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ARTICLE SYMPOSIUM

# THE (NOT SO) EXCEPTIONAL ESTABLISHMENT CLAUSE OF THE UNITED STATES CONSTITUTION

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## ABSTRACT

Since the end of World War II and the beginning of the human rights era, a common narrative has dominated international discussions of law and religion, especially in Europe, that emphasizes the alleged idiosyncrasy and uniqueness of U.S. Constitutional law regarding freedom of religion. What I call the "standard story" notes that unlike human rights instruments, and the constitutions of most European States, the U.S. Constitution contains an "Establishment Clause" prohibiting an establishment of religion, while European countries do not have prohibitions on state establishments, and indeed the relationships between religion and the state fall along a continuum running from cooperation, favored religions, to actual state establishments of religion. According to the standard story, the Free Exercise Clause of the U.S. First Amendment is a precursor of and has analogues in the human rights instruments' provisions protecting freedom of thought, conscience, and religion, but the Establishment Clause is characterized as being sui generis, a thing unto itself. The U.S. experience with the antiestablishment principle, symbolized by Jefferson's wall of separation, the standard story notes, is so unique and so different that the lessons gleaned there have very little to offer Europe, or indeed perhaps the rest of the world. In this article I argue, as my title suggests, that the American experience is not as unique as some (especially Europeans) sometimes think it is.

KEYWORDS: Establishment Clause, religious liberty, Europe, United States, established church

## INTRODUCTION

Since the end of World War II and the beginning of the human rights era, a common narrative has dominated international discussions of law and religion, especially in Europe, that emphasizes the alleged idiosyncrasy and uniqueness of United States Constitutional law regarding freedom of religion.[1] What I call the "standard story" notes that (1) unlike human rights instruments, and the

1 *See, e.g.*, W. Cole Durham, Jr., *The Right to Autonomy in Religious Affairs: A Comparative View*, in CHURCH AUTONOMY: A COMPARATIVE SURVEY 683–714, at 684 (Gerhard Robbers, ed., Peter Lang 2001) ("From [the European] vantage point, the American experience has typically seemed distinctly irrelevant if not positively threatening to Europeans, because the radical separation of church and state mandated by the Establishment Clause of the First Amendment to the United States Constitution seems hopelessly at odds with most European church-state

constitutions of most European states, the U.S. Constitution contains an "Establishment Clause" prohibiting an establishment of religion, and (2) European countries do not have prohibitions on state establishments. Indeed, the relationships between religion and the state fall along a continuum running from cooperation, favored religions, to actual state establishments of religion.[2] According to the standard story, the Free Exercise Clause of the Constitution's First Amendment is a precursor of and has analogues in international human rights instruments' provisions protecting freedom of thought, conscience, and religion, but the Establishment Clause is characterized as being sui generis, a thing unto itself.[3] The U.S. experience with the antiestablishment principle, symbolized by Jefferson's wall of separation,[4] the standard story notes, is so unique and so different that the lessons gleaned there have very little to offer Europe, or indeed the rest of the world. In this article, I argue, as my title suggests, that the American experience is not as unique as some, especially Europeans, sometimes think it is.

## OVERSIMPLIFICATION AND EXAGGERATION

The standard story was always an oversimplification and an exaggeration. A number of other constitutional democracies, including Japan[5] and Australia,[6] include constitutional provisions prohibiting an establishment of religion or providing for the separation of religion and the state.[7] Some strongly secular constitutions, especially in communist and formerly communist countries, contain even stronger separation of church and state provisions than the U.S. Constitution, and these are often genuinely unfriendly, suspicious, or even hostile to religion. Most Western European

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arrangements.") (citation omitted). *See also* C. H. Esbeck, *The Establishment Clause as a Structural Restraint on Governmental Power*, 84 Iowa Law Review 1, 98 (1998) ("It is in this primary role—when invoked to keep the spheres of government and religion in the right relationship to each other—that the Establishment Clause broke free from older European patterns and made its most unique and celebrated contribution to the American constitutional settlement."); *Id.* at 89 n.422 ("Historian Stanford Cobb has observed that America's solution to the 'world-old problem of Church and State' was 'so unique, so far-reaching, and so markedly diverse from European principles as to constitute the most striking contribution of America to the science of government.'" (citing Stanford Cobb, The Rise of Religious Liberty in America at vii (1902)).

2 *See* Carolyn Evans, Freedom of Religion under the European Convention on Human Rights 19–22 (2001). For example, France has adopted a strict separation conception of the state, *see* 1958 Constitution art. 1 ("France shall be an indivisible, secular, democratic and social Republic.") (Fr.), while there is a very close relationship between the Greek Orthodox Church and the state in Greece, *see* Syntagma [Syn.] [Constitution] sec. 2, arts. 3 (Relations of Church and State) & 13 (Religion). For additional examples, *see supra* note 1.

3 *See supra* note 1.

4 In the words of Jefferson, the Establishment Clause was intended to erect "a wall of separation between church and State." *See* Daniel Driesbach, Thomas Jefferson and the Wall of Separation between Church and State (2001). Additionally, Justice Hugo L. Black in *Everson v. Board of* Education stated, "That wall must be high and impregnable. We could not approve the slightest breach." *Everson v. Board of Education*, 330 U.S. 1, 18 (1947).

5 Nihonkoku Kenpō [Kenpō] [Constitution], art. 20, para. 1 (Japan) ("Freedom of religion is guaranteed to all. No religious organization shall receive any privileges from the State, nor exercise any political authority.").

6 *Australian Constitution* s 116 ("The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion.").

7 Constitution (1987), art. 3, § 5 (Philippines) ("No law shall be made respecting an establishment of religion, or prohibiting the free exercise thereof."); Konstitutsiia Rossiiskoi Federatsii [Konst. RF] [Constitution] art. 14 (Russia) ("The Russian Federation shall be a secular state. No religion may be established as the State religion or as obligatory."); Xianea art. 36 (2004) (China) ("No state organ, public organization or individual may compel citizens to believe in, or not to believe in, any religion; nor may they discriminate against citizens who believe in, or do not believe in, any religion.").

countries have constitutions that provide some funding[8] or favored status to specific churches.[9] However, many Western European countries also prohibit the establishment of a state church.[10]

According to one recent study by University of Texas law professor Frank B. Cross, nearly 40 percent of the constitutions in the world include some sort of antiestablishment provision.[11] Thus the U.S. antiestablishment provision is not as much of an outlier as is often suggested. Furthermore, those antiestablishment provisions correlate positively, although not overwhelmingly, with higher religious freedom.[12] According to Cross, constitutional antiestablishment provisions correlate positively with less oppression of minorities, less regulation of religion, and a lower likelihood that religious laws will be enacted in a country.[13] Other variables, such as a robust democracy, have a stronger correlation with religious freedom, while other variables, such as a large Islamic population, have a stronger correlation with a low degree of religious freedom.[14]

Another cause of the exaggerated prominence of the standard story of U.S. antiestablishment exceptionalism is that Europeans have tended to see separation through the filter of French Jacobinism, which has meant that a more religion-friendly variation of the nonestablishment principle is not well understood.[15] The constitutions of many European countries contemplate, at a minimum, a close relationship between church and state, if not a complete recognition of a state-sponsored church.[16] France, which has a declared itself a "secular" ("laïque") republic, is a major exception to this rule.[17] When Europeans consider the U.S. Establishment Clause, they often incorrectly assume that U.S. constitutional law is as rigidly secular as the French antiestablishment principle of *laïcité*.

While the French Revolution was in a very real sense a fight against a powerful religious establishment, and its victory viewed as a victory for freedom *from* religion,[18] the American Revolution was never viewed as a fight against religious establishment, and the history as well as the mythology

8 *See* W. Cole Durham, Jr. & Christine G. Scott, *Public Finance and the Religious Sector in the United States: Expanding Cooperation in a Separationist State*, 2006 Il Diritto Ecclesiastico, 360, 361–62.

