissey-Berru, No. 19-267, slip op, Opinion of Sotomayor, J., dissenting at 3 (U.S. Jul. 8, 2020).
[900] Fraternal Ord. of Police Newark Lodge No. 12 v. City of Newark, 170 F.3d 359, 367n7 (3d Cir. 1999).

disciplined force'" and to offer a "sense of security" to the public in a police force constituted by "readily identifiable and trusted public servants."[901] The Court did not contest the importance of this objective; however, because the objective must be evaluated in the specific context of the case under intermediate scrutiny, Alito concluded that "[t]he Department has not offered any interest in defense of its policy that is able to withstand any form of heightened scrutiny." The general interest may be important, but under heightened scrutiny it must be important as applied to the employee. Specifically, the police department could not in this case produce any evidence to explain why *this* beard worn for *this* religious reason would threaten these interests any more than beards worn for medical reasons. This result would have been no different under strict scrutiny, but arguably the Court was uncomfortable with the notion that in the public employment context only "compelling" interests would stand if strict scrutiny were applied. In other words, the Court concluded that strict scrutiny was a little too strict if applied in cases of public services like the police. Supreme Court practice seems to confirm this position, as the Court has rarely applied strict scrutiny in government employment cases.[902]

In both *Berry* and *Brown* the courts found that the state action in question was neutral and generally applicable and therefore subject to minimal rational basis scrutiny. Both chose a higher standard than mere rational basis scrutiny by applying the principles laid out in Pickering in the context of speech in the government workplace. The *Pickering* test is "essentially a structured intermediate scrutiny where the interests have been preset."[903] The interest of the state employer is predefined as "promoting the efficiency of the public services it performs through its employees."[904] Thus the test is somewhat closer to ECtHR proportionality in that it calls for a genuine balancing of interest rather than adherence to categorical benchmarks. In *Brown*, the Eighth Circuit went out on a limb in applying a *Pickering*-like test outside the context of government employee speech. The Court explained that "an analysis like the one enunciated in *Pickering*" was appropriate "because the analogy [between government employee speech and government employee free exercise] is such a close one, and because [the court could see] no essential relevant differences between those

[901] Fraternal Ord. of Police, 170 F.3d at 366.
[902] See Berry v. Dep't of Soc. Servs., 447 F.3d 642, 649n5 (9th Cir. 2006).
[903] Corbin, "Government Employee Religions," 1236 (n210).
[904] Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968).

rights."[905] However, the situation was complicated by the presence of a Title VII claim in addition to the free exercise claim, and some of the discussion of the state's interest in the case is presented in the discussion concerning whether the employer would face an "undue burden" by accommodating Mr. Brown. In that discussion, the court noted crucially that the problems feared by the employer if they accommodated the employee were too "hypothetical" to qualify as an undue burden for the purposes of Title VII.[906] When turning to the free exercise claim, the court then used this finding to show that there was insufficient state interest at stake to qualify under the *Pickering* test since the record showed "no diminution whatever in the effectiveness of governmental functions fairly attributable to anything that Mr. Brown did."[907] Such concerns may be rational, but they could not be deemed important enough to survive the Pickering variant of intermediate scrutiny.

In *Berry* the situation more clearly demanded the application of *Pickering*; the religious exercise in question was highly expressive in nature and thus the Court was obliged, faced with two possible standards, to choose the higher speech-related level of scrutiny. The importance of the differing standard of review is very much on display in this case since some of the conduct was clearly expressive and some was not. Moreover, the Establishment Clause was especially implicated since Mr. Berry was discussing religion with clients (in contrast to Mr. Brown, whose activities only affected fellow staff members), prompting the Court to note that Establishment Clause concerns can qualify as a compelling interest for a state employer.[908] Unsurprisingly in this regard, Mr. Berry's claim did not survive even the *Pickering* standard; the Court ruled that the Department's need to avoid Establishment Clause violations – particularly avoiding any appearance of a government endorsement of religion to the public – was an important objective and outweighed his free exercise and free speech rights.[909]

In the strict scrutiny cases, however, an important objective is not enough. The state interest in these cases – either under RFRA (for measures by the federal government) or when the state measures are found to be non-neutral of generally applicable - must be compelling,

[905] Brown v. Polk Cnty., 61 F.3d 650, 658 (8th Cir. 1995).

[906] Brown, 61 F.3d at 657.
[907] Brown, 61 F.3d at 658.
[908] Berry v. Dep't of Soc. Servs., 447 F.3d 642, 651-652 (9th Cir. 2006).
[909] Berry, 447 F.3d at 650.

and as explained in Part II Chapter 1 this is meant to be a very exigent standard to meet, certainly much more so than the necessity standard used by the ECtHR. It is meant to involve combatting "only the gravest abuses endangering paramount interests."[910] In the workplace cases explored for this study strict scrutiny is applied surprisingly rarely. This is the case in large part because so many of the workplace cases either implicated the ministerial exception or the ACA contraceptive mandate. In the ministerial exception cases, as discussed above, the court's inquiry ends when they have determined that the employee is a minister. Of these cases, only in *Harris Funeral Homes* did the court reject the characterization of the employee as a minister and move on to explore the state's objectives (the ministerial exception argument, to be fair, was a long shot). And while the ACA cases were decided under RFRA, the compelling interest test was not applied in most of the Circuit Court cases because there was broad consensus among those courts that the complicity arguments put forward by the religious non-profits in question did not mee the "substantial burden" requirement of the test given the nature of the accommodation that had been put into place. Of the remaining cases, seven were decided under the Free Exercise Clause using the *Smith* standard.

This leaves us with five cases in which the court needed or chose to conduct a RFRA strict scrutiny analysis, and in all of them the government's broadly-framed interest was found to be compelling. In *Hobby Lobby* the Supreme Court accepts without discussion that "guaranteeing cost-free access to the four challenged contraceptive methods is compelling within the meaning of RFRA."[911] However, as outlined in Part II Chapter 1, courts must not only consider "broadly formulated interests" but rather must "scrutiniz[e] the asserted harm of granting specific exemptions to particular religious claimants."[912] This means that the courts must "look to the marginal interest in enforcing the contraceptive mandate in these cases."[913] Nevertheless in *Hobby Lobby* the court found this step unnecessary because they decided the case on the basis of the least restrictive means test. The Sixth Circuit in *Notre Dame v. Burwell* merely recited *Hobby Lobby's* conclusion although their finding for the government makes the approach somewhat more suspect. The Court in *Hobby Lobby* felt

[910] Sherbert v. Verner, 374 U.S. 398, 406 (1963).
[911] Burwell v. Hobby Lobby Stores Inc., 573 U.S. 682, 728 (2014).
[912] Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 431 (2006).
[913] Hobby Lobby, 573 U.S. at 726-727.

they did not need to go into detail about the state interest because the decisive argument was to be found in the least restrictive means test. The Court in *Notre Dame* had no such excuse.

This "to the person" component of RFRA strict scrutiny is applied by courts variously at the compelling interest phase, the least restrictive means phase, or both.[914] In *Tagore*, it was applied in the compelling interest phase and was decisive. The broad goal of protecting federal buildings and employees was deemed "surely" compelling, and the court noted that in such a case the government's judgment regarding the safe length of a kirpan merited "significant deference." The government offered evidence that case by case exemptions would not be practical, but they then undermined their own argument by subsequently changing their policy and allowing individualized exemptions. Thus, the court noted, the state interest was not compelling when applied to the person.[915] In *Harris Funeral Homes* the court likewise had little trouble identifying the goal of combatting discrimination as a compelling interest. Moreover, the Court explained that the interest was compelling in the particular case because an accommodation for Harris would lead to precisely the harm for his employee as is being targeted by Title VII in the first place. Finally, in *Priests for Life* the court expanded on the difficulty of distinguishing what counts as a compelling interest from other interests. It observed that "certain touchstones aid our analysis. Interests in public health, safety, and welfare—and the viability of public programs that guard those interests—may qualify as compelling, as may legislative measures to protect and promote women's well-being and remedy the extent to which health insurance has not served women's specific health needs as fully as those of men.[916] In this case the court identified the interest "in a sustainable system of taxes and subsidies under the ACA to advance public health" as a clearly compelling interest.[917] The court justified its finding in detail by examining specific elements of this interest and citing studies and to the Congressional Record as evidence, noting the importance of contraceptive coverage for public health as well as the effects of such coverage on women's social and economic equality.[918] It did not consider the interest

[914] Tanner Bean, "'To the Person': RFRA's Blueprint," 1.
[915] The similarity to the judgment in *Eweida* is striking, and while the approach is logically consistent, the public policy implications of punishing employers for finding a compromise during litigation are potentially troubling.
[916] Priests for Life v. U.S. Dep't of Health and Hum. Servs. 772 F.3d 229, 258 (D.C. Cir. 2014).
[917] Priests for Life, 772 F.3d at 258.
[918] Priests for Life, 772 F.3d at 259-264.

"to the person" at this stage, however, instead incorporating that element of the analysis into its discussion of the least restrictive means test.

C. Contrasting approaches with some common ground

The US intermediate scrutiny cases by and large present less of a contrast with their ECtHR counterparts than those analyzed under other forms of scrutiny. Neither court is particularly voluble in its elaboration of precisely why the state interests are or are not important enough to merit restricting a fundamental right like freedom of religion. But since intermediate scrutiny involves a genuine balancing that is largely absent from other US cases, the evaluation of state interest tends to be more detailed than in rational basis or ministerial exception cases. The discussions are not dissimilar to those put forward by European governments and accepted or rejected by the ECtHR. Both systems place a high value on specific government objectives and tend to spend time elaborating why those interests matter enough to carry the day in court. In the ECtHR workplace cases, state secularism and neutrality concerns are perhaps the most widely discussed and vigorously defended state interest largely because of the predominance of cases involving government employment. Thus the opinions in cases like *Ebrahimian* and *Ladele* justify the importance of the state aim similarly to the US intermediate scrutiny cases – rather than simply asserting that the state has a rational objective, they elaborate on why that value matters. The main difference is that the US cases face a clearer requirement to evaluate the objective in the specific context of the case (as in *Brown* and *Fraternal Order of Police*), while the ECtHR tends to content itself with approving state objectives expressed at a higher level of abstraction. An exception appears when there is no real evidence of harm to the state interest in the particular circumstances. But the ECtHR is inconsistent in this regard; in *Dahlab* the court accepted generalized concerns, whereas the existence of evidence was taken as important in *Eweida*, *Chaplin* and *Thlimmenos*. This difference should not be overstated, however, since in other US cases (such as *Berry*) the courts have been willing to entertain more abstract claims about possible or probable harm without direct evidence. And whereas overall the US has struggled to identify various specialized tests or standards in the government employment context, the

ECtHR has been able to content itself mostly with using the margin of appreciation as an overarching logic to explain its decisions protecting the state in cases where government employees' religious requirements risk undermining state neutrality.