9 *See, e.g.*, Kongeriket Norges Grunnlov [Constitution] (1814), art. 16 (Norway) ("The Norwegian church, an Evangelical-Lutheran church, shall remain the Norwegian National Church and will as such be supported by the State."); Arts. 7–8 Constituzione [Cost.] (Italy) (mentioning the Catholic Church specifically and referring to other churches generally); Constitución Española, Boletín Oficial del Estado, n. 311, Dec. 29, 1978, art. 16(3) (Spain) ("There shall be no state religion. The public authorities shall take into account the religious beliefs of Spanish society and shall consequently maintain appropriate cooperation relations with the Catholic Church and the other confessions.").

10 *See, e.g.*, Constituição do Repuública Portuguesa [Constitution], Diário da República n. 86/1976 (1976), art. 41 (4) (Portugal) ("Churches and other religious communities are separate from the state."); Grundgesetz für die Bundesrepublik Deutschland [Basic Law], art. 140 (incorporating by reference, inter alia, article 137(1) of the Weimar Constitution, which reads: "There shall be no state church."); 1958 Constitution, art. 1 (declaring France a "secular" republic).

11 Frank B. Cross, Constitutions and Religious Freedom 166 (2015).

12 *Id.* ("The next constitutional provision to be examined is the existence of something like the American establishment clause that calls for the separation of church and state. In the sample, 39 percent of the nations have such a provision."). Cross concludes that "[a] separation clause appears to provide for greater religious freedom, but those benefits seem relatively slight." *Id.*

13 *Id.* at 167–68.

14 *Id.* at 167.

15 *See generally* Jacques Robert, *Religious Liberty and French Secularism*, 2003 Brigham Young University Law Review 637 (2003); Dominique Decherf, *French Views on Religious Freedom*, Brookings Institute (2001), https://www.brookings.edu/articles/french-views-of-religious-freedom/.

16 *See supra* notes 8–10.

17 1958 Constitution, art. 1.

18 *See* Michael Vovelle, The Revolution against the Church: From Reason to the Supreme Being (1991).



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of the American Revolution centers around the vindication of the principle of freedom *of* religion, or even freedom *for* religion, and religious pluralism, rather than a conquest or rejection of religion.[19] This may in part explain why the European Catholic reaction to the French Revolution was so different from the American Catholic reaction to the American Revolution, and the American Catholic embrace of religious freedom much easier than it was for some European Catholics.[20]

## AMERICAN AND EUROPEAN CONVERGENCES

To a remarkable extent, the last twenty years has seen a recognizable convergence between the U.S. Supreme Court's understanding of nonestablishment and the European approach to addressing institutional issues involving freedom of religion and belief. Whereas the idea of separation of church and state dominated the U.S. understanding of the Establishment Clause in the years

19 One popular high school American History textbook explains the motivation for the revolutionary war as follows:

> [Thomas Paine, the author of Revolutionary propaganda] wanted to turn the anger of Americans away from the specific parliamentary measures they were resisting and toward what he considered the root of the problem—the English constitution itself … . It was the king, and the system that permitted him to rule, that was to blame. It was, he argued, simple common sense for Americans to break completely with a government that could produce so corrupt a monarch as George III, a government that could inflict such brutality on its own people, a government that could drag Americans into wars in which America had no interest.

ALAN BRINKLEY, AMERICAN HISTORY 130 (15th ed. 2015). Scholars dispute, however, whether the American Revolution had its origins in a defense of ideals and principles (e.g., democracy and inalienable rights), or whether it was motivated by social and economic interests (e.g., "no taxation without representation"). *Id.* at 132–33. Early American settlers who had separated from the established Church of England were not rejecting religion in general, but simply rejecting the Church of England. Many Separatists moved to the Americas in hopes of creating a "close-knit Christian community" and "spread[ing] 'the gospel of the Kingdom of Christ in those remote parts of the world.'" *Id.* at 41.

20 *See* Donald R. McClarey, *Catholics in the American Revolution*, AMERICAN CATHOLIC, Sept. 23, 2011, http://the-american-catholic.com/2011/09/23/catholics-in-the-american-revolution/ (documenting Catholic involvement in the American Revolution and quoting George Washington's statement to Catholics after the war was over: "I presume that your fellow-citizens will not forget the patriotic part which you took in the accomplishment of their Revolution, and the establishment of their government; or the important assistance which they received from a nation in which the Roman Catholic faith is professed."). American Catholic leaders also had a notable influence on the Council's teachings on religious liberty. Prior to Vatican II, "The perception of the Church's teaching by many was that whenever she found herself in the minority, the Church would cry religious liberty. However, if the Church was in the majority, the state would be obliged to suppress other faiths." Such a perception made inroads with non-Catholic Christians difficult and was a particular challenge for the Catholic Church in America. "Thus Father John Courtney Murray, Cardinal Richard Cushing of Boston, Cardinal Francis Spellman of New York, and other American prelates agreed and worked to advance the declaration at the Council." Omar F. A. Gutierrez, *Vatican II and Religious Liberty*, CATHOLIC WORLD REPORT, Jan. 14, 2013, http://www.catholicworldreport.com/Item/1883/vatican_ii_and_religious_liberty.aspx. Before becoming Pope Benedict XVI, Cardinal Ratzinger "described the American model of church-state relations as more hospitable to religious truth and institutions than European models." *See* Staff Writer, *Church-State Relations in America and Europe (Part 1): Robert Kraynak on America's Civil Religion*, ZENIT, Mar. 25, 2005, https://zenit.org/articles/church-state-relations-in-america-and-europe-part-1/. Cardinal Ratzinger also played an important role as a theological consultant for the Second Vatican Council. *Ratzinger, Vatican II and the Summer of 1962*, VATICAN INSIDER, Aug. 24, 2012, http://www.lastampa.it/2012/08/24/vaticaninsider/eng/inquiries-and-interviews/ratzinger-vatican-ii-and-the-summer-of-rFmd13cqV5EljPGAeSfGuL/pagina.html.



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after *Everson v. Board of Education* was decided in 1947,[21] beginning in the late 1980s and accelerating during the last decade of the twentieth century, U.S. Establishment Clause jurisprudence has been dominated by notions of endorsement,[22] neutrality,[23] and nondiscrimination.[24] Because this story has been extensively recounted elsewhere, my explanation will be truncated and somewhat simplified.[25]

## Everson: *Separation vs. Accommodation*

The first Establishment Clause case, *Everson v. Board of Education*,[26] set the stage for the contest between separationist and accommodationist interpretations. The question in that case involved a government program that reimbursed parents for the cost of busing children to religious (and almost exclusively Catholic) private schools.[27] The Court's opinion is schizophrenic.[28] The first half of the opinion is a passionate articulation of the value of freedom and separation, culminating in the invocation of Thomas Jefferson's, until then largely ignored, image of a "wall of separation between Church and State."[29] Only a sentence later, however, the opinion is demarcated by an important, "but,"[30] which is followed by a defense of accommodation of religion by the state

21 Everson v. Board of Education, 330 U.S. 1 (1947). The opinion in Everson addresses the limitations that result because of the "wall of separation" between churches and government by the establishment clause by saying that neither states nor the federal government can "set up a church"; "pass laws which aid one religion, aid all religions, or prefer one religion over another"; "force [or] influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion"; or punish a person for "entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance." *Id.* at 15–16.

22 *See, e.g.*, Lynch v. Donnelly, 465 U.S. 668 (1984) (O'Connor, J., concurring) (arguing violations of the Establishment clause arise in two principle ways: entanglement and endorsement). Justice O'Connor states, "Endorsement sends a message to non-adherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community." *Id.* at 688.

23 *See, e.g.*, Agostini v. Felton, 521 U.S. 203 (1997) (reversing the earlier *Aguilar* case that prohibited state subsidies to religious schools to pay for special education programs). Justice O'Connor writing for the Court noted that this program did not advance religion because the "aid is allocated on the basis of neutral, secular criteria that neither favor nor disfavor religion, and is made available to both religious and secular beneficiaries on a nondiscriminatory basis." *Id.* at 231.

24 *See, e.g.*, *Id.* For further discussion of the interaction between *Everson*, *Lynch*, and *Agostini*, see W. Cole Durham, Jr. & Brett G. Scharffs, Law and Religion: National, International, and Comparative Perspectives 132–52 (2010).

25 *See, e.g.*, Emma Long, The Church-State Debate: Religion, Education and the Establishment Clause in Post War America (2012) (examining how the Court's jurisprudence of the establishment clause has developed since World War II); Michael W. McConnell, *The Religion Clauses of the First Amendment: Where Is the Supreme Court Heading?*, 32 Catholic Lawyer 187, 188–95 (1989) (recounting "the recent history of twists and turns in religion clause doctrine").

26 *Everson*, 330 U.S. at 1.

27 *Id.* at 3.

28 *See, e.g.*, Bruce J. Dierenfeld, The Battle over School Prayer 48 (2007) (arguing that "almost every religion case decided by the U.S. Supreme Court in the past half-century has been affected by Black's schizophrenic decision in Everson").

29 *See supra* note 21.

30 *Id.* at 16 (We must consider the … statute in accordance with the foregoing limitations imposed by the First Amendment. But we must not strike that state statute down if it is within the state's constitutional power even though it approaches the verge of that power.").



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that is nearly as passionate.[31] The Court opines that the state "cannot exclude individual [members of any faith], because of their faith, or lack of it, from receiving the benefits of public welfare legislation."[32] The bus fare reimbursement program the court notes is a "general program."[33] The Court also invokes the concept of neutrality: "[The First] Amendment requires the state to be a neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary."[34] The Court concludes by again invoking the wall of separation, saying "[t]hat wall must be kept high and impregnable."[35] But the Court concludes, perhaps somewhat surprisingly, that there has been no breach of that wall by the public funding program.[36]

The European Court of Human Rights (ECtHR) has similarly held that appropriating tax funds to benefit churches or religious education does not violate European antiestablishment principles. In *X v. The United Kingdom*, the ECtHR held that states are permitted, but not required, to subsidize religious education.[37] And in *Darby v. Sweden*, the ECtHR held that Sweden could use tax funds to directly support the state-sponsored church.[38]

## *The* Lemon *Test and the Rise of a Separationist Understanding of Nonestablishment*

Two decades after *Everson*, in 1971's *Lemon v. Kurtzman*,[39] another case involving state aid to religious schools,[40] the Supreme Court adopted a three-prong test, focusing on purpose, effect, and entanglement of religion and state, which came to be known as the *Lemon* test.[41] Over the

31 The Court held that although a state cannot "contribute tax-raised funds to the support of an institution which teaches the tenets and faith of any church," it also can't hinder an individual's right to freely exercise her faith by excluding her from "receiving the benefits of public welfare legislation" because of her religious affiliation. *Id.* The First Amendment was not written to make the state be an adversary to religion. *Id.* at 18. Rather, it "requires the state to be a neutral in its relations with groups of religious believers and non-believers." *Id.* The establishment clause means that the state can neither "handicap religions … [nor] favor them." *Id.*

32 *Id.* at 16.

33 *Id.* at 17–18. Notice that "general" programs invoke the value of equality, as opposed to "separation," which suggests the value of freedom or independence of religion and religious influence from the state.

34 *Id.* at 18. Neutrality, like "generality," is a concept that evokes equality and equal treatment.

35 *Id.*

36 *Id.* (concluding that while the Court "could not approve the slightest breach" of the impregnable wall, "New Jersey has not breached it here"). Justice Jackson was not persuaded by the majority. In his dissenting opinion, after expressing his sympathy for those "compelled by law to pay taxes for public schools," and "constrained by conscience and discipline to support other schools for their own children," he nevertheless found that the majority's advocacy for "complete and uncompromising separation of Church from State, seem[ed] utterly discordant with its conclusion yielding support to their commingling in educational matters." *Id.* at 18–19 (Jackson, J., dissenting).

37 X v. The United Kingdom, App. No. 7782/77 Eur. Ct. H.R. (1978).

38 Darby v. Sweden, App. No. 15581/85 Eur. Ct. H.R. (1990).

39 Lemon v. Kurtzman, 411 U.S. 602 (1971).

40 In *Lemon*, two statutes, one from Pennsylvania and one from Rhode Island were challenged as "violative of the Establishment and Free Exercise Clauses of the First Amendment and the Due Process Clause of the Fourteenth Amendment." *Id.* at 606. The Pennsylvania statute provided that nonpublic elementary and secondary school teachers could be reimbursed "for the cost of teachers' salaries, textbooks, and instructional materials in specified secular subjects." *Id.* at 607. Under Rhode Island's statute, nonpublic teachers, even those at "church-related educational institutions," received "a supplement of [up to] 15% of their annual salary." *Id.* The Court held both unconstitutional. *Id.*

41 *See id.* at 612–13 (internal quotations omitted) (establishing that for a statute to survive a First Amendment challenge, (1) it must "have a secular legislative purpose; (2) "its principal or primary effect must be one that neither advances nor inhibits religion"; and (3) it "must not foster an excessive government entanglement with religion").

jurisprudence of the next two decades, the most important consideration turned out to be "nonentanglement" of religion and the state, and over that period of time the *Lemon* test generally resulted in separationist outcomes in Establishment Clause cases, particularly those involving public schools.[42]

So influential was the idea of the "wall of separation," that if you had asked a school child, or even a lawyer or law professor, what the First Amendment said about nonestablishment, they would probably have answered with some variation of "separation of church and state" or "wall of separation," even though those words never appear in the First Amendment.[43] Jefferson's wall was the dominant metaphor animating this ideal of separation of church and state, an ideal that focuses on demarcating appropriate boundaries and that evinces a strong preference for liberty or freedom of the state and religion from interference, or even engagement with each other.[44]

Although the ECtHR has approved of state support of religion in ways that the U.S. Supreme Court would not (e.g., using tax funds to directly support a state-sponsored church), case law from the ECtHR from the 1970s to the 1990s reflected a similar concern with "nonentanglement" principles. In 1996, the ECtHR held that a nonbeliever may be required to pay the proportion of taxes to a state church that the church uses for carrying out "secular functions."[45] And, as previously mentioned, the ECtHR also held in 1978 that states are permitted, but not required, to subsidize religious education.[46]

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42 *See, e.g.*, Tilton v. Richardson, 403 U.S. 672 (1971); Committee for Public Education and Religious Liberty v. Nyquist, 413 U.S. 756 (1973) (invalidating government grants for building maintenance of religious schools and tax credits to parents); Levitt v. Comm. for Pub. Educ., 413 U.S. 472 (1973) (prohibiting reimbursement of religious schools for the costs of administering and recording state-required examinations); Meek v. Pittenger, 421 U.S. 349 (1975) (prohibiting loan of instructional equipment and materials to religious schools); Wolman v. Walter, 433 U.S. 229 (1977) (prohibiting reimbursement of costs of teacher-led field trips); Aguilar v. Felton, 473 U.S. 402 (1985) (invalidating federal program that paid public school teachers to teach remedial classes to children at religious schools in poor inner-city neighborhoods); School District of the City of Grand Rapids v. Ball, 473 U.S. 373 (1985) (striking down remedial and enrichment programs provided to classes of nonpublic school students on the premises of religious schools).