In conclusion, there are significant differences between the ECtHR and the US courts not so much in what state interests they find compelling so much as how they go about the analysis itself. Both courts take a broad view of the role of government in its interactions with both the workplace and religion. Both are deferential when it comes to state neutrality and efficiency in providing government services as well as in contexts where governments are seeking to combat workplace discrimination or promote public health and safety. Both set limits on the extent to which the state may interfere with the autonomy of religious organizations, although the US is much stricter in this regard than the ECtHR. The differences in analytical approaches are more marked, however, and are important in both a rhetorical and a structural sense. Rhetorically, in the various discussions of state interest we see widely differing approaches to transparency of legal reasoning. The ECtHR treatment of state interest is quite cursory when explicit – often reciting what have become platitudes from previous decisions in a formulaic manner - and maddeningly opaque when, as is usually the case, it is blended with discussions of the means. The overall evaluation of the importance of state interest is often indistinguishable from legitimacy, and in fact the legitimacy discussion is often deemed to suffice in the court's justification of a measure as a "pressing social need" insofar as that standard implicates the aim as opposed to the means used to achieve it. The US courts, however, are far more expansive in their reasoning with regard to state objectives when they are discussed. Both courts give a certain degree of importance to evidence in their analysis, but the US judges seem more consistent and more thorough in their evidentiary discussions than their ECtHR counterparts. Arguably, the analysis of state objectives in this body of cases suggests differing levels of commitment to clarity, to detail, and to keeping judicial decisions closely tethered to the legislative process and to democratic accountability. The US courts are playing to a single domestic audience; the ECtHR seems more like it is trying to stay out of trouble.

However, some of the rhetorical differences in argumentation between the two courts can be linked to the broader structural differences in their approaches to balancing. Specifically, tiered review's framework of categorical reasoning has a strong influence on

the argumentation of US court decisions. In ministerial exception cases the effect is readily apparent; the only discussion of state objectives, if there is one at all, is about how they are irrelevant. Such a position is uncommon in Article 9 cases because the ECtHR, by tacitly adopting a proportionality-based approach, has by and large eschewed categorical analysis. A rare example of dismissing the relevance of evaluating the importance of the state's objectives comes in the oath cases. In *Buscarini,* after a brief discussion of San Marino's history and the reasoning for requiring an oath on the Bible, the Court noted somewhat curtly that the requirement "to swear allegiance to a particular religion… is not compatible with Article 9 of the Convention."[919] Noticeably the courts' rhetoric is most similar when the US is applying intermediate scrutiny, since in those cases the standard is quite similar to what the ECtHR applies in practice, if not in theory. When the US courts apply strict scrutiny, however, the finding of a compelling governmental interest requires more elaborate justification, not only because the standard is in theory stricter but also because the result can be dispositive of the outcome of the case. There is more at stake in the compelling state interest test than in its equivalent in the ECtHR, where there is no similar cleavage between different tiers of review in Article 9 cases. The ECtHR's necessity, pressing social need, very weighty reasons, and relevant and sufficient tests simply do not pull as much weight as their US counterparts. So long as the government's aim is legitimate, the ECtHR is still free to come to what it deems the correct conclusion of the case in the unstructured balancing portion of the analysis. The case gets resolved in a holistic analysis and at times the importance of the state's interest seems to be acknowledged as a necessary but unimportant step in writing the decision rather than a genuine analytical component of the decision-making process. This also explains the greater focus in US cases on providing evidence for the state's compelling interest.

In neither court is the importance of a broadly construed state interest often a decisive factor in the case. If anything, in both systems it is a hurdle to overcome before the specific means of achieving the goal are analyzed. State aims in passing laws that limit religious freedom in the workplace are usually important enough to merit serious consideration. Where many state measures fail to pass muster, however, is in the fit between the means and the ends. It is to this factor in the analysis we now turn.

[919] Buscarini and Others v. San Marino [GC], no. 24645/94, § 39, ECHR 1999-I.

II. COMPARING METHODOLOGIES OF EVALUATING THE RELATIONSHIP BETWEEN THE INTERESTS OF THE PARTIES

1. Assessing the means/ends relationship

Once courts reach this stage of the analysis they have, in theory at least, a full picture of the interests of all parties to the dispute. They have looked at the severity of the harm done to the religious interests of the individual or community whose free exercise is being limited, and they have evaluated how important it is to the state to be able to circumscribe that behavior. What remains is an evaluation of the specific means used to achieve the state's objective. This can involve looking at a law as it is written or analyzing a particular measure taken to implement that law in a specific situation. Both the US and the ECtHR have embraced the notion that when a state measure places a limitation on religious freedom the measure must be evaluated with respect to the specific case at hand and not in a generalized fashion. In cases where a reasonable accommodation is feasible, the focus of the accommodation inquiry is on whether the measure is necessary for this specific individual. If there is no feasible accommodation, the inquiry will focus on the validity of the measure itself.

However, when looking at the means used to achieve the state's objectives, there are in fact two comparative exercises that must be undertaken. The first component of balancing is the relationship between the means and the state interest, i.e. whether the measure itself is an efficient and effective (or in ECtHR parlance, "relevant and sufficient") way of actually achieving the result. This is often referred to as the "means/ends relationship." Secondly and perhaps even more intuitively, balancing involves weighing the interests of the parties. Put in more precise terms, balancing is a comparison between the severity of the "substantial burden on" or "interference with" religious liberty on the one hand and the importance of the state's objective on the other (as a "compelling interest" or an objective that is "necessary in a democratic society.") Such balancing is an evaluation of the goal with regard to the harm inflicted by pursuing it with reference to a particular individual or organization. We can call this the ends/burden relationship, but the relationship between the ends and the burden only will make sense in light of the means being used to achieve those ends. Since, in contrast to

US practice, the balancing phase as undertaken by the ECtHR takes all three elements into consideration, we will use the awkward but more accurate term "means/ends/burden relationship" to describe this final balance. These inquiries play somewhat different roles in the treatment of religious freedom cases in the US and ECtHR.

The means/ends analysis breaks down into two fundamental issues: suitability and tailoring. The question of suitability involves checking that the measure really does advance the state interest it was designed for. It may be because it directly achieves the objective; for example, in *Harris Funeral Homes* the antidiscrimination law as applied to Mr. Harris really did stop discrimination as it was intended to do. Or the measure may advance the state interest as applied to the individual because the cost of *not* applying it would thwart the state interest in some way, perhaps because managing a system of exemptions is deemed impractical even if it would create a more just result for a few people. Either way this can be seen as an extension of the rationality test with regard to state interests; not only must the aim be legitimate and rational, but there must be a rational basis for believing that the precise measures will actually advance that aim. Secondly, courts must address the question of tailoring – is the measure unnecessarily broad or punitive in the circumstances? Is there some other way of getting the state's work done without inflicting harm on religious interests?

A. ECtHR's deferential stance regarding the means/ends relationship

In ECtHR proportionality analysis, these questions are implicitly raised in the democratic necessity test. Democratic necessity means a "pressing social need," and that need is defined as both the overarching objective and the specific measures used to achieve it. The need for a specific measure is not pressing if the objective can be achieved in other ways. The "relevant and sufficient" test is geared mostly towards the justification for the measure rather than the measure itself; however, if a measure does not serve the state's objective or is needlessly overinclusive or underinclusive, then the lower courts' reasoning is unlikely to be sufficient to justify the law. The "relevant" aspect of the test functions to test the rationality of relationship between means and ends. "Sufficient," on the other hand, is essentially a balancing test except that it is "more focused on the question of whether the

restriction actually and reasonably served to achieve the aims pursued."[920] Once the means are determined to be to suitable to the ends, the ECtHR generally takes all the preceding factors into account in balancing the interests, i.e., in determining whether the sacrifices being demanded of the religious claimant are excessive in relation to the service rendered to the state interests being served by limiting his/her free exercise. In the US courts, these questions are asked more explicitly in the various tiers of review. In all three tiers the measure must be at least rationally related to the state interest. Heightened review requires a closer relation and more narrow tailoring, especially at the strict scrutiny level where it must be the "least restrictive means" possible. In US cases, the means/ends fit is dispositive – if the state measures achieve the appropriate degree of fit then the law survives scrutiny. There is no formal balancing phase, although in intermediate scrutiny the entire process can come quite close to holistic balancing.

In the ECtHR, we see once again that the appropriateness of the means is often only vaguely distinguished, if at all, from the holistic balancing phase. Even in some cases that might be expected to be "hard cases," the ECtHR at times contents itself with reciting the arguments of each side and then simply affirming a finding of proportionality without any serious exploration of the means/ends fit. In *Ladele*, for example, the situation was complex and there were mitigating factors that were seemingly not given much weight by the court. The judgment recites some of this in the background to the case, but offers no comment on the means used to promote Islington Council's "equality for all" policy – i.e. refusing any accommodation for Ms. Ladele such as not assigning her civil marriage cases. – other than an assertion that it was not disproportionate. This was a lost opportunity for the court to clarify its view on the narrow tailoring of means to ends, and unfortunately the discussion was left to the dissent, who point out that an accommodation was both legally permissible and practically feasible since there had been no complaints from service users.[921] Likewise in *Pichon and Sajous* the Court does not question the means used to ensure access to prescriptions. In *Kurtulmuş* the Court deemed the "veil ban" justified by the state's legitimate aim in preserving neutrality in state education. In *Kosteski*, the Court merely observes that

[920] Gerards, *General Principles,* 241.
[921] Eweida and Others. v. the United Kindgom, nos. 48420/10 and 3 others, Joint Partly Dissenting Opinion of Judges Vučinič and de Gaetano, §§ 5-6, ECHR 2013 (extracts).

the means were not unreasonable. In each of these cases the Court viewed the means as plainly reasonable in pursuit of the legitimate aim, thus rather than engage in a lengthy discussion of why the means were appropriate the Court simply shifts the analysis into the holistic balancing phase.

A focus on the workplace cases where the court found a violation of Article 9 or a related article reveals how limited the ECtHR inquiry into the means/ends relationship can be. In these cases, one might expect to find a deeper discussion of the means/ends relationship, but in most of these cases other factors took precedence. In *Thlimmenos* the court found no legitimate aim, but its finding was based at least in part on reasoning that there was "no reasonable justification" for the law in terms of promoting its objective (punishment for refusing to serve in the military) since that objective had already been achieved through a prison sentence. Thus here we see a situation in which the means were not suited to the objective, but where the Court framed the question in terms of the legitimacy of the aim. In *Schüth* and *Lombardi* the Court focused its attention on the inadequacy of procedural safeguards considered in light of the means/ends/burden relationship (to be discussed below). Likewise in *Sodan* the Court's analysis rests more on the disproportionate relationship between the sanction and the burden on religious freedom than on the means/ends relationship – the authorities in this instance were simply targeting behavior that they had no right to target, i.e. matters intimate to the claimant's private life. Only in *Eweida* does the court clearly find the means (a uniform policy with no accommodation for religious symbols) not necessary to achieving the objective (corporate image) because BA undermined its own evidence to the contrary by later changing their policy. While the workplace cases are only a sampling of the entire range of Article 9 cases, this body of judgments does suggest that the means/ends relationship tends to be occluded by the other elements of the proportionality analysis. The fact that to date the Court has still very rarely applied a true least restrictive means test in religion cases bears this out.[922]

In positive obligation cases, the ECtHR cannot as easily apply the various steps of proportionality since the text of the Convention, and the democratic necessity test that is

[922] For a fuller discussion of the court's less restrictive means test, see Laurens Lavrysen, "On Sledgehammers and Nutcrackers: Recent Developments in the Court's Less Restrictive Means Doctrine," *Strasbourg Observers* (blog), 20 June 2018, https://strasbourgobservers.com/2018/06/20/on-sledgehammers-and-nutcrackers-recent-developments-in-the-courts-less-restrictive-means-doctrine/.

derived from it, is geared more towards direct state action than the actions of private parties.[923] The analysis of the means/ends fit become confusing in these cases, since the court is in a sense evaluating both the means used by the private parties to achieve private ends (corporate image, diversity policies or religious autonomy in these cases) *and* the procedural protections put in place by the government in order to protect Convention rights. The "relevant and sufficient" test has played an important role in these cases. In *Obst* the Court concludes that the national courts sufficiently review the case and that their conclusions were not unreasonable, carefully noting that the means (dismissal without prior warning) was justified by the gravity of adultery as a sin in the Mormon faith and the duty of loyalty owed by the employee. Implicit in this decision is the idea that when an infraction is sufficiently serious in the eyes of the church, it is reasonable to conclude that a warning would not suffice in achieving the aim of maintaining the church's credibility. But the crux of the decision is not that the judgment of the lower courts is correct; rather, it is that the judgment is not so unreasonable as to signal a lack of oversight that would constitute a violation by the state of its positive obligations under the Convention. In *Siebenhaar* the Court takes even more of a distance from the facts of the case, reciting in detail the steps taken by the lower courts, determining that their conclusions were "not unreasonable," and concluding that the German courts had fulfilled their positive obligations under the Convention.