43 "I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should 'make no law respecting an establishment of religion or prohibiting the free exercise thereof,' thus building *a wall of separation* between church and State." Reynolds v. United States, 98 U.S. 145, 164 (1878) (emphasis added); *see also* Goodson v. Northside Bible Church, 261 F. Supp. 99, 103 (S.D. Ala. 1966) ("the [legislation in question] violates what Jefferson termed the 'wall of separation between Church and State' on other grounds. No constitutional principle is more firmly imbedded in our heritage than this separation. It is a fundamental to our liberty.").

44 This is evident in the litigation that arose following the Court's decision in *Everson*. Although the exact degree of separation has been "difficult to define with precision," holdings in lower federal courts demonstrate the outer boundaries of the doctrine. Gilfillan v. City of Philadelphia, 480 F. Supp. 1161, 1166 (E.D. Pa. 1979). *See, e.g.*, *Goodson*, 261 F. Supp. 99 (holding as a violation of the establishment clause an act that gave a 65 percent majority of local parishioners the right to "sever . . . connection with the parent church and retain the possession and ownership of the local church property free and clear of any trust"); Hunt v. Bd. of Educ., 321 F. Supp. 1263, 1267 (S.D. W. Va. 1971) (granting motion for "summary judgment and dismissal" of a school board that was sued after it prohibited a group of students from holding a prayer group).

45 Kustannus Oy Vapaa Ajattelua Ab and Others v. Finland, App. No. 2047/92 Eur. Ct. H.R. (1996).

46 X v. The United Kingdom, App. No. 7782/77 Eur. Ct. H.R. (1978).



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### *The Rise of Indirect Benefits, Parental Choice, and Neutrality*

In the late 1980s and early 1990s things began to change, with several cases that revisited issues of state support of religious schools and reached more flexible conclusions concerning some forms of state funding. The signpost cases, such as *Agostini v. Felton*,[47] involved support to schools in troubled school districts, and often involved support of special education programs designed to assist students with handicaps.[48] Two ideas began to compete with "nonentanglement" for dominance in Establishment Clause jurisprudence: "parental choice" and "neutrality." Both of these ideas can be traced back to the latter "accommodationist" half of the *Everson* opinion.

The first is "parental choice"—the idea being that state aid to religious schools that is filtered through parental choice is sufficiently indirect that it does not constitute an "establishment" of religion.[49] In time, a variety of indirect mechanisms for including religious schools in public funding programs were permitted by the Supreme Court.[50] The second idea was "neutrality"—the proposition that it was discriminatory to exclude religious schools from general and broad programs that provided benefits to both secular and religious schools.[51] This was a significant shift.

This shift can be viewed as part of a general ascendance of equality and nondiscrimination norms above liberty and nonentanglement norms in American political life. As equality and nondiscrimination supplanted liberty as the primary political and legal ideal in Constitutional jurisprudence, separation and entanglement (principles that vindicate the principle of separation of church and state) were also supplanted by concepts such as parental choice and neutrality that reflected this equalitarian impulse.

To an extent that would surprise many Europeans, current U.S. Supreme Court doctrine allows considerable amounts of state funding to make its way to religious schools.[52] Participation in public

47 *See, e.g.*, Agostini v. Felton, 521 U.S. 203 (1997) (reversing *Aguilar* and, in part, *Grand Rapids*); Mitchell v. Helms, 530 U.S. 793 (2000) (permitting use of federal funds for purchasing educational materials and equipment, such as textbooks and computers, effectively overruling much of *Meek* and *Wolman*).

48 *See* Witters v. Washington Department of Services for the Blind, 474 U.S. 481 (1986) (upholding state scholarships to blind citizens seeking occupation in professions, businesses, or trades, including to a student who wanted to use the scholarship to study at a religious institution to become a pastor); Zobrest v. Catalina Foothills School District, 509 U.S. 1 (1993) (upholding Arizona school district program that provided an interpreter for a deaf student attending a parochial school).

49 *See, e.g.*, Mueller v. Allen, 463 U.S. 388 (1983) (reasoning that aid given to parochial schools only as a result of parental decisions in tax deductions indicates no official state approval of that religion and does not violate the establishment clause); *Witters*, 474 U.S. 481 (upholding state scholarships to blind citizens seeking occupation in professions, businesses, or trades, including to a student who wanted to use the scholarship to study at a religious institution to become a pastor); Zelman v. Simmons-Harris, 536 U.S. 639 (2002) (upholding use of educational vouchers that were often used by parents to send their children to religiously affiliated schools); *Mitchell*, 530 U.S. 793 (permitting use of federal funds for purchasing educational materials and equipment, such as textbooks and computers).

50 For example, *Mueller*, 463 U.S. 388, allows for governments to reimburse parents who spend money on their children's education in religious schools; *Witters*, 474 U.S. 481, allows for government scholarship money to be used at religious institutions; *Zelman*, 536 U.S. 639, allows for government-funded educational vouchers to be used at religious schools; and *Mitchell*, 530 U.S. 793, allows for the lending of government owned educational materials to religious schools.

51 *See. e.g.*, *Mueller*, 463 U.S. at 398–99; *Witters*, 474 U.S. at 489–91; *Zobrest*, 509 U.S. at 8; *Zelman*, 536 U.S. at 649–52; *Mitchell*, 530 U.S. at 794–95.

52 While the diverse nature of this aid makes calculating exact numbers difficult, some figures can help illustrate the extent of this aid. For example, in 2010–2015, the federal government spent approximately $859,000,000 in voucher and educational savings account programs that fund educational expenses in private schools. U.S. Government Accountability Office, GAO-16-712, School Choice: Private School Choice Programs Are

funding programs is also evident in other programs, such as "charitable choice" and "faith-based initiatives," embraced by President George H. W. Bush,[53] expanded by President Bill Clinton in the 1990s,[54] made a priority by President George W. Bush in the 2000s,[55] and continued by President Barack Obama.[56] These initiatives allow religiously affiliated charitable programs to participate in government funding programs of civil society social service programs. These programs were expanded under President George W. Bush,[57] and survived under President Barack Obama,[58] even in the face of threats to place curbs on faith-based organizations' ability to favor hiring employees from the sponsoring religious group. Another example of religious participation in state funding programs is the Supreme Court's approval of school voucher programs, which give

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Growing and Can Complicate Providing Certain Federally Funded Services to Eligible Students 12 (2016). Reports indicate 69–88 percent of these schools are religiously affiliated (*id*. at 27 n. 43). In more specific circumstances, such support can turn into situations like North Carolina in 2016, where over 90 percent (approximately 11 out of 12 million dollars) of government private-school funding went to faith-based schools. Ann Doss Helms & T. Keung Hui, *NC Vouchers Head to Religious Schools*, News & Observer (April 17, 2016), http://www.newsobserver.com/news/local/counties/wake-county/article72328707.html). A similar pattern in Cleveland (96.6 percent of all voucher recipients attended religious schools) led to massive concerns for the four Supreme Court Justices making up the dissent in *Zelman*, 536 U.S. at 703–04.

53 *See, e.g.,* Judith B. Goodman, *Charitable Choice: The Ramifications of Government Funding for Faith-Based Health Care Services*, 26 Nova Law Review 463 (2002) (discussing implications of the "Charitable Choice" bill, which authorizes faith-based organizations to compete with secular organizations for federal funding of welfare, health, and social services).

54 Clinton once stated, "[F]amilies cannot solve [societal, childcare, and welfare] problems alone. We, as a community, have an obligation here. Government can provide some help." William Jefferson Clinton, Between Hope and History 121 (1996). These ideals eventually led President Clinton to pass several welfare reform laws including what are now referred to as Charitable Choice provisions. These provisions eventually lead to the direct funding of religious organizations that help provide social services (for general discussion of Charitable Choice, see Hebah Farrag, *Charitable Choice: A Bibliography*, University of Southern California Center for Religion and Civic Culture (Aug. 22, 2016), https://crcc.usc.edu/charitable-choice-a-bibliography/). Upon signing part of this welfare reform legislation, President Clinton stated that such an effort "provides an historic opportunity to end welfare as we know it and transform our broken welfare system by promoting the fundamental values of work, responsibility, and family." *Bill Clinton on Welfare & Poverty*, On the Issues, http://www.ontheissues.org/Celeb/Bill_Clinton_Welfare_&_Poverty.htm (last visited Jan. 16, 2017).