In *Schüth* there is a detailed evaluation of the suitability of the decision to fire the claimant rather than take other disciplinary action. The court acknowledges that the claimant has a duty of loyalty to the church, but the essence of the decision appears to lie in the fact that the lower courts did not sufficiently consider the means used to discipline him for breaching that duty under these circumstances. Whatever national law says on the subject, the Convention requires consideration of the means used and how suitable they are for protecting the church's interest in credibility while at the same time offering sufficient procedural guarantees of Convention rights, including the observance of a detailed balancing review. For this reason, the court essentially passes judgment on the fairness of the decision and concludes that the national courts did not provide relevant and sufficient reasons for the dismissal. The essence of the balance is not so much about the state interest or the interest of the church employer – those considerations are most relevant to determining the margin of

[923] Gerards, *General Principles,* 110.

appreciation (usually wide in cases involving the regulation of church/state relations). Rather, the court focusses on whether the means are appropriate to achieving the objective given the weight of the burden to the claimant. The balance is holistic, but in this decision one can see the various considerations at work. In *Eweida v. UK* the court focusses less on procedural adequacy and seems dangerously close to acting as a court of fourth instance. In this case the limitation on religious liberty was intended to pursue the legitimate aim of protecting BA's image, but the means were not necessary to achieve it (as evidenced by BA's willingness to modify its uniform policy to accommodate Ms. Eweida). Curiously, the ECtHR held that UK had "failed sufficiently to protect" Ms. Eweida's Article 9 rights by permitting the limitation to occur in the first place.[924] Such uniform policies are not uncommon and there was no European consensus against them, so it is unusual that the ECtHR found the UK courts' conclusion, arrived at through a normal balancing process, to be so disproportionate as to constitute a failure of the state's positive obligation. This difference may be better explained by the nature of the rights in conflict, to be discussed below.

Criticism of the means/ends relationship is particularly scarce in cases involving state employers. This is largely due to the nature of the challenge to the limitations. In *Eweida* an accommodation was easy to achieve because the means were overinclusive and the ends could be met sufficiently even with a religious exemption. In cases involving state neutrality and religious symbols in the public workplace, however, accommodation in a particular instance is rarely a logical option since the point of the measure is precisely to exclude the cross, the veil, etc. The means in such circumstances are difficult to tailor more narrowly while still achieving the aim. In practice, this has been the case with veils more than with crosses. In *Ebrahimian*, *Dahlab*, and *Kurtulmuş* there is no logical middle ground, as there is no particular reason why these claimants are different from any other employee who wants to wear a veil in that workplace. The only other option would be to say that accommodations would be granted until someone complained, but such a position would potentially raise other public interest issues. Thus in such cases the means/ends inquiry, although nominally relating to the situation of the individual in question, is in fact focused on the law itself. Is banning headscarves in the public services a suitable means of achieving the state interest in neutrality and the protection of the rights of others? In either case the outcome applies to everyone.

[924] Eweida and Others v. the United Kingdom, nos. 48420/10 and 3 others, § 99, ECHR 2013 (extracts).

That said, while judges do go into some detail on the particular risks associated with teachers or medical staff due to the vulnerability of the public with whom they interact, the veil cases offer little consideration of other options that might protect the public from undue influence or pressure. One can imagine a few creative approaches like a uniform head covering as an optional accessory.[925] However, because the Court gives a wide margin of appreciation in such circumstances, it does not try to closely second-guess how hospitals choose to enforce religious neutrality in the workplace so long as the result is not disproportionate. This highlights the fact that the ECtHR does not usually employ a least restrictive means test; rather, it looks to whether the means are reasonably tailored to the needs and ultimately whether the tradeoff is fair in relation to the importance of the aim. With an aim like state neutrality, the means would have to be excessive or discriminatory before the ECtHR would be likely to challenge them.

B. The means/ends fit in US courts: a wide range of standards

In US rational basis review, the inquiry is quite similar to the ECtHR standard of a reasonable relationship between the means and ends, and as in ECtHR cases where the margin of appreciation is wide, the burden of proof lies with the claimant regarding the rationality of the means/ends relationship. And like the ECtHR, US courts tend to be very succinct in their determinations of rationality. The Ninth Circuit's opinion in *Stormans v. Wiesman* offers a succinct summary of the means/ends inquiry: "Under rational basis review, we must uphold the rules if they are rationally related to a legitimate governmental purpose. Plaintiffs 'have the burden to negat[e] every conceivable basis which might support [the rules],' a burden that they have failed to meet."[926] Likewise in the other cases subject entirely or in part to rational basis review – *Booth, Daniels, Berry*, and *Little Sisters of the Poor*, the

[925] A Google search of "nurse uniform 1900" reveals a plethora of possible head coverings for nurses, some with Christian overtones, others quite neutral in appearance. Presumably it would be possible to offer a few options that would respond to religious strictures regarding modesty while at the same time not appearing to have religious connotations. See https://www.google.com/search?q=nurse+uniform+1900&sxsrf=ALeKk03IzhYT4KJ9tUe5O8idw3NB3RZfuw:1624884742402&source=lnms&tbm=isch&sa=X&ved=2ahUKEwjdrfyur7rxAhXkAWMBHVD2CHcQ_AUoAXoECAEQBA&biw=1232&bih=631.

[926] Stormans Inc. v. Wiesman, 794 F.3d 1064, 1084 (9th Cir. 2015).

courts have briefly affirmed that the measures are rationally related to a legitimate interest without justification.

Under cases where an intermediate form of scrutiny was applied as in the modified *Pickering* test, the examination of the means/ends relationship takes on a bit more substance. The *Pickering* test itself does not necessarily require anything more than a rational relationship between the means and ends, but in practice its balancing test generally means that the state must demonstrate a connection strong enough to outweigh the limitation on the employee's right to free expression. The way in which that is applied has varied among the cases in this study, partly because of the inherent vagueness of the role of the means/ends relationship in the overall balance and partly because the courts in these cases were adapting the *Pickering* test to a context different from that of the original case. In *Berry*, where the test was most clearly applicable, the court contented itself with a rationality review (although obliging him to remove religious items from his cubicle in order to avoid Establishment Clause concerns would also likely have survived higher levels of scrutiny). Likewise in *Daniels*, the standard for the means/ends test was mere rationality, and in addition the Court noted that police anti-adornment policies are entitled to deference in the *Pickering* balance.[927] Thus *Pickering* is a higher standard than rational basis review, but it does not carry with it any specific requirement concerning the means/ends relationship. The test is best seen as an unstructured balancing test not dissimilar to that employed by the ECtHR except that the interests being balanced are predefined as the employee's free expression on issues of public concern against the state's interest in efficiency.

In *Brown* and *Fraternal Order of Police*, however, a somewhat different standard more akin to classic intermediate scrutiny was applied. After suggesting that *Pickering* served as a model in such cases, the court in *Brown* proceeded to evaluate whether the measures taken against the plaintiff were "reasonably related and narrowly tailored" to the government's interest in avoiding Establishment Clause issues.[928] It held that ordering Mr. Brown to "cease any activities that could be considered to be religious proselytizing, witnessing, or counseling" was clearly not narrowly tailored, nor was forbidding him to keep any items with religious connotations in his office (importantly, unlike in *Berry*, in this case the plaintiff did

[927] Daniels v. City of Arlington, 246 F.3d 500, 504 (5th Cir. 2001).
[928] Brown v. Polk Cnty., 61 F.3d 650, 658-659 (8th Cir. 1995).

not receive the general public in his cubicle).[929] In *Fraternal Order of Police*, the court explicitly applied intermediate scrutiny, and the means/ends relationship was dispositive. It held that the no-beards policy was not tailored to serve the interest of safety since the police department could provide no evidence of why religious beards posed a more serious threat to safety than did beards worn for religious reasons.[930] The burden of proof as to the means/ends fit was put upon the state employer in this case, and at least some showing of an effort to tailor the means narrowly to the ends was required (and found lacking). These cases thus require a much clearer and more exigent analysis of the means/ends relationship than the ECtHR cases without requiring the much more difficult standard of strict scrutiny. This approach, however, is not the norm for religious freedom cases and these cases must be viewed as outliers.

Finally, in strict scrutiny cases, the least restrictive means test is meant to be "exceptionally demanding."[931] While strict scrutiny may indeed be less strict than often claimed, to the extent that is a difficult standard to meet, it is the least restrictive means test that has the greatest potential to make it so. In this study there were surprisingly few strict scrutiny cases. This is explained by RFRA's limited reach but even more by the number of "no burden" rulings by circuit courts in ACA challenges (cases which themselves were consolidated cases that included several appeals of similarly situated organizations within the same judicial circuit. These cases – *Priests for Life, Wheaton College, Geneva College, East Texas Baptist and Notre Dame* – were all remanded by the Supreme Court in light of supplementary briefings confirming that a less restrictive means of achieving the federal government's objectives was available.[932] While the Supreme Court pointedly refused to rule on the substantial burden or least restrictive means elements of the case, the existence of a feasible alternative that was more acceptable to the religious nonprofits suggests that the least restrictive means inquiry would end in defeat for the existing accommodation.[933] When one considers the elaborate lengths the government went to in order to respect the nonprofits'

[929] Brown, 61 F.3d at 658.
[930] Fraternal Ord. of Police Newark Lodge No. 12 v. City of Newark, 170 F.3d 359, 366-367 (3d Cir. 1999).
[931] City of Boerne v, Flores, 521 U.S. 507, 532 (1997).
[932] See Zubik v. Burwell, 136 S. Ct. 1557, 1560-1561 (2016).
[933] The ongoing developments in the *Notre Dame* case, however, are instructive in just how complex and contentious the inquiry can be. For a summary of the shifting sands on which this battle continues to be fought, see Marilyn Odendahl, "Judge Calls Notre Dame's Third Try at Avoiding Contraceptive Mandate 'Absurd,'" *The Indiana Lawyer* (blog), 20 January 2020, https://tinyurl.com/44yxudwu.

wish not to be involved in giving access to contraception to their employees, it is clear that the least restrictive means test remains a formidable hurdle for the federal government. With the current configuration of the Supreme Court – now much more conservative than it was when *Zubik* was decided – the test is likely to become even more strictly enforced.