55 "It is one of the great goals of my administration to invigorate the spirit of involvement and citizenship. We will encourage faith-based and community programs without changing their mission. We will help all in their work to change hearts while keeping a commitment to pluralism . . . . [W]hen we see social needs in America, my administration will look first to faith-based programs and community groups, which have proven their power to save and change lives." George W. Bush, *Remarks by the President in Announcement of the Faith-based Initiative*, Office of the Press Secretary (Jan. 29, 2001).

56 *See* President Obama Signs Executive Order to Implement Reform Recommendations on the President's Advisory Council on Faith-based and Neighborhood partnerships, Nov. 17, 2010, https://obamawhitehouse.archives.gov.

57 *See, e.g.*, Exec. Order No. 13,199, 3 C.F.R. §§ 752–54 (2001), which created the White House Office of Faith-Based and Community Initiatives. The office called for and established dramatic expansion of cooperation between civil government and private religious organizations to help alleviate social ills. Oliver Thomas, *Charitable Choice/Faith-Based Initiatives*, First Amendment Center, Sept. 16, 2002, http://www.firstamendmentcenter.org/charitable-choicefaith-based-initiatives/.

58 It is interesting to note that Obama, on the campaign trail, committed to banning religious hiring in social-service programs or faith-based organizations using federal funds. Upon being elected, however, President Obama amended other aspects of the initiative but left Bush and Clinton hiring rules intact, to the surprise of many. *President Obama's Faith-Based Initiatives*, Institutional Religious Freedom Alliance, http://www.irfalliance.org/president-obamas-faith-based-initiatives/ (last visited Jan. 16, 2017).



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parents a "voucher" that can be used to enroll their children in religiously affiliated schools as well as nonreligious private schools.[59]

A similar focus on neutrality principles is evident in recent ECtHR decisions. In *Association Les Témoins de Jehovah v. France*, the ECtHR held that taxing church donations of only certain religions violated the European Convention.[60] In *Hasan and Eleym Zengin v. Turkey*, the ECtHR held an exemption procedure in Turkey insufficient to protect those who are opposed to religious education in public schools.[61] These developments have resulted in levels of convergence between Europe and the United States that are not evident unless you are familiar with what has been is happening in the U.S. system over the past twenty years.

## COMMON ISSUES, COMMON PRINCIPLES, COMMON PRESSURES

There is another reason why the U.S. experience with the nonestablishment principle is not as unique as we sometimes imagine. Many issues that arise in the United States under the rubric of the Establishment Clause arise in other countries as well, even if they are not directly characterized as involving the question of the establishment of religion. For example, questions of the permissible scope of state funding of religion, and religious schools, the presence of religious symbols in public schools, or the appropriate ways to engage in religious instruction in public schools arise in many legal settings.[62]

In addition, there is a common set of pressures both in the United States and Europe that put pressure on the establishment idea. Below I discuss three sets of pressures that have pushed U.S. and European systems towards greater common ground. The first are pressures from secularism; the second, pressures from pluralism; and the third, pressures from equalitarianism and nondiscrimination.

59 *See* Zelman v. Simmons-Harris, 536 U.S. 639 (2002) (upholding use of educational vouchers that were often used by parents to send their children to religiously affiliated schools).

60 Association Les Témoins de Jehovah v. France, App. No. 8916/05 Eur. Ct. H.R. (2011) (the European Court of Human Rights held that imposing a tax on "hand-to-hand gifts" received by one of the national governing bodies of the Jehovah's Witnesses violated the European Convention).

61 Hasan and Eleym Zengin v. Turkey, App. No. 1448/04, Eur. Ct. H.R. (2007).

62 Darby v. Sweden, App. No. 15581/85 Eur. Ct. H.R. (1990) (the European Commission and the European Court of Human Rights confirmed that the state of Sweden could directly collect taxes for an established church); Kustannus Oy Vapaa Ajattelua Ab and Others v. Finland, App. No. 2047/92 Eur. Ct. H.R. (1996) (the European Commission held that a nonbeliever may be required to pay the proportion of taxes to a state church that the church uses for carrying out "secular functions"); Association Les Témoins de Jehovah v. France, App. No. 8916/05 Eur. Ct. H.R. (2011) (the European Court of Human Rights held that imposing a tax on "hand-to-hand gifts" received by one of the national governing bodies of the Jehovah's Witnesses violated the European Convention); X v. The United Kingdom, App. No. 7782/77 Eur. Ct. H.R. (1978) (the European Commission on Human Rights ruled that states are allowed to subsidize religious schools, but there is no positive obligation on states to do so); Classroom Crucifix II Case, Federal Constitutional Court of Germany, 93 BVefGE 1 (1995) (the Federal Constitutional Court of Germany ruled that the affixation of a crucifix in the classrooms of a state compulsory school that is not a denominational school infringes German Basic Law); Lautsi v. Italy, 2011-III Eur. Ct. H.R. (2011) (the ECtHR ruled that the requirement in Italian law that crucifixes be displayed in classrooms of states schools is allowed); Hasan and Eleym Zengin v. Turkey, App. No. 1448/04, Eur. Ct. H.R. (2007) (the ECtHR ruled an exemption procedure was insufficient to protect those who are opposed to religious education in public schools).

## *Pressures from Secularism*

In both Europe and the United States, pressures from secularism have resulted in calls to reduce public support of religion, and to remove religion from public life.[63] For example, the German[64] and Italian[65] controversies surrounding the presence of crucifixes in state schools reflect antiestablishment concerns that were thought to be more uniquely American phenomena.[66]

In the German controversy, the Federal Constitutional Court of Germany decided that the affixation of a crucifix in the classrooms of a nondenominational state compulsory school infringed on German Basic Law.[67] The Bavarian State Ministry for Education and Cultural Affairs had declared that "[i]n every classroom a cross shall be affixed."[68] The Court reasoned that "the cross cannot be divested of its specific reference to the beliefs of Christianity and reduced to a general token of the Western cultural tradition."[69]

The ECtHR on the other hand, has not accepted the reasoning of the German Constitutional Court. In *Lautsi v. Italy*, the ECtHR ruled that the requirement in Italian law that crucifixes be displayed in classrooms of state schools is permissible.[70] The Court endorsed the Italian government's claim that, "beyond its religious meaning, the crucifix symbolised the principles and values which formed the foundation of democracy and western civilisation, and that its presence in classrooms was justifiable."[71]

The ECtHR decision in *Lautsi* is reminiscent of the United States Supreme Court decision in *Lynch v. Donnelly*.[72] *Lynch* upheld the constitutionality of a state-funded Christmas display that included Christian symbols.[73] The *Lynch* majority, concurrence, and the dissent all listed numerous examples of state-sponsored religious symbols and proclamations that are commonplace in the United States.[74] The dissent suggested that these religious symbols are only acceptable because they are a form of "'ceremonial deism,' protected from Establishment Clause scrutiny chiefly because they have lost through rote repetition any significant religious content."[75] It appears

63 José Casanova, *Religion, European Secular Identities and European Integration*, in RELIGION IN THE NEW EUROPE 23–34 (Krzystof Michalski ed., 2006), http://books.openedition.org/ceup/1273.

64 Bundesverfassungsgericht [Federal Constitutional Court], May 16, 1995, 93 BVerfGE 1 (1995) (Germany) (Classroom Crucifix II Case); JUSTIN COLLINGS, DEMOCRACY'S GUARDIANS: A HISTORY OF THE GERMAN FEDERAL CONSTITUTIONAL COURT 1951–2001 at 260–66 (2015).