Of the cases in this study, five apply the least restrictive means test; of these, only two ended in defeat for the restrictive measure. The discussions, however, are instructive in highlighting the differences between US strict scrutiny and the ECtHR balancing approach. In the three ACA cases – *Hobby Lobby, Priests for Life*, and *Notre Dame* – the state interest is in assuring efficient and widespread access to contraceptive services via the modalities of the ACA. The means in *Hobby Lobby* are the application of the contraceptive mandate, while in the other two cases the means at issue are the procedures by which nonprofits can be accommodated by opting out of the provision, specifically the filing of the EBSA 700 form. In *Hobby Lobby* the government's case failed because it had not demonstrated that it could not itself step in and pay the costs of the contraceptives at issue. The burden of proof was on the government to back up its concerns that the cost would be prohibitive, or that the exemption was unpracticable, or that it would create a flood of opportunistic religious objections. Moreover, there existed a model of a successful exemption scheme to the contraceptive mandate that would have met the employer's concerns: the accommodation given to religious nonprofits. The government expressed concern that the exemption would not be as efficient or as effective in achieving its aim of cost-free access to contraceptives, providing evidence that "even moderate copayments for preventive services can deter patients from receiving those services."[934] The government is not required to accept a less restrictive means that is also fundamentally less effective in achieving its goal. But in this case, there already existed an accommodation and the government had not shown any reason why the same exemption could not be applied to *Hobby Lobby*.[935] As in *Eweida* and *Tagore*, the government employer had undermined its own logic and demonstrated that the measure was overinclusive and restricted religious freedom in a way unnecessary to achieve its ends.

In *Priests for Life* the court highlighted the language in *Hobby Lobby* where the Supreme Court concluded that the nonprofit accommodation was a viable alternative for a closely held

[934] Burwell v. Hobby Lobby Stores Inc., 573 U.S. 682, 727 (2014).
[935] Hobby Lobby, 573 U.S. at 692.

corporation because it served the purposes of the government equally well and that, in the particular instance, it "[did] not impinge on the plaintiff's religious beliefs."[936] The religious nonprofit in *Priests for Life* was in a different situation; they already benefited from the accommodation, but felt that even less restrictive means were possible to accommodate their belief that signing the EBSA 700 form had a directly causal relationship with the provision of contraceptive services and thus made them complicit. While they disputed this theory of complicity, the DC Circuit walked through the strict scrutiny argument anyway and upheld the accommodation. Noting that the goal is not just providing contraceptive services but doing so seamlessly and without imposing additional steps that studies show have a dissuasive effect, the Court found that accommodating nonprofits but requiring them to notify the Department of Health and Human Services (HHS) was the least restrictive means of achieving that objective. The Court rejected the plaintiffs' claim that their employees could not be compared to women in general with regard to contraceptive services since presumably as good Christians working for a Christian nonprofit they did not *want* contraceptives. While the government bears the burden of showing that the means are the least restrictive possible, it does not have to produce evidence to counter every hypothetical claim made by the other party. In this case, the government had evidence that women in general seek contraceptive services and noted that women working for religious nonprofits do not necessarily share (or necessarily always follow) the precise beliefs of the organization itself. This, the DC Circuit reasoned, is sufficient. Finally, in examining the other possible accommodations proposed by the plaintiffs, the Court observed that they all would add steps "or pose other financial, logistical, informational, and administrative burdens." Since the alternatives would not achieve the objective equally as well, the least restrictive means test was satisfied. In *Notre Dame* the Seventh Circuit came to similar conclusions with a detailed and mildly disdainful review of the university's various suggestions (including the option of providing only "Natural Family Planning training and materials" which, as Judge Posner quipped, is "not contraception at all").[937] Judge Hamilton's concurring opinion also makes the point that, as a matter of law, the "scope of imagination permitted in thinking of supposedly less restrictive

[936] Priests for Life v. U.S. Dep't of Health and Hum. Servs. 772 F.3d 229, 264 (D.C. Cir. 2014) (citing Hobby Lobby).
[937] Univ. of Notre Dame v. Burwell, 786 F. 3d 606, 617 (7th Cir. 2015).

means" must have some limits, and therefore the court need not entertain every radical hypothetical proposed by the plaintiff such as a single payer health care system.[938]

The Sixth Circuit decision in *Harris Funeral Homes* outlines the same arguments in a very different context, that of the Title VII prohibition on gender-based discrimination in the workplace. The Court explored the option of granting an accommodation to the employer but found that there was no less restrictive means that would accomplish the same objective as well as an outright ban on gender discrimination without imposing unacceptable burdens on third parties. The Court also noted cost to the government and the need for uniformity as legitimate and important considerations. Ultimately, however, in this case the measure, when applied "to the person," was simply functioning as intended and preventing the employer from inflicting the exact kind of harm on his employee that Title VII was drafted to stop. In such a case, there is no less restrictive means and no accommodation is possible. Finally, the decision in *Tagore* highlights, as do the ACA cases, the "fact-intensive nature of the RFRA strict scrutiny test" especially in the least restrictive means phase.[939] The Court was quick to defer to the government in determining the means necessary to protect its employees in federal buildings and notes that it fulfilled its duty to provide evidence justifying its position. The government's arguments against the availability of an equally effective regime to accommodate Ms. Tagore rested on the practical difficulties of providing case-by-case exemptions, and the district court had found the evidence presented convincing enough to justify a conclusion that such a system of exemptions would undermine security.[940] While the Court does not say so specifically, it seems evident that the government's least restrictive means argument would have been successful had it not undermined its argument by altering its rules to provide for precisely the kind of case-by-case evaluation that it had argued were not feasible.

[938] Notre Dame, 786 F.3d at 625.
[939] Tagore v. United States, 735 F.3d 324, 332 (5th Cir. 2013).
[940] Tagore, 735 F.3d at 331.

C. Comparing the review of the means/ ends relationship: a common focus on a fact-intensive approach

The strict scrutiny cases have few direct counterparts in the Article 9 jurisprudence of the ECtHR except for a few cases outside the scope of this study in which the Court seems to apply something approaching a least restrictive means test, the cases nevertheless do address some similar issues in evaluating the means/ends relationship as those faced in the ECtHR caseload. Perhaps the most striking similarity is the fact-intensive nature of the inquiry. Both courts expect the government to provide some evidence for its conclusions as regards the means of achieving its legitimate aim in cases that require anything more than basic rational basis review. In the ECtHR context that is true where discrimination is found, if the margin of appreciation is sufficiently narrow, or, as in *Schüth* and *Lombardi*, the lower courts fail to ensure that procedural safeguards are sufficient and that the state has offered some credible explanation for applying the restrictive measure. Neither court is willing to tolerate inconsistency in the government's claims about the means required to achieve its ends – if there is evidence that the means are overinclusive or unnecessary, that in itself may be grounds to deem them inappropriate where they impose burdens on religion. But the relevance of the factual inquiry in decision-making is somewhat more opaque in the ECtHR because of the relative brevity of its decisions. Moreover, even though the least restrictive means test in the US RFRA cases appears to be less strict than in other contexts, it is clearly a far more exigent test than anything used in similar cases in the ECtHR. However, as we will explore below, the real analytical work in the ECtHR tends to be done not in evaluating the means/ends relationship, but rather in weighting the state interest and means of achieving it against the gravity of the interference with religious liberty.

2. Assessing the means/ends/burden relationship as an overall balance

The means/ends/burden relationship, as opposed to the means/ends relationship, constitutes the ultimate stage of the balancing phase *stricto sensu*. In the previous section we explored the effectiveness and efficiency of the specific measures in achieving the state's broader objectives. Here, by contrast, we are looking at whether those measures, in trying to achieve the state's objectives in the particular case, are worth it when viewed against the

harm done to the individual. This is a true balancing of interests – once the courts have looked at the severity of the burden, the importance of the objective, and the efficiency and effectiveness of the specific measures, they must decide whether, in the balance, it is fair to make this particular trade between an individual's rights and the public good.

The use of the term "means/ends/burden relationship" to stand for holistic balancing is admittedly somewhat awkward – it is not just the "means" being weighed against the burden, nor just the ends, but rather it is an evaluation of the interaction of all three components to ensure that the final result is in some sense fair. Viewing this as a relationship aiming at overall fairness seems to better capture what is actually happening in these cases than the useful but at times misleading lexical field of "weighing" and "balancing." The emphasis on the role of the burden in this relationship rather than simply on the means/ends fit is important for the comparison of the ECtHR and the US courts, because the way the burden is factored into European balancing is a key difference between the two systems. It thus emphasizes the transactional nature of European balancing – the real give and take of interests – as opposed to the more mechanical functioning of much of US balancing with its at times rigid tiers and categories. A more detailed look at how each set of cases handles evaluating the means used to achieve the state's interest in light of the harm being done to a specific individual's religious liberty should, to some degree, clarify this point. But it should be noted in advance that a promise to "clarify" may be optimistic; in fact, a detailed comparison of this last step in balancing demonstrates that clarity is in many cases elusive and may at time be unachievable despite the courts' best intentions.

A. The ECtHR's decisive application holistic balancing

Because the ECtHR no longer considers the orthodoxy or centrality of a religious belief beyond the basic "cogency" requirement, there is in many cases little to say about the severity of the burden imposed on the religious party. The Court makes a standard practice of reciting the importance of religious freedom in general. Sometimes judgments emphasize this point in the final analysis and/or with specific reference to the individual, but not always. In *Chaplin*, for example, the Court emphasizes that "as in Ms. Eweida's case, the importance

for the second applicant of being permitted to manifest her religion by wearing her cross visibly must weigh heavily in the balance." What makes the difference in these two cases is the weight accorded to the employer's objectives: corporate image was insufficient a reason to limit Ms. Eweida's religious freedom, whereas health and safety was weighty enough an aim that it took precedence over Ms. Chaplin's desire to wear her cross dangling on a chain. The Court in these cases does not factor in an objective evaluation of the importance of wearing crosses in traditional Christian practice; rather, it is the subjective importance to the applicant that is to be weighed in the balance, whether or not it is central to the faith in a collective sense. In *Obst,* the judgment makes repeated reference to the importance in the Mormon church of marital fidelity in evaluating the relationship between the church's Article 9 rights and the applicant's Article 8 rights; this remains consistent with the approach in *Eweida* since the rights holder in this case is the church itself rather than an individual. In the context of church autonomy the Court has been careful to explain the importance not just of Article 9 rights in general, but of the significant weight accorded to those rights in their collective dimension. In *Fernandez Martinez* [GC], for example, the Court observes:

> The autonomous existence of religious communities is indispensable for pluralism in a democratic society and is thus an issue at the very heart of the protection which Article 9 of the Convention affords. It has a direct interest, not only for the actual organization of those communities but also for the effective enjoyment by all their active members of the right to freedom of religion. Were the organizational life of the community not protected by Article 9 of the Convention, all other aspects of the individual's freedom of religion would become vulnerable.[941]

While in all of these cases there is an emphasis on the importance of the religious manifestation, and thus to the "weight" of the burden being placed upon the applicants, there is no real measuring of *how important* the practice is. It is difficult to imagine what form such a measurement would take. In the Court's rhetoric, however, beliefs are all taken as important essentially as a reminder that the process must take them into account as part of the final evaluation. In most cases, however, the Court is content with simply taking note of the

[941] Fernandez-Martinez v. Spain [GC], no. 56030/07, § 127, ECHR 2014 (extracts).

religious belief motivating the contested behavior and confirming that there has been an interference.