65 *Lautsi*, 2011-III; JEROEN TEMPERMAN, THE LAUTSI PAPERS: MULTIDISCIPLINARY REFLECTIONS ON RELIGIOUS SYMBOLS IN THE PUBLIC SCHOOL CLASSROOM 81 (2012) ("The precarious unity of … [the] different Christian churches and interest groups was not so much in favour of the mandatory Catholic crucifix … but it was predominantly directed against what was interpreted as a court ruling that could be the beginning of an aggressive secularist judicial policy resulting in the purge of all kinds of public manifestations in Europe.").

66 "The Court takes the view that these considerations entail an obligation on the State's part to refrain from imposing beliefs, even indirectly, in places where persons are dependent on it or in places where they are particularly vulnerable … . The Court cannot see how the display in state-school classrooms of a symbol that it is reasonable to associate with Catholicism (the majority religion in Italy) could serve the educational pluralism which is essential for the preservation of 'democratic society' within the Convention meaning of that term." Lautsi v. Italy, App. No. 30814/06 Eur. Ct. H.R. (2009).

67 Classroom Crucifix II Case, Federal Constitutional Court of Germany, 93 BVerfGE 1 (1995).

68 Elementary Schools Act (VoSchG) § 13(1) VSO.

69 Classroom Crucifix II Case at ¶ 3(a).

70 Lautsi v. Italy, 2011-III Eur. Ct. H.R. (2011).

71 *Id.* at ¶ 67.

72 465 U.S. 668 (1984).

73 *Id.* at 687.

74 *Id.* at 674–78, 692–94, 714–17.

75 *Id.* at 716.



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that the U.S. Supreme Court and the ECtHR agree that some religious symbols have become sufficiently secularized to justify their state-sponsored expression.

### *Pressures from Pluralism*

A second powerful set of pressures comes from increasing religious pluralism. As societies around the world, including the United States and Europe, become more religiously diverse, pressures have increased for equal (or at least less overtly discriminatory) treatment of religious groups.[76] This can be accomplished either by leveling down state support of historically favored groups, or leveling up of state support of newer or previously disfavored groups. Countries have responded in a variety of ways, but the usual pattern seems to be a combination of leveling up and leveling down state support of religion. In this regard, high rates of Muslim immigration have made this process much more complicated.[77]

The leveling down of historically favored groups or leveling up of state support for newer or previously disfavored groups is typically done by disestablishment of the official state religion and gradual increase in advantages and benefits available to minority religious groups. At the time of disestablishment, the assurance is often made that the former state church will continue to be treated with the same respect as other religious groups, but at times the former state church is accorded a "continuing special status."[78]

Such a leveling up of state support for religious minority groups occurred in Spain during its "transition from an authoritarian state-church system to a democratic cooperationist regime. The aim of the transition, which has brought major benefits to most religious groups, was to bring others 'up to' the level of the Roman Catholic Church."[79] Professor Cole Durham and I have observed that "[t]he difficulty in Spain (and in many other cooperationist regimes) is that the intended upward equalization does not always trickle down to the full range of smaller religious groups."[80]

On the challenges Europe is facing in adapting to high rates of Muslim immigration, one scholar has noted,

> Internal differences notwithstanding, western European societies are deeply secular societies, shaped by the hegemonic knowledge regime of secularism. As liberal democratic societies they tolerate and respect individual religious freedom. But due to the pressure towards the privatization of religion, which among European societies has become a taken-for-granted characteristic of the self-definition of a modern secular society, those societies have a much greater difficulty in recognizing some legitimate role for religion in public life and in the organization and mobilization of collective group identities. Muslim organized collective identities and their public representations become a source of anxiety not only because of their religious otherness as a non-Christian and non-European religion, but more importantly because of their religiousness itself as the

76 Casanova, *supra* note 63, at 9–10.

77 Many European countries are currently "faced with the challenge of integrating a growing diversity of religions, particularly Islam." Veit Bader, Katayoun Alidadi & Floris Vermeulen, *Religious Diversity and Reasonable Accommodation in the Workplace in Six European Countries: An Introduction*, 13 International Journal of Discrimination and the Law 54, at 74 (2013). *See also* Islam, Europe and Emerging Legal Issues (W. Cole Durham, Jr., Rik Torfs, David M. Kirkham & Christine Scott eds., 2016).

78 *See, e.g.,* Per Pettersson, *State and Religion in Sweden: Ambiguity between Disestablishment and Religious Control*, 24 Nordic Journal of Religion and Society 119 (2011).

79 Durham & Scharffs, *supra* note 24, at 124.

80 *Id.*

> other of European secularity. In this context, the temptation to identify Islam and fundamentalism becomes the more pronounced. Islam, by definition, becomes the other of Western secular modernity.[81]

Germany, for example, has adapted to an influx of Muslim immigrants by leveling up support for Islam by making several accommodations for Muslims.[82]

U.S. Supreme Court case law also reflects the pressure to accommodate historically disfavored or newer religious groups. In *Church of Lukumi Babalu Aye v. City of Hialeah*, the Court held that the City of Hialeah could not pass city ordinances that prohibited ritual animal sacrifice because the city ordinances in question targeted the petitioning Santeria church.[83] The Court also held that the federal government could not prohibit the importation of a hallucinogenic tea leaf used by a minority religious group.[84] In recent years, both the U.S. Supreme Court and Western European countries have been accommodating historically disfavored and new religious groups in a way that promotes a more pluralistic society.

### *Pressures from Equalitarianism and Nondiscrimination*

Pluralism is closely related to the third set of pressures that have been brought to bear by equalitarianism and the ascendance of nondiscrimination. These have been the most powerful and salient political and legal values, at least since the civil rights, women's rights, and sexual rights revolutions.[85] Whereas a generation ago, discussions of nonestablishment in the United States were dominated by liberty values such as separation and nonentanglement, more recently equalitarian values of neutrality, nondiscrimination, and equal participation have been ascendant.[86] As far as I can tell, nondiscrimination has also become the dominant political/legal value in Europe as well.[87]

## RECOGNITION OF RELIGIOUS AUTONOMY AS AN IMPORTANT VALUE

Religious autonomy is a particular area where we see evidence of greater similarity than usually is recognized between Europe and the United States. Religious autonomy is recognized both in the United States and Europe, and indeed around the world as an important constitutionally protected right.[88] Legal protections of church autonomy reflect a recognition of a wide variety of ways in which religious groups are of value to a society—as buffering institutions that can protect

81 Casanova, *supra* note 63, at 32–33.

82 *See* Gerhard Robbers, *Religious Freedom in Germany*, 2001 BYU LAW REVIEW 643, 656–58 (2001) (discussing several accommodations that Germany has created to allow religious freedom for Muslims, and stating that "[p]robably the foremost challenge in German law on religion today is the need to integrate the large Islamic population").

83 508 U.S. 520, 533–535 (1993).

84 Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418 (2006).

85 See Brett G. Scharffs, *Equality in Sheep's Clothing: The Implication of Anti-Discrimination Norms for Religious Autonomy*, 10 SANTA CLARA JOURNAL OF INTERNATIONAL LAW 107 (2012).

86 *See supra* "The Rise of Indirect Benefits, Parental Choice, and Neutrality."

87 *See* CHRISTOPHER MCCRUDDEN & SACHA PRECHAL, THE CONCEPTS OF EQUALITY AND NON-DISCRIMINATION IN EUROPE: A PRACTICAL APPROACH 2 (2009) (discussing the various sources of equality and nondiscrimination in European law: "the constitutional traditions of Member States and the EEA countries; EC law; and human rights law, in particular the European Convention on Human Rights.").