Apart from the importance of the belief at issue, the evaluation of the burden in relation to the limitation often involves the starkness of the choices that the employee is being forced to make, i.e. the severity of the sanction or the availability of other options for religious expression that might not leave the religious employee entirely barred from religious manifestation or expression. In other words, the issues that were used to determine the existence of an interference are also often relevant in balancing the severity of the interference with the other relevant factors in the case. In several of the ECtHR cases the Court engages in at least some discussion of whether and how the religious party might in some way "get around the problem" and thus make the burden less severe. The relevance of this is not only that the burden may be lighter and thus be less important relative to the state interests. In *Pichon and Sajous*, the Court was quite explicit in linking its decision to the fact that the applicants could "manifest [their religious] beliefs in many ways outside the professional sphere."[942] In that case this observation was part of the Court's finding that there was no interference at all, but the argument works better when seen as part of an implicit balance with the state interest in the widespread availability of contraceptives. In *Steen v. Sweden*, the Court found it significant that the employee was not being fired and could continue to perform her prior function as a nurse – the "sanction" was simply that she could not work as a mid-wife without being willing to perform abortions, and this was considered proportionate.

The Court may also consider the reasonableness of the parties when the employer has made suggestions as part of a process to find a compromise. For example, in *Ebrahimian* the Court, as one of the last points it makes in its lengthy balancing discussion, recounts evidence that the hospital had a history of seeking amicable solutions to such conflicts in the past. In *Chaplin* the hospital offered the applicant a variety of ways in which she could wear her cross so as to respect her religious convictions and their own health and safety concerns. The Court does not judge the reasonableness of her refusal of any accommodation short of being permitted to wear her cross on a necklace while on duty, but the hospital's attempts are recited in the Court's final analysis and thus can be assumed to have been of some significance in

[942] Pichon and Sajous (dec.), no. 49853/99, ECHR 2001-X, p. 388.

determining that the measures were proportionate. In *Ladele*, the Court noted that efforts were made by the employer but failed because they imposed burdens on other employees. In *Eweida*, on the other hand, the response of BA to Ms. Eweida's situation was by all accounts very accommodating: she was offered the opportunity to do other work that would not put her into contact with the public, she had recourse to a grievance procedure but did not wait for the results before deliberately violating the uniform policy, and she was invited to be part of a consolation process in which BA agreed to relax the rules in question. The measure was in the end found to have been disproportionate in the period leading up to the change in policy on other grounds. However, the Court made it clear that BA's attempts to mitigate the limitations on Ms. Eweida's religious freedom did count in the balance, noting in the final analysis that their various efforts "combined to mitigate the extent of the interference suffered by the applicant and must be taken into account."[943] The judgment in *Eweida* is somewhat curious in this respect. In contrast to the decision in *Schüth*, the court in *Eweida* focused not so much on the unfairness of the choice of means used to protect the legitimate aim, but rather on an *a posteriori* determination that the means were not necessary to achieve the ends and were therefore disproportionate. The key to this case may well lie in the fact that corporate image is not a human right, so to restrict a fundamental human right to protect corporate image is not a suitable means to achieve it.[944] On this theory, narrow tailoring of means to ends seems to be required if a fundamental right is restricted for an interest that is not directly related to the Convention, although the court does not say so outright.

Similarly, the balance seems significantly affected when the claimant knew or should have known that her religious manifestation would create difficulties but nevertheless sought out the work in question. This was the case in the Swedish midwife cases – *Steen* and *Grimmark* – where in both instances the claimant objected to performing abortions even though they were part of a midwife's duties in Swedish hospitals. In the Court's short but dense balancing discussion in *Steen*, it noted pointedly that "[w]hen concluding an employment contract, employees expressly accept these duties. In the present case, the applicant had voluntarily chosen to become a midwife and to apply for vacant posts while

[943] Eweida and Others v. the United Kingdom, nos. 48420/10 and 3 others, § 94, ECHR 2013 (extracts).
[944] Stephanie E. Berry, "Religious Freedom," 205.

knowing that this would mean assisting also in abortion cases."[945] Similar arguments are made in *Kurtulmuş* (the applicant had "assumed the status of a public servant of her own free will… and could not have been unaware of the rules"[946]) and *Macfarlane*. In the latter case, the Court clarifies the role of such prior knowledge, noting that an employee's prior knowledge that taking a specific job will involve duties that conflict with his beliefs is not a determinative factor in resolving the case, but is "a matter to be weighed in the balance when assessing whether a fair balance was struck."[947] In several of the cases involving religious employers, employees knew when taking the job that they would be expected to comply with religious codes of conduct, and this fact was significant in the final balance. In its lengthy balancing discussion in *Fernandez Martinez* the Grand Chamber expresses this approach explicitly: "The consequences for the applicant must also be seen in the light of the fact that he had knowingly placed himself in a situation that was incompatible with the Church's precepts… [and] should therefore have expected that the voluntary publicity of his membership of MOCEOP would not be devoid of consequences for his contract."[948]

However, several of the harder cases involve situations where the employee did not know of the job requirements that would conflict with their desired form of religious manifestation. Usually this was because of changed circumstances, either a religious conversion or a rule change placing new limitations on the applicant that had not previously applied. In *Dahlab* the applicant had converted to Islam after becoming a teacher in the state school system. Interestingly the government made the argument that she had known of and "freely accepted" the secularism requirements in state education when she applied for the job (she was Catholic at the time) and nevertheless had "decided" to convert to Islam.[949] The Court, however, chose not to refer to this argument in its balancing phase and rested its decision on other grounds. In *Eweida*, the applicant did not undergo a religious conversion, but simply decided to start wearing her cross openly; the Court essentially ignored this in their final balancing analysis. In *Ladele* and *Chaplin* the rules had changed after the applicant was already employed. In *Ebrahimian*, the rule had not changed but the Court concluded that

[945] Steen v. Sweden, no. 62309/17, § 21, 11 February 2020, http://hudoc.echr.coe.int/eng?i=001-201732.
[946] Kurtulmuş v. Turkey (dec.), no. 65500/01, ECHR 2006-II, p. 306.
[947] Eweida and Others, § 109.
[948] Fernandez-Martinez v. Spain [GC], no. 56030/07, § 146, ECHR 2014 (extracts).
[949] Dahlab v. Switzerland (dec.), no. 42393/98, ECHR 2001-V, p. 459.

she had no way of knowing that wearing a hijab was not permitted when she applied for the job. The lack of prior knowledge did not seem to be significant in the Court's reasoning in any of these cases. In *Ladele* it received more consideration than in the other cases, including in the final balancing discussion, but the Court determined that the margin of appreciation in cases balancing fundamental Convention rights was wide enough that there was no violation.

In summary, prior knowledge – or lack thereof - is an element that arises with some frequency in the workplace context. The Court usually takes it into account in their balancing discussions when it is raised by the fact pattern of the case; however, it has not played an important role in the analysis in any cases in which the applicant won. However, the possession of such prior knowledge seems to be relatively powerful argument for the state, suggesting a certain duty of care for religious employees to choose their jobs carefully.

Another factor that has played an important role in the final evaluation of the means/ends/burden relationship has been the presence or absence of actual harm inflicted by the religious manifestation on the rights of others. Evidence of actual harm to third parties (as opposed to hypothetical fears) allegedly caused by the religious manifestation can be important in the means/ends/burden evaluation because it is a way of demonstrating the state's pressing social need for the restriction. In *Eweida* the Court found it significant that there was no real evidence of problems arising in prior cases where exceptions to the uniform code had been granted. Even more significant, however, was the assertion that BA had changed the policy and thus provided evidence that it had not previously been as important as they had claimed. In *Chaplin* the evidence is theoretical rather than involving a history of problems or complaints, but as the feared harm was medical in nature one can assume that there was actual data in terms of cross-infection rates that did not need to be individualized to this nurse in this hospital.

In a variety of other cases, however, the lack of concrete evidence did not appear to affect the Court's decision. In *Dahlab* there had been no problems or complaints for the three years during which she wore the hijab, but the court found the theoretical danger to state neutrality sufficient to find the dismissal of the applicant proportionate. In this case, the Court placed its emphasis on the young age and impressionability of primary school students as part of its explanation for upholding the dismissal. In *Kurtulmuş*, a case with a similar fact pattern but involving university students, the Court still upheld the dismissal on the theoretical grounds

of the importance of state neutrality. In neither case was there evidence of actual harm such as complaints from students or their parents; rather, in both cases the harm was abstract (with an added sense of urgency in the case of *Dahlab*) but the state interest sufficiently important to tip the balance. In *Steen* and *Grimmark*, the question of actual harm was never addressed; the simple fact that the applicants could not fulfil the job description of a midwife was enough.

In another line of cases, however, there has been more concrete evidence of harm, and the Court has generally been quick to emphasize it in its balancing rationale. In *Ebrahimian* the Court took note of actual complaints about the applicant's hijab from both colleagues and patients. The *Pichon and Sajous* case arose from actual complaints from customers. No mention is made of the complaints in the final balancing discussion, which remains focused on the bigger principles at issue, but this may be attributable to the brevity of the admissibility decision. *Larissis* also arose from specific complaints from the targets of the proselytizing activity. The testimony of the fellow airmen who complained of proselytism at work is the main focus of the balance and was clearly decisive in the case. In the case of the civilian complaints, however, the nature of the harm was different, so even though there was evidence of actual harm the nature of that harm did not give rise to sufficient concern to justify the applicants' dismissal. Likewise in *Pitkevich* there was ample evidence that the applicant abused her position as a judge and there was no real controversy over the grossly inappropriate nature of her behavior; nevertheless, the Court made a point of repeating in the final balancing discussion the "numerous testimonies and complaints" over her behavior.[950]

In the religious employer cases, the role of evidence of actual harm is somewhat different; rather than having the manifestation of religion affecting the rights of others, these cases involve employees exercising other rights but in the process violating religious mandates (and hence the collective Article 9 rights) of their employers. The threat of harm in these cases is the threat to church autonomy caused by not allowing them to dismiss employees on grounds that would be prohibited in the secular workplace. For the ECtHR, the question is whether applying the law truly threatens the organization's autonomy enough to justify sacrificing the individual rights of the employee. It is a question of group rights versus individual rights. The Grand Chamber insisted in *Fernandez Martinez* on the importance of

[950] Pitkevich v. Russia, no. 47936/99, 8 February 2001, http://hudoc.echr.coe.int/eng?i=001-5726, p. 12.

having evidence of a concrete threat to religious autonomy, insisting that "a mere allegation by a religious community that there is an actual or potential threat to its autonomy is not sufficient to render any interference with its members' rights to respect for their private or family life compatible with Article 8 of the Convention. In addition, the religious community in question must also show, in the light of the circumstances of the individual case, that the risk alleged is probable and substantial."[951] In this case the applicant's proximity to the church's proclamatory mission and the high-profile nature of his public campaigning against the church's doctrine of celibacy made the very actual nature of the harm clear. In other cases, the clarity of the harm is much less obvious but in a similar fashion is construed from the overall context of the behavior. In *Siebenhaar*, as in *Dahlab*, the vulnerability of young children was given as reason for a heightened evaluation of the probable harm. In *Obst*, the applicant held a high position in the Mormon church which was explicitly part of the Court's evaluation of the certainty and degree of reputational harm to the church (in tandem with the importance of the church's teachings about marriage, as discussed above). In *Lombardi* and *Schüth*, however, the evidence of actual harm was deemed insufficient to justify the infringement on the rights of the employees. In *Lombardi* no reasoning was given by the church employer whatsoever. In *Schüth*, the issues were similar to those in the other religious employer cases except that his position in the church (an organist) weighed against any easy conclusion that his marital status could cause the church harm. The lack of media attention and his lack of real connection with the delivery of the church's message made serious harm unlikely, and the Court treated this as of central importance when balancing the potential harm to the church with the severity of the sanction on the applicant.

The Court, not surprisingly, finds the presence of concrete harm an important factor in the balance because it renders clear the importance of taking measures to achieve the state's legitimate aim in preventing limitations on the rights of others. However, despite frequent discussion of it in the balancing phase, it does not appear to be a highly decisive factor in the outcomes of the cases. While cases averring clear concrete harm are almost always successful for the government, mere theoretical harm is sufficient when the corresponding state interest is particularly important. Put another way, the more serious and theoretically likely the harm, the less evidence an employer seems to need to use it to justify dismissing an employee.

[951] Fernandez-Martinez, § 132.

This particular correlation goes hand in hand with the margin of appreciation. Most of the cases in this study are subject to a wide margin of appreciation because the focus has been workplace cases where either Convention rights come into conflict or the case poses questions related to the relationship between church and state. This is to some extent a liability in that the caseload examined is not necessarily representative of the body of Article 9 cases more generally. However, it is also an asset inasmuch as the margin of appreciation is often seen as the driving force behind many Article 9 judgments; with the margin more or less removed as an explanatory element of the decision-making, clear focus can be placed on the balancing reasoning as compared among cases. These cases seem to show quite a significant degree of consideration of just how the means, ends and burden form a system such that they cannot be approached in isolation. This is particularly true of Grand Chamber decisions which, not surprisingly, devote more time and attention to laying out clear reasoning. By picking apart that reasoning, we see a variety of priorities addressed by the Court when rights come into conflict in the workplace and religion is involved. We also see a strong deference to particular government objectives that at times seem like a trump card when they are balanced against individual freedoms. The nature of the religious manifestation does not seem to matter greatly, but the overall severity of the sanction does play a significant role. Even very severe sanctions, however, are tolerated if the state's interest is proportionately stronger and especially if the employee has not done everything possible to mitigate the risk. Failure in this duty of reasonable care seems almost inevitably to prove fatal unless, like in *Eweida*, the rights of others in the case are not fundamental.

B. The US courts' evasion of genuine balancing

i. No real balancing in most cases

In the US cases, by contrast, we find a range of approaches that are particularly difficult to compare when it comes to the overall means/ends/burden relationship. The position of balancing in US Constitutional law has long been contentious, and it has been alternately supported and vilified by both the political left and right over the years – currently conservative-leaning justices have tended to be critical of balancing in rights cases, whereas

liberal or left-leaning justices have been more open to the considered weighing of interests as opposed to strict textual interpretation or rigid categorical approaches.[952] One point that both ends of the spectrum agree on is that balancing is of no relevance in the ministerial exceptions cases, where a strictly categorical form of logic is used (once the employee has been identified as performing a "ministerial function"). Of the other cases, what can be said with relative confidence is that in rational basis or strict scrutiny cases there is no formal balancing between the objectives of the government and the burden on free exercise. The inquiry is simply whether the measure bore a rational relationship to a legitimate state interest. The focus is purely on means and ends; the nature of the burden does not get balanced with the state interest at all. Where the nature of the burden matters is when there is alleged discrimination, either deliberately or through inconsistent application of the measure, but those measures are not evaluated under rational basis review but rather receive heightened scrutiny. Thus in *Little Sisters of the Poor*, *Stormans*, *Daniels* and *Booth* there is no explicit balancing in the free exercise analysis. In *Stormans* the Court makes a point of emphasizing, in response to an argument by the pharmacy, that even the fact that religious pharmacy owners will be disproportionately affected by the law does not change their conclusions; the interest is legitimate and the law advances it. That is enough. In *Daniels* one might argue that there is hint of balancing logic; the opinion refers to the fact that the claimant had "myriad alternative ways to manifest this tenet of his religion," suggesting that if wearing a cross had been an essential and irreplaceable element of the officer's faith it would have been taken into consideration.[953] However, this hardly amounts to real balancing; rather it seems more a rhetorical attempt to further justify a decision already taken on rational basis scrutiny.

Strict scrutiny cases arguably contain more balancing logic than those employing rational basis review, but the similarities with proportionality analysis are mostly superficial. Strict scrutiny is fundamentally categorical in its mode of reasoning; once a substantial burden has been identified, if the government has not used the least restrictive means to accomplish a compelling governmental interest, then the government loses no matter what kind of burden it is or how serious the state's interest may be. However, in practice, judges

[952] See generally Sweet and Mathews, "All Things in Proportion."
[953] Daniels v. City of Arlington, 246 F.3d 500, 505 (5th Cir. 2001).

have at times injected flexibility into the analysis and applied a form of heighted scrutiny that has not proven inevitably fatal to government interests. In such cases strict scrutiny can be seen as a form of "weighted balancing" where "the stakes on the rights side of the scale are unusually high and that the government's interests must therefore be weighty to overcome them."[954] This is view of strict scrutiny usually favored by liberal-leaning justices, and may offer an explanation of the relative laxity of the test in religious liberty cases in comparison with free speech cases. This was especially the case during the *Sherbert* era. Under RFRA, however, the test has become more categorical, even if that has not always ended in defeat for the government. In the ACA cases in the circuit courts, judicial interpretations of what constitutes a burden allowed the courts to avoid the difficult phases of strict scrutiny and to find for the government. This was not balancing, however. Rather, it was simply a finding that there was insufficient cognizable interest on the part of the claimants to warrant continuing the analysis. In other words, the yes/no question of substantial burden was answered in the negative, and a categorical decision was taken in favor of the government. In most strict scrutiny cases, the least restrictive means test acts as the categorical step that is likely to be fatal to government measures. That is, if any practicable and less restrictive means is identified, then the government loses. This can be seen particularly well in *Hobby Lobby* and the Supreme Court's remand of the other ACA cases, where the pivotal determination that decided the cases was the existence of a possible compromise.

At times, even in these cases one finds language suggesting the need for a balance. In his concurring opinion in *Hobby Lobby*, Justice Kennedy observes "courts must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries."[955] Moreover, he continues, free exercise may not "unduly restrict other persons, such as employees, in protecting their own interests, interests the law deems compelling."[956] Other cases either cite these lines or make similar points. However, on closer inspection this is still not strictly speaking balancing in the sense that it is done in the ECtHR. Kennedy's focus is in on burdens imposed on third parties, and ultimately this reflects on the bigger picture due process issues and other rights questions raised by simply shifting a burden

[954] Fallon, "Strict Judicial Scrutiny," 1306.
[955] Burwell v. Hobby Lobby Stores Inc., 573 U.S. 682, 729n37 (2014) (Kennedy, J., concurring) (citing Cutter v. Wilkinson, 544 U. S. 709, 720 (2005)).
[956] Hobby Lobby, 573 U.S. at 739 (Kennedy, J., concurring).

onto third parties not related to the case. It is not an injunction to explore the means/ends/burden relationship, but rather a reminder that the government is not free to solve free exercise problems by simply shifting the burden onto other citizens. The DC Circuit in *Priests for Life* quotes *Hobby Lobby* to similar effect.

Likewise the "to the person" test mandated by RFRA and elaborated in *O Centro* can at times sound like balancing, but again this does not involved a genuine "all things considered" evaluation of the means/ends/burden relationship. The Sixth Circuit in *Harris Funeral Homes* offers an example of an extremely detailed application of the "to the person" test that makes clear how balancing is avoided. Here it can be observed how strict scrutiny as applied "to the person" does not formally involve any weighing of the severity of the burden on the religious claimant, even though there can be evaluation of whether and how the religious substantial burden on free exercise can be reduced. The initial burden determination is categorical and independent of the means/ends inquiry; once the burden on religious practice is identified it plays no role in the subsequent tests other than as a point of reference for the least restrictive means test. The question is, firstly, whether the compelling state interest remains compelling when applied in this particular fact pattern. In *Harris Funeral Homes* the court explores whether the "big picture" government interest in "eradicating employment discrimination" remains compelling when applied to this employer forbidding this employee to dress in traditionally female clothing. The Court notes that this is clearly the kind of harm the law is designed to prevent. The religious burden placed on the employer does not come into the discussion in the compelling interest analysis, thus the result still functions in a categorical manner. Is the state interest compelling in these circumstances? Once the court decides that it is, the only question remaining is whether there is a less restrictive means of achieving it. RFRA's "to the person" language applies to the least restrictive means test as well as the compelling interest test, and here the Court is once again careful to avoid balancing even as it evaluates various alternatives that might satisfy the interests of both parties. While the alternatives explored are attempts to mitigate the burden on the funeral home, at no point are the employer's interests balanced against those of the government or of the employee. Both alternatives are found flawed; one because it would not resolve the problem, and the other because it would not advance the government's interest. The court's conclusion is simply that Title VII is on its own terms the least restrictive means to achieve

the compelling governmental interest. The decision, while carefully analyzed, is essentially categorical in nature. As the court puts it, "enforcement actions brought under Title VII… will necessarily defeat RFRA defenses to discrimination made illegal by Title VII."[957]

In *Tagore*, the lower court clearly had some doubts about the sincerity of the employee's claim that a 2.5 inch kirpan would not satisfy her religious convictions but a 3 inch kirpan would, and this seemed to have played a role in their decision. The Fifth Circuit, however, accepted Ms. Tagore's sincerity as well as the compelling nature of the governmental interest in the case, moving straight to the least restrictive means test. Here again there is no balancing; the court observes that the government undermined its own claims about the impossibility of using a less restrictive means by way of individualized exemptions and thus remanded the case.[958]

In all these cases we see the same pattern in the application of strict scrutiny. Where there is detailed discussion, the analysis can often look superficially like balancing since the courts discuss both the substantial nature of the burden and the necessity of the limitations being placed on free exercise. But there is no weighing of components as there is in the ECtHR cases; each component functions as a kind of gateway leading to the next component in the analysis. If the government reaches and wins the least restrictive means phase of the analysis, it wins the case. If it fails to carry its burden in either the compelling interest or least restrictive means phase, it loses. There is no "all things considered" balancing. What ultimately makes strict scrutiny relatively strict in religious freedom cases is that the burden of proof gets quite easily shifted to the government since most burdens on free exercise are deemed substantial (especially in light of the subjective version of the substantial burden test defended by the Supreme Court in *Hobby Lobby*). But strict scrutiny in these cases is not balancing with a thumb on the scales. The balancing metaphor does not work at all in these cases, and thus they offer a radical contrast, in procedural terms, to what takes place in the ECtHR. The result can be deeply considered and rigorously analyzed as seen in *Harris*

[957] EEOC v R.G. &. G.R. Harris Funeral Homes Inc., 884 F.3d 560, 595 (6th Cir. 2018).

[958] Richard Fallon has argued that this kind of case, where "challenged governmental regulations, viewed realistically, will at best merely reduce risks or incidences of harm more or less effectively than would other regulations," will almost always require some form of proportionality-like reasoning where "the effort to identify compelling interests and to determine the adequacy of regulatory tailoring is likely to involve fluid, two-way traffic in which assessments of ends and means occur simultaneously" instead of in a step-by-step categorical approach. Such reasoning does not appear in *Tagore*, however, or in the other workplace cases in this study. See Fallon, "Strict Judicial Scrutiny," 1333.