88 *See generally* Durham, *supra* note 1. *See also* Perry Dane, *The Varieties of Religious Autonomy*, in CHURCH AUTONOMY: A COMPARATIVE SURVEY, *supra* note 1, 117–48, at 118 ("Countries such as Israel and India also



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individuals from the state;[89] as identity-forming associations that provide a context for the development of individual personality;[90] and for their envisioning value,[91] where religious groups are viewed as being part of a larger collection of social institutions that create, advocate, and maintain values important to a society.[92]

A full discussion of religious autonomy throughout the world would encompass a discussion of government restrictions on religion of many stripes (e.g., registration, selection and regulation of clergy and their training, monitoring of worship, etc.).[93] However, religious autonomy has largely developed as an employment law issue in the United States and Europe. Additionally, in U.S. and European jurisprudence, the more pluralistic term of "religious autonomy" has been discarded for the more sectarian term of "church autonomy." Accordingly, the next two sections will compare the U.S. and European development of "church autonomy" doctrine in the employment context.

## *Church Autonomy in the United States*

In the United States, it has sometimes been unclear whether church autonomy is a matter of Free Exercise or Establishment Clause jurisprudence, or perhaps of both.[94] In the United States, cases involving church autonomy often arise in the context of disputes over church property,[95] as well as the hiring and firing of ministers and other church personnel.[96] For example, in the noteworthy 1952 case, *Kedroff v. St. Nicholas Cathedral*,[97] the U.S. Supreme Court deferred to the hierarchical

explicitly extend a high degree of formalized religious autonomy in matters of 'personal law' such as marriage or divorce.") (citation omitted).

89 W. Cole Durham, Jr., Silvio Ferrari, Cristiana Cianitto, & Donlu Thayer, Law, Religion, Constitution: Freedom of Religion, Equal Treatment, and the Law 26 (2016).

90 *Id.*

91 *Id.*

92 *Id.*

93 For a more complete discussion of the various religious autonomy issues throughout the world, see Durham. & Scharffs, *supra* note 24.

94 Some have stated that church autonomy is protected by the establishment clause, but not the free exercise clause. C. H. Esbeck, *Differentiating the Free Exercise and Establishment Clauses*, 42 Journal of Church & State 311, 320 n.31 (2000) (declaring that it is the Establishment Clause, but not the Free Exercise Clause, that affords church autonomy). Others have said that the Free Exercise Clause protects certain aspects of church autonomy while the Establishment Clause protects other aspects. *See* EEOC v. Catholic Univ. of Am., 83 F.3d 455, 457 (D.C. Cir. 1996) (stating "that the Free Exercise Clause forbids judicial review" of church autonomy cases concerning the employment decisions of employees who are "the functional equivalent of a minister," but that the Establishment Clause forbids the application of federal employment law to the employment of ministers.). *See also* Mark E. Chopko, *Constitutional Protection for Church Autonomy: A Practitioner's View*, in Church Autonomy, *supra* note 1, 95–116, at 103 (arguing "that both the Free Exercise Clause and the Establishment Clause support the concept of constitutional 'church autonomy'").

95 *See, e.g.*, Watson v. Jones, 80 U.S. 679 (1872) (deference to hierarchy principle, based upon doctrinal reasons for decisions and implied consent of members); Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Church, 393 U.S. 440 (1969) (Court rejects departure from doctrine test and courts should not resolve ecclesiastical questions, although courts can use neutral principles of law, developed for use in all property cases); Jones v. Wolf, 443 U.S. 595 (1979) (allowing state to apply "neutral principles of law" in dispute arising from church schism).

96 *See* Serbian Eastern Orthodox Diocese v. Milivojevich, 426 U.S. 696 (1976) (court declining to involve itself in a decision to defrock a minister, a decision that was arguably an arbitrary decision that did not follow canonical procedure); Corporation of Presiding Bishop v. Amos, 483 U.S. 327 (1987) (holding that provision of the Civil Rights Act of 1964 that allows religious employers to choose employees for nonreligious jobs based on their religion did not violate the Establishment Clause).

97 Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church, 344 U.S. 94 (1952).

decision-making procedures of the Russian Orthodox Church over a conflict regarding church property, even though it was during the Cold War and the state legislature of New York had sided with a U.S. splinter group that was seeking independence from the Russian Church, which was controlled by the Soviet Union.[98]

More recently, in January 2012, the U.S. Supreme Court unanimously decided *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*,[99] which was widely viewed as the most important religious freedom ruling of the Supreme Court in the previous two decades, and possibly longer.[100] The court upheld the "ministerial exception," which creates an exception from the nondiscrimination laws of Title VII. The Court did not follow the principle articulated in an earlier precedent, *Employment Division v. Smith*,[101] which held that laws that are general and neutral are constitutionally permissible, even if they burden religious exercise. One interesting aspect of the *Hosanna-Tabor* case is that the Court decided the case not exclusively on the basis of the Free Exercise Clause or the Establishment Clause, but as a type of synthesis of the two clauses, with a general concern for religious freedom and church autonomy.[102] The *Hosanna-Tabor* case is, thus, significant because the Court unanimously endorsed the importance of protecting the core domain of the autonomy of religious communities and confirmed the constitutional grounding of the ministerial exception in both Free Exercise and Establishment Clause doctrines. More generally, it protected the fundamental divide, traceable at least to John Locke, of the distinction between temporal and spiritual authority that has been a hallmark of Western civilization.

### *Church Autonomy in Europe*

Church autonomy has also been a value repeatedly recognized by the European Court of Human Rights. For example, in the case of *Jehovah's Witnesses v. Austria*,[103] the European Court of Human Rights noted,

98 *See id.* "For starters, it is striking, and instructive, that even as the Cold War against Soviet aggression, expansion, and influence was ramping up, and notwithstanding what had to have been the Justices' clear-eyed appreciation for the realities of the relationship between the Soviet state and the Church authorities in Moscow, the Court nevertheless held the First Amendment line against an effort by politically accountable actors to strike back in defense of what they perceived as American interests and values." Richard W. Garnett, *"Things That Are Not Caesar's": The Story of Kedroff v. St. Nicholas Cathedral* 17 (Notre Dame Law School, Legal Studies Research Paper No. 11-27, 2011), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1896266.

99 Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC, 565 U.S. 171 (2012).

100 "The Supreme Court decided against the Obama administration today on what many have called the most important religious freedom case in decades." Michael De Groote, *Supreme Court Rejects Obama Administration Arguments in "Most Important" Religious Freedom Case*, DESERET NEWS, Jan. 11, 2012, http://www.deseretnews.com/article/700214420/Supreme-Court-rejects-Obama-administration-arguments-in-most-important-religious-freedom-case.html?pg=all. Hannah Clayson Smith, one of the attorneys representing the Hosanna-Tabor Church and School said, "You saw a unanimous Supreme Court saying that the government has no business interfering with who a church chooses to be its minister . . . It rejected the [Obama] administration's view of churches as inherently discriminatory." *Id.*

101 Employment Div. v. Smith, 494 U.S. 872, 879 (1990) ("Subsequent decisions have consistently held that the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'") (citation omitted).

102 The Court narrowed the scope of *Smith* to "outward physical acts" as opposed to government interference with an internal church decision that affects the faith and mission of the church itself. Hosanna-Tabor, 565 U.S. at 173.

103 Religionsgemeinschaft der Zeugen Jehovahs v. Austria, App. No. 40825/98 (Eur. Ct. H.R., 2008), http://hudoc.echr.coe.int/eng#{"itemid":["001-88022"]}.



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> While religious freedom is primarily a matter of individual conscience, it also implies, inter alia, freedom to "manifest [one's] religion" alone and in private or in community with others, in public and within the circle of those whose faith one shares … 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 affords.[104]

Thus, it is clear that freedom of religion and belief includes a corporate as well as an individual dimension, and the autonomous existence of religious communities is at the heart of democratic pluralism and is protected by Article 9. Under the European Convention, Article 9 rights work in conjunction with the freedom of assembly rights of Article 11. As the European Court explained in *Hasan and Chausch v. Bulgaria*, "Where the organization of the religious community is at issue, Article 9 must be interpreted in the light of Article 11, which safeguards associative life against unjustified State interference."[105]

Many of the recent European Court church autonomy cases have involved employees who are dismissed, or not renewed, after running afoul of religious doctrines or conditions of employment. These cases, including *Obst v. Germany*,[106] which involved the Latter Day Saints' head of religious affairs who was terminated for adultery, and *Schüth v. Germany*,[107] which involved a Catholic organist also terminated for adultery, were decided based upon whether the national courts had done an adequate job of balancing religious autonomy rights with the privacy and family life rights. For example, in *Schüth*, the European Court held that the German courts had failed to balance all the relevant interests raised by the privacy claim.[108]

In *Siebenhaar v. Germany*, a school teacher unsuccessfully appealed under Article 9 (religious freedom) her termination from a Protestant kindergarten for adherence to a different Christian

104 *Id.* ¶ 61.

105 Hasan and Chaush v. Bulgaria, 2000-XI Eur. Ct. H.R. 117, at ¶ 62.

106 In Obst v. Germany, the Latter Day Saints' head of public relations in Europe appealed his termination for adultery to the European Court under Article 8, claiming that it violated his privacy rights. *See* Obst v. Germany, App. 425/03 Legal Summary (Eur. Ct. H.R., 2010), http://hudoc.echr.coe.int/eng#{"itemid":["002-834"]}.

107 In Schüth v. Germany, a Catholic organist appealed termination for adultery under Article 8 of the ECHR (Privacy). Schüth v. Germany, 2010-V Eur. Ct. H.R. 397, at ¶ 43. Schüth was dismissed for violating his duty of loyalty under rules for service in the Catholic Church, which were incorporated in his contract. *Id.* ¶ 13. Church rules provided for increased duty of loyalty for some employees. *Id.* ¶ 16. The Employment Appeal Tribunal of Germany held that higher standards shouldn't apply to Schüth because he did not work in pastoral catechesis, he lacked mission canonica, and he was not a leading collaborator in church work. *Id.* ¶ 16. The Federal Employment Tribunal of Germany overturned the lower court in stating that adultery was a serious moral failure and was a legitimate basis for termination. *Id.* ¶ 23. After remittal of the case, the Employment Appeal Tribunal upheld the termination because playing the organ was actually a part of the church's liturgy, with close proximity to the religious mission of the church. *Id.* ¶ 25. The Federal Constitutional Court also upheld the termination. *Id.* ¶ 35.

While explaining their decision to overturn the German courts' decision, the ECtHR mentioned that Catholic and Protestant churches employ more than 1 million people (including their charities), which makes them the largest employer after the state of Germany. *Id.* ¶ 31. Both churches have specific regulatory structures governing employment, with a vision of employment as part of a Christian community of service, and a context where collective bargaining is rejected. *Id.* ¶ 32.

108 The Court ultimately held that the termination was improper because the labor courts "failed to weigh the rights of the applicant against those of the employing Church in a manner compatible with the Convention." *Id.* ¶ 74. Part of the reasoning the court gave for finding in favor of the employee was that the organist would have a difficult time finding new employment, *id.* ¶ 73, because "the applicant's case had received media coverage," *id.* ¶ 72, and because "the impugned conduct in the present case went to the very heart of the applicant's private life." *Id.* ¶ 72.

sect.[109] Church autonomy rights were reaffirmed by the European Court in two significant cases decided in 2013 and 2014. In *Sindicatul "Pastorul cel Bun" v. Romania*, decided in 2013, the Court held that Romania could permissibly reject the right of a mixed clergy and worker union to organize out of respect for the religious autonomy rights of the Romanian Orthodox Church.[110] In *Fernández Martínez v. Spain* (2014), the Court held that the autonomy rights of the Catholic Church justified its decision not to renew the contract of a Catholic priest when his marriage and opposition to celibacy became publicly known.[111]

What are the lessons or patterns that emerge from the U.S. and European church autonomy cases? For one thing, these cases illustrate the importance of church autonomy in the employment context. Church autonomy is essential to protect authentic pluralism, to avoid chilling effects on legitimate expressions of difference, and as a measure of respect regarding the limits on the state's competence to intervene in religious affairs. While this has been approached in the United States in large measure on quasi-jurisdictional grounds that express a view that judicial competence is limited, in Europe the protection of church autonomy with respect to personnel decisions has been accomplished as part of the balancing of the church autonomy interests and the employees' interests. This is interesting because it flies in the face of our usual presumptions about common law versus civil law countries; here the usual presumption that common law judges are more likely to engage in a balancing analysis, while civil law judges would be more concerned about judicial activism and discretion, are reversed.[112]

## CONCLUSION

This summary has admittedly been a simplification and many complexities and nuances have been omitted. Nevertheless, the pattern of cases from the United States and Europe illustrate four striking conclusions regarding the nonestablishment principle. First, the standard story that has emphasized the uniqueness of U.S. antiestablishment preoccupations has been exaggerated. In recent years the U.S. antiestablishment principles have weakened as European antiestablishment principles have strengthened—resulting in something approaching a convergence in approaches in the two regions.

Second, over time, the U.S. Establishment Clause jurisprudence has undergone a remarkable transformation, from focusing on liberty-oriented concerns such as separation and nonentanglement, to focusing on equality-oriented concerns such as neutrality and nondiscrimination. This transformation in the United States is especially reflected in the "parental choice" cases of *Mueller*, *Witters*, *Zelman*, and *Mitchell*.[113] A similar pattern is evident in ECtHR jurisprudence,

109 Siebenhaar v. Germany, App. No. 18136/02 (Eur. Ct. H.R., 2011), available in French and German at http://hudoc.echr.coe.int/eng#{"appno":["18136/02"]}.

110 Sindicatul "Pastorul cel Bun" v. Romania, App. No. 2330/09 (Eur. Ct. H.R., 2013), http://hudoc.echr.coe.int/eng#{"itemid":["001-122763"]}.

111 Fernández Martínez v. Spain, 2014-II Eur. Ct. H.R. 449, at ¶ 3.

112 *See* Susan Gluck Mezey, *Civil Law and Common Law Traditions: Judicial Review and Legislative Supremacy in West Germany and Canada*, 32 INTERNATIONAL & COMPARATIVE LAW QUARTERLY 689, 689–90 (1983) (explaining that the prevailing theory of "legislative supremacy in civil law countries and the presumed reluctance of civil law courts to overturn legislative enactments, and the concomitant view of judicial activism in common law nations with the alleged free-wheeling judicial infringement on legislative power" is often times inaccurate and that the roles are actually reversed when you compare civil law Germany with common law Canada.).

113 *See supra* note 50.



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reflected especially in the recent cases of *Association Les Témoins de Jehovah v. France*[114] and *Hasan and Eleym Zengin v. Turkey*.[115]

Third, in both the United States and Europe common pressures from secularism, pluralism, and equalitarianism (as manifested in the political and legal salience of nondiscrimination as the dominant post-civil rights movement value), have placed similar pressures on both the U.S. and Europe as they deal with the contemporary meaning of nonestablishment (in the United States) and nondiscrimination. This shift is most evident in the U.S. cases of *Lukumi* and *O Centro Espirita Beneficente Uniao do Vegetal*[116] and in the European trend of leveling down state support for historically favored religions and leveling up state support for historically disfavored and newer religions.

Fourth, in both the United States and Europe, similarities can be seen in the recurring issues that arise with respect to church autonomy, especially those arising in the employment law context. Although somewhat ironically, the common law U.S. system has taken a more categorical approach to these questions—that is, categorically deciding not to interfere in church hiring decisions—while the civil law dominated Europe has adopted sweeping balancing approaches that empower judges and give them broad discretionary powers—balancing the interests of churches in selecting their own employees with the rights of employees in not being discriminated against based on their religion.

114 *See supra* note 60.

115 *See supra* note 61.

116 *See supra* notes 83–84.



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