Funeral Homes, but the process is mechanistic. Whether or not the results are fair is a matter of opinion, but there remains something unsatisfying in cases like the ACA cases where the common-sense question – is the religious harm done to these organizations by signing the EBSA 700 form really severe enough to justify the time, money and burden on third parties required to create yet another form of accommodation – is never asked. It is a "winner takes all" competition, an approach perhaps more at home in the US than in Europe. The result, however, is that it compels the government to narrowly tailor legislation that can have the effect of limiting free exercise. In *Harris Funeral Homes* the Court concluded that Title VII is in fact the least restrictive means possible of achieving its aims; this can be seen as an argument for the success of RFRA in helping to stop unnecessary limitations on religious freedom before they start. Where the ECtHR remains deferential to legislatures, the US courts exercise a certain pressure on them (ironically, RFRA represents a case of the legislature forcing the judiciary to keep stricter control of the legislature). That pressure, however, arguably comes at the expense of any true process of weighing interests and forging consensus.

ii. Exploring balancing options through intermediate scrutiny

What remains to be addressed is the third category of review that has been used in some religious freedom cases in the workplace – *Pickering*-like tests and intermediate scrutiny. Pickering is a significant advance from rational basis scrutiny in analytical terms since it introduces a balancing logic. In fact it is far closer to "balancing with a thumb on the scales" than it is the version of strict scrutiny used in the workplace cases – it is a balance between the state employee's interest in free expression on "matters of public concern" and the state's implicitly important goal of "promoting the efficiency of the public services it performs through its employees."[959] In *Berry* and *Brown* the courts, faced with cases involving religious behavior with an expressive component in a government workplace, used or adapted the *Pickering* test to undertake a deeper (and hopefully more fair) analysis than the rational basis review prescribed by *Smith*. In *Berry* the choice of Pickering was clear because the religious activity being prohibited was highly expressive in nature and the facts fit nicely

[959] Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968).

with the *Pickering* framework. The balancing is explicit. The court asserts that Berry's religious display in his office "implicitly endorses a religious message and it is precisely that message which the Department *reasonably* seeks to avoid. We conclude that *under the balancing test*, the Department's need to avoid an appearance of endorsement of religion *outweighs* the curtailment on Mr. Berry's ability to display religious items in his cubicle, which is frequented by the Department's clients."[960] The elements going into the balance are clear – the employer's concern over Establishment Clause violations is explicitly weighed against the burden on the employee, taken in the context of where and how the religious expression was taking place. In other words, the court assesses all the various factors and then decides the case in light of the mean/ends/burden relationship, concluding that the restrictions are "reasonable." This can be contrasted with the court's language in Berry's other claim over denied use of a conference room for prayer meetings. This behavior was not expressive so here the court applied rational basis review, concluding that the employer "*could reasonably determine* that such business-related social functions furthered its administrative tasks in ways that employee social organizations and prayer meetings would not." [961] Under *Pickering* the employer's decision is "reasonable" in light of the circumstances.

In *Brown*, however, the choice of *Pickering* is less obvious and was arguably a response to the analytical inadequacy of rational basis review under *Smith*. In that case the Eighth Circuit accepts the rationally related objective of ensuring "that its workplace is free from religious activity that harasses or intimidates" but nonetheless balks at stopping its analysis there. Rather, the Court uses the logic of *Pickering* adapted to the context of religious free exercise.[962] As in *Berry*, what a *Pickering*-like approach adds to the analysis is balancing; in *Brown* the court did not merely accept the measures as rational, but evaluated whether the limitations were "reasonably related to the exercise of that right and … narrowly tailored"[963] to ensure that "'the effective functioning of the public employer's enterprise' is not interfered with."[964] What follows is an all-things-considered balancing of the necessity of the measure,

[960] Berry v. Dep't of Soc. Servs., 447 F.3d 642, 652 (9th Cir. 2006) [emphasis added].
[961] Berry, 447 F.3d at 654 [emphasis added].
[962] Brown v. Polk Cnty., 61 F.3d 650, 658 (8th Cir. 1995).
[963] Brown, 61 F.3d at 658.
[964] Brown, 61 F.3d at 659.

its narrow tailoring, its objective, the context and the nature of the religious behavior. The holistic consideration of the various facets of the case is captured in the court's final analysis:

> If the "offensive" character of the display ran to a well-grounded apprehension among employees of discriminatory treatment by Mr. Brown, then this case might be entirely different. But the evidence will not support such a finding here. We emphasize, too, that fear alone, even fear of discrimination or other illegal activity, is not enough to justify such a mobilization of governmental force against Mr. Brown. The fear must be substantial and, above all, objectively reasonable.[965]

The court takes into consideration the employer's needs, the context of the behavior, and even the interests of third parties to determine if they are "enough" to justify the precise limitations placed on the employee. In other words, the balancing logic permits a far more nuanced discussion and consideration than would either the rational basis or strict scrutiny ends of the spectrum.

Finally, in *Fraternal Order of Police* the Third Circuit did not use *Pickering*, but nevertheless approached the case with intermediate scrutiny because on its understanding of precedent that is what is required in government workplace cases that do not meet *Smith's* requirements that the law be neutral and generally applicable. Cases in which the court finds that the law is not neutral or generally applicable nearly always result in a defeat for the government party.[966] *Fraternal Order of Police* is no exception, but the court did not need to do any nuanced balancing because in its view the means were not narrowly tailored, and possibly even irrational or discriminatory, in their connection with the state's legitimate interest in maintaining the safety, reputation, and esprit de corps of the police force. The same deficiency that led to heightened scrutiny, i.e. the singling out of religious beards with no clear rationale other than a decision to suppress diversity to cater to discriminatory attitudes by some members of the public, made the measure unjustifiable regardless of the purpose or the gravity of harm done to the employee. Thus the intermediate scrutiny formula seems to offer a framework within which balancing can take place since the narrowness of the tailoring and the importance of the state interest are not superlatives like in strict scrutiny, which

[965] Brown, 61 F.3d at 659.
[966] Wolanek and Liu, "Applying Strict Scrutiny," 304.

invites interpretation in light of the entire situation. However, the formula is clear enough that the more holistic all-things-considered sort of discussion seen in *Berry* and *Brown* was not necessary in *Fraternal Order of Police*. Balancing, in short, is useful in hard cases, but a more straightforward fact pattern in which there is clear targeting of religion simply does not need to enter into the more complex and potentially contentious balancing process.

CONCLUSION TO PART II

Detailed examination of the step-by-step processes employed by the courts in addressing limitations on religious manifestation in the workplace shows that underneath the very different analytical frameworks employed by the US and ECtHR lies a similar body of concerns. The severity of the religious burden, the legitimacy and importance of the state's objective, and the suitability of the measure in achieving the objective are common elements that are relevant and important in both courts. Indeed it is difficult to imagine a fair approach to resolving such conflicts that would not take these factors into account. The burden phase is similar in both forms of analysis, and while the ECtHR is more willing to scrutinize the content of religious beliefs, both courts are careful not to openly pass judgment on the beliefs and are in general deferential to assertions that a measure interferes with the practice of an individual or group's faith. Neither court has been eager to decide cases by denying that the measure in question poses a burden, and when they have done so, it has mostly taken the form of arguing that the religious obligation could be met sufficiently in other contexts outside of the workplace. Burdens on religion in either system do not need to be extremely weighty in order to merit some scrutiny by the court of the government's reasons and methods for interfering with religious freedom.

Both courts have been prepared to question the government on the legitimacy of its aims, but in practice it is rare to catch an even moderately competent state body openly pursuing illegitimate aims, since both courts are quite flexible in their evaluation of legitimacy – anything that furthers the public interest and is nondiscriminatory tends to be seen as legitimate. The courts also take a relatively broad view on the role of the state in the workplace when it comes to fighting discrimination or in maintaining state neutrality and efficiency in most cases. When it comes to the relationship between the means and ends, while there are some significant differences in approach, both insist as a bare minimum that measures have a rational relationship to the objectives, and in most cases they acknowledge that there must be at least some evidence that the means advance the ends. Both consider how tailored the measure is to the ends in some but not all contexts. Moreover, both courts agree that when dealing with the exercise of religion in its collective dimension there must

be more careful consideration given to avoiding interference by the state in the internal workings of religious institutions.

The analytical differences, however, are important in several respects, and vary depending on which category of scrutiny by the US courts is at issue. The ECtHR is generally more comfortable with the imposition of incidental burdens that unintentionally interfere with religious practice in the workplace than the US courts. While from a strict textual perspective state parties to the Convention can interfere with Article 9 rights only in pursuit of a short list of legitimate aims contained in the limitations clause, the US courts have no predefined list of legitimate aims and must determine the legitimacy of government objectives on a case-by-case basis. In practice, legitimacy in the US context means "not illicit;" in the ECtHR even the noblest of goals is not legitimate if it cannot be framed as one of the limitations clause aims, although in practice the court interprets these aims quite broadly. In all the tiers of review the US courts are flexible in their conception of legitimacy, but in free exercise cases there is careful scrutiny of the neutrality and general applicability of the state measures in a far more explicit way than in the ECtHR.

The ECtHR is less rigorous in evaluating the government's objective than some US courts, and if thought of on a spectrum the ECtHR standard falls somewhere between rational basis review and intermediate scrutiny. However, such a comparison is deceptive, because in practice the ECtHR employs a variety of tests as interpretations of the "necessary in a democratic society" language of the Convention in contrast with the clearer and more structured spectrum of tiers of review imposed by the US courts. In these tests the state's aims tend to be discussed at quite a high level of abstraction, as in the lower tiers of US review. Strict scrutiny with its "to the person" requirement imposes a much higher level of specificity when defining state objectives than the ECtHR tends to use in most cases. And in general, it is fair to say that the US courts are more detailed in their analysis of the state's objectives than the ECtHR, with the exception of the ministerial exception cases, in which are radically different from other US cases and from similar cases in the ECtHR in that US courts do not even consider the importance of the government's objectives in cases involving ministers as employees. The ECtHR, in contrast, do not subject these cases to a different methodology than other cases.

In evaluating the means/ends relationship the courts give very different weight and attention to the narrow tailoring of measures in order to achieve the state's objectives, but again the different tiers of review are the most significant complication in comparing the US and ECtHR's respective analytical traditions. The ECtHR's degree of scrutiny of the means/ends fit in these cases is similar to that used in US rational basis approach, but the analysis feels very different because it is spread over the necessity phase and the balancing phase. The ECtHR's analysis is nowhere near as rigorous as the least restrictive means test used in US strict scrutiny cases, but at times seems comparable in rigor, if not in method, to the narrow tailoring requirement of intermediate scrutiny.

Ultimately there are two methodological differences that seem to have a significant impact on how religious freedom in the workplace is evaluated in the US and ECtHR. Firstly there is the system of tiered review used in the US system and its accompanying categorical approach to reasoning at each step of the process. Each phase of review, for each of the tiers of review, acts as a potentially decisive threshold and either determines the outcome of the case or opens the door to the next phase of analysis. In the ECtHR cases, the separate phases of analysis are important but individually are rarely treated as decisive of the case. Rather, the outcomes of these various inquiries are then reassembled and reconsidered in the holistic balancing phase. This is the second and equally vital distinction to be made between the methods of analysis used in the two court systems; the all-things-considered approach to balancing that constitutes the final and decisive discussion of the ECtHR cases has no real equivalent in either rational basis or strict scrutiny in the US courts. This phase is where the real analytical work seems to be done, where the various components of proportionality are weighed and evaluated against the backdrop of the margin of appreciation doctrine. Only in intermediate scrutiny cases do the US courts operate in a similar fashion, and even in those cases the balancing seems somewhat more restricted than in the ECtHR decisions. Thus the US approach is diverse in its tiers of review, but overall more structured and consistent within those differing analytical methods. The ECtHR approach is on the surface more unified in a single analytical approach of proportionality analysis, but within that methodology the ECtHR is more scattered and less consistent in its application of the various tests that have arisen out of the case law. The final balancing phase offers a great deal of flexibility for the Court to determine what seems holistically to be the most just and ultimately most

appropriate balancing of interests in light of its obligations to respect its subsidiary role to national courts. However, while the approach is more holistic and consensus-driven, it also results in decisions that are far more opaque than their equivalents in US courts.

CONCLUSION

The question posed at the beginning of this study was threefold. Firstly, what differences in attitudes and outcomes can be noted in the treatment of religious freedom issues in the workplace in the US courts and the European Court of Human Rights? Secondly, to the extent that these differences exist, how important a role do the balancing methodologies of the courts play in generating these differences? And finally, what can we learn about balancing approaches from exploring their application in these cases?

It is often said that the US courts are more protective of religious freedom than the ECtHR. This study has shown this to be correct, but only to a limited extent. Moreover, the protective approach of the US courts is found not to come from its constitutional rights commitments, but rather from legislation that has sought to augment those rights in the face of judicial interpretations that left religious free exercise with very little protection. Some of the increased protectiveness of the US cases when looking specifically at the workplace arises specifically in the ministerial exception cases which do not reflect the approach of the courts more generally. Furthermore, the US experience with civil rights reform generated a strong social and legal interest in strict antidiscrimination measures which have had an enormous impact on religious freedom in the workplace, both as a protector of that liberty and as source of restrictions on free exercise. Such social contestations have underpinned the enormous importance of judicial approaches to managing conflicts between fundamental rights as well as conflicts between rights and the requirements of governing. This importance, moreover, has become highly politicized and integrated into the moral and political discourse of the general public. The development of the ECtHR's jurisprudence and methodology, on the other hand, has occurred in a context far more distanced from the everyday concerns of Europeans and as forum for compliance with international obligations rather than a constitutional court at the heart of social and political debate. Moreover, it has evolved by taking into account a variety of legal systems that are less conflict-driven than the US adversarial system. The result is a more consensus-driven and superficially "scientific" approach applied by legal experts which is designed to balance fundamental rights and interests in a way that will be accepted as fair across the spectrum of national legal traditions. These differences have resulted in two very different methodologies of managing rights conflicts: US tiered review and European proportionality analysis.

That said, the study of the workplace cases suggests that the differences in attitudes, outcomes and methodologies between these two legal systems appear to be less significant than some commentary would suggest. Much of the difference in the cases arise from differing needs and attitudes not regarding religion itself, but rather concerning other values that have arisen because of Europe's particular history as well as the nature of the Court as an international human rights court. Europe emerged from centuries of religious conflict with a variety of legal approaches to preventing such conflicts in future. In some countries a strict form of secularism arose in response partly to historic perceptions of abuse by religious authorities that cast formal religious bodies as potential enemies of modern notions of republican citizenship. Other countries have established religions, or constitutionally recognized religions. As a result, the ECtHR must maintain a high degree of flexibility when evaluating cases involving the relationship between church and state. Hence national approaches to neutrality in public service are a particularly sensitive issue and the court generally will support national approaches. This can make the ECtHR appear relatively indifferent to religious freedom when, in fact, it is defending a pluralistic community of nations that have chosen different approaches to maintaining a balance between religious freedom and harmony.

It is certainly the case that the US tradition is more vigilant in its expectations that employers must grant accommodations to religious employees where possible. There seems to be some indication that the ECtHR is moving in this direction, although it is significant that the European Court of Justice, which serves a political community that largely overlaps that of the ECtHR, has resisted this trend in recent cases supporting religious dress restrictions in the private workplace in order to protect corporate image. The ECtHR has also been more reluctant to protect religious employers or employees from being associated with the sins of others, whereas in the US one finds that this is a highly contentious issue still being played out in the courts. While this difference once again suggests that US courts are more rights protective, it is important to note that the price of this approach has been an arguable weakening of the government's ability to protect the rights of others. Moreover, in the body of cases concerning religious employers, the US approach that effectively bars all unfair dismissal or discrimination suits brought by employees with even the slightest connection with the spiritual mission of the organization may well be more protective of

religious interests in their collective dimension; however, that protection comes at the expense of individual rights and freedoms, including individual religious liberties. This greater protectiveness of religious rights in the US is partly attributable to one of the fundamental differences between the two court systems, specifically the need for the ECtHR to grant a wide margin of appreciation in so many cases. In this fundamental sense the ECtHR is much less powerful than the US federal courts, which operate both as appeals courts and as constitutional courts. This is highly explanatory of many differences in outcomes. However, beyond this key difference, one might argue that another key difference, especially in both religious autonomy and complicity type cases is that they have struck different balances between freedom and equality. This would suggest that what is happening is much more complex and systemically significant than a simplistic narrative of the US courts "caring more" about religion than their insensitive and relatively powerless European counterparts.

If that is indeed the case, then arguably it is a mistake to evaluate these courts purely on the degree to which they protect religion. Outcomes matter, but courts also serve the vital function of creating a neutral venue where just resolutions to rights conflicts can take place and, perhaps just as important, can be generated in an open process that is fair to all parties. The process and the methods that a legal system embodies are just as important as outcomes inasmuch as they are vital to maintaining faith in democracy and the rule of law. Both the ECtHR and the US federal courts play such a role as constitutional or quasi-constitutional courts charged with overseeing and defending fundamental rights, so understanding differences in methodology can be vital in evaluating the integrity of the social contract, both real and perceived, in their respective jurisdictions. Two paramount methodological differences emerge from close study of the workplace cases. First is the fractured landscape of multiple standards embodied by US tiered review versus the unitary standard of proportionality. At every step of comparison, we see that the tier of review is central to understanding how US courts will decide cases, whereas in the ECtHR there is one system that, despite variations in its application, offers a notionally unified structure upon which various national systems can agree and rely.

The second key difference is the strong strain of categorical reasoning that infuses most of the US cases in contrast to the ECtHR reliance on an explicit all-things-considered

balancing phase to weigh all the factors. This difference is fundamental in allowing the ECtHR to maintain the flexibility it needs as an international court serving 29 different countries with their own histories and traditions. Because there is more diversity in approaches to the balance between religious freedom and other rights in the ECHR countries than in the United States, there is a correspondingly greater need for tolerance for that diversity in the ECtHR than in US courts. This is facilitated by the contextual, holistic form of balancing provided by the ECtHR's version of proportionality analysis where the results of each step in the inquiry are then scrutinized as a working system rather than as decisive thresholds in themselves. What is proportionate in that final phase of analysis may be different in different countries because of their different political, legal, or religious traditions. The resulting flexibility is well-adapted to a human rights regime even if at times it is arguably under-protective of some human rights norms.

Both of these methodological differences are important. However, as we drill down to the specific components of the application of balancing tests, we find that the contrast between the apparently unified ECtHR proportionality analysis and the undoubtedly fractured US approach of various levels of tiered review should not be overstated. Certainly the European approach is overall more streamlined in applying a holistic set of standards than the fractured landscape of US tiered-review and categorical thresholds. But ultimately both courts suffer from various forms of inconsistency and opaqueness. Categorical reasoning and radically different standards applied to state and federal laws, for example, creates unfairness, and at times obscures important debates about the relative social value of competing rights in a multicultural and multifaith democracy. Proportionality, on the other hand, offers the benefits of holistic thinking that takes the interests of all sides account. That said, the reasoning is at times opaque, and inconsistencies in the application of proportionality, especially in the final balancing phase, are often left unexplained. The US courts, especially when applying heightened levels of scrutiny, offer more precision in their opinions and have a tradition of clear and extensive public reasoning that the ECtHR often lacks.

Despite the significant differences between these two approaches to balancing, they share a persistent pathology – when the means and ends are being balanced, neither court has been able to consistently apply a clearly defined set of steps or criteria to rationalize the balance. The ECtHR, despite its supposedly unitary approach, applies various components

of ‘necessary in a democratic society’ test inconsistently. In the US courts, either no balancing happens at all because of categorical reasoning, or the specific components that explain finding an interest “compelling” or “important” are not clearly laid out in a way that offers any conceptual consistency across specific types of cases (speech, religion, race, etc.). The US in this sense is both too rigid and too *ad hoc.* The ECtHR, by contrast, is too opaque and inconsistent. Either way, judicial certainty is lost, and rights are put in jeopardy. But what emerges from sustained comparison and an appreciation of the weaknesses in each approach is that they can each perhaps learn something from the other. The US can learn from Europe in experimenting more with balancing rationales that can cut through the sometimes unfairly mechanistic approach of categorical reasoning. The occasional tinkering with forms of intermediate scrutiny may pave the way in refining a standard that maintains the strictness of strict scrutiny without falling prey to the deficiencies engendered in a categorical mindset that often dissuades serious discussion of how society can most fairly balance the vital needs of faith with the equally valid and important rights interests of others. The ECtHR, on the other hand, could learn from the US legal tradition of extensively reasoned opinions as a way of clarifying the steps and considerations that go into the final balance in a way that may feel less cursory. By experimenting with more US style opinions and clarifying its balancing logic, the court may open itself to more detailed criticism of its reasoning, but it would also make its decision-making less opaque and could serve to boost the Court’s overall credibility among the citizens and nations it serves.

The integrity of both courts has been challenged in recent years. To maintain their sense of legitimacy, it is vital that the courts be, and be *perceived* to be, fair and thorough in the consideration of the rights of all rather than being distant and obscure processes that apply mechanistic forms of decision making irrespective of the justice of the final outcomes. There is some danger in open, careful, all-things-considered balancing exercises. Justice Scalia famously warned that balancing rights is like comparing “whether a particular line is longer than a particular rock is heavy.” He may well have been correct that there is no Archimedean point from which courts can objectively weigh and balance competing rights. However, it must be remembered that we all compare the incomparable every day. What is more important – to sleep an extra half hour or to enjoy the psychological benefits of slowly

savoring a cup of coffee before going to work? Without resigning ourselves to weighing incomparable values, we literally could not get out of bed in the morning.

Courts regularly face far more weighty and complex challenges. As Immanuel Kant famously observed, "out of the crooked timber of humanity no straight thing was ever made."[967] Put more simply, life is messy. In trying to maximize justice among the tangled mess of life in a liberal democracy, the question cannot be whether courts should balance the incommensurable; it must be "how?" The experiences of the ECtHR and US courts in dealing with religious liberty in the workplace show how difficult it is to balance fundamental rights openly, carefully, and with due consideration for the complexity and uniqueness of each situation. The advances and refinements these courts have made on the journey towards an optimal methodology to guide their decision-making are admirable and should not be underestimated. And if Kant was right, then there is no perfect method. But there is still much to learn, and the more these courts strive to learn from each other, the more nuanced, context-sensitive and transparent balancing methodologies can become.

[967] "Aus so krummem Holze, als woraus der Mensch gamacht ist, kann nichts ganz Gerades gezimmert warden." From Immanuel Kant, "Idee zu einer allgemeinen Geschichte in welbürgerlicher Absicht." (1784). English translation taken from Isaiah Berlin, *The Crooked Timber of Humanity*, (New York: Vintage, 1992), frontispiece.

